

1940

South East Furniture Company v. The Industrial Commission of Utah operating as the Utah Labor Relations Board : Brief of Plaintiff

Utah Supreme Court

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In the Supreme Court of the State of Utah

SOUTH EAST FURNITURE
COMPANY, a corporation of
of Utah,

Plaintiff,

vs.

THE INDUSTRIAL COM-
MISSION OF UTAH, oper-
ating as the UTAH LABOR
RELATIONS BOARD,

Defendant.

No. 6297

PLANTIFF'S BRIEF

ROMNEY & NELSON,
Attorney for Plaintiff.

FILED

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Defendant.

No. 6297

PLAINTIFF'S BRIEF

STATEMENT OF THE CASE

This proceeding is brought by the plaintiff, under Chapter 55, Section 11(f), Laws of Utah, 1937, for the purpose of reviewing a decision and order of the Industrial Commission of Utah, operating as the Utah Labor Relations Board, in the matter of certification of employes of the South East Furniture Company, for the purpose of collective bargaining, which decision and order, made and entered by the said Board on the 16th

day of August, 1940, certified that United Industrial Local Union No. 1068 was authorized and appointed by a majority of the employees engaged and employed in the department theretofore determined by the said Board as the appropriate unit for collective bargaining purposes with the South East Furniture Comany, the plaintiff herein, and ordered and directed the plaintiff, without further delay, to enter into negotiations for the purpose of collective bargaining with the said local union, with respect to rates of pay, wages, hours of employment, or other conditions of employment.

On or about July 26, 1940, the said union notified the plaintiff that it represented a majority of a certain group of employees of the plaintiff, and demanded to bargain collectively with the plaintiff in behalf of said employees. The plaintiff informed the union officials that it did not believe that the union had a majority of the said employees, and declined to bargain with said union until such majority was satisfactorily established. On July 27, 1940, a strike was called of certain of said employees. On July 30, 1940, an informal meeting was held with Commissioner William M. Knerr presiding as a conciliator, Mr. Knerr having been called in as such conciliator by the union officials, and the company representatives having voluntarily attended said meeting.

On July 31, 1940, after having allegedly checked the payroll of the said company against a list of names submitted by the union, and allegedly interviewing some of the alleged union applicants, and upon that basis, the said defendant, as the Utah Labor Relations Board,

certified the United Industrial Local Union as the appropriate unit for the purpose of collective bargaining for the employes of the plaintiff company employed in the shipping, servicing, delivery, and general warehouse work.

A subsequent meeting called by Commissioner Knerr, as conciliator, was attended voluntarily by the plaintiff and representatives of the union, on August 2, 1940, in an attempt to conciliate and mediate the controversy between the employer and the union and, if possible, as stated by the defendant Board, for the purpose of having the men return to work.

On August 1, 1940, the plaintiff filed a formal protest to the said certification of the defendant, and requested an appropriate hearing upon due notice, and further requested that the defendant Board arrange for a secret ballot of the said employes, for the purpose of determining the appropriate unit for collective bargaining purposes, and whether or not said union did, in fact, represent a majority of the employes in the appropriate bargaining unit. In the said protest, the plaintiff, in substance, alleged that the said union did not truly represent a majority of plaintiff's employes nor a majority of the employes in the classification mentioned; the plaintiff further alleged that the sales and office employes should be classified together with the employes mentioned, in one unit, for collective bargaining; the plaintiff further alleged that the certification of the defendant Board was based upon inadequate and incomplete investigation, which failed to establish that

the said union represented a majority of the said employees of plaintiff at the time the said protest was filed; plaintiff further objected that the said certification was not made after an appropriate hearing upon due notice, and that no secret ballot was taken as a basis for said certification, and that such investigation and certification was made while part of said employees were out on strike, and under conditions which made it difficult, if not impossible, to determine whether or not all the said employees were still in the employ of the plaintiff company.

On August 2, 1940, Commissioner Knerr transmitted to the plaintiff a communication from the union officials, in which the said union consented to the conducting of a secret ballot among the employees of the unit theretofore designated by the Board as the appropriate unit for collective bargaining. On August 3, 1940, the plaintiff replied in substance to Commissioner Knerr, consenting to a secret ballot, on condition that no charges of alleged unfair labor practices, up to the time of said ballot, be filed or considered, and that all the said company's employees, save for managers, assistant managers, and supervisors, be classified together and allowed to cast their ballot.

On August 7, 1940, the Industrial Commission adopted a resolution calling a hearing for August 9, 1940, at the hour of 10:00 o'clock A.M., for the purpose of determining the question of representation for collective bargaining in the said matter. A copy of the said resolution was served upon the plaintiff on August 7,

1940. At the outset of the said hearing, the plaintiff objected to the sufficiency of notice of the said hearing, and called the attention of the defendant Board to the fact that the notice of one day did not constitute due notice within the meaning of the statute. The Board, nevertheless, proceeded with the said hearing, as scheduled, and on the 16th day of August, 1940, rendered its decision and made its order, in substance and effect that the said union, as of July 26, 1940, had a majority of the employees in the department theretofore designated by the Board as the appropriate unit for collective bargaining purposes, and denying a secret ballot among the said employees, and ordering and directing the plaintiff, without further delay, to enter into negotiations for the purpose of collective bargaining with the said local union, with respect to rates of pay, wages, hours of employment, or other conditions of employment. The said decision and order was made and entered upon the affirmative vote of Commissioner Knerr and McShane, Commissioner Jugler voting in the negative. Commissioner Jugler further filed a dissenting opinion, in substance and effect holding that all the employees named on the list furnished by the plaintiff company should be classified together as one unit for collective bargaining purposes, and that a secret ballot should be conducted of the said employees, for the purpose of determining whether or not the said union had a majority.

