

American Totalisator Company, Inc. and International Brotherhood of Electrical Workers, Local Union No. 1501, AFL-CIO. Cases 5-CA-12079 and 5-CA-12090

September 30, 1982

DECISION AND ORDER

On June 19, 1981, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The amended complaint alleges that Respondent, a wholly owned subsidiary of General Instruments Corporation, a technology company, is engaged in commerce within the meaning of the Act, and that it violated Section 8(a)(1) of the National Labor Relations Act, as amended, by advising its employees that it would refuse to bargain with the Union, a labor organization within the meaning of the Act, which represented shop and field employees, if they failed to ratify a proposed collective-bargaining agreement, and that it also violated Section 8(a)(1) and (3) of the Act by refusing to pay sick benefits to three employees¹ whose absence from work coincided with the period of a strike conducted by the Union. Although Respondent does not contest these allegations, it contends, and the Administrative Law Judge finds on the basis of an earlier Decision involving Respondent and the New York Racing Association, 243 NLRB 314 (1979),² that it is an integral part of the horseracing industry and as such comes within Section 103.3 of the Board's Rules and Regulations which states that the Board will not assert jurisdiction over any proceeding involving that industry. However, the General Counsel contends, and we agree for reasons which follow, that the shop and field employees involved herein are outside the category of employees contemplated by the foregoing provision of the Rules and Regulations.

Respondent maintains its headquarters and a facility at Towson, Maryland, where it is engaged in the manufacture, service, and repair of electronic and other equipment used in parimutuel wagering at racetracks in 31 States, Puerto Rico, and abroad.

At the Towson facility, about 45 shop employees are engaged in the construction, assembly, servic-

ing, and repair of parimutuel equipment, including (1) small electronic machines (TIM 300s), which are used to record bets and dispense tickets, and (2) large sophisticated computers (TOTE 300s) to which the TIM 300 terminals at the racetracks are connected.

Respondent also has approximately 400 field employees assigned to 5 regions throughout the United States, who maintain, service, and repair the foregoing equipment at the racetracks. Respondent's employees do not operate equipment such as the TIM 300s and thus do not handle money that is wagered or issue tickets to the bettors.³ Respondent's operator technicians and assistants operate the TOTE 300 computers which are separately housed and attended only by them.⁴ There appears to be a minimum of contact between Respondent's employees and track personnel in the ordinary course of business. Respondent's employees are hired, controlled, supervised, assigned, and transferred by Respondent, and their working conditions are set by the bargaining agreement of Respondent and the Union which expired on February 28, 1980.

Another subsidiary of General Instruments Corporation, American Totalisator Systems, Inc., herein called AmTote, is engaged in the manufacture, assembly, service, repair of off-track betting equipment, and electronic equipment used in the operation of lotteries in several States. It has a manufacturing and assembly plant at Hunt Valley, near Respondent's Towson facility. It appears that AmTote's employees at Hunt Valley and in the field work on equipment similar to that worked on by Respondent's employees, operate computers, have the same or similar job classifications, use similar skills, and in many cases work side by side with Respondent's employees at different locations.

The Board in a Decision involving AmTote (Case 5-RC-10497 (1978)) certified the Union as the bargaining representatives of a unit which consists of employees whose functions are similar to those of the shop and field employees involved herein.

As indicated above, the Administrative Law Judge felt constrained to dismiss the complaint herein solely on the basis of the Board's earlier denial of petitions to repeal or amend Section 103.3 of the Board's Rules and Regulations. However, he pointed out that the Board has asserted jurisdiction over AmTote, a "sister company" whose oper-

³ These tasks are performed by employees of the track or by the association or group running the racing meet.

⁴ Respondent's field personnel and equipment are moved from one racetrack to another, frequently across state lines. In certain cases, shop personnel may also be used in the field.

¹ Gordon William Blount, George Collis, and Pearl Minnick.

