

1949

# Hotel Utah Company v. R. H. Dalrymple, Otto Weisley, H. Fred Egan and Laundry Workers Local Union No. 316 : Brief of Petitioners

Utah Supreme Court

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Callister, Callister & Lewis; Attorneys for Petitioner;

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**IN THE SUPREME COURT  
of the State of Utah**

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HOTEL UTAH COMPANY, a corporation,

*Petitioner,*

vs.

R. H. DALRYMPLE, OTTO WEIS-  
LEY and H. FRED EGAN consti-  
tuting the Utah Labor Relations  
Board, and LAUNDRY WORKERS  
LOCAL UNION NO. 316,

*Defendants.*

Case No.  
7290

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**BRIEF OF PETITIONER**

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**FILED** CALLISTER, CALLISTER & LEWIS,  
*Attorneys for Petitioner*

APR 9 - 1933

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**CLERK, SUPREME COURT, UTAH**

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*Defendants.*

Case No.  
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## BRIEF OF PETITIONER

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## STATEMENT OF FACTS

The petitioner herein, Hotel Utah Company, a corporation, with its principal place of business at Salt Lake City, Utah, heretofore filed its petition with this Honorable Court for Writ of Certiorari to review the proceedings and order of the Utah Labor Relations Board.

On the 15th day of June, 1948, the Laundry Workers Local Union No. 316 filed its petition for investigation and Certification of Representatives as provided for by Title 49-1-17, Subsection (c), Utah Code Annotated 1943 (Tr. 157). This petition alleged that the unit appropriate for the purposes of collective bargaining was the production workers engaged in laundry work; that said unit was to exclude clerical workers and supervisors with the power to hire and fire.

The Utah Labor Relations Board caused a notice to be served upon this petitioner, notifying it that a hearing would be held on the 25th day of June, 1948, at the State Capitol at Salt Lake City, Utah (Tr. 122).

On said day a hearing was conducted by the Honorable Daniel Edwards, as examiner. That at said hearing said Daniel Edwards granted a motion to continue the hearing, and made and entered his order, setting the matter for hearing on the 12th day of July, 1948. That on said 12th day of July, 1948, a hearing was held in conformance with said notice.

On the 20th of July, 1948, the Utah Labor Relations Board made and entered its order (Tr. 99) determining that a unit for the purpose of collective bargaining consisted of the following:

“All laundry production workers, and exclude clerical workers and supervisors with the right to hire and fire.”

This order further provided that a cross-check of respondent's payroll record be made from June 1, 1948

to and including June 15, 1948, with evidence of Union designation by employees of Hotel Utah Company in the unit herein to be determined by the Board; it further provided that said cross-check be made on the 23rd day of August, 1948.

On the 30th day of July, 1948, and before said cross-check was made by a representative of the Utah Labor Relations Board, the Hotel Utah Company protested and objected to the said order (Tr. 69). It is objected to the order upon the following grounds:

1. That there is evidence in the record to the effect that the employees executing the designations or applications known as Exhibit 1 in the record, did not know the purport of what they executed or signed. 2. That it has come to our attention within the past four (4) days that employees have advised us that when they executed Exhibit 1 they did not know that it was a designation of the Union as their representative; further that they were not told the real reason for the signing of Exhibit 1.

On the 5th day of August, 1948 (Tr. 67), the Utah Labor Relations Board issued a certification designating the Laundry Workers Local Union No. 316 to be the sole, collective bargaining representatives with respect to rates of pay, hours of labor and other conditions of employment with respect to the following described unit:

“All laundry production employees, and exclude clerical workers and supervisors with power to hire and fire.”

On the 10th day of August, 1948, this petitioner made a motion to vacate and set aside the certification (Tr. 61). This motion in substance provided that the method of cross-check was not the suitable method to be used to ascertain the representative of the employees as provided for by Section 49-1-17, Sub-section (c). That the suitable method under the facts in this case in determining the representatives should be by secret ballot of the employees. Section 49-1-17, Subsection (c) provides as follows:

(c) "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." (Italics ours)

On the 20th day of August, 1948, the Utah Labor Relations Board denied the motion to vacate and set aside the certification (Tr. 59).

On the 1st day of November, 1948, the Laundry Workers Local Union No. 316 filed a charge with the Utah Labor Relations Board, alleging among other things that the Hotel Utah had refused to bargain with the Laundry Workers Local Union No. 316 (Tr. 1).



The Laundry Workers Local Union No. 316 further alleged that it was the representative of the majority of respondent's employees in a collective bargaining unit.

Pursuant to the charge, the Utah Labor Relations Board on the 18th day of November, 1948, issued its complaint alleging that the Hotel Utah Company had refused to bargain collectively and in good faith with Laundry Workers Local Union No. 316.

