

1949

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

Utah Supreme Court

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Clinton D. Vernon; Attorney General; Mark. K. Boyle; Assistant Attorney General; Attorneys for Defendant; Utah Labor Relations Board; Clarence M. Beck; Reid W. Nielson; Attorneys for Defendant; Laundry Workers Local Union No. 316;

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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 WEISLEY and H. FRED EGAN constituting the Utah Labor Relations Board, and LAUNDRY WORKERS LOCAL UNION NO. 316,

*Defendants.*

Case No.  
7290

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## BRIEF IN BEHALF OF DEFENDANTS

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CLINTON D. VERNON,  
*Attorney General*

MARK K. BOYLE,

*Assistant Attorney General*

*Attorneys for Defendant,  
Utah Labor Relations Board*

CLARENCE M. BECK,

REID W. NIELSON,

*Attorneys for Defendant,  
Laundry Workers Local  
Union No. 316.*

**FILED**

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# I N D E X

PAGE

I.	STATEMENT .....	1
II.	The Order of the Utah Labor Relations Board, dated January 27, 1949, is fully supported by Finding of Fact as provided for in Title 49-1-18, Utah Code Annotated, 1943.....	3
III.	The Discretion of the Board in Directing a Cross Check as the Suitable Method of Ascertaining the Representative of a Majority of the Employees.....	9
IV.	Determination of the Appropriate Unit for Purposes of Collective Bargaining .....	19
V.	Authority of Board to Issue Order to Cease and Desist from any further unfair labor practices as set forth in Section 49-1-16, Subsection 1, Paragraph d, Utah Code Annotated 1943, as amended.....	32
VI.	Authority of the Board to Issue the Order and Make Findings .....	34

## CASES CITED:

American Foundry & Machine Co. vs. Utah Labor Relations Board, 141 Pac. (2) 390.....	30
A. Sartarius & Co., Inc. & United Mine Workers of America District No. 50, Local No. 12090, 40 N.L.R.B. 107.....	16
Consolidated Machine Tool Corp., & Pattern Makers League of North America, 67 N.L.R.B. 747.....	17
National Labor Relations Board vs. Bradford Dyeing Association, 310 U. S. 318.....	18
National Labor Relations Board vs. Cheney Cal. Lumber Co., 327 U. S. 385.....	5
National Labor Relations Board vs. Chicago Apparatus Co., 116 Fed. (2d) 753.....	18
National Labor Relations Board vs. Express Pub. Co., 312 U. S. 426 .....	33
National Labor Relations Board vs. Hearst Publications, 322 U. S. 111.....	23
National Labor Relations Board vs. Lettie Lee Inc., 140 Fed. (2) 243.....	31
National Labor Relations Board vs. Link Belt Co., 311 U. S. 584.....	24
National Labor Relations Board vs. Nevada Consolidated Copper Corp., 316 U. S. 105.....	30
National Labor Relations Board vs. Somerset Shoe Co., 111 Fed. (2d) 681.....	18
Packard Motor Car Co. vs. National Labor Relations Board, 330 U. S. 485.....	24
Pittsburg Plate Glass Co. vs. National Labor Relations Board, 313 U. S. 146.....	24
Teamsters Local Union No. 222 and the Industrial Comm. vs. Strevell-Paterson Hardware Co., 174 Pac. (2) 164.....	8

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## BRIEF IN BEHALF OF DEFENDANTS

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### STATEMENT

The Utah Labor Relations Board certified the Laundry Workers Local Union No. 316 the collective bargaining agent for all of petitioner's employees in its laundry unit. Thereafter the petitioner ignored such certification, and refused to bargain; whereupon unfair labor practices were charged against petitioner. The Board, after hearing such charges, thereupon formally ordered petitioner to bargain; petitioner again ignored the Board and sued for a writ of review in this Court.