² A majority of the Board in that case denied their petitions to repeal or amend Sec. 103.3 of the Board's Rules and Regulations.

ations parallel those of Respondent by providing similar equipment and services for off-track betting and lotteries and using similar classifications of employees who perform similar functions and frequently work side by side with Respondent's field employees. In view of the parallel functions of Respondent and AmTote, the Administrative Law Judge takes the position that the difference in the type of customers served by each should not be deemed a sufficient basis for distinguishing the instant case from *AmTote*. Accordingly, he recommended that the Board follow *AmTote* and assert jurisdiction over Respondent. We agree. The Board has not generally been concerned with the type of operation conducted by the customer.⁵ Thus, the mere fact that the parimutuel equipment is designed for use at various racetracks does not make Respondent an integral part of the horseracing industry. It is significant that Respondent, whose shop employees manufacture the equipment at its Towson facility and whose field employees repair and in some cases run some of the equipment in separate quarters at the racetrack, maintains its operation as an independent entity with its own employees who are hired, supervised, assigned, and transferred without any input from the owners of the racetracks.⁶ Accordingly, as Respondent retains control over its field employees and has demonstrated that it is capable of effective bargaining with respect to them, we shall, contrary to our dissenting colleagues who do not appear to take cognizance of or give weight to these crucial criteria,⁷ assert jurisdiction over Respondent's operations.⁸

As indicated above, Respondent conceded that, if the Board decides to assert jurisdiction over its operations, its conduct was unlawful. We therefore find that Respondent violated Section 8(a)(1) of the Act by advising its employees that it would refuse to bargain with the Union which represented Respondent's shop and field employees if they failed to ratify a proposed collective-bargaining agree-

⁵ See *Pinkerton's National Detective Agency, Inc.*, 114 NLRB 1363, 1364 (1955).

⁶ Cf. *Pinkerton's National Detective Agency, supra*, which involved an "atypical situation" wherein the racetrack owners assumed direct supervision of Pinkerton's guards who were consequently held to be "part and parcel" of the racetrack operation.

⁷ See *National Transportation Service, Inc.*, 240 NLRB 565 (1979).

⁸ However, assuming *arguendo* that Respondent does constitute a part of the horseracing industry, Members Fanning and Zimmerman would nevertheless assert jurisdiction herein for the reasons stated in Member Fanning's dissenting opinions in *American Totalisator Company*, 243 NLRB 314 (1979), and *Centennial Turf Club, Inc.*, 192 NLRB 698 (1971).

See also the decision of the United States District Court, Eastern District, in *The New York Racing Association Inc. v. The National Labor Relations Board*, 80 Civ. 2779, July 28, 1982, wherein the court found "ample evidence of the overwhelming impact of the horseracing industry on commerce" and held that the Board may not decline jurisdiction over an entire class of employers or over an entire industry in the absence of "a reasoned opinion that no labor dispute involving that class or industry will sufficiently impact interstate commerce."

ment, and also violated Section 8(a)(1) and (3) of the Act by refusing to pay sick benefits to Gordon William Blount for the period March 1-12, 1980, George Collis for the period March 1-13, 1980, and Pearl Minnick for the period March 1-14, 1980.

THE REMEDY

Having found that Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights by telling employees that Respondent would refuse to bargain with the Union if they failed to ratify a proposed collective-bargaining agreement, and having also found that Respondent discriminated against employees Gordon William Blount, George Collis, and Pearl Minnick by refusing to pay their sick benefits for the period stated above, we shall order that Respondent cease and desist from such conduct and take certain actions intended to effectuate the policies of the Act. We shall also order Respondent to make the above-named employees whole for their loss of sick leave pay with interest thereon in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁹

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees that Respondent would refuse to bargain with the Union if they failed to ratify a proposed contract, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to pay sick benefits to employees whose absence from work coincided with the period of a strike conducted by the Union, Respondent discriminated against such employees in violation of Section 8(a)(3) and (1) of the Act.

5. The unfair labor practices of Respondent have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

⁹ See, generally, *Isis Plumbing & Heating Company*, 138 NLRB 716 (1962).

American Totalisator Company, Inc., Towson, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees by refusing to pay them sick benefits because their absence from work coincided with the period of a strike conducted by the Union.

(b) Telling employees that it would refuse to bargain with the Union if they failed to ratify a proposed collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make Gordon William Blount, George Collis, and Pearl Minnick whole for the loss of sick benefits they suffered as a result of the discrimination practiced against them, as provided in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of sick benefits due under the terms of this Order.

(c) Advise employees that it will continue to bargain with the Union even if they refuse to ratify a proposed collective-bargaining agreement.