QUESTIONS FOR REVIEW

As stated in plaintiff's petition for review, plaintiff contends that the said decision and order of the defen-

dant Board is without legal right and contrary to law, and the plaintiff is aggrieved thereby for the following reasons, to-wit:

1. That the notice of one day, given the plaintiff of the said hearing of August 9, 1940, did not constitute due or legal notice, and was not sufficient or reasonable notice to enable the plaintiff and others interested in the said hearing adequately and properly to prepare and present to the Board evidence pertaining to the issues to be presented at the said hearing.

2. That at the said hearing of August 9, 1940, the said Board entirely failed and refused to take any evidence or seek any information to enable it adequately to determine the proper representative of the employes of the plaintiff company for collective bargaining purposes.

3. That the said decision of said Board, designating and classifying certain employes as the proper unit for collective bargaining purposes, was made without adequate inquiry or consideration, was directly contrary to the expressed written wishes of 67 per cent of the employes of the plaintiff company, and was made solely for the reason and upon the ground that the said union requested such classification.

4. That the said decision of the said Board, denying a secret ballot of the employes of the said company, was contrary to law, and was made in the face of the express consent of the said union that such an election be had, on condition that it be confined to the

employees of the unit, as classified by the Board in its decision of August 16, 1940, as aforesaid, and was made in disregard of all the facts and circumstances and evidence presented to the Board to the effect that a fair and just determination as to the said representation could not be had in any other way than by a secret ballot.

5. That the said decision of the defendant Board was made solely on the basis of alleged applications for membership in the said union, previously presented to the said Board by the said union, and without any check or evidence as to whether the persons who allegedly signed the said applications in fact desired the said union to represent them at the time of the said decision of the Board on August 16, 1940.

6. That the said decision of the said Board was made while some of the said employees affected by the said decision were out on strike from the said company, and while informal charges of alleged unfair labor practices filed by the said union against this plaintiff were pending and undetermined, and upon which charges this plaintiff had not and has not yet been afforded any hearing whatever.

ARGUMENT

We shall discuss the questions for review in the same order presented in our petition for review.

I. THE NOTICE OF ONE DAY OF THE SAID HEARING OF THE BOARD OF AUGUST 9, 1940, DID NOT CONSTITUTE DUE

OR LEGAL NOTICE, AND WAS NOT SUFFICIENT OR REASONABLE NOTICE OF THE SAID HEARING.

Chapter 55, Section 10, Sub-section c, Laws of Utah, 1937, reads as follows:

“Questions affecting intrastate commerce: Whenever a question affecting intrastate commerce or the orderly operation of industry arises concerning the representation of employees, the board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 11 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.”

It will be noted that this section requires that the Board shall “provide for an appropriate hearing *upon due notice*, either in conjunction with a proceeding under section 11 or otherwise.” We grant that the hearing in question was not called in conjunction with a proceeding under section 11, which section has to do with hearings upon charges of unfair labor practices, but we respectfully call attention to the fact that, under the said section 11, the Legislature provided that not less than five days’ notice must be given of any hearing under the said section. There is no express number of days of notice provided in the statute for any hearing other than hearings under such section 11; the only requirement is that the said hearing be “upon due notice.” We call attention, however, to the fact that the

matter of determining the appropriate unit and the representative thereof for collective bargaining purposes, is at least as vital and important as the matter of adjudicating an alleged unfair labor practice, and that, in all fairness, at least as much notice should be given of such hearing as of one called for the purpose of adjudicating the charge of unfair labor practice. The hearing of August 9, 1940, was the first formal hearing called by the defendant Board for that purpose, and it appears that the action of the Board in providing only one day's notice for said hearing, was made in utter disregard of the vital importance of the question to be determined, and of the necessity for a complete and thorough investigation of the facts of the matter.

We have been able to find but one case bearing directly upon the question of the sufficiency of notice of hearing under the National Act. That is the case of *Lane Cotton Mills*, 1938, 9 *N.L.R.B.* 952. In that case, the company was served with an amended complaint and notice of hearing on October 16, 1937, after business hours, and hearing was held on October 18, 1937. The trial examiner denied the company's motion for postponement, and the Board over-ruled the examiner, stating as follows:

“Although the respondent participated in the hearing, because of lack of notice, full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues of the amended complaint, was not at the time afforded to it.”

It should be noted further that, under the National Act, at least five days' notice is provided for the hearing

of charges of alleged unfair labor practices, and that the N.L.R.B. formerly issued regulations requiring five days' notice but that the existing rules and regulations of N.L.R.B., Section 202.5, series 2, provides that the date fixed for the hearing shall not be less than ten days after the service of the complaint.

The action of the defendant Board, therefore, in affording only one day's notice in the instant case would seem to be entirely unwarranted.

II. AT THE SAID HEARING, THE BOARD FAILED TO TAKE ANY EVIDENCE OR TO SEEK ANY INFORMATION TO ENABLE IT ADEQUATELY TO DETERMINE THE PROPER REPRESENTATIVE OF THE EMPLOYEES FOR COLLECTIVE BARGAINING PURPOSES.

