

In the Matter of A. J. TOWER COMPANY and LOCAL #24, WATERPROOF
GARMENT WORKERS UNION, AFFILIATED WITH INTERNATIONAL
LADIES' GARMENT WORKERS UNION (A. F. OF L.)

Case No. 1-C-2416.—Decided March 23, 1945

DECISION .

AND

ORDER

On September 29, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions to the Intermediate Report, and the respondent and the Union filed briefs. Oral argument, in which the respondent and the Union participated, was held before the Board at Washington, D. C., on February 8, 1945. The Board has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions, the briefs of the respondent and the Union, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions:

1. The Trial Examiner found, and we agree, that the respondent refused to bargain with the Union in violation of Section 8 (1) and (5) of the Act. The respondent defends its position on the alleged ground that the Union had not been validly chosen as the statutory bargaining representative in a prior election conducted by the Regional Director pursuant to a consent election agreement because Kane, one of the voters, was not an employee. The Regional Director ruled, on the basis of the facts set out in his report, that the respondent could not for the first time challenge the vote of Kane after the results of the election had been announced. As we have previously held,¹ we will not disturb the rulings of a Regional Director on

¹ *N. L. R. B. v. Capitol Greyhound Lines, et al.*, 49 N. L. R. B. 156, enf'd 140 F. (2d) 754 (C. C. A. 6), cert. den. 322 U. S. 763, *Matter of Actna Firebrick Company*, 56 N. L. R. B. 849.

questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious. No such grounds for disturbing the instant ruling of the Regional Director are present in this case.

2. The respondent contends that its objection to the election on the ground that Kane was not eligible to vote, was filed within 5 days after the issuance of the Tally of Ballots, as provided in the consent election agreement, and hence was timely. The respondent has misconceived the purpose of this provision which is identical with that appearing in the Board's rules and Regulations.² The objections referred to in this provision relate to the conduct of the election and not to the eligibility of the persons who vote. An objection to the conduct of an election, if sustained, voids the results of the election; while a challenge, if sustained, merely eliminates the objectionable ballot. Here, the respondent's representatives certified that the election was properly conducted; its objection merely consisted of a challenge to the ballot of Kane on the ground that she was ineligible to vote. Moreover, insofar as the respondent's objection may be said to concern the conduct of the election, the Regional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon.

3. The respondent further contends that the right to challenge a voter on the ground that he is a non-employee cannot be waived as a matter of law. The respondent reasons that since it would not be valid for the respondent in advance to agree with the Regional Director to permit non-employees to vote, the respondent cannot do so by waiver. Here again we believe that the respondent has misconceived the issue. Were the Regional Director knowingly to agree in advance to permit non-employees to vote, we might well hold his action to be arbitrary and capricious, but that is not the issue in this case. Here we are confronted solely with the question of whether the respondent, after certifying Kane as an eligible employee voter and permitting her to vote without challenge although facts which it now asserts rendered her ineligible were then in its possession, should be permitted to attack her status as a voter after the results of the election have been announced. The Regional Director's ruling that under the circumstances the respondent's claim could not be considered at that stage, is not arbitrary or capricious as a matter of law, but, as stated in the Intermediate Report, is in complete accord with the established principles and policy of the Board.³

² Article III, Section 10, National Labor Relations Board Rules and Regulations—Series 3, as amended.

³ The respondent seeks to distinguish the cases cited in the Intermediate Report, contending that in those cases the post-election challenge attacked the eligibility of the voter on the ground that he did not fall within the appropriate unit while in the instant

We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result. Moreover, a post-election challenge forecloses identification of the ballot which would otherwise have been segregated. Since the challenged ballot may have been cast against the Union,⁴ it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

4. Finally, the respondent contends that the consent election agreement is invalid because it does not conform with the Massachusetts law pertaining to arbitration agreements. It is sufficient to say that the Board, in enforcing a national policy, is not bound by local statutory conceptions.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, A. J. Tower Company, Roxbury, Massachusetts, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right

case the eligibility of the voter is attacked on the ground that she was not an employee. We perceive no distinction in principle between the two grounds of attack which would render the former defense invalid and the latter valid. Section 9 (a) of the Act refers to a bargaining representative selected by a majority of the employees in *an appropriate unit*.