At the outset we desire to expressly invite the Court's attention to an odd situation in a labor controversy. There were at least thirty-five laundry employees of Petitioner involved in this matter, in addition to its executive and supervisory personnel. The case was prolonged over quite a period of time, and divided into three separate hearings, viz., June 24, 1948, July 12, 1948, and December 6th, 1948. Yet not a single witness was called to the witness stand by Petitioner, except Louis H. Callister (attorney for Petitioner), and he quite naturally and obviously put into the record the precipate of Petitioner's bitter opposition to the Board's decision in this matter. Mr. Callister testified (Tr. 16, Dec. 6 hearing 1948), as follows:

MR. CALLISTER: No, we weren't crossed up at all. As I told you heretofore, there were two reasons why we would not bargain. The first is that the unit was not the appropriate unit for the purpose of collective bargaining *because it was contrary to the laws and practices of the industry particularly of the Hotel Utah Company*; and second, that the employees were deprived of their right to indicate their desire by secret ballot." (Emphasis ours.)

Thus it appears that the Petitioner is intent on pre-empting the Board in a determination of which employees shall constitute a collective bargaining unit, thus ignoring the welfare of its employees and in violation of the statute, which says the Board shall decide *in each case* in order to insure the employees full benefits of self organization, etc. (Sub-section (b) of Section 49-1-17

of the Act.) Thus they upset craft unionism; furthermore, Petitioner strives to substitute its judgment in place of the Board's judgment in selecting the appropriate manner of ascertaining what collective bargaining agent, if any, Petitioner's laundry employees have chosen.

It would seem perfectly obvious that, if there was even a little doubt respecting whom Petitioner's laundry employees desired to represent them, or the manner in which such employees desired to make their wishes known, the Petitioner would have had at least some of its employees testify at the hearing. And on the other hand, even if there was a little doubt that the usual craft unit was inappropriate to the operations of Petitioner's hotel, then certainly, in that event, Petitioner would have called one of its executives to the witness stand and placed at least some evidence in the record touching the merits of a contention it so long and vigorously proclaims.

We shall treat Petitioner's assignments of error in the order in which they appear in its brief.

#### PETITIONER'S 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 Findings of Fact, as provided for in Title 49-1-18, Subsection C, Utah Code Annotated 1943."

In the unfair labor practices procedure in this matter the union filed *charges* before the Board alleging 1, that the Utah Hotel Company is engaged in the general hotel business in Salt Lake City, and has engaged in and

is engaging in unfair labor practices. 2, that the union is now and ever since August 5, 1948 has been and is the duly authorized collective bargaining representative of respondents employees in a collective bargaining unit appropriate for the purposes of bargaining with employer respecting hours, wages and conditions of employment. 3, that the Utah Hotel Company has deliberately and wilfully refused to bargain with the union and that on several occasions the union has endeavored to bargain with the Utah Hotel Company in such behalf, but that the company continued to refuse or recognize the union as the bargaining agent of its laundry employees. 4, that the company has interfered and restrained its employees in their rights guaranteed in Section 49-1-15 of Utah Labor Relations Act. 5, that the Company has dominated and interfered with the affairs of the union. 6, that the Company has discriminated against certain of its laundry employees. 7, *that such unfair labor practices on the part of the Company are unfair labor practices affecting intrastate commerce and the orderly operation of business within the meaning of the Utah Labor Relations Act.*

The union therefor prayed the board to issue its complaint in the premises. On the 16th day of November, 1948, the board issued its complaint stating: 1. *That the Company is a corporation of the State of Utah and does business in Salt Lake City.* 2. That the Company is an employer within the meaning of the Utah Labor Relations Act. 3. That the union is a labor organization within the meaning of said Act. 4. That respondent has re-

fused to bargain collectively with the union in violation of the Board's certification of August 5, 1948, and in violation of the Act.

The answer of the Company admits paragraphs 1 and 2 of the complaint and admits that it has refused to bargain with the union, and as an affirmative defense, sets out in its answer that the union is not the authorized bargaining representative of the Company's employees in the laundry unit, and that the unit found by the Board is not an appropriate unit, and that the method of selecting the bargaining unit on behalf of the Company's laundry employees as found by the Board was wrong.

The hearing to determine the issues respecting the unfair labor charges was held pursuant to notice of the Board on the 6th day of December, 1948, such hearing was conducted by the Honorable Daniel Edwards, a Commissioner of the Utah Labor Relations Board, who presided at the hearing. Commissioner Edwards, who conducted the hearing, made and entered the following findings of fact:

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.

2. That Respondent is an employer within the meaning of Title 49-1-10, Sub-section (2), Utah Code Annotated 1943, as amended.

3. That Laundry Workers Local Union No. 316, hereinafter referred to as Complainant, is a labor organization within the meaning of Title



49-1-10, sub-section (5), as amended.