A search of the transcript of the testimony taken at the said hearing reveals only testimony and evidence pertaining to the classification of the employees as a unit for collective bargaining purposes, with the exception of the petition signed by thirty out of a total of forty-five employees in the company, requesting the right to vote on any unionization of the employees, which petition is referred to on page 4 of the transcript, and which is also made a part of the record, and, with the further exception of Mr. Andrews' testimony on page 5 and on pages 78, 79, and 80, and Mr. Sorensen's testimony on page 41, as follows:

“Q. You have also expressed a desire, through your representative here to the Commission, that you feel that a secret ballot would be the only way of determining the desire of your em-

ployees as to the bargaining agency. Will you explain that?

“A. I sincerely feel that a secret ballot is necessary. I have been informed and believe that considerable pressure has been brought on our employees by some of the union representatives, and the employees of our store can express their free opinions only by a secret ballot, so that we won't feel they are being influenced.

“Q. You believe under the condition that has been reported to you that is the only proper way to determine this issue?

“A. Yes, I think that is the only proper way.”

It will be noted that the Board did not, at any time at the hearing or in conjunction therewith, make any inquiry or investigation whatsoever with respect to the question of whether or not the said union represented a majority of the employees, either in the unit designated by the Board as the proper bargaining unit, or in the company as a whole, either at the time of its decision or at any prior time. In other words, the Board went through the formalities of a hearing, because the law required such a hearing, but did not seek nor receive any evidence whatsoever on the vital question of whether or not the said union represented a majority of the employees; the Board evidently chose to disregard entirely the statement of Mr. Sorensen as set forth on page 41 of the transcript and the statements of Mr. Andrews, as aforesaid, and rested its decision as to the existence of a majority of the employees in the union upon the prior action of the Board, which certified the union as the collective bargaining agent, as of July 26, 1940, solely

on the basis of a comparison of union applications with a list of employes of the company. In this respect, it appears that the Board, at the said hearing, entirely closed its eyes and its mind to the vital question of the existence of a union majority, and merely rested upon its prior certification, which was made without hearing, without notice, and without adequate investigation.

III. THE DECISION OF THE BOARD DESIGNATING CERTAIN EMPLOYES AS THE PROPER UNIT FOR COLLECTIVE BARGAINING PURPOSES, WAS MADE WITHOUT ADEQUATE INQUIRY OR CONSIDERATION, AND WAS DIRECTLY CONTRARY TO THE EXPRESS WRITTEN WISHES OF 67 PER CENT OF THE EMPLOYES.

At the said hearing, the Board was faced with two requests: first, a request from the local union that the employes in the shipping, servicing, delivery, and general warehouse work of the company be designated as the proper unit for collective bargaining purposes; and, second, a request voluntarily submitted and filed by the employes themselves, acting through one of their number, Mr. Thos. K. Andrews, signed by thirty out of forty-five employes in the entire company, asking that all the said employes have a right to vote on any unionization of the employes of the company. The Board saw fit after the said hearing, to deny and disregard the request of the said thirty employes, and to grant the request of the union, and classified the employes in accordance with the union's request and contrary to the wishes of the said thirty employes, many of whom were among those who had allegedly signed union applica-

tions. It would appear that such action of the Board, in choosing to follow implicitly the demands of the union in preference to the express written request of the employes themselves, does violence to the very spirit and essence of the Utah Labor Relations Act, in that it exalts the union above the employes, and curbs the "full freedom of association, self-organization, and designation of representatives of their (the employes) own choosing," as set forth in the said law, and subordinates the will of the employes to that of the union.

While it is admitted that the plaintiff, through Mr. H. A. Sorensen, expressed its belief that it would be to the best interest of the employes, and in the interest of harmony in the company that all the employes be classified in one unit, and that dissention would ensue if such classification were not made (Tr. 37), the employer made such observation in sincerity and with the firm conviction that the action recommended by the employer would bring about harmony and good will in his establishment. The request for classification of all the employes in one unit sprang voluntarily from the employes themselves; and their representative, Mr. Andrews, was interrogated severely and at length by Commissioner Knerr, for the purpose of eliciting some evidence of influence or coercion on the part of the employer, in the instigation of the said request, but the said interrogation of the said Mr. Andrews brought out emphatically the fact that the said request was wholly voluntary on the part of the said thirty employes (Tr. 78-81).

While admitting the soundness generally of the policy of protecting employes against coercive influences on the part of the employer, and the consequent possible need for the protective measures afforded by law in behalf of unions, as against employers, we fail to see where, by all rules of reason and justice, there is any justification for a labor board to close its eyes completely to the expressed wishes of 67 per cent of the employes of a company, and to follow blindly the demands of a union, in conflict with the said employes' request, particularly where the employer is not involved in the said controversy beyond expressing its wish and desire that the request of the employes be followed, in the interest of harmony and peace.

In connection with the classification ordered by the Board we respectfully call attention to the fact that the union representative, in the first instance, claimed that "nowhere throughout the United States has the Congress for Industrial Organization ever admitted to its membership or claimed jurisdiction over the employes herein exempted." (From letter of August 5, 1940, to Utah Labor Relations Board, signed Frank Bonacci). At the hearing, Mr. Bonacci stated, in substance, that he did not claim jurisdiction over the employes exempted as aforesaid (Tr. 9), but stated that in several small stores and restaurants, cashiers are sometime taken into the union (Tr. 13). Mr. Bonacci further stated, in substance, that he did not take in the employes excepted, because he did not want them in the union (Tr. 17), and stated further that there is nothing to prevent the C.I.O. from organizing said employes (Tr. 21).