(d) Post at its Towson, Maryland, facility, and mail to its field employees, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CHAIRMAN VAN DE WATER AND MEMBER HUNTER, dissenting:

In their eagerness to expand the contours of the National Labor Relations Act, our colleagues have, unfortunately, abandoned longstanding policy considerations and departed from recent Board precedent. In Section 103.3 of the Board's Rules and Regulations, the Board plainly states that it will not assert jurisdiction in proceedings that involve horseracing, or that involve disputes of employers whose operations are an integral part of the racing industry. And just 3 years ago, in a case involving the Employer named as Respondent here, this Board refused to repeal or amend its rules declining jurisdiction over the horseracing and dogracing industries. *American Totalisator Company, Inc.*, 243 NLRB 314 (1979) (Members Penello and Murphy, Member Jenkins concurring, Chairman Fanning and Member Truesdale dissenting). In the instant case the Administrative Law Judge concluded that he was bound by that precedent and by the Board's historical policy in this area. We agree with that conclusion.

In the instant case, it is undisputed that Respondent's 400 field employees work at racetracks.¹¹ Respondent manufactures, services, repairs, and operates parimutuel equipment, including, most recently, small electronic computer terminals, or ticket issuing machines, called TIM 300s. These machines record bets and dispense tickets, and are operated by employees of the track at which the machines are placed. Respondent's employees may service the machines at the track. The TIM 300 terminals are connected to a large sophisticated computer, called the TOTE 300. The TIM 300 transmits data to the TOTE 300, which accepts the bets, issues the tickets, and computes the price on winners in the races at the track. In addition to maintaining, servicing, and repairing equipment at the track, Respondent's employees in some cases operate equipment there, including the TOTE 300. The TOTE 300 is separately housed at the track, and is attended only by Respondent's employees.¹²

Based on these facts it is readily apparent that Respondent's operations are an integral part of the horseracing industry. Indeed, the taking of bets, the issuance of tickets, and the computation of payoffs for horses running at tracks of necessity are integral to the industry and, as noted above and as found by the Board in its prior decision, Respondent's employees are intimately involved in these

¹¹ By contrast, only 45 of Respondent's employees work at a separate shop facility in Towson, Maryland.

¹² Employees of the mutuel department at the track may have access to the TOTE room to check on the amount of handle, among other things.

functions at the track. Whatever surface appeal there is to the General Counsel's plea to take jurisdiction here, we should not let hard cases make bad law by ignoring the reality of the factual situation that is presented to us. Accordingly, we would dismiss the complaint in its entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discriminate against employees by refusing to pay them sick benefits because their absence from work coincided with the period of a strike conducted by the Union.

WE WILL NOT tell employees that we would refuse to bargain with the Union if they fail to ratify a proposed collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make Gordon William Blount, George Collis, and Pearl Minnick whole for the loss of sick benefits they suffered as a result of the discrimination practiced against them, with interest.

AMERICAN TOTALISATOR COMPANY,
INC.

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Baltimore, Maryland, on December 11, 1980 (all dates hereinafter are in 1980 unless otherwise noted), upon an order consolidating cases and a consolidated complaint issued on May 23, based on charges and amended charges in Case 5-CA-12079 filed by the above-named Charging Party (herein the Union) on April 2 and May 12, and in Case 5-CA-12090 on April 7 and 30 and May 12. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (herein the Act) by advising its employees that Respondent would refuse to bargain with the Union should the employees fail to ratify a proposed collective-bargaining agreement, and violated Section 8(a)(1) and (3) of the Act by refusing to pay sick benefits

to three employees whose absence from work coincided with the period of a strike conducted by the Union. At the hearing, Respondent stated that it does not contest the allegations of the complaint and concedes that, if the Board should assert jurisdiction over its operations, its conduct was in violation of the Act. It is admitted that the Union is a labor organization within the meaning of the Act.

Upon the entire record in this case, and after due consideration of the brief filed by the General Counsel (no other party filed a brief), I make the following:

FINDINGS AND CONCLUSIONS

Respondent's Operations

Respondent is a wholly owned subsidiary of General Instruments Corporation, a technology-based company, with divisions producing cable TV products, data products (which includes Respondent), semiconductor products, and electric component products. Respondent, a Delaware corporation, maintains its headquarters and a facility at Towson, Maryland, where it is engaged in the manufacture, service, and repair of electronic and other equipment used in parimutuel wagering at racetracks in 31 States of the United States, Canada, Mexico, Puerto Rico (see G.C. Exh. 2), Hong Kong, and Argentina (see G.C. Exh. 12, p. 7). It also has facilities in California and New England where some assembly and repair of equipment takes place, but which seem to be used principally for storage of equipment.