4. That a hearing was held before the Honorable Daniel Edwards on June 24, 1948, on a Petition for Investigation and Certification of Representatives in the matter of case No. 615.

5. That the Utah Labor Relations Board found that an appropriate collective bargaining unit consisted as follows:

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

6. That the Utah Labor Relations Board certified the Petitioner as the legally selected and designated agent of the employees of Respondent in the above described unit for the purpose of collective bargaining on August 5, 1948.

7. That Complainant and Respondent did meet on several occasions but did not enter into collective bargaining.

8. That Respondent did refuse to bargain with Complainant on the grounds: (a) That the unit found by the Board was not an appropriate unit. (b) That the Board's method of determining the collective bargaining representative, if any, was not in conformity with the Utah Labor Relations Act.

9. That Respondent did refuse to bargain.

Thereafter, on the 27th day of January 1949, the Utah Labor Relations Board acting through Commissioners Daniel Edwards, H. Fred Egan, and R. H. Dalrymple concurred in Commissioner Edwards findings of fact and

conclusions, that is to say, agreed to and adopted such findings of fact and conclusions and issued its order requiring the Company (1) to cease and desist from any further Unfair Labor Practices, (2) to enter into collective bargaining with the union, (3) and notify the Board of compliance on the part of the Company, with the Board's order.

Petitioner protests that there are no legal findings of fact in this case. Let us examine this issue; Subsection (c) of Section 49-1-18 of the Utah Labor Relations Act, reads as follows:

... "Thereafter in its discretion, the board, upon notice, may take further testimony or hear argument. If upon all the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, 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, and to take such affirmative action, including reinstatement of employees with or without back pay as will effectuate the policies of this act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue an order dismissing the said complaint."

There can be no doubt that full, separately stated

and comprehensive findings of fact were made by Commissioner Edwards. Nor can there be any doubt that such findings of fact are agreed to and concurred in by the other two commissioners. (See order of the Board January 27, 1949.)

It is far fetched and remote for petitioner to contend that the Board should adopt any particular method of stating the findings of fact with any sort of meticulous exactitude, for the reason that, all that is contemplated by the section of the statute above referred to, *is that the Board state its findings of fact, issue its order to cease and desist, and take affirmative action.* The manner, method, form, and fashion in which, or time when the Board shall state its findings of fact is not mentioned by the statute. Indeed the board in this respect has a very wide latitude and discretion under the statute. See Teamsters Local Union No. 222 and the Industrial Commission vs. Strevell Patterson Hardware Co., 174 P2d 164, in which case the court says:

“Section 49-1-18 U.C.A. 1943 required the Board to make findings of fact after testimony taken on complaint that any person has engaged in unfair labor practices. It does not provide for any particular type of findings of fact, and it is our opinion that in the absence of such instruction from the legislature, findings of fact which would be sufficient to sustain a judgment or order of a court will be sufficient to sustain an order of the Board.”

If findings of fact are stated, the above section of the Act is complied with. The Act doesn't even require

the Board to state its findings of fact in writing. The testimony in the case must be reduced to writing, but there is no such provision of the section prescribing such reduction respecting the Boards findings of fact, hence if the board decides that it wants to adopt the findings of fact of its own member, made pursuant to its own hearing, that is certainly within the discretion of the board. If a board member has made, in the case, full and complete itemized findings of fact, which meets the approval of and are concurred and adopted by the whole Board, why should the Board be put to the extra burden of making findings of fact all over again—that would seem to be nonsense.

The board, under this section of the statute, had the obvious right to adopt and concur in the findings of fact of its own member. Indeed all that can be said respecting any insufficiency of findings of fact, is that the findings as originally found were found by a minority and adopted by a majority of the Board; certainly when the findings of fact were ultimately concurred in by all of the board members, then such findings of fact become the legal, binding, unanimous findings of fact by the Board.

## PETITIONER'S 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.

Sub-section (c) of Section 49-1-17 reads as follows:

“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 (18) or otherwise, and *may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.* (Emphasis ours.)