The Hotel Utah Company (Tr. 12) filed its answer to the complaint. The Hotel Utah Company in its answer alleged as follows, in part:

"4. In further answering said complaint, this respondent alleges that it has refused to bargain with Laundry Workers Local Union No. 316, for the reason that the said Laundry Workers Union is not the duly authorized bargaining representative of any of the employees of the respondent company; particularly, it is not the bargaining representative as provided for by the laws of the State of Utah, with respect to a purported appropriate unit as referred to in the proceedings heretofore held in this cause. That the unit purportedly found by the board to be an appropriate unit, is not, in fact, an appropriate unit for the purpose of collective bargaining.

5. This respondent further alleges that the Utah Labor Relations Board, in violation of the laws of the State of Utah, refused to permit the employees involved to express their choice of bargaining representatives by secret ballot.

6. This respondent alleges that under the circumstances and facts in this case, the only appropriate and fair means of determining the desires of the employees was by the holding of an election, thereby affording the opportunity to the employees to express their desires without any chance of coercion, intimidation, or influence of any kind."

A hearing was held with respect to this matter on the 6th day of December, 1948; the Trial Examiner, Daniel Edwards, one of the Commissioners of the Utah Labor Relations Board, presiding.

On the 5th day of January, 1949, the Trial Examiner, Daniel Edwards, made and filed his examiner's report, findings of fact and recommended order (Tr. 19 to 21). The examiner recommended as follows:

"1. That the Board order the Respondent, Hotel Utah Company, to cease and desist from any further unfair labor practice as set forth in Section 49-1-16, Subsection (1), Paragraph d), Utah Code Annotated, 1943, as amended.

2. That the Respondent enter into collective bargaining with the Complainant as it relates to rates of pay, hours of labor and other conditions of employment within fifteen (15) days from this date.

3. That the Respondent notify the Board of its compliance with the Board's Order."

Within the time required by law, that is, the 15th day of January, 1949, the Hotel Utah Company filed its objections to the intermediate report of the Trial

Examiner and his findings of fact and recommended order (Tr. 26 and 27).

The Hotel Utah Company, among other things, made the following objections to said report, findings of fact and recommended order:

“There is no evidence to substantiate the findings of fact as contained in paragraph five of said findings of fact; further there is no evidence to support the Board’s action in determining that the unit as set forth in paragraph five of said findings of fact, constitutes and is an appropriate unit for the purpose of collective bargaining; it is the position of said respondent that the unit as determined by the Board does not constitute an appropriate unit for the purpose of collective bargaining as provided for by the laws of the State of Utah.

“That the certification, as referred to in paragraph 6, is void and has no force and effect and designates that said certification was based upon applications and designations by employees; that said employees were not fully apprized of the signature of executing said applications and designations; that because of the evidence in this cause, an election should have been held, affording the employees the right to express their opinions, without any interference from anyone. The evidence clearly shows that the Union was afraid of an election. The record further discloses that the only appropriate method of determining the representative should have been by an election.

“In view of the fact that there has been an improper determination of an appropriate unit for the purpose of collective bargaining, it can-

not be said that this respondent has refused to bargain as provided by the laws of the State of Utah.”

On the 27th day of January, 1949, the Utah Labor Relations Board made and entered its order (Tr. 32), which is as follows:

“The Utah Labor Relations Board, after consideration of a statement of Respondent’s Objections to Intermediate Report of Trial Examiner, Finds of Fact and Recommended Order, *concur*s with the Trial Examiner’s Report issued January 5, 1949, and hereby orders: (Italics ours)

1. That Respondent, Hotel Utah Company, cease and desist from any further unfair labor practice as set forth in Section 49-1-16, Subsection (1), Paragraph (d), Utah Code Annotated 1943, as amended.

2. That Respondent enter into collective bargaining with the Complainant as it relates to rates of pay, hours of labor and other conditions of employment within fifteen (15) days from this date.

3. That the Respondent notify the Board of its compliance with the Board’s Order.”

Attention is called to the order of the Board in which it states that it *concur*s with the Trial Examiner’s report. It does not adopt the order of the Board; and the Board has not made any findings of fact and conclusions of law as required by Title 49-1-18, Subsection (c). The order of the Board (Tr. 32) is the only document issued by the Board with reference to this matter.

On February 1, 1949, this petitioner, Hotel Utah Company, filed its petition for writ of certiorari with the Clerk of the Supreme Court of the State of Utah.

## ASSIGNMENTS OF ERROR

1. The order of the Utah Labor Relations Board, dated the 27th day of January, 1949, is void in that it is not supported by any Findings of Fact, as provided for in Title 49-1-18, Subsection C, Utah Code Annotated 1943.