⁴ We do not regard Kane's signed statement, submitted by the respondent to the Regional Director, as evidence that Kane voted for the Union. Because of a reluctance to antagonize the employer or the Union, a voter, knowing that his statement could not be verified, would not be likely to disclose the true state of his ballot. But what is even more important, we cannot sanction the respondent's invasion of the voter's privacy because such a practice would nullify the very purpose of the secret ballot to insure a free and untrammelled choice. Indeed, we would regard as an unfair labor practice an employer's questioning of his employees as to the manner in which they voted in a Board election. To the extent that any statement in the decision in *Matter of Capitol Greyhound Lines, et al*, 49 N. L. R. B. 156, is inconsistent herewith, such statement is overruled.

to self-organization, to form labor organizations, to join or assist Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain collectively with Local #24, Waterproof Garment Workers Union, affiliated with International Ladies' Garment Workers Union (A. F. of L.), as the exclusive representative of all the employees of the respondent at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post at its plant at Roxbury, Massachusetts, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the First Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the First Region in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

MR. GERARD D. REILLY, concurring specially:

I concur with the majority in the view that the consent election of May 5, 1944, determined that the Union represented a majority of the employees in the bargaining unit involved in this case. Since their conclusion is based in part, however, upon a theory which I think is questionable, I feel that I should express my views separately.

The issue which the respondent seeks to raise here involves the validity of the certification issued by the Regional Director following the consent election. The respondent contends that the record shows that a majority of the employees in the unit did not vote for the Union; that the certification was invalid; and that, therefore, it has no duty under the Act to bargain with the Union as exclusive bargaining representative of the employees involved. This contention is predicated primarily upon the respondent's argument that Kane was not an employee when she cast her ballot. My colleagues hold

in effect, that, since the respondent failed to challenge Kane's ballot at the election, it is estopped from raising that argument by means of an objection to the election and in this proceeding. I am of the opinion that this reasoning is erroneous as a matter of law. Although I have consistently held that binding commitments may estop parties from utilizing the processes of this Board,⁵ I do not believe that any doctrine of estoppel is applicable here. The Board's jurisdiction under the Act to prevent an employer from engaging in unfair labor practices in violation of Section 8 (5) is restricted to instances where there is a refusal to bargain with a representative of a majority of employees in an appropriate unit. A determination that a labor organization is the majority representative contemplated by the Act, where its designation as such depends upon ballots cast by individuals who were not employees when said ballots were cast,⁶ is clearly not within the Board's power. Therefore, *a fortiori*, no theory of "waiver" or "estoppel" will supply the Board with such jurisdiction.

However, I am of the opinion that the weight of the evidence in the case establishes that Kane was an employee at the time of the election and, therefore, the Union was properly selected by a majority of the employees. The fact that Kane's name was included on the pay-roll list which the respondent itself drew up and vouched for as a list of eligible employee voters, *prima facie* establishes that Kane had the status of an employee. Kane's statement in her application for unemployment insurance benefits is entitled to no more weight than, and is in effect neutralized by, her statement to an agent of the Board that she did not intend thereby to sever her employment relationship with the respondent. Nor may such statements be regarded as an admission against interest since Kane was not an interested party in this proceeding. Kane did not in fact accept any other employment. On this state of the record, I am of the opinion that the respondent has not successfully overcome the *prima facie* case establishing Kane's employee status at the time of the election.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to bargain with Local #24, Waterproof Garment Workers Union, affiliated with International

⁵ See dissenting opinions in *Matter of Packard Motor Company*, 47 N. L. R. B. 932, and *Matter of Federal Motor Truck Company*, 49 N. L. R. B. 57

⁶ Cf. *N. L. R. B. v. Capitol Greyhound Lines, et al.*, 49 N. L. R. B. 156, enf'd 140 F. (2d) 754 (C. C. A. 6), cert. den. 322 U. S. 763.