It readily appears from the language employed in the above section; that if the Board decides to make an investigation in a representation case, then and in that event, the Board *must* provide for a hearing and that is the only must; the hearing shall, of course, be upon due notice and appropriate. Now the hearing can be in conjunction with an unfair labor practice charge or it can be otherwise. No provision is contained in the section providing for an election. Indeed the legislature has given wide discretion to the Board to determine how and by what method a collective bargaining agent shall be designated. Indeed the Board can use any method suitable to ascertain such designation. It *may* take a secret ballot, but this is only a suggestion on the part of the legislature. The emphasis is on the discretion of the Board to use any suitable method. Assume that the Board would decide, that here the suitable method to designate the representative among the employees, would be by a ballot, there is absolutely nothing in the section that

even squints at when the ballot shall be cast. For all that appears, the ballot can be held before the investigation, or after the investigation, or during the investigation, or before, after or during the hearing. Indeed the discretion of the Board pursuant to this section seems to be very wide and general. The Board is not required to investigate. The only thing *it must do*, if it decides to investigate, is hold a hearing and when the hearing is to be held is not mentioned. We therefore submit, in this case the Board did investigate, the Board did hold a hearing, and the Board did certify in writing the collective bargaining agent, which was the union, that had been designated.

Now if the Board knew, as it surely did, that a collective bargaining representative had already been designated by the laundry employees, and in writing, over the solemn signatures of the respective employees, composing the unit, then why resort to the extra time, ceremony and procedure of affixing a cross to still another designation exhibit. And it is important, if the Court please, to keep in mind in this behalf, that there was not here presented an intramural scrap between two or more labor unions, contending for a bargaining representative. There was only one single labor union involved; so it was merely a question of no union or the Laundry Workers Union. This situation made it relatively easy for the Board to determine whether or not the laundry employees wanted to be unionized; and furthermore, the testimony shows approximately 35 employees comprised the laundry unit (Tr. 6, June 24th

hearing) of the Hotel Utah; that 70% of the employees composing the laundry unit were represented by the union (Tr. 30, June 24th hearing). Mr. Harter, the International Representative, testified when questioned by Mr. Callister: (Tr. 30, June 24th hearing)

BY MR. CALLISTER:

Q. Now Mr. Harter, it was at this meeting last night when individuals were present whose names appear on Petitioner's Proposed Exhibit 1, at that time did you tell them that by signing that authorization that they would strengthen the case so there would be no election?

A. No, I didn't think we would have to have an election anyway, with 100%.

Now what persuaded the Board to order a cross-check, which is the common method in this type of case, where all the union testimony and exhibits are thrown open to invite examination and cross-examination by the adversary, of course we do not know. The history of collective bargaining negotiations, for one thing, on the part of an employer is very important. References were made on page 14 of the June 24th transcript to another Hotel Utah Company case, which was heard before the Utah Labor Relations Board, and apparently it was a long and notorious proceeding (Tr. 15, June 24th hearing). Apparently the union in that case had a big majority of the employees of the Hotel Utah, and then the Hotel Utah clamored for an election, precisely as they are doing here, in the same words and by the same rea-

soning, and an election was ordered and the union lost that election by one vote (Tr. 18, July 12th hearing). On the other hand, there was apparently an election lately held in another case between Hotel Utah and another union, and the employees voted in favor of the union 39 to 1 (Tr. 18, July 12th hearing), so the election issue on the part of the company can't be very sincere.

That the Board does a good conscientious, honest and impartial job of administrating the Act and its duties and obligations, there would seem to be no doubt. (Tr. 16, July 12th hearing.)

“MR. CALLISTER: I am sure if that had been the case, his report would indicate that. This Board has the machinery to see to it that it is done without any interference. Now this Board, Mr. Beck, as you know, conducts an election as unbiased and expeditious as I have ever seen. As a matter of fact, it does a better job, in my opinion, than the National Labor Relations Board, and I have seen them both in operation, and I have never had a complaint on this Board conducting an election. They have been cooperating with the employer as well as the Union—I couldn't criticize them at all. I feel that accusation is offensive and improper. When this Board conducts an election, it does it right, or it doesn't conduct it. I have seen that, and you may rest assured if this Board orders an election, it will be conducted right because Mr. Gehring and Mr. Cockayne, or whoever conducts the elections are above reproach, and they would never tolerate interference by Management or the Union at all.”