Mr. Varro C. Jones, organizer for C.I.O., called to testify by Commissioner Knerr, testified in substance that, if the thirty men in question, employees of the South East Furniture Company, had made application for one charter for their group, such charter would have been granted by the C.I.O. (Tr. 65-66), and that the men themselves determine the classification the group shall be in (Tr. 64).

Furthermore, the documents submitted by the plaintiff company at the said hearing (marked Exhibits A, B, C, D, E, F, G, and H), we believe, constitute evidence that the C.I.O. does frequently include in one unit employees in shipping, servicing, delivery, warehouse, clerical, and sales departments of a company. Despite the evidence submitted to that effect, the Board erroneously, we think, chose to follow the demands of the union and to classify the bargaining unit in accordance with such demands.

The Board's power to define the appropriate unit for purposes of collective bargaining is set forth in Subsection b of Section 10, Chapter 55, Laws of Utah, 1937, as follows:

“Appropriate unit.

The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.”

The above quoted sub-section was copied word for word from Sub-section b of Section 9 of the National Labor Relations Act. Therefore, it would seem that the decisions of the National Labor Relations Board pertaining to this subsection, should be a safe guide for this court to follow.

We quote from the Third Annual Report, N.L.R.B., 1938 and Fourth Annual Report N.L.R.B., 1939, page 83, as follows:

“Self-organization among employees is generally grounded in a community of interest in their occupations, and more particularly in their qualifications, experience, duties, wages, hours, and other working conditions. This community of interest may lead to organization along craft lines, along industrial lines, or in any of a number of other forms representing adaptations to special circumstances. The complexity of modern industry, transportation, and communication, and the numerous and diverse forms which self-organization among employees can take and has taken, preclude the application of rigid rules to the determination of the unit appropriate for the purposes of collective bargaining.

“In attempting to ascertain the groups among which there is that mutual interest in the objects of collective bargaining which must exist in an appropriate unit, the Board takes into consideration the facts and circumstances existing in each case. The nature of the work done by the employees involved, their training and the extent of their responsibilities, and the organization of the employer's business are all entitled to weight. In evaluating these factors, the Board must also consider the history of collective bargaining, whether successful or otherwise, among the employees involved as well as among other employees in the same industry or in similar industries.

Finally the Board must evaluate various other factors which tend to show the presence or absence of a mutual interest in collective bargaining between various groups of employees.

“The precise weight to be given to any of the relevant factors cannot be mathematically stated. Generally several considerations enter into each decision.” (Third Annual Report, NLRB, 1938 (page 157)).

“The Board must determine frequently whether the unit or units shall be industrial, including practically all the employees in the plant, semi-industrial, including a majority of the employees, multicraft, including several groups of skilled workers, craft, including one group of skilled workers, or some other unit, including only part of the employees.” (Fourth Annual Report, NLRB, 1939 (page 83)).

As to centralization of management, an employee unit was held appropriate because of a central employment office, interchange of employees, one superintendent, and a central handling of grievance problems.

Aluminum Co. of America, (1938) 6 NLRB 444.

Similarly, the matter of central management resulted in a designation of one unit in the following cases:

United Shipyards, Inc., (1938) 5 NLRB 742

Standard Oil Company of Calif., (1938) 5 NLRB
750

Waggoner Refining Co., Inc., (1938) 6 NLRB 731

Stackpole Carbon Co., (1938) 6 NLRB 171

Paraga Rubber Co., (1938) 6 NLRB 23

The American Brass Co., (1938) 6 NLRB 723

American Hardware Corp., (1937) 4 NLRB 412

Kling Factories, (1938) 8 *NLRB* 1228

The Sorg Paper Co., (1938) 8 *NLRB* 657

Columbia Broadcasting System, Inc., (1938) 8
NLRB 508

As to community of interest, we quote from the Third Annual Report of N.L.R.B., 1938, page 174, as follows:

“Under the terms of the Act, the Board, in determining the appropriate unit, attempts to insure to employees the full benefit of the right to self-organization and to collective bargaining. The chief object of the Board, therefore, is to join in a single unit only such employees and all such employees, as have a mutual interest in the objects of collective bargaining. The appropriate unit selected must operate for the mutual benefit of all the employees included therein. To express it another way, the Board must consider whether there is that community of interest among the employees which is likely to further harmonious organizations and facilitate collective bargaining.”

Some of the N.L.R.B. decisions grouping together those employees having common economic interests are the following:

International Mercantile Marine Co., (1936) 1
NLRB 384

Tennessee Copper Company (1938) 5 *NLRB* 768

The Texas Co., (1939) 11 *NLRB* 925

Pittsburgh Plate Glass Co., (1939) 15 *NLRB* 515

(Where employees of several plants were grouped together as one unit because the interests of such employees were interwoven, and the collective bargaining for all the plants

involved, in the opinion of the Board, could most effectively be achieved through the establishment of a single bargaining unit.)