Ladies' Garment Workers' Union (A. F. of L.), as the exclusive representative of our employees in the bargaining unit described herein;

WE WILL NOT engage in any like or related act or conduct interfering with, restraining, or coercing our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this Union, or any other labor organization.

WE WILL BARGAIN collectively, upon request, with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: all employees at our Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees.

A. J. TOWER COMPANY, *Employer.*

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT

Messrs. Leo J. Halloran and Samuel G. Zack, for the Board.

Herrick, Smath, Donald, Farley & Ketchum, by Mr. Robert G. Moch, of Boston, Mass., for the respondent.

Mr. George E. Roewer, of Boston, Mass., for the Union.

STATEMENT OF THE CASE

Upon a charge duly filed on June 9, 1944, by Local No 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the First Region (Boston, Massachusetts); issued its complaint, dated July 24, 1944, against A. J. Tower Company, Roxbury, Massachusetts, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notices of hearing thereon, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint, as amended at the hearing, alleged in substance: (1) that all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining; (2) that on or about May 5, 1944, the Union was designated by the employees in the aforesaid unit as their representative and has at all times since been such representative for the purposes of collective bargaining; (3) that on or about May 25, 1944, and continuously thereafter the Union requested the respondent to bargain collectively; (4) that on or about June 6, 1944, and continuously thereafter the respondent refused to bargain collectively with the Union; and (5) that by such refusal the respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

On August 2, 1944, the respondent filed its answer which, as amended at the hearing, admitted the appropriateness of the unit, and that the Union had requested and the respondent had refused to bargain collectively. The answer denied, in substance, that the Union is or ever has been the duly designated bargaining agent of the employees in the appropriate unit because the result of a consent election held on May 5, 1944, would be a tie vote if a ballot challenged by the Union were opened, upon overruling the challenge, and proved to be against the Union, and if a ballot cast for the Union by Jennie A. Kane, who was not an employee of the respondent at the time of the election and has not since been such an employee, were subtracted from the vote received by the Union.¹

Pursuant to notice, a hearing was held on August 3, 1944, at Boston, Massachusetts, before Earl S. Bellman, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the close of the hearing, without objection, the pleadings were conformed to the proof as to formal matters. The parties were afforded the opportunity to argue orally before the undersigned and were given leave to file briefs with the undersigned. Briefs have been received from the respondent, the Union, and the Board. Also a letter from the respondent has been considered as a supplement to its brief.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

A. J. Tower Company, a Massachusetts corporation, is engaged at its principal office and plant in Roxbury, Massachusetts, in the manufacture and sale of waterproof oiled clothing, aprons, hats and fabrics.² During the calendar year of 1943, the value of the respondent's raw materials, consisting of cotton textiles, oils, threads, fastenings, and sundries, was in excess of \$1,000,000. Approximately 90 percent of such raw materials was shipped to the respondent's plant

¹ In the consent election, 116 votes were cast for the Union and 114 against the Union. There was also 1 ballot challenged by the Union. Under the respondent's contention, Kane's vote for the Union would be subtracted from the votes received by the Union and the challenged ballot, if against the Union, would be added to the votes against the Union, thus producing a tie vote of 115 for and 115 against the Union.

² The respondent has one wholly owned subsidiary, A. J. Tower Sales Company.

from points outside of the Commonwealth of Massachusetts. During 1943, the value of the respondent's finished product was in excess of \$2,500,000,³ of which 95 percent was transported to points outside of the Commonwealth of Massachusetts. For the purpose of this proceeding, the respondent concedes that it is engaged in interstate commerce and is subject to the provisions of the Act.