2. The Board erred in directing a cross check of the Company's payroll as the suitable method to ascertain the representative of a majority of the employees.

3. The Board erred in determining that the unit appropriate for the purposes of collective bargaining was "all laundry production workers."

4. The Utah Labor Relations Board erred in providing in its order that Hotel Utah Company cease and desist from any further unfair labor practice as set forth in Section 49-1-16, Subsection 1, paragraph (d), Utah Code Annotated 1943, as amended.

5. The Utah Labor Relations Board did not have the authority to issue any order or make any findings.

## ARGUMENT

### ASSIGNMENT OF ERROR NO. 1

THE ORDER OF THE UTAH LABOR RELATIONS BOARD, DATED THE 27th DAY OF JANUARY, 1949, IS VOID IN THAT IT IS NOT SUPPORTED BY ANY FIND-

INGS OF FACT AS PROVIDED FOR IN TITLE 49-1-18, SUBSECTION C, UTAH CODE ANNOTATED 1943.

Title 49-1-18 provides in part as follows:

“ . . . . then the Board shall state its findings of fact and shall issue and cause to be served on such person an order to cease and desist from such unfair labor practice, . . . . ”

The statute is clear and mandatory that the Utah Labor Relations Board shall state its findings of fact in each case.

The record in this case discloses the fact that no findings of fact or conclusions of law were made or entered by the Utah Labor Relations Board.

It is the position of this petitioner that it is mandatory upon the Board to make findings of fact upon all the material issues presented by the pleadings and necessary for a proper disposition of the case.

Title 49-1-18 further provides:

“ . . . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive . . . . ”

By reason of the fact that no findings have been made or entered in this cause, this petitioner is not given an opportunity to assail the findings as unsupported by the evidence.

The petitioner contends there were material issues presented by the pleadings in this cause, and that the disposition of the same was necessary for a proper disposition of the case; therefore, findings of fact were necessary with reference to these material issues. The petitioner will hereinafter set forth facts and circum-

stances in the following assignments of error that justify the statement set forth herein, that there were material issues presented by the pleadings in this cause, and that the disposition of the same was necessary for proper disposition of the case.

## ASSIGNMENT OF ERROR NO. 2

THE BOARD ERRED IN DIRECTING A CROSS CHECK OF THE COMPANY'S PAYROLL AS THE SUITABLE METHOD TO ASCERTAIN THE REPRESENTATIVE OF A MAJORITY OF THE EMPLOYEES.

Sec. 49-1-17, subsection (c), Utah Code Annotated 1943, provides in part as follows:

“ . . . . In any such investigation, the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 11 Sec. 49-1-18) (insertion ours), and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.”

It will be noted that under the provisions of Section 49-1-17, subsection (c) that the Board may take a secret ballot of employees or utilize any other suitable method.

It would seem that the legislature, by specifically providing for an election, intended that this method should be used, unless there was some reason for not doing so; it then provided for any other suitable method.

Certainly there is no better method of ascertaining the desires of employees, than by an election. It is a quick, expeditious way of ascertaining employee's desires.

We are sure that it is not necessary before this Court to argue that the American system of elections, to determine the desires of its citizens, is a proper procedure.

Further, we do not think it necessary to argue against the substitution of other methods, to take its place.

We cannot understand why the Board in this case denied to the employees of the Hotel Utah Company the right to express their desires by a free and unmolested election.

The Board (Tr. 67) certified the Union as the bargaining representative by comparing authorization forms submitted by the Union, with the payroll of the Company. The Board found that a majority had so designated.

List of employees as submitted shows thirty-nine in employment (Tr. 70). Authorization cards (Tr. 71 to 93, inc.) show twenty-one employees of those on payroll had designated the Union as their representative.

The record shows that the Union had a majority of three. Two people of this group could change the result.

It is interesting to note that the authorizations (Tr. 71 to 93, inc.) were not the first obtained by the Union.

Previous authorizations were received (Tr. 124 to 156, inc.) by the Board at the time of filing the Petition for Investigation on June 15, 1948 (Tr. 157).



The subsequent authorizations were introduced at the hearing on June 24, 1948, as Exhibit 1 (Tr. 165).

It will be observed that there were thirty-two applications or authorizations originally filed as Exhibit A. Further, that when Exhibit 1 was filed, only twenty-one names matched those of the payroll.

This petitioner objected to the introduction of Exhibit 1 (Tr. 199).

The Union refused to consent to an election (Tr. 195).

With only a majority of three, it is easily understandable why the Union was afraid to permit the employees to freely express their choice. Upon reading the transcript it is clear that the employees did not know exactly the purport of what they signed (Tr. 192).

Without question, the only reason given to the employees to sign Exhibit 1, was that it would strengthen the case if they were signed before a witness (Tr. 192).