Fisher Body Corp., (1938) 7 *NLRB* 1083

The Calco Chemical Co., Inc., (1939) 13 *NLRB* 34

Nekoosa-Edwards Paper Co., (1939) 11 *NLRB* 446

Terminal Flour Mills Co., (1938) 8 *NLRB* 381

The Osgood Co., (1937) 4 *NLRB* 312

As to the desire of the employes, we quote in part from the Third Annual Report of N.L.R.B., 1938, beginning on page 167, as follows:

“The Board has given great weight to the desires of employees as expressed by their forms of self-organization; and it has also considered whether certain groups of employees have expressed a will to be included or excluded from a particular unit, in determining the bounds of that unit.”

Accordingly, in the case of *The Globe Machine and Stamping Co.*, (1937) 3 *NLRB* 294, where three unions advocated a division of the employes into three units, and a fourth union contended for a single unit for all employes, the Board stated in part as follows:

“In such a case where the considerations are so evenly balanced, the determining factor is the desire of the men themselves. On this point, the record affords no help . . . The only documentary proof is completely contradictory. We will therefore order elections to be held separately for the men engaged in polishing and those engaged in punch press work. We will also order an election for the employees of the company engaged in production and maintenance, exclusive of the pol-

ishers and punch press workers and of clerical and supervisory employees . . .”

To similar effect is the *Commonwealth Division of General Steel Castings Corporation*, (1937) 3 NLRB 779.

As to past experience of workers in the plant with respect to collective bargaining units, it is evident that in the instant case, there is no previous experience upon which to base a determination.

With reference to the matter of functional coherence and interdependence of the various departments and employes, we quote from the Third Annual Report of N.L.R.B., 1938, pages 191-192, as follows:

“Hence the Board has held that a close interrelation of the work of various departments of a plant tends to support a finding of one plant unit, rather than departmental units, and also militates against the splitting off of one department from a plant unit. Similarly, the fact that two plants owned by a company cooperate in the manufacture of some of the company’s products supports a finding of one unit for the employees at both plants.”

As to interchange of employes, it has been generally held by the Board that employes whose duties are so nearly alike that they can be transferred throughout the departments of one plant, or from plant to plant, have a common viewpoint as to working conditions and should, therefore, be classified as one unit. To this effect, see the following cases:

Paper, Calmenson & Co., (1938) 10 NLRB 228

Postal Telegraph-Cable Corp., (1938) 9 NLRB 1060

Lenox Shoe Co., (1937) 4 *NLRB* 372

Bingham & Taylor Corp., (1937) 4 *NLRB* 341

Federated Fishing Boats of New England (1939)
15 *NLRB* 1080.

With reference to the interdependence of operations of the employes, it has been generally held that where the departmental operations of a plant are so highly interdependent that the stoppage of work in any department necessitates a stoppage of the work in the remaining departments, the contention is usually supported that a plant unit is the most appropriate. To this effect, see the following cases:

Hamilton Realty Corp., (1938) 10 *NLRB* 858

Postal Telegraph-Cable Corp., (1938) 9 *NLRB*
1060

Daily Mirror, Inc., (1938) 5 *NLRB* 362

(In which the Board stated in part as follows:

“The functional interdependence of the various departments of the company and the greater effectiveness of the larger unit for collective bargaining make the employer unit appropriate.”)

National Distillers Products Co., (1938) 5 *NLRB*
862.

With reference to the lack of representation of particular employes excluded, it has generally been held by the Board that where the petitioning union desires the exclusion of a group of employes from a bargaining unit, and the Board finds that there is no bona fide union in the plant to which these employes are eligible, the Board usually includes them in the unit, so as not

to deprive them of the right to bargain collectively. To this effect, see the following cases:

Cupples Co., (1938) 10 *NLRB* 168

(Where the union organized the match department only, and the employer contended that an industrial unit embracing all employees was proper, the employer's contention was upheld by the Board, on the grounds that the employees who were not organized should not be denied the benefits of the act.)

Harter Corp., (1938) 8 *NLRB* 391

(Where the Board included maintenance men and engineers in a plant unit contrary to the wishes of the union.)

Times Publishing Co., (1938) 8 *NLRB* 1170

(Where the Board, contrary to the wishes of the union, included six composing room employees who were denied membership in the union because of their brief apprenticeship.)

Selby Shoe Co., (1939) 15 *NLRB* 489

(Where four pressfeeder girls excluded from the craft union were placed in the major unit by the Board, contrary to the wishes of the union.)

As to the effect of alleged eligibility to membership in the union, we quote from the Third Annual Report of N. L. R. B., 1938, pages 166-167, as follows .

“ * * it is clear that the Board cannot be bound in determining the appropriate unit by the rules established by the labor organizations in the field. Those rules constitute only one of the factors which the Board considers in making its decision.”

IV. IN DENYING A SECRET BALLOT
IN THE FACE OF THE EXPRESSED CON-

SENT OF THE UNION THAT SUCH BALLOT BE CONDUCTED, AND IN DISREGARD OF ALL THE FACTS AND CIRCUMSTANCES, THE BOARD ACTED CONTRARY TO LAW, AND ITS SAID ACT CONSTITUTED A BREACH OF DISCRETION.