II. THE ORGANIZATION INVOLVED

Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), is a labor organization which admits to membership certain employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. Chronology of events

On April 24, 1944, the Union filed its Petition for Certification of Representatives in Case No. 1-R-1880, pertaining to certain employees in the respondent's Roxbury plant, with the Board at its office for the First Region at Boston, Massachusetts. Thereafter on April 27, 1944, an Agreement for Consent Election was duly signed by the respondent and the Union and approved by the Board's Regional Director. Said agreement provided, among other things, for an election on Friday, May 5, 1944, among the employees of the respondent alleged in the complaint in this case and admitted in the answer to constitute an appropriate unit; that the pay-roll period for eligibility would be April 21, 1944; that employees in the unit "who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off" should be eligible voters; that employees "who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election" were not eligible to vote; and that objections "to the conduct of the ballot, or to a determination of representatives based on the results thereof," might be filed with the Regional Director within five days after the issuance of the Tally of Ballots. The agreement also contained the following provision:

Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

On May 1, 1944, the respondent, in conformity with the Consent Election Agreement, furnished the Regional Director with a complete list of its employees in the appropriate unit on its pay roll for April 21, 1944.⁴ The pay roll so furnished was the only pay roll used at the election. Jennie A. Kane, a stitcher whose classification admittedly falls within the appropriate unit, was marked upon the pay roll setting out the eligible voters as "out sick" Kane, who last worked at the respondent's plant on March 24, 1944, had sent her forelady a note on March 31, 1944, stating that she had not been to work the preceding week because she had been sick and asking that her pay be given to the bearer of the

³ The value of the above products which went to various departments of the United States Government was \$2,250,342 08

⁴ The evidence shows that the employees, on the pay roll of April 21, performed the work for which they were then paid during the period from April 7 to April 14, as it is the respondent's practice to pay its employees one week after the termination of the work period for which payment is made.

note. Kane cast an unchallenged ballot⁵ at the election duly held on May 5, 1944, under the supervision of an agent of the Regional Director as provided in the agreement. At the election the respondent was duly represented by two observers who had been informed of their rights and duties with respect to such matters as the challenging of the ballot of any person not qualified to vote. One of the respondent's observers, a clerk in the factory office, regularly received records in the course of her duties by which she would have known whether any given employee, such as Kane, had actually worked during any given week.

After the polls had closed on May 5, the two authorized observers of the respondent, the two authorized observers of the Union, and the agent of the Regional Director duly signed the customary Certification on Conduct of Election which set out that the "balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote." Under the date of May 5, 1944, there was issued, over the signatures of representatives of the Regional Director, the respondent, and the Union, the Tally of Ballots which set out that there were approximately 250 eligible voters; that 230 valid votes were cast, of which 116 were cast for the Union and 114 against the Union; and that in addition there was 1 challenged ballot.

The respondent filed objections to the election on May 9, 1944, clearly within the 5-day period provided in the agreement for filing such objections. In its objections the respondent stated that it had come to its attention after the election that Kane was not an employee;⁶ challenged "the right of Mrs. Kane to vote in the election of employees at its plant" and "the ballot cast by her"; pointed out that the ballot challenged by the Union in the election, won by only 2 votes, had not been passed on; requested a hearing for the purpose of passing on this challenged ballot; and argued that if the challenge to said ballot were overruled and the ballot should prove to be against the Union it would then "become material to rule upon the challenge which the Company hereby makes to the vote of Mrs. Kane."⁷ The objections also set forth as facts with respect to Kane, the following.

Mrs. Kane was employed by A J Tower Company from March 16, 1943, through March 24, 1944. After the latter date Mrs. Kane did not ever again report for work at the Tower Company and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944. The Tower Company, not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote. It has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that

⁵ In Board election practice, challenged ballots are distinguishable but unchallenged ones are not. Since Kane's ballot was not challenged it was counted and was in no way differentiated from the rest of the unchallenged ballots.