It can easily be seen why the company is not satisfied with the method used by the Utah Labor Relations Board in ascertaining the desires of the employees with reference to their bargaining representatives.

For the Board to substitute a cross-check for the election procedure under the circumstances in this case does not make sense.

One of the main objectives of the Utah Labor Relations Act, without question, is to encourage the practice

and procedure of collective bargaining through employee representatives of their own choosing.

One of the main obstacles to such collective bargaining is uncertainty or disagreement concerning who has been designated by the employees as their representatives. Section 49-1-17, Subsection (c), Utah Code Annotated 1943, is designed to remove this obstacle by creating machinery for the determination of such representatives.

It is very evident that the employer was not satisfied in using a method of cross-check under the circumstances.

To effectuate the policies of the act, that is, to encourage collective bargaining, the Board should use the method of determining the bargaining representatives that would erase from anybody's mind any question as to the desires of the employees.

In this case there was a question in the employer's mind as to whether the authorization cards actually represented the true desires of the employees. The reluctance of the Union to submit to any election further created a suspicion, and naturally so in the employer's mind.

At the hearing of June 24, 1948, Mr. Harter and Mr. McEwan testified pertaining to the procurement of Exhibit 1. It will be remembered that Exhibit 1 is the authorization slips that were procured the night before the hearing of June 24, 1948, and which were procured in

the interpretation of this petitioner without advising the employees the purport of the authorization slips.

Section 49-1-17, Subsection (c) is identical with Title 29, Section 159, Subsection (c), United States Code Annotated.

The National Labor Relations Board's usual practice, initiated in *Matter of The Cudahy Packing Co. and United Packinghouse Workers of America, etc.*, 13 N. L. R. B. 526, is to direct an election in a representation proceeding if the parties are in doubt or disagreement regarding the wishes of the employees even if there is only one labor organization claiming the status of majority representative. This was done even though authorization cards showed a substantial majority in favor of the Union.

The National Labor Relations Board has pointed out in this case that a certification looks to the initiation of collective bargaining and that bargaining relations would 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. The Board further stated in substance that even though they had in the past certified representatives without an election upon a showing of the sort here made, they were persuaded by their experience that the policies of the act would best be effectuated upon the question of representation by resolving in an election by secret ballot. It has become clear that workers see secret ballots as the most democratic method of select-

ing their representatives, free from the coercion of their employer or the Union seeking to organize them.

Since 1939 the Board has adhered faithfully to the policy expressed in the Cudahy Packing Case.

There are certain fundamental standards which the Board is required to observe in the effectuation of the legislative purpose of the Utah Labor Relations Act; one of which is the traditional rule against the presumption of liability or bad faith. See *Boeing Airplane Co. vs. N. L. R. B.*, 140 Fed. (2d) 423.

Therefore, there should have been no fear in the Board's mind whatsoever in permitting an election to be held and the employees given the opportunity of free expression. The Labor Board has conducted many hearings and they are well grounded in the procedure of conducting free and proper elections.

It will be said, of course, that the Board in its discretion may adopt any method that it seems suitable to effectuate the purposes of the Act. However, when objection is made to the method of a cross-check and another suitable method may be adopted which should be acceptable to all parties, we feel it is abuse of discretion to adopt the method of cross-check.

In reviewing all the facts in this case, together with the policy adopted by the National Labor Relations Board based upon its past experience, it seems without question that the Board abused its discretion in at-

tempting to please the Union by only doing that which the Union requested.

We feel that the Board must realize that there are other parties to a controversy in matters of this kind, other than a labor organization. Everything that the Union requested was granted, regardless of the facts and circumstances.

We submit that an election should be held in this cause to permit the employees in the unit which is found to be a unit appropriate for the purposes of collective bargaining, to express their choice of a collective bargaining agency, by their free expression without coercion or fear of reprisal from anyone.

A secret election is the only answer.

### ASSIGNMENT OF ERROR NO. 3

THE BOARD ERRED IN DETERMINING THAT THE UNIT APPROPRIATE FOR THE PURPOSES OF COLLECTIVE BARGAINING WAS "ALL LAUNDRY PRODUCTION WORKERS."

The petition for investigation and certification (Tr. 157) filed on the 12th day of July, 1948, alleged that the following unit constituted a unit appropriate for the purpose of collective bargaining:

"Thirty-five production workers engaged in laundry work."

A hearing was held with respect to said petition on the 24th day of June, 1948. Upon motion the hearing was continued until July 12, 1948.

On the 5th day of August, 1948, the Utah Labor Relations Board (Tr. 67) issued its certification in which it certified the Laundry Workers Local Union 316 as the collective bargaining representative for the employees in the following described unit:

“All laundry production workers and exclude clerical workers and supervisors with power to hire and fire.”