We call attention to the offer of the union (contained in the letter from A. M. Peterson to Chairman W. M. Knerr, dated August 2, 1940) to consent to a secret ballot among the employees in the unit designated by the Board. In respect to that offer, the employer agreed to stipulate in accordance therewith, on condition that the clerical and sales employees be included in the said unit and be allowed to ballot. The hearing in question was thereafter called, and, in the course of the hearing, Commissioner Knerr, who presided at the said hearing, stated in part as follows:

“If we hold an election and the Commission defines the unit, we may define all the employees or take Mr. Bonacci’s version of it, we don’t know. If we define the unit then the employer will be authorized to have a representative at the ballot box and the employees will designate a representative, and those representatives ought to be familiar with the activities of every employee so they can intelligently challenge any ballot that may be cast. So if we have an election we ought to be in a position to do that.”
(Tr. 35)

At the same hearing, Commissioner Knerr further stated as follows:

“As a matter of fact, the union has consented to a secret ballot, with the understanding that the appropriate unit be determined. So the only issue is as to whether or not the proper

unit has been determined. As I understand it, the union has said they would submit to a secret ballot provided the Commission would define the proper employees to belong to the union, but they challenge, or they ask the Commission not to include all the employees that the employer wants." (Tr. 41)

Without further comment from the Board or any of its members, the next notice that the plaintiff received was the decision of the said Board of August 16, 1940, wherein a secret ballot was denied and the employer was ordered to bargain with the union.

At the said hearing, there were two general questions before the Board for determination, namely:

First, what is the appropriate unit for collective bargaining purposes? and

Second, does the union hold a majority of the employees in the said unit?

After determining that the appropriate unit was in accordance with the prior designation of the Board, in the light of the consent of the union theretofore given and the statement of the Chairman of the Board, indicating that an election would be held after the determination of the appropriate unit, it would appear that the subsequent action of the Board in denying a secret ballot was entirely unwarranted and unjustified.

Sub-section c, Section 10, Chapter 55, Laws of Utah, 1937, governs the method of ascertaining who the representative of employees is in such cases. This section was copied, word for word, from Section 9(c) of the National Labor Relations Act, save for the fact that the

said section of our state law was made to apply to intrastate commerce. This honorable Court has not passed upon the question at bar, and the decisions of the federal courts on the National Act are indeed meagre. We must, therefore, turn principally to the decisions of the N. L. R. B. for light as to the interpretation of this section. First, however, let us turn to the expressions of the intention of our national Legislature in enacting National Labor Relations Act.

The United States House of Representatives Labor Committee made a report dated June 10, 1935 (Report 1147), which reads in part as follows:

“Section 9(c) makes provision for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged. It is, of course, contemplated that pursuant to its authority under section 6(a), the Board will make and publish appropriate rules governing the conduct of elections and determining who may participate therein.

“The committee adheres, with the present National Labor Relations Board, to the common belief that the device of an election in a democratic society has, among other virtues, that of allaying strife, not provoking it. Obviously the Board should not be required to wait until there is a strike or immediate threat of strike. *Where there are contending factions of doubtful or unknown strength, or the representation claims of*

the only organized group in the bargaining unit are challenged, there exists that potentiality of strife which the bill is designed to eliminate by the establishment of this machinery for prompt, governmentally supervised elections.” (Italics ours)

The N. L. R. B., on July 12, 1939, adopted a policy which was even more liberal than the policy theretofore prevailing with respect to elections. On that day, in the case of *Cudahy Packing Company*, 13, *NLRB* 526, a national union introduced in evidence 147 membership cards, signed during the previous year by employees within the appropriate unit of 157 persons, and also presented petitions signed within two months preceding the hearing by 141 of the said persons, but an independent union introduced petitions signed by 43 of the said employees, designating the independent union as their representative. We quote the text of the decision of N. L. R. B. in full as follows:

“The United claims that it should be certified upon the proof offered. The Company and the Independent, however, assert that an election must be held in order to ascertain the true wishes of the employees. We are thus faced with conflicting claims as to which of the two labor organizations, each designated by a substantial number of the employees involved, is entitled, under the act, to represent all of them. Our determination of representatives looks to the initiation of collective bargaining between the Company and its employees. *We believe that since each of two contesting labor organizations has proved substantial adherence among the employees, the bargaining relations which result will be more satisfactory from the beginning if the doubt and disagreement of the parties regarding the wishes of the employees is, as far as possible, eliminated.*

Although in the past we have certified representatives without an election upon a showing of the sort here made, we are persuaded by our experience that the policies of the act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot. We shall, accordingly, direct that such an election be held.

“It should be noted that we are not here confronted with the necessity of deciding, upon the testimony and documentary evidence in the record, *whether on the date of an alleged refusal to bargain, the Union represented a majority of the employees in the appropriate unit.* That question could not be answered by an election, for the result of a present election would not show the Union’s authority on the particular past date in question. Were it necessary to decide in the present case whether the testimony and documentary evidence in the record did or did not establish a majority for the Union, we would find that it did. However, it is not necessary in this proceeding to make such a determination on the present record. *We are here concerned with establishing representatives for future bargaining purposes, and under the circumstances we think that such future bargaining will best be effectuated by holding an election by secret ballot.*” (Italics ours)

The best and customary method for resolving questions of representation under Section 9(c) of National Labor Relations Act, has always been by means of elections conducted under the supervision of the Board. In this manner, all doubt as to the desires of the employees concerning representation is dispelled. The following cases represent only a few of the vast number of cases in which the Board has determined the bargaining representatives on the basis of an election:

In the case of *Armour & Company*, 13 *NLRB* 1143, decided July 12, 1939, the union produced evidence in support of its claim of representation of a majority of the employees. The company disputed the claim of the union, but offered no evidence. The text of the Board's decision follows:

“At the hearing, the Union offered evidence in support of its claim that the majority of the employees had designated it as their collective bargaining agent. It requests certification upon the proof offered. The Company, however, contests the Union's claims. It contends that an election is necessary to determine the wishes of the employees. Although in the past we have certified representatives without an election upon a showing of the sort made by this record, *we are persuaded by our experience that, under the circumstances of this case, any negotiations entered into pursuant to a determination of representatives by the Board will be more satisfactory if all disagreement between the parties regarding the wishes of the employees has been, as far as possible, eliminated. We shall therefore direct that an election by secret ballot be held.*” 4 LRR Man. 326. (Italics ours)

In the case of *Woodward Iron Company*, 13 *NLRB* 71, an election was directed although one union introduced in evidence authorization cards allegedly signed by 402 employees within an appropriate unit of 584, where a rival union challenged the validity of authorization card signatures and contended that the signatures, if genuine, were obtained by coercion.

In the case of *Joe Lowe Corporation*, 13 *NLRB* 76, decided July 18, 1939, an election was directed, although one union introduced documentary proof of present

designation by a majority, where a rival union refusing to reveal the names of its members requested an election. A similar holding is found in the case of *National Carbon Company, Inc.*, 13 *NLRB* 100.

In the case of *National Can Co.*, 13 *NLRB* 124, a craft union presented proof of 54 signatures out of a total of 95, signed and witnessed in the presence of the union organizer, but the industrial union objected to the use of the petition as the basis for certifying the representative, and the Board ordered an election.

To the same effect is the case of *S. Karpen & Bros.*, 14 *NLRB* 36.

In the case of *New York Handkerchief Company*, 5 *NLRB* 703, decided as early as February 28, 1938, the union claimed to represent a majority of the employes, but the company denied the union's majority and refused to negotiate. The Board ordered an election.

In *re Gate City Cotton Mills*, *NLRB* 57, decided December 7, 1935, the union's claim to represent a majority was denied by the employer, and the Board ordered an election. In the case of *American Tobacco Company*, 2 *NLRB*, decided September 1, 1936, an election was ordered where the employer refused to recognize the union claiming a majority of the employes engaged in the department held to be an appropriate unit, on a finding that the union represented at least a substantial number.

In the case of *In re International Nickel Company, Inc.*, 1 *NLRB* 907, decided June 11, 1936, it was held that a majority status dispute between union and employer regarding representation, together with employer's refusal to bargain with the union, constitutes the basis for an election order. We quote a part of the Boards' conclusion as follows:

“A question concerning the representation of the employees in the plant has arisen and has created discontent, unrest and bitterness and tends to lead to labor disputes, burdening and obstructing commerce, etc.”

In the case of *Atlantic Refining Company*, 1 *NLRB* 359, decided March 19, 1936, the union presented 230 cards recently signed by employees, in a unit of 316. The employer contended that many of the signatures were obtained by coercion and compulsion, and the Board ordered an election.

In the case of *Associated Press*, 1 *NLRB* 686, decided May 6, 1936, it was held that a dispute by the employer of the union's claim to represent a majority of the employees, and the employer's refusal to bargain collectively with such union, and the unrest among employees, resulting therefrom, raises a question of representation, and is a sufficient basis for an election order by the Board.

In the case of *Burroughs Adding Machine Company*, (1939) 14 *NLRB* 829, the employer introduced letters signed by a number of employees, renouncing their applications for membership in the union. The Board decided

that the doubt created by the evidence could be resolved best by an election to determine the bargaining representative. Similarly is the case of *Superior Felt and Bedding Company*, 14 *NLRB* 835.

Further evidence of the present policy of N. L. R. B. to base its certifications on elections rather than on proof of a majority status, adduced at the hearing, is the case of *Alpina Garment Company*, (1939) 13 *NLRB* 720.

In another case, decided in 1940, where the employer did not question the majority status of the union, the Board directed an election nevertheless, on the ground that the evidence consisting only of testimony concerning the membership of the union was insufficient. 19 *NLRB* 51.

It is evident from the above decisions that from the inception of National Labor Relations Act, it has been the policy of N. L. R. B. to order an election, where there was any reasonable doubt as to the majority claims of the union, and that the Cudahy Packing Company case (1939) cited above, marked the beginning of even a more liberal attitude on the part of the N. L. R. B. with reference to elections. From that time on, N. L. R. B. has steadfastly and consistently held to the position that the determination of the Board in cases such as the one at bar, with respect to representation of the employees, looks to the initiation of collective bargaining between the company and its employees, and that the bargaining relations which result will be satisfactory

from the beginning, if the doubt and disagreement of the parties regarding the wishes of the employees is, as far as possible, eliminated, and that such doubt and disagreement can best be eliminated by the holding of an election by secret ballot. Accordingly, since the Cudahy Packing Company case, it appears that N. L. R. B. has always ordered an election where doubt or disagreement of the parties regarding the wishes of the employees has been expressed. If such policy is good for N. L. R. B., as applied to the interpretation of the National Act, it most certainly should be the policy of the defendant Board with respect to the interpretation of the state law, which was copied from and is identical with the National Act.