⁶ It should be noted that the agreement provided that employees who had "since quit" and had not been "rehired" were not eligible to vote.

⁷ It was then and is now clearly impossible to determine which one of the 230 ballots which had been counted as valid had been cast by Kane. It should also be noted that the respondent chose as its starting point in exploring the possibility that the election might be found to be a tie, a hearing upon the ballot challenged by the Union at the election on May 5, rather than any ruling upon its post-election challenge concerning Kane.

her reason for leaving was that she "could not continue to do heavy work of carrying bundles which was part of her job." The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment

A conference was held among representatives of the respondent, the Union, and the Board on May 12, 1944, for the purpose of considering the respondent's objections. A hearing thereafter was held on said objections on May 22, 1944, which was attended by representatives of the respondent, the Union and the Board. On May 24, 1944, the Regional Director issued and duly served copies of his "Report on Objections." This report was duly amended on May 31, 1944.⁸

The Regional Director's Report on Objections, after summarizing the basis of the respondent's objections, sets out the above-quoted paragraph concerning Kane contained in the respondent's objections. The report then states:

The Company contends that irrespective of any oversight or neglect on its part, the vote cast by Mrs. Kane was ineligible beyond question.

The report continues with the following summary of the conflicting evidence considered by the Regional Director as to Kane's employment status and as to whether she had ever revealed how she had cast her ballot:

. . . It [Company] submitted a witnessed statement signed by her on May 8, 1944, stating that she "left the employ of A. J. Tower Co. in March, 1944, because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the Union at the Tower Co. as I felt it was a good thing. I voted for the union at the election on last Friday. I have not worked since leaving the Tower Co. because of my physical condition."

Subsequently interviewed by an Agent of the Board on May 23, 1944, Mrs. Kane asserted—"On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. & in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself an employee of the Company & therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

"On May 8, 1944, Mr. Ellberry of the Co. & another gentleman whose name I've forgotten visited me at my home & questioned me. I informed them that I thought the Union was a good thing but I do not recollect ever telling them exactly how I voted at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry but my words have been misconstrued. I did say 'I applied for social security benefits because of this' but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

⁸ The discussion herein is based on the amended report.

"Shortly after I took sick, I wrote a note to Miss Stone, in the office at the A J Tower Co, which Miss Higgins a fellow employee carried for me. In this note, I told Miss Stone that I was under a doctor's care & that I intended to return to the Company as soon as I was well.

"Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able & asked him would I get my job back or would he give me a release. Mr. Ellberry said 'I don't see why you need a release.' This was in answer to my question, 'Would I need a release to obtain social security benefits?' When I sought social security benefits, it was something I thought to which I was entitled because of my illness; so I had been told by several of my friends. I did not think that it would be considered quitting my job at the A. J. Tower Co. because naturally I intended to go back to the Co."

The report then sets out evidence secured by subsequent investigation and the Regional Director's concluding findings and rulings, including footnote citations, in the following language:

Subsequent investigation confirmed the fact that Mrs. Kane did advise the Division of Employment Security of the Commonwealth of Massachusetts on April 28, 1944, that she had left her employment with the Company in March and that the reason stated was her inability to do heavy work of carrying bundles.

A Notice to Employer of Claim Filed was sent to the Company by the U. S. Employment Service on May 1, 1944, the same day on which the Company submitted "a complete list of employees of the A. J. Tower Co. on the payroll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944."

The Company contends that it does not know the exact date of receipt of the notice of claim, but does not deny that it was received prior to the date of the election, and in the opinion of the undersigned it failed, through oversight, to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls.

The Board Agent conducting the election reports that he followed the usual practice of instructing the observers at the election, including the two Company representatives, Helen Considine and Charles Kissork, who were accompanied by the Company counsel, of their right to challenge the ballot of any person believed ineligible to vote. These observers were present when Mrs. Kane cast her ballot and did not challenge her right to vote. Prior to the count of the ballots, the Company tellers conferred with the Company counsel when asked to certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to vote their ballots in secret. After approval by counsel, both signed the usual Certification on Conduct of Election.