The Certification as issued by virtue of 49-1-17, is not an appealable order. See *Southeast Furniture Company vs. Industrial Commission*, 111 P. 2d 154.

However, when an order made pursuant to Section 49-1-18 is properly taken before a court of review (which is being done in the present case), that court then may review the regularity of the Board's action under 49-1-17. See *Southeast Furniture Company*, supra.

Orders issued by the Utah Labor Relations Board under 49-1-17 are preliminary in nature. They merely designate the proper bargaining agent. No action involving an unfair labor practice is involved. However, orders under 49-1-18 are predicated upon a complaint, hearings and findings of fact. (We again call the attention of the court that in this case findings of fact were not stated by the Board.) They are orders to “cease and desist.” These are “final orders” which may by either party be taken to the courts for enforcement or review. Courts in reviewing such “final order” may also review at that time the regularity of the Board's action

under Section 49-1-17. See Southeast Furniture Company, *supra*.

Section 49-1-17, Subsection (b), Utah Code Annotated 1943, provides as follows:

“(b) 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.”

This section of the Utah Code was identical with the Wagner Act, known, however, as Title 29, Section 159, United States Code Annotated, Subsection (b). This section, however, was amended by the Labor Management Act of 1947 (Taft-Hartley Law). However, for our purpose here, the amendment is immaterial.

The establishment by the Utah Labor Relations Board of an appropriate unit or units for collective bargaining purposes is a prerequisite to the resolutions of questions concerning representation. Each case must be decided on its own particular facts.

In making this determination within this general rule, the Utah Labor Relations Board should consider a number of factors, the most important of which are: The history of collective bargaining and the history, extent and type of organization among the employees at the plant involved and at other plants of the same employer, or at plants of other employers in the same or

related industries; the skill, wages, and working conditions of the employees; the desires of the employees; the eligibility of employees for membership in the union or unions involved; and the relationship between the unit or units proposed and the operation, organization, and management of the employer's business.

It is the position of this respondent that the Utah Labor Relations Board must, in determining the unit appropriate for the purposes of collective bargaining, consider all of the factors hereinabove enumerated.

We refer this Honorable Board to the Twelfth Annual Report of the National Labor Relations Board for the year ending June 30, 1947, pages 18 and 19. The Board in its twelfth annual report again reiterated the factors hereinabove enumerated, as the ones they deem essential and necessary to consider when determining an appropriate unit for the purposes of collective bargaining. The Board in its annual report referred to many of the cases decided by the Board in support of these statements.

For further reference we refer this Honorable Court to the Fourth Annual Report of the National Labor Relations Board, found in Labor Relations Manual, Volume 5, at page 31.

It is very important in any establishment to have what may be termed a homogeneous unit; that is, one that would make for better industrial relations.

It is the position of this petitioner that there is no evidence whatsoever in this record to warrant the Board



in determining that the unit appropriate for the purposes of collective bargaining was the laundry production workers. It is the position of the petitioner that there must be evidence to substantiate the Board's determination.

The only evidence which we can find in the record is the fact that Mr. Harter, the representative of the Union involved, stated that the laundry unit was the appropriate unit. For the convenience of the court, we are setting forth all the testimony in the record introduced by the Union with reference to what constitutes an appropriate unit for the purposes of collective bargaining. (Tr. 161-164) :

*BY MR. BECK :*

Q. You may state your full name.

A. Harry F. Harter.

Q. Where do you live, Mr. Harter?

A. 386 South 7th East.

Q. What is your business?

A. International Organizer for the Laundry Workers.

Q. Where is your place of business?

A. 69 South State Street.

Q. In Salt Lake City?

A. Yes sir.

Q. How long have you been identified with organized labor generally?

A. Since 1936.

Q. Are you acquainted with the business of the Respondent?

A. I am.

Q. Where is it located?

A. South Temple and Main.

- Q. In this city?
- A. Yes sir.
- Q. Is it engaged generally in the hotel business?
- A. Yes sir.
- Q. And as a part of its business what does it operate which your labor organization customarily takes jurisdiction?
- A. Laundry work, linen for the hotel.
- Q. What kind of service does that include that you speak of?
- A. Laundering linen.
- Q. Anything else?
- A. That is all I know of.
- Q. Linen for what use?
- A. To be used in the hotel.
- Q. Bedroom and table linen?
- A. Yes.
- Q. And also service to the culinary?
- A. Yes.
- Q. Do you know whether or not such laundry has been operated in such manner you have indicated for some period of time?
- A. As long as I can remember.
- Q. Where is that laundry that you speak of? Where is it located?
- A. Directly north of the hotel in the same block.
- Q. Would you be good enough, Mr. Harter, to describe and define an employee unit appropriate for the purpose of bargaining with the Employer with respect to hours and wages and conditions of employment, particularly in a unit over which your organization customarily takes jurisdiction?
- MR. CALLISTER: Just a moment. I object to that as calling for a conclusion.