Thus, when management discharges an obligation,



the report is generally loud in all directions—however, if our adversary is so thoroughly sold on the honesty, integrity and good faith of the Board, why does it so bitterly oppose the Board in the exercise of the discretion the statute so plainly and palpably delegates to the Board—unless the Company desires to gain a selfish unilateral advantage it is not entitled to.

Why should the Board be put to the extra expense, time and trouble of requiring the company's laundry employees for a third successive time to express their preference for a bargaining representative. First, a very wide majority, in writing over the solemn signatures of the respective laundry employees, designated the union as their bargaining representative, see Exhibit A, and again, later, for the second time, these same employees reiterated their preference, and in writing too, over their respective signatures, in authorizing, constituting and appointing the union their bargaining representative, see Exhibit 1.

That the Board investigated the matter there is no doubt, hence presumptively, the Board knew and knows the facts, from direct contact and direct examination of the laundry employees. Why does the Company challenge the Board, in the presence of the statute that so expressly provides for this identical procedure. The statute suggests the Board *may* hold an election, but the statute goes further and emphasises the fact that the Board may exercise other procedure to effectuate the policy of the Act. The Board knows the history of collective bargaining on the part of the Company, from its

own files, and knows the history of this case. This history, if the court please, is of paramount, substantial and great relative importance in a labor controversy. The record discloses that the Company quite deliberately and most conspicuously neither produced nor attempted to introduce any testimony or any exhibits from its files or otherwise, with the excepting of, Mr. Callister. Notwithstanding, the Company had abundant access, contact, and dominion over its own employees, its own executive officers, and its own records and files. When such testimony and such evidence is so easily and readily available to the Company and under its control and dominion as it is here, the presumption, certainly is—that if the Company had produced one single employee or one executive or any of its files, those employees, those executives, and those files would have been detrimental to the Company and in favor of the Union. Why was the Company so silent, and so inactive in the production of evidence to assist the Board in a determination of the issue, and why does it protest with such abundant vigor the Board's decision. There must be a very good reason in its general strategy—there usually is—the answer might be procrastination. When everything else fails, procrastination will beat the unions down and break their backs, because of the turnover in payroll, the waiting out, the disappointments, anxiety, instability and the daily uncertainty of the employment status and the final result. All of these elements work to the huge advantage of the employer and express themselves in the maxim—"justice delayed is justice defeated." So procrastination may be the reason

for the extra hearing and continuance in this case. The Company deliberately and wilfully disobeyed the Board's orders, and incidently it thus gained another delay with an appeal to this Court.

Petitioner seems to emphasize and rely on the National Labor Relations Board holding in the Cudahy case. The facts in the Cudahy case were entirely different than in the case at bar. In the Cudahy case, two contending separate unions were campaigning for the same collective bargaining certificate, so for a most excellent reason the Board decided, to effectuate the policies of the Act, the best way to quiet the strife existing between the two contending unions was to call all of the employees into an election and have them mark a ballot deciding which contending union, they wanted to serve them as a collective bargaining agent. In the case at bar, there was only one union involved, and practically all of the company's employees, had at two different occasions, expressed their preference in writing for the Laundry Workers Union. Indeed, no other union appeared that could assume such jurisdiction. In the matter of A. Sartorius and Co., Inc., and United Mines Workers of America District No. 50, Local No. 12090, 40 N.L.R.B. 107, decided April 3, 1942, the National Labor Relations Board cites the Cudahy case and then holds:

“The respondent's contention, that it should not be required to bargain with the Union in the absence of an election by secret ballot in view of the alleged doubts concerning the Union's

majority is similarly without merit.

“We find that on and at all times after June 24, 1938, the Union was the duly designated representative of the majority of the employees in the appropriate unit for purposes of collective bargaining, and, pursuant to Section 9 (a) of the Act, was the exclusive representative of all the employees in such unit for purposes of collective bargaining.”