The fact remains that the list of eligible voters was prepared solely by the Company and was submitted by them as the exclusive list of eligible voters. Four or five days prior to the election, the Company knew, by reason of a letter from the U. S. Employment Service, that Mrs. Kane had made an application for unemployment compensation. It is this application that the Company urges as a basis for determining that she was not an employee at the time of the election and therefore not entitled to vote; yet not only did it do nothing to correct the eligibility list, but it did in fact acquiesce in her casting a ballot. Whether or not Mrs. Kane was an employee entitled to vote was, under the circumstances, a fact peculiarly within the Company's knowledge.

Yet it was not until four days after the election that they raised any objection to her vote.¹

Although the question of Mrs. Kane's status as an employee is not quite clear, the undersigned is of the opinion that under the circumstances set forth the Company has waived its right to challenge her vote or to object to the election on this ground.² To hold otherwise would vitiate the Board's procedure of having observers present at the polls, of challenges by such observers, and of certifications of conduct by the parties.

Since the overruling of this point makes unnecessary a ruling on the vote challenged at the election, the undersigned finds that a majority of the valid votes have been cast for the Union indicated below. Pursuant to Section 8 of the Agreement for Consent Election the undersigned hereby finds and determines that

LOCAL NO. 24, WATERPROOF GARMENT WORKERS UNION, affiliated with the International Ladies Garment Workers Union (A. F. of L.)

is the exclusive representative of all the employees in the unit defined in Section 2 of the Agreement for Consent Election, for the purposes of bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

¹ See *N L R B v. Capitol Greyhound Lines, et al.*, 140 F (2d) 754 (C. C. A. 6), cert. denied 322 U. S. 763.

² See in re *American Granite Finishing Company and International Union of Operating Engineers* (XXVIII NLRB 739).

By letter dated May 25, 1944, the Union requested a collective bargaining conference as to the terms of an agreement covering the employees in the unit for which it had been certified.⁹ By letter dated June 6, 1944, the respondent replied to the Union's letter of May 25, stating that in the light of "certain matters having to do with the election" with respect to which the Union was familiar, the respondent did not believe that the Union had been "validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held."

B. *The respondent's contentions*

The respondent raises no question as to the manner in which the election was conducted and makes no claim that the Regional Director acted arbitrarily or capriciously in the way he conducted his investigation of the objections or arrived at his decision thereon. However, the respondent contends, in essence, that "as a matter of law" the Regional Director's decision is arbitrary and capricious because it permits the vote of a non-employee to determine the result of an election among its employees and because there is no basis for the finding therein that through "negligence or laches" the respondent waived its right to challenge Kane's vote or to object to the election.

As to the vote of a non-employee determining the election, it should be noted that the Regional Director made no finding as to how Kane voted or as to whether or not Kane was an employee of the respondent at the time of the election. The Report on Objections does not resolve the first point. On the second, it refers to Kane's employment status as "not quite clear." As to Kane's status, the evidence shows that Kane has been ill; that the respondent has never set a time limit as to how long an employee may be absent from work because of illness before being separated from the pay roll; that in some cases em-

⁹ The amendment of May 31, 1944, did not modify the certification but pertained only to the third paragraph of the section of the Regional Director's report last quoted above.

ployees are away from work "a good many months" because of illness; that Kane's name was not taken off the respondent's pay roll until some time after May 8, 1944; and that it was not until the early part of July, when she returned to the plant to see if there was lighter work available for her, that Kane was first informed that her name was no longer on said pay roll. Further, there is no evidence that Kane has worked anywhere else since March when she sent her forelady at the respondent's plant a note that she was not working because she was ill. Thus while the evidence appears to afford ample basis for a finding that, at the time she voted, Kane was an employee who was not working because she was then ill, it is equally apparent, on the one hand, that the Regional Director's less positive finding as to Kane's status was neither arbitrary nor capricious and, on the other hand, that the evidence does not warrant a finding in line with respondent's contention that Kane was no longer its employee when she voted on May 5, 1944.