MR. BECK: That is a good objection.

Q. Go ahead.

A. All employees employed by the Hotel Utah in the laundry department in the production end of it. That includes the girls and boys in the wash room and the shakers and mangles.

Q. That includes the employees operating the mangles?

A. Yes.

Q. And operating the washing machines?

A. Yes sir, the shakers and pressers.

Q. You are speaking now for the most part with respect to the laundering and finishing of linen for culinary service departments in the hotel?

A. Yes sir.

Q. In other words, it would be a laundry unit you have described?

A. Yes sir.

Q. Within the plant and a part of the operations of the hotel?

A. Yes sir.

Q. Now give Mr. Callister a chance to object before you answer. In your opinion is the unit you have described peculiarly a craft unit for the operation of that laundry?

MR. CALLISTER: We object to it on the ground that it is immaterial with reference to whether it is a craft unit or not. It has no materiality. The purpose of this proceeding is to determine the appropriate unit for the employees at the establishment of this Respondent.

Q. Very well, then, Mr. Harter. Do I understand you to say that the employee unit that you have heretofore defined is the ap-

propriate and proper unit to bargain with the management?

MR. CALLISTER: Just a moment. We object to it on the ground that it is calling for a conclusion. It is for the Board to determine this unit.

MR. BECK: No. That was the ground of your other objection.

MR. CALLISTER: I think you may set forth what the facts are to assist the board in making its determination, but I think for him to give his conclusions is of no evidentiary value, because the Commission is not bound by it and we are not bound by it. When he attempts to give his conclusions what is the appropriate unit, he is thereby taking away from this Commission that authority.

BY MR. BECK:

Q. All right then, Mr. Harter. So there can be no mistake about it, the unit that you have defined will be commonly known and designated as a laundry unit within the Hotel Utah?

A. Yes.

Q. And over that unit your organization takes jurisdiction?

A. Yes.

Q. How many employees is the laundry unit in the Hotel Utah composed of?

A. Approximately thirty-five.

Q. Thirty-five. And those are the employees composing such unit and are for the most part engaged there directly or indirectly contributing—I mean engaged in laundering?

A. Yes.

This petitioner introduced into the record the Utah Labor Relation's Board Case No. 5, which was held in 1937, in which the Building Service Employees Local No. 59 was the petitioner for investigation and certification with respect to certain employees of the Hotel Utah. At this hearing the Utah Labor Relations Board found that the appropriate unit for the purposes of collective bargaining was housekeeping, passenger elevator, freight elevator, doorman, package room, fountain, valet shop, print shop, engineers, electricians, carpenters, furniture finishers and laundry (Tr. 172, 173).

The Utah Labor Relations Board, after a hearing in that cause, found that the appropriate unit was what is usually termed the service unit, which included the job classifications herein enumerated. As a matter of fact, the Union alleged that the job classifications herein mentioned would constitute a unit appropriate for the purposes of collective bargaining.

The statements of Mr. Harter (Tr. 174) are very significant. We feel that they are important enough to set forth in this brief:

*"BY MR. CALLISTER:*

Q. Mr. Harter, you say you are familiar with the operations of the Hotel Utah Company?

A. The laundry department.

Q. Is that all you are familiar with?

A. Yes.

Q. You don't know anything about the other service units, then, I assume?

A. No sir.

- Q. Then how can you tell this Board in your opinion that the Laundry constitutes an appropriate unit if you don't know anything about the operations of the rest of the Hotel?
- A. We don't have anything to do with organizing the rest of the hotel. All we do is the laundry.
- Q. That is right, because you are only organizer for the laundry, and that is the reason why you think that is the appropriate unit?
- A. Sure that is right.

The only reason Mr. Harter feels the Laundry is the appropriate unit is because that is all he is required to organize, and that is all the employees that he has apparently been able to organize. The basis for determining an appropriate unit certainly should not only be the various departments that the Union is able to organize. Apparently, this is the thinking of the Utah Labor Relations Board.

If this is the basis for determining an appropriate unit, then there is no necessity of holding a hearing and receiving evidence with respect to what constitutes an appropriate unit. All that should be done is to have the Union advise the Board what departments they are able to organize, and then ask that that be determined to be the appropriate unit.

The National Labor Relations Board, and properly so, has found that certain factors should be taken into consideration in determining the unit. We have enumerated these factors.