During 1979, Respondent purchased materials and services from vendors (whose operations are not connected with the racing industry) located in 10 States outside the State of Maryland, valued at approximately \$13.5 million,¹ which materials were shipped to Towson for use.

At the Towson facility, approximately 45 employees (shop employees) are engaged in the construction, assembly, servicing, and repair of parimutuel wagering equipment, including, in particular, small electronic machines (referred to as TIM 300s) used to record bets and dispense tickets at racetracks and large, sophisticated computers (referred to as TOTE 300s) to which the TIM 300 terminals in use at the racetrack are connected and which apparently compute the odds and the payments to bettors on the winners in the races.

Respondent has approximately 400 employees, assigned to 5 regions throughout the country, classified as field employees, who maintain, service, and repair Respondent's equipment and operate some of it at the racetracks. Respondent's employees do not operate equipment such as the TIM 300, and thus do not handle money that is wagered or issue tickets to bettors, which is done by employees of the track or the association or group running the racing meet. Respondent's operator technicians and assistants do operate equipment such as the TOTE 300, which is separately housed and attended only by Respondent's field personnel. There seems to be a minimum of contact between Respondent's employees

¹ Such purchases for the first 10 months of 1980 were approximately \$8.9 million.

and track personnel in the ordinary course of business. The working conditions of Respondent's employees are set by the bargaining agreement between Respondent and the Union. Those employees are hired, controlled, supervised, assigned, and transferred by Respondent with no apparent input from the operators of the race meet.² Personnel matters involving Respondent's employees are centrally controlled from Respondent's headquarters in Towson.

Respondent's field personnel are moved from race-track to racetrack, as needed, frequently across state lines, in accordance with procedures laid down in the bargaining agreement with the Union. Respondent's equipment is also moved from track to track, as needed, also frequently across state lines. When the racetracks are not active, particularly in the wintertime, or when they may be otherwise needed, field personnel may be moved to the Towson facility, or that in California, or New England to perform assembly, repair, or maintenance functions. In certain cases, shop personnel may be used in the field. All of these employees are regular, full-time employees who can be laid off and recalled only in accordance with the seniority provisions of the bargaining agreement.³ The total payroll for union-represented shop and field employees for 1980 was over \$14 million.

The total revenue received by Respondent from sales and services to customers located outside the State of Maryland during 1980 exceeded \$30 million.

Related Operations

American Totalisator Systems, Inc. (herein AmTote Systems), another subsidiary of General Instruments Corporation, engaged in the manufacture, assembly, service, and repair of off-track betting equipment, and electronic equipment used in the operation of lotteries in several States, has a manufacturing and assembly facility at Hunt Valley, Maryland, near Respondent's Towson facility. It appears that AmTote Systems' employees at Hunt Valley and in the field work on equipment quite similar to that worked on by Respondent's employees, are employed in the same or similar job classifications, use similar skills, and "in many, many cases, the employees [of both employers] work side by side at different locations if there is a problem." As a result of a petition filed in Case 5-RC-10497, the Board, in 1978, certified the Union as the bargaining representative of a unit of employees at AmTote Systems similar to that represented at Respondent's operations.

The Unfair Labor Practices

At the end of the bargaining agreement between Respondent and the Union expiring February 28, 1980, the covered employees engaged in a strike, characterized by the General Counsel as a "nationwide strike."⁴ Accord-

² It was testified that, if Respondent's customer should object to a specific employee, Respondent would transfer him to another race meet.

³ In peak periods, the bargaining agreement permits Respondent to hire a certain number of probationary employees who do not, of course, have seniority.

⁴ In her brief (p. 19) counsel for the General Counsel lists four local state court cases (California, Kentucky, Massachusetts, and New York),

ing to admitted allegations of the complaint, the strike lasted from about March 1 until about March 12. At the time the strike began, three employees, Gordon W. Blount, George Collis (both field employees), and Pearl Minnick (a shop employee) were on sick leave. During the strike, and in the case of Minnick for some days thereafter, Respondent refused to pay sick benefits to these employees. Respondent, assuming that the Board would take jurisdiction over its shop operations, concedes that the refusal to pay sick benefits to Minnick constituted a violation of Section 8(a)(1) and (3) of the Act. Respondent further concedes that, if the Board would take jurisdiction over its field operations, the refusal to pay sick benefits to Blount and Collis would similarly be a violation of the Act.