It should further be noted that for Kane's vote to have been determinative in reducing the election to a tie, every one of several factors would have had to have been resolved in line with the respondent's hypotheses. The Union's challenge of one unopened ballot made at the polls on May 5 would have had to have been overruled by the Regional Director. That ballot, upon being opened, would have had to have been cast against the Union. It would also have been necessary for the Regional Director to have found that a ballot which had been duly cast at the election in the presence of authorized observers for the respondent, which had not been challenged at the polls, and which had therefore not been segregated, but rather had been counted as valid along with the other valid ballots, could have been challenged four days after the polls had been closed. It would further have been necessary for the Regional Director to have found that Kane had not been an employee and had not been entitled to vote. It would then have been necessary either to have held a new election on the assumption that Kane might have voted for the Union, thus reducing the vote to a tie,¹⁰ or to have ignored the secrecy of the ballot and to have attempted to determine how Kane voted. If the latter course were to have been followed, the word of the voter, who would thus have been placed under pressure by having to reveal publicly how her ballot had been cast, would have had to have been accepted as final, since the ballot itself could not have been identified for examination. It is clear from the Regional Director's report that he believed that to have followed such a post-election procedure as the foregoing would have involved would have vitiated the Board's established election practices, and that in view of his ruling to that effect it became unnecessary for him to resolve other matters.

As to the question of negligence or laches, it should be noted that the Regional Director did not make any finding of negligence or laches but found rather, in effect, that the respondent had failed "through oversight" to correct the voting list or challenge the eligibility of Kane at the polls and that under all the circumstances it would vitiate the Board's election procedure to permit a post-election challenge of her vote. It is evident that the Regional Director had in mind the problems of post-election procedure discussed above. Among the circumstances which he specifically cited were that the balloting had been duly conducted in the presence of two observers for the respondent who had failed to challenge Kane's vote and who had thereafter signed the Certification on Conduct of Election; that the list of eligible voters had been prepared solely

¹⁰ Under the terms of the consent agreement, the Regional Director had authority to void the result of the election and to conduct a new election. There is no evidence that the respondent at any time requested such a procedure.

by the respondent, that Kane's unemployment compensation application had been received by the respondent prior to the election; that whether Kane had been an employee entitled to vote had been peculiarly within the respondent's knowledge; and that no objection to Kane's vote had been raised until four days after the election. The Regional Director cited the American Granite Finishing case¹¹ as authority for his determination that "under the circumstances" the respondent had "waived its right." In the case cited, the only labor organization involved in an election which had been duly conducted sought, in effect, to dissipate a tie vote by deducting the ballots of two persons, who allegedly had voted against it, on the ground that both persons were clerical employees who were not properly within the appropriate unit. Both employees had been listed as eligible voters and both had cast unchallenged ballots. In deciding in that case that "under the circumstances" the labor organization had "waived its right" to oppose the result of the election, the Board relied upon such circumstances as the presence of the observer for the labor organization at the polls and his failure to challenge the two ballots or to object to the inclusion of the names of the two employees on the list of eligible voters.