Respecting the proposition generally and the disposition of the National Labor Relations Board particularly we cite the following cases:

Consolidated Machine Tool Corporation and Pattern Makers League of North America, 67 N.L.R.B. 747 April 25, 1946, in which the board said:

“We concur in the Trial Examiner’s conclusion that the League was on January 16, 1945, and at all times thereafter has been, the exclusive bargaining representative of the employees within the appropriate unit. In excepting to this conclusion, the respondent does not challenge the Trial Examiner’s findings that a majority of the employees within the appropriate unit had signed the League’s membership application cards by January 16, 1945, and the ‘Candidate’s Applications’ on March 27, 1945. The respondent contends, however, that the signing of such cards did not constitute designation of the League as bargaining representatives on the grounds, in substance, that the cards contained no express designation of the League as bargaining agent; that the pattern makers never became members of the League, nor did they pay their entire initi-

ation fee to the League; that certain of the pattern makers testified at the hearing that they signed the cards for the purpose of being excluded from the bargaining unit which the machinists sought to represent and did not desire representation by the League; and that the signing and delivery of the cards by the employees was conditional.

“Like the Trial Examiner, we find no merit in the respondent’s contention. As the Trial Examiner states, an application for membership implies authority to bargain; neither membership in, nor payment of dues to a union is determinative of statutory authorization. And we agree with the Trial Examiner that the testimony of a signor as to his subjective state of mind at the time of signing cannot operate to overcome the effect of his overt action in having signed the application card.”

National Labor Relations Board vs. Chicago Apparatus Company, CCA 7, 116 Fed. 2d 753, December 12, 1940:

“Application for membership may be counted in determining whether the union has a majority. National Labor Relations Board vs. Somerset Shoe Co., 111 Fed 2d 681; National Labor Relations Board vs. Bradford Dyeing Association, 310 U. S. 318. This is true even though no dues have been paid.”

In th case of Lebanon Steel Foundry vs. N.L. R.B., 130 Fed. 2d 404, the court held that, the Wagner Act requires no specific form of authority to bargain collectively; that authority may be given by action as well as in words; an application for union membership implies authority to bar-

gain; not form but intent, is the essential thing; the intent is merely that the union act as the employee's representative in collective bargaining; it is only necessary that it be manifest in some manner capable of proof, whether by behavior or language; and oral authority is not invalid, but is merely more difficult to prove.

Petitioners assignment of error No. 2 has no merit.

### PETITIONER'S 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'."

Sub-section (c) of Section 49-1-17 reads as follows:

"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 or the representatives that have been designated or selected . . ."

Sub-section (b) of Section 49-1-17 reads as follows:

"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." Emphasis added.)

Sub-section (a) of Section 49-1-17 reads as follows:

“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining” . . .

We quote from page 19 and 20 of Petitioner’s brief, to-wit:

“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 purposes of collective bargaining consider all of the factors hereinabove enumerated.”

That would seem to us to be absolutely good law, and we whole heartedly concur, agree and adopt it. It appears that the Board very clearly followed this concept. The history of the Hotel Utah Company’s collective bargaining over a period of 10 years was gone into—the

extent and type of organization among the employees was weighed—the eligibility of the employees for membership in the Laundry Workers Union, the union involved, the working conditions, the craft set-up was all considered by the Board—and so following this concept, of course the Board did the only proper and fitting thing to do, it set up a craft unit. All laundry employees were on the same payroll and heretofore always treated as a craft unit by the Company; no other employees were on the payroll except laundry employees—so why mix up the garage mechanics and the cashiers with the laundry unit—or the bell boys and engineers with the laundry unit—perhaps the Company might think this a good idea in an election, because maybe the garage mechanics, cashiers, bell boys and engineers are not organized and would vote no union in an election. But the Board disagreed with the Company. The Board was thinking about the welfare of the employees in the laundry unit, who had petitioned the Board for a good and lawful reason. The Company was thinking about the welfare of the company, and that thinking was no union, which could be wrong even for the Hotel Utah Company.

Perhaps we are too naive to recognize and assess, the true proportion and merit of this assignment. Nowhere does there appear to be one error by the Board with respect to this particular assignment. At the beginning of the hearing on June 24th, 1948, Commissioner Daniel Edwards, stated, at page 2 of the Transcript:

COM. EDWARDS: The hearing will be in ses-



sion. Laundry Workers Local No. 316, Petitioner, filed a Petition for Investigation and Certification of representatives on June 15th, in which it claims bargaining right for thirty-five production workers engaged in laundry work. The number and classification of employment in said unit which the Petitioner claims to represent consists of thirty inside laundry workers.

They further request that the unit shall include all production workers and exclude clerical workers and supervisors with power to hire and fire.

The Board conducted its usual investigation and served notice of hearing as of the 17th of June. Said notice was received by Respondent and Petitioner on June 18, 1948.