It further appears that Respondent sent a letter to all of its employees advising that, if they refused to ratify a proposed bargaining agreement, Respondent would refuse to bargain further with the Union. Again it is conceded that this constituted a violation of Section 8(a)(1) as to the shop employees, but would be a violation as to the field employees only if the Board would take jurisdiction over them.

Analysis and Conclusions

After due proceedings, pursuant to public notice, the Board has adopted the following rule as part of its Rules and Regulations:

Sec. 103.3 *Horseracing and dogracing industries.*—

The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the act involving the horseracing and dogracing industries.

The Board explained its decision as follows (some footnote references omitted):

Under section 14(c) of the act, the Board in its discretion may decline to assert jurisdiction over labor disputes involving any class or category of employers if such labor disputes will not have a substantial impact in commerce and provided that it had not asserted jurisdiction over such class or category prior to August 1, 1959. The Board has consistently declined to assert jurisdiction over labor disputes in the horseracing and dogracing industries⁵ as well as over labor disputes involving employers whose operations are an integral part of these racing industries.⁶ After carefully considering the responses, the Board has decided not to alter its position with respect to the horseracing and dogracing industries and has concluded that it will continue to decline to assert jurisdiction over labor disputes in these industries.

In prior decisions, the Board declined to assert jurisdiction over these industries noting, *inter alia*, the extensive State control over the industries. It appears that State law sets racing dates of the tracks; State law determines the percentage share of

and one secondary boycott case before the Board allegedly arising out of this strike indicating the nationwide impact of the labor dispute.

the gross wagers that goes to the State; and State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the industries through State racing commissions, and in many States retains the right to effect the discharge of employees whose conduct jeopardizes the "integrity" of the industry. As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States and these industries which is reflected by the States continuing interest in and supervision over the industries.

In addition, the sporadic nature of the employment in these industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work force. This is further evidenced by a pattern of short workhours and sporadic and short periods of active employment with any given employer.

Besides minimizing the impact on commerce of the industries, this pattern of short-term employment also gives us pause with respect to the effectiveness of any proposed exercise of our jurisdiction in view of the serious administrative problems which would be posed both by attempts to conduct elections and to make effective any remedies for alleged violations of the act within the highly compressed timespan of active employment which is characteristic of the industries.

Thus, we have concluded that the operations of these industries continue to be peculiarly related to, and regulated by, local governments and, further, that our exercise of jurisdiction would not substantially contribute to stability in labor relations. We are also not unmindful of the fact that relatively few labor disputes have occurred in these industries in recent years, thus reaffirming the Board's earlier assessment that the impact of labor disputes in these industries is insubstantial and does not warrant the Board's exercise of jurisdiction.⁷

Accordingly, for the above reasons, the Board reaffirms its earlier conclusion and declines to assert jurisdiction over these industries.

Member Fanning does not join in the Board's conclusion to decline to assert its jurisdiction over the said industries, based on the reasons spelled out in his dissenting position in *Centennial Turf Club, Inc.*, 192 NLRB 698.

⁵ *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (horseracing track); *Jefferson Downs, Inc.*, 125 NLRB 386 (horseracing track); *Meadow Stud, Inc.*, 130 NLRB 1202 (horseowner/breeder); *Hialeah Race Course, Inc.*, 125 NLRB 388 (horseracing track); *Walter A. Kelley*, 139 NLRB 744 (horse owners/breeders); *Centennial Turf Club, Inc.*, 192 NLRB 698 (horseracing track); *Yonkers Raceway, Inc.*, 196 NLRB 373 (horseracing track); *Jacksonville Kennel Club*, Case 12-RC-3918, May 5, 1971 (dogracing track) (not reported in NLRB volumes).

⁶ *Pinkerton's National Detective Agency*, 114 NLRB 1363; *Hotel & Restaurant Employees & Bartenders International Union, Local 343 (Resort Concessions, Inc.)*, 148 NLRB 208.

⁷ *Walter A. Kelley, supra*.