At the hearing before the undersigned, no question was raised as to the regularity of the election involved in the instant matter. Also it was admitted that the respondent furnished the pay roll which contained Kane's name and which was the only pay roll used at said election. As to the respondent's knowledge of Kane's employment status, the evidence shows that the respondent's copy of Kane's application for unemployment compensation was in the respondent's files when Superintendent Elbery¹² looked for it on May 8; that it was stamped as mailed on "May 1, 1944"; that in the normal course of business it would have been received on Tuesday, May 2; and that it was customary for such matter to be placed on Superintendent Elbery's desk the date received. Elbery testified that he first found the application in the respondent's files upon making a search for it upon his return on May 8 from the office of United States Employment Service in Boston where he had gone in an effort to verify a statement made to him on the morning of May 8 by an unidentifiable employee in Kane's department to the effect that Kane should not have voted because she was not an employee and was working somewhere else.¹³ The undersigned finds it difficult to credit Elbery's testimony that it was impossible for him to identify his informant, especially in view of the smallness of the respondent's plant, the recency of the event, and the investigation which Elbery testified was initiated as a result of that statement. But in any event, the Regional Director's opinion that the respondent failed to correct the voting list or to challenge Kane's eligibility at the polls "through oversight" is a temperate conclusion in view of all of the evidence in this case.

Upon the entire record, the undersigned concludes and finds that the Regional Director's certification of the Union upon the basis of the election of May 5, 1944, was neither arbitrary nor capricious and that, accordingly, it is binding upon the parties to the Agreement for Consent Election.¹⁴

¹¹ *Matter of American Granite Finishing Company*, 28 N. L. R. B. 739

¹² John J. Elbery. The last name is spelled differently in the transcript as compared to the Regional Director's report cited above

¹³ There is no evidence that Kane has worked anywhere else.

¹⁴ *Matter of Capitol Greyhound Lines, et al.*, 49 N. L. R. B. 156, enforced 140 F. (2d) 754 (C. C. A. 6), cert. denied, 322 U. S. 763; and *Matter of Aetna Fire Brick Company*, 56 N. L. R. B. 849.

The following language in the Board's decision in the *Capitol Greyhound* case, holding the Regional Director's determination to be binding in the absence of a showing that his rulings were arbitrary or capricious, is noteworthy:

C. The refusal to bargain collectively

1 The appropriate unit

The undersigned finds, in accordance with the Agreement for Consent Election, that all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment and that said unit insures to such employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

2. Representation by the Union of a majority in the appropriate unit

The undersigned also finds that at all times since May 5, 1944, the Union has been the bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that by virtue of Section 9 (a) of the Act, the Union has been at all times since May 5, 1944, and now is, the exclusive representative of all of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

The undersigned further finds that on June 6, 1944, and at all times thereafter, the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees within the unit hereinabove found to be appropriate, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The undersigned finds that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation 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.

V. THE REMEDY

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since it has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent, upon request, bargain collectively with the Union.

To hold otherwise would permit an employer deliberately to ignore binding commitments embodied in a consent agreement: would open the door to subterfuges for hampering and delaying a final determination of bargaining representative, and would tend to defeat, rather than to effectuate, the policies of the Act.

It should also be noted that Article III, Section 12, of the Board's Rules and Regulations, Series 3, effective November 26, 1943, as amended, provides specifically concerning consent elections that "the rulings of the Regional Director shall be final, and the statement of the Regional Director of the results thereof shall be final."

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Local No 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Local No 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), was on May 5, 1944, and at all times thereafter has been, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 6, 1944, and at all times thereafter, to bargain collectively with Local No 24, Waterproof Garment Workers Union affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, A. J. Tower Company, Roxbury, Massachusetts, its officers, agents, successors, and assigns shall:

1. Cease and desist from.

(a) Refusing to bargain collectively with Local No 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local No. 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain collectively with Local No 24, Waterproof Garment Workers Union, affiliated with International Ladies Garment Workers Union (A. F. of L.), as the exclusive representative of all of the employees of the respondent, at its Roxbury, Massachusetts, plant, except for executives, foremen, assistant foremen, maintenance employees, janitors, engineers, firemen and watchmen, and office and clerical employees;

(b) Post immediately in conspicuous places at its plant in Roxbury, Massachusetts, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the First Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that, unless on or before ten (10) days from the date of the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, as amended, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of the said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the parties or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

EARL S. BELLMAN,
Trial Examiner.

Dated September 29, 1944.