Hence it appears that the investigation of the claims of the union as presented in the Petition by the union were fully investigated by the Board, pursuant to subsection (c) of section 49-1-17 above mentioned, and that a question affecting intrastate commerce was involved, and that the facts set out by the union warranted a hearing pursuant to this particular section. There is only one thing the Board *must* do, if it investigates, the Board must provide for a hearing and it must be appropriate, and upon due notice. These three elements seem to be mandatory. An election is not mandatory at all, it is merely discretionary. If the Board decides that an investigation shall be made, the Board *may* decide to hold a secret election. But a secret ballot is not

*required.* The Board decides when an election is to be held, if any, and to illustrate the discretion of the Board, an election could be held before, during or after an investigation; an election could be held before the hearing, after the hearing, or during the hearing—the discretion of the Board is that broad. In any event, subsection (b) of the statute was fully complied with. The Board had a perfect right to decide that a craft unit was the most appropriate unit for collective bargaining commensurate with the welfare of the employees. The Company contends that they are inconvenienced by such a unit, but it shows no evidence to that effect because it can't, and this section of the Statute doesn't say anything about the convenience of the employer, but it does say that in *each case* the Board shall decide what insures to the employees the full benefits of their rights of self organization and collective bargaining. The Board complied with the very letter and spirit of this section.

The Supreme Court of the United States in *National Labor Relations Board vs. Hearst Publications*, 322 U. S. 111, says on page 134:

“Wide variation in the forms of employee self-organizations and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter. Its choice of a unit is limited specifically only by the requirement that it be an ‘employer unit, craft unit, plant unit, subdivision thereof’ and that the selection be made so as ‘to

insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the Act'. Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146, 85 L. ed 1251, 61 S. Ct. 908."

We cite the following case to the proposition; Packard Motor Car Co. vs. N. L. R. B., 330 U. S. 485, on page 491 the following language is found:

"Our power to review also is circumscribed by the provision that findings of the Board as to the fact, if supported by evidence, shall be conclusive. 10 (e), 49 Stat. 454, c 372, 29 U.S.C.A. 160 (e). So we have power only to determine whether there is substantial evidence to support the Board, or its order over steps the law. National Labor Relations Board vs. Link-Belt Co., 311 U. S. 584, 85 L. ed. 368, 61 S. Ct. 358; Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146, 85 L. ed. 1251.

"The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled our power is at an end."

Nowhere is it denied that the union did not represent a majority of the Company's employees in the

laundry unit. Indeed 100% of the evidence points to the contrary. Upon a determination that the union represented close to 100% of the Company's employees in such unit, Sub-section (a) of the Statute was fully and completely complied with. A mere majority of the employees in such unit is the exclusive representative of all the employees in such unit for the purposes of collective bargaining. Our adversary contends, there is no evidence to support the Board's finding that a production unit or more properly the laundry unit is appropriate. Again all of the evidence points in one direction, except the evidence of Mr. Callister.

Mr. Harry F. Harter, a witness called on behalf of the union, testified on pages 3 and 4 of the Transcript of June 24th, 1948, as follows:

BY MR. BECK:

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 generally 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 over 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. Would you be good enough, Mr. Harter, to describe and define an employee unit appropriate for the purposes of bargaining with the Employer with respect to hours and conditions of employment, particularly in a unit

over which your organization customarily takes jurisdiction? (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 shaker 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. Within the plant and a part of the operations of the hotel??

A. Yes, sir. . . .

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.

Q. Laundering the linens for the Hotel Utah's use?

A. Yes.

Mr. Max Carpenter, the assistant manager of the Hotel Utah, was called to the witness stand, not by the Company, but by the Board. After being duly sworn, he testified as follows:

BY COM. EDWARDS:

Q. Will you state your name, please?

A. Max Carpenter.

Q. You reside at the Hotel Utah?

A. Yes, Assistant Manager at the Hotel Utah.

Q. How many employees are employed in the particular unit requesting certification by the Union?

A. I couldn't give you the exact number because it changes all the time. I would say about forty; that is an estimate, of course.