We further cite the case of *N. L. R. B. vs. Fansteel Metallurgical Corporation*, decided by the Supreme Court of the United States on February 27, 1939, and reported in 306 U. S. 240, 83 L. Ed. 627. In this case, there had been a lawful discharge of employees who had participated in a sit-down strike, and new men had been employed to replace them. Nevertheless, the N. L. R. B. had ordered the employer to bargain collectively with the union as the exclusive representative of the employees in the unit in question. We quote from the decision of the Court as follows:

“Respondent resumed work about March 12, 1937. The Board’s order was made on March 14, 1938. In view of the change in the situation by reason of the valid discharge of the sitdown strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice

of a majority of respondent's employees for the purpose of collective bargaining. The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. *But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election.*" (Italics ours)

We further respectfully call attention to the fact that the law in question defines no other method for determining such matters, and that the "secret ballot" is the only method mentioned in the statute. Where dispute or disagreement exists, and where coercion, intimidation, and pressure upon the employees on the part of either the union or the employer may exist, it is apparent that any method of determining the wishes of the employees which relies upon the expression given by the employees in the presence of any person, is inadequate and unsatisfactory in determining the employees' wishes. In such cases, a secret ballot is the employee's protection against such coercion, intimidation, and pressure from any source whatsoever. It can harm no one; there can be no valid objection to it from any source; it is the American way, the democratic way, of guaranteeing to the citizen his sacred franchise; and it is the American way of guaranteeing to the employee his free expression of preference as to his representative. There can be no substitute for the secret ballot in such cases.

We respectfully contend, therefore, that, in the light of the employer's expressed opinion that the union has brought considerable pressure upon the employes, and that a free expression of opinion can only be obtained by a secret ballot, and in further light of the consent of the union to the holding of a secret ballot, and in view, further, of the petition signed by thirty out of a total of forty-five employes, as well as the memorandum of Chairman W. M. Knerr, filed with the record to the effect that "subsequent to August 13, 1940, certain documents with reference to the status of employes of the South East Furniture Company have been filed with the Commission," which documents the employer has requested the Commission to certify to the Court, but which the Commission has refused to do, there is ample doubt and disagreement as to the wishes of the employes in regard to representation, to justify an election, and that the action of the Board in denying a secret ballot, in view of all the circumstances, was an abuse of discretion; and that the cause should be remanded to the Board with directions to conduct a secret ballot.

V. THE DECISION AND DETERMINATION OF THE BOARD WAS MADE SOLELY ON THE BASIS OF ALLEGED UNION APPLICATIONS, AND WITHOUT ANY EVIDENCE AS TO THE EMPLOYES' WISHES AT THE TIME OF THE BOARD'S DECISION.

In the hearing of August 9, 1940, which was called for the purpose of determining the appropriate unit and the representative of the employes therein, the Board failed and refused entirely to seek any evidence to determine the wishes of the employes at that time. Through-

out the entire proceeding, and in its decision, the Board hearkened back to the date of July 26, 1940, and the decision of the Board was made solely upon the basis that the Board believed the union had a majority of the employes, as of July 26, 1940, and, therefore, the Board certified the union as the bargaining representative, as of the date of its decision, August 16, 1940, without attempting in any way to ascertain whether a change of representation occurred in the interim.

It is our contention that if, at the said hearing, the Board was called upon to determine whether an unfair labor practice had been committed by the employer on July 26, 1940, in refusing to bargain with the union as of that date, the Board should properly base its decision, in part at least, upon a determination of the union representation as of July 26, 1940, but in the case at bar the Board was called upon to determine the union representation as of the present time, and, therefore, in the light of all the circumstances, it should have endeavored to determine the wishes of the employes as of the date of its decision. As was stated by the N. L. R. B. in the Cudahy Packing Company case, cited above, which case is analagous in this respect, the Board was here concerned with establishing representatives for future bargaining purposes, and consequently, the Board should have decided, as N. L. R. B. did in the Cudahy case, that, under the circumstances, such future bargaining would best be effected by holding an election by secret ballot.

VI. THE DECISION OF THE BOARD WAS MADE WHILE A STRIKE WAS IN PROGRESS AND WHILE INFORMAL

CHARGES OF ALLEGED UNFAIR LABOR PRACTICES, FILED BY THE UNION AGAINST THE PLAINTIFF WERE PENDING AND UNDETERMINED, AND UPON WHICH THE PLAINTIFF HAD AS YET NO OPPORTUNITY OF BEING HEARD.

At the time the Board conducted its hearing, and made its decision, a strike was in progress among some of the employes of the unit in question. The very existence of such a strike is proof positive of disagreement somewhere between the employes, the union, and the employer. It is an outstanding evidence of strife, and sometimes an indication of coercion or pressure somewhere along the line. Under these conditions, we submit that the Labor Board fails to exercise its discretion wisely or to promote the interests of harmony, good will, and understanding between all the parties, when it ruthlessly overrules the objections of the employer to the claims of the union as to representation, and denies the simple request made by the employer that a secret ballot be conducted, and, without further ado, orders the employer to bargain with the union on the basis merely of an alleged comparison with union applications of a list of the employes.

It will be noted further that the file contains evidence of informal charges having been filed by the union against the employer, alleging unfair labor practices. For some reason, the defendant Board failed to call up for hearing the said charges, and the said charges have been pending since that time, without hearing. The very existence of such informal charges is further evidence

of strife and contention between the union, the employees, and the employer, and constitutes a further reason and justification for the employer's request that an election be held. Under these circumstances, it is submitted that the Boards' refusal to heed the employers' request for an election was unjustified.

Respectfully submitted,

ROMNEY & NELSON,
Attorney for Plaintiff.