The duty and power to determine the appropriateness of the unit is vested by the Act in the Utah Labor

Relations Board. It does not permit the Utah Labor Relations Board to delegate that duty to the Union. From the facts in this case there is no other alternative than to assume that the Board has delegated that power to the Union, because had the union requested other employees besides the Laundry, no doubt it would have complied with the request of the Union.

The Board in making its determination, has wholly disregarded the testimony of the petitioner by reference to past determinations of this Board. The petitioner further introduced evidence with respect to what constituted an appropriate unit (Tr. 204, 205).

The Board, in making its determination, has wholly disregarded the prior determination by the Utah Labor Relations Board; wholly disregarded any testimony with respect to what constituted an appropriate unit.

The determination by the Board is arbitrary; further, there is no evidence whatsoever to support its determination.

It is of the utmost importance that the Utah Labor Relations Board, having been given such broad power in respect to the facts, should be scrupulously careful to see that the power is exercised with a commensurate sense of what is just and fair, and to let its actions demonstrate that it do so. See *National Labor Relations Board v. Western Cartridge Co.*, 138 Fed. 2d 551.

It is very important to this petitioner that a unit should be determined or found that is appropriate in

view of all of the various factors present at its establishment. Certainly it is the duty of the Board to make a thorough and intelligent investigation with respect to what constitutes an appropriate unit.

The Board fails in its duty when it permits the Union to determine what shall constitute the appropriate unit, based upon what it is able to do in the way of organization. By accepting this standard the Board entirely disregards the purposes of the Utah Labor Relations Act.

The Board acted arbitrarily and in abuse of its discretion in acting in compliance with the request of the Union when there was no evidence to support it.

We respectfully submit that the Board cannot find a unit to be appropriate without evidence to support it in accordance with the factors enumerated by the National Labor Relations Board.

The reason we have referred to the policy of the National Labor Relations Board is because of the fact that they are administering an Act identical with that of the Utah Labor Relations Act. That is, the cases we have referred to and the policy of the Board was prior to the amendment known as the Taft-Hartley Law. The fact that the Utah Labor Relations Board has gone absolutely contrary, without any reason for was contrary to the unit found in this case. so doing, to the policies as set down by the National Labor Relations Board, clearly demonstrates its arbitrariness and bias.



The Board's order clearly demonstrates its utter disregard for evidence or precedent.

By precedent, we mean the precedent with respect to the unit, previously found by this Board, which unit

We submit that the Board's order is contrary to Title 49.

The Board must make a finding as to what constitutes an appropriate unit; and there must be substantial evidence to support such finding.

The fact that the Union is only able to organize one department, does not warrant the Board in determining that that is the appropriate unit for the purposes of collective bargaining.

#### ASSIGNMENT OF ERROR NO. 4

THE UTAH LABOR RELATIONS BOARD ERRED IN PROVIDING IN ITS ORDER THAT HOTEL UTAH COMPANY CEASE AND DESIST FROM ANY FURTHER UNFAIR LABOR PRACTICE AS SET FORTH IN SECTION 49-1-16, SUBSECTION 1, PARAGRAPH D, UTAH CODE ANNOTATED 1943, AS AMENDED.

Section 49-1-16, Subsection D, provides as follows:

“To refuse to bargain collectively with the representative of a majority of his employees in any collective bargaining unit; provided, that when two or more labor organizations claim to represent a majority of the employees in the bargaining unit the employer shall be free to file with the board a petition for investigation of certification of representatives and during the

pendency of such proceedings the employer shall not be demed to have refused to bargain.”

It will be noticed that Subsection D provides that it shall be an unfair labor practice to refuse to bargain in *any* collective bargaining unit.

As the record shows, there are other departments in the hotel than the laundry workers. There could be and are many other units for the purpose of collective bargaining. The order provides as follows:

“That respondent, Hotel Utah Company, cease and desist from any further unfair labor practice as set forth in Section 49-1-16, Subsection 1, Paragraph D, Utah Code Annotated, 1943, as amended.”

We cannot understand why the Utah Labor Relations Board would incorporate in its order the statute. By doing so, it is directing that this company cease and desist from refusing to bargain collectively with the representative of a majority of its employees in *any* collective bargaining unit. This it does not have the power to do.

Assuming for argument sake, that the board has the power and the right to make and enter its order as it has done (Tr. 32), then, in that event, it could only direct that the Hotel Utah Company cease and desist from any unfair labor practice with reference to refusing to bargain collectively in the unit known as the laundry workers.

Without any question the literal language of the order goes beyond what the Board no doubt intended.

It is only fair to the petitioner that there be no question as to the interpretation of the Board's order; particularly, before any enforcement order may be issued upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts for which it must cease and desist from, only on pain of contempt of court.