On March 26, 1979, Respondent and The New York Racing Association, Inc., filed a petition with the Board seeking to repeal or, in the alternative, to amend Section 103.3 of the Board's Rules and Regulations. Service Employees International Union was permitted to intervene to argue that the Board should amend the rule. The Board, by a divided vote, after briefly noting the facts applicable to Respondent and the Racing Association, rejected the petition. *American Totalisator Company, Inc.*, 243 NLRB 314 (1979).

In this case the General Counsel argues that, under the facts and previous Board decisions, Respondent should be held to be "outside the category of employers contemplated by Section 103.3 of the Board's Rules and Regulations," but that, in any event, jurisdiction should be asserted over Respondent's shop operations. If it were not for the Board's Decision in *American Totalisator, supra*, I would have no hesitancy in agreeing with the General Counsel that jurisdiction should be asserted over Respondent's field as well as its shop operations, for those operations do not seem to fall within the various reasons expressed in the past for declining jurisdiction over aspects of the racing industry.

First of all, we are here dealing with a manufacturing operation of nationwide and international scope. Not only do its interstate purchases and receipts easily come within the Board's discretionary standards, but it is clear that a labor dispute affecting Respondent's employees would have substantial impact on interstate commerce and the economies of many companies and communities, as well as of several States.

The Board has often asserted that, in the case of horse and dog racing, it prefers to defer regulation of those employed at the tracks to state law and regulations. However, while it is possible that some state laws may relate to Respondent's operations, this is not shown by the record in this case. In some of the Board's decisions, assertion of jurisdiction has been declined over activities performed at the racetracks because the employers involved have granted control or supervision over their employees to the track authority. See, e.g., *Pinkerton's National Detective Agency, supra*. That is not the case here. On the other hand, Respondent's personnel also have no control or supervision over track employees.

In explaining its adoption of Section 103.3, the Board placed considerable emphasis upon the temporary, sporadic nature of employment in the racing industry, with high turnover and a relatively unstable work force which the Board considered would limit its effectiveness in conducting elections and providing remedies for alleged unfair labor practices. These are factors that have no application to Respondent and its employees, who constitute a stable work force whose working conditions are established and protected by collective-bargaining agreements. As has been noted, in the case of AmTote Systems, a "sister company" providing similar equipment and services for off-track betting and lotteries, employing similar classifications of employees performing similar functions to those provided by Respondent and its employees, the Board has already conducted a representa-

tion election and certified the Union as the representative of those employees.

So far as I can see, the only basis for refusing to accept jurisdiction over Respondent's field employees lies not in what Respondent is or what it does, but in who its customers are. Cf. *Pinkerton, supra*. I would recommend to the Board that this should not be a sufficient basis for distinguishing Respondent's field employees from those employed by AmTote Systems, who perform similar functions, using similar skills on similar equipment, and who frequently work side by side with Respondent's field employees, or from other electronics companies (not involved in racing), who service their own products with their own field employees.

The General Counsel and the Union argue that the Board's Decision in *American Totalisator, supra*, was not a decision on the merits of the case, and thus is not binding in the case before me. It may be that the record before me is more complete and the issues more sharply defined. But it may not be gainsaid that the issue in that case, *inter alia*, was whether, in light of Section 103.3 of the Rules and Regulations, the Board would assert jurisdiction over Respondent's operations. The Board answered in the negative. It is true that the Board there was asked to decide the issue in terms of rescinding or amending the rule; here, the General Counsel asks only

that it be found that Respondent's operations are not within the intendment of the rule. It may be that, in light of a more complete record and the different procedural context, the Board would distinguish its prior decision. I do not feel justified in ignoring the Board's obvious decision there. For this reason I am, albeit reluctantly, recommending dismissal of the complaint.

In recommending dismissal of the complaint, I am aware that all of the parties seem to be in agreement that, even if jurisdiction should not be asserted over Respondent's field operations, jurisdiction should be taken over its shop operations. This seems to me to be most impractical. Field employees spend considerable time working in the shop. Shop employees on occasion work in the field. All are covered by a single bargaining agreement. An attempt to break the operations into two units would be needlessly disruptive of the labor relations into two units would be needlessly disruptive of the labor relations patterns that have been developed. As noted, I believe that the purposes of the Act would be best served by asserting jurisdiction over all of Respondent's operations, but not by merely taking jurisdiction over the shop operations.

[Recommended Order for dismissal omitted from publication.]