If this Honorable Court is called upon to enforce the order of the Utah Labor Relations Board, then this order becomes that of the Court. Court orders are not to be trifled with, nor should they invite litigation as to their meaning. See *J. I. Case Company vs. National Labor Relations Board*, 88 L. Ed. 769, 321 U. S. 341.

We submit that the order of the Board is not in conformance with the evidence in this cause. It is, therefore, void.

### ASSIGNMENT OF ERROR NO. 5

THE UTAH LABOR RELATIONS BOARD DID NOT HAVE THE AUTHORITY TO ISSUE ANY ORDER OR MAKE ANY FINDINGS.

Section 49-1-17, Utah Code Annotated, subsection (c) provides in part as follows:

“Whenever a question affecting intrastate commerce or the orderly operation of industry arises concerning the representation of employees \* \* \*.”

Section 49-1-18 provides in part as follows:

“The board is empowered, as hereinafter pro-

vided, to prevent any person from engaging in any unfair labor practice affecting commerce or the orderly operation of industry \* \* \*."

We refer this Honorable Court to the complaint filed in this cause (Tr. 7). Paragraph 1 of said complaint provides as follows:

"1. That Hotel Utah Company, hereinafter referred to as respondent, is a corporation organized under the laws of the State of Utah and as such is doing business in Salt Lake City, Utah."

There is no allegation that there is a question affecting intrastate commerce or the orderly operation of industry.

Nor is there any allegation that any person, or particularly the Hotel Utah, is engaging in any unfair labor practice affecting intrastate commerce or the orderly operation of industry.

Assuming, for the purpose of this argument, that the findings of fact of the Trial Examiner (Tr. 19) is that of the Board, nowhere is there any finding that the unfair labor practice in any way affects intrastate commerce or the orderly operation of business.

The Utah Labor Relations Board is a creature of statute, any action brought by the Board against any employer is a special one brought under a statutory provision to enforce a statutory cause of action. In this situation there is no presumption of jurisdiction. Jurisdictional allegations are an integral and necessary part

of the case, without the statement of which there is no cause of action, for it is obvious that one who seeks the benefit of a statute must bring himself within its provisions. See *Furbreeders Agricultural Cooperative v. Wiesley*, 132 P. 2d 384. (Utah case)

This petitioner contends that in view of the fact that there are no allegations to jurisdiction of this court, no evidence to substantiate any allegations if such was made, and the further fact that no finding is made to invoke the jurisdiction of this Board, therefore, any order or any purported finding is of no force and effect.

The Board cannot take jurisdiction of a subject matter unless and until such time that it alleges that the matter in controversy affects intrastate commerce or the orderly operation of business as provided for by law. This, of course, is in view of the fact that the Utah Labor Relations Board is a creature of statute, and that the Board's jurisdiction over such subject matter will not be presumed, but must be alleged and there must be evidence to support such allegation.

### CONCLUSION

The Order issued by the Utah Labor Relations Board is void because of the failure of the Utah Board to make findings on material issues presented by the pleadings in this cause. As a matter of fact, the Board failed to make any findings whatsoever.

The record discloses the further fact that if the Board made findings, they would be unsupported by

evidence as provided and required by Title 49-1-18.

The record of this case conclusively shows that the Utah Labor Relations Board acted arbitrarily and in abuse of its discretion.

It must have evidence to support a finding or determination as to what constitutes an appropriate unit for the purpose of collective bargaining. It cannot arbitrarily accept the request of the Union as the basis for the determination as to what constitutes an appropriate unit for the purpose of collective bargaining. The fact that the Union can only organize a certain group or only desires to organize a certain group, does not, in of itself, constitute sufficient evidence to support a finding as to what constitutes an appropriate unit.

The substitution of a cross-check as a method of determining the desires of the employees for that of an election under the circumstances in this case, is arbitrary on the part of Utah Labor Relations Board and in abuse of its discretion. The mere fact that the Union does not desire an election and refuses to consent thereto does not warrant the Board in granting their request for a cross-check.

The fact that since 1939 the National Labor Relations Board has definitely followed a strict policy of granting an election when either party to a controversy questions the advisability of a cross-check or other method of determining a representative, should be given some weight. This policy was developed through experi-

ence by the National Labor Relations Board. They came to the conclusion that to better effectuate the purposes of the National Labor Relations Act, it was necessary to have an election in cases such as the one in question. Under the facts in this case, to substitute a cross-check for the democratic method of determining employees desire by secret ballot, is certainly arbitrary and in abuse of its discretion.

It is further submitted that the Utah Labor Relations Board does not have jurisdiction of this case. To invoke jurisdiction the Utah Board must comply with the statute creating it. Therefore, no order or purported finding of this Board is of any effect.

Respectfully submitted,  
CALLISTER, CALLISTER & LEWIS,  
*Attorneys for Petitioner*