Q. Does that include all of the inside laundry workers?

A. Yes.

Q. Would you say there are forty inside laundry workers?

A. I would say that, yes.

Q. You have seen this petition for Investigation and Certification have you not, Mr. Carpenter?

A. Yes, sir.

Q. There are no other type of workers involved or that you consider as inside laundry workers in the number that you have given me at this time, which is forty?

A. I don't believe I get that question, Mr. Commissioner.

Q. Do you have any people that deliver from the laundry, or bring things to the laundry at the Hotel Utah that are included in the forty production workers that you have mentioned?

A. Well, the contact, or the effect of the laundry for the rest of the Hotel would reach the entire Hotel, because it does work for the Hotel, it comes in contact with the boys that bring down the laundry, and they take the laundry back to the room. In other words, there is a contact there although they are not on the laundry pay-roll.

Q. *They are not on the laundry pay-roll, and the people you have mentioned are on the laundry- pay-roll?*

A. Yes.

COM. EDWARDS: That is all. (Emphasis ours)



Thus it was freely admitted by the assistant manager of the Hotel Utah Company, that no employees except the production or laundry unit were on the Hotel Utah laundry payroll. Which admission is evidence abundant, that the craft unit found by the Board is not only the proper and appropriate unit, but it is the most convenient for the Hotel, because and by reason of the fact, that all of the employees comprising such unit were inside employees, and on one and only one particular payroll, to-wit: the *Laundry Payroll*.

The general rule, is that if there is any substantial evidence whatsoever to support the Board's findings, then and in that event, the Courts are without power to set them aside. In support of the above rule, we cite the following cases:

National Labor Relations Board vs. Nevada Consol. Copper Corp., 316 U.S. 105:

"We have repeatedly held that Congress, by providing, Section 10 (c), (e) and (f) of the National Labor Relations Act, 29 U.S.C.A., Section 1600 (c), (e) and (f) that the Board's findings 'as to the facts if supported by evidence, shall be conclusive,' precludes the courts from weighing evidence in reviewing the Board's orders, and if the findings of the Board are supported by evidence the courts are not free to set them aside even though the Board could have drawn different inferences."

American Foundry & Machine Company vs. Utah Labor Relations Board, 105 Utah 83, 141 Pac. 2d 390:

“The only question before this Court is whether on the record as it now stands, these findings are supported by substantial evidence. It is not a question of weighing the evidence, and determining what decision we would have arrived at had we been members of the board. It is well established that if the award or finding is supported by substantial evidence, then it must be sustained by this Court on review. Our own Court has passed on this question in *Buildings Service Employees vs. Newhouse Realty Co., et al*, 97 Utah 562, 95 P. 2d 507.”

See *Packard Motor Car Co. vs. National Labor Relations Board*, *supra*.

*National Labor Relations Board vs. Lettie Lee, Inc.*, 140 Fed. 2d 243 (CCa 9) 1944.

“The choice of an appropriate unit for collective bargaining is one for the official judgment of the Board and unless the decision of the Board as to the appropriate unit passes the bounds of permissive discretion of the administrative body in the particular case, the Court cannot interfere in such matters.”

Hence it would seem specious and hollow for our adversary to contend that its convenience is interfered with by the selection of a craft unit or that the Board acted arbitrarily and was motivated by some capricious whim. The Board was not groping in a factual vacuum in this case. The Board went through its usual investigation before the hearing. The Board then heard the testimony of Mr. Harter describing the unit. The Board then heard Mr. Carpenter testify, that the laundry unit and

payroll was a distinct and segregated craft set up within the general hotel operation. The Board examined the exhibits in this case.

There is no merit to Petitioner's assignment No. 3.

#### PETITIONER'S 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 practices as set forth in Section 49-1-16, Subsection 1, Paragraph d, Utah Code Annotated 1943 as amended."

The rather doubtful point here raised by our opponent, seems to be, that the Board should have used the word "such" instead of the word "any" at the end of line one of paragraph 1 of the order of the Board. We fail to see much substance in such super technical argument. The only case that was before the Board was this case and the only unfair labor practices that were before the Board were the unfair labor practices charged in the complaint in this case; so quite naturally the Board ordered the Hotel Utah Company to bargain, because they refused to bargain, in defiance of the Board. The Board used the words "any further unfair labor practices." It plainly meant what everyone knows, to-wit: The unfair labor practices set out in the complaint which were admitted by the Company.

That the Board could have improved the language it used in the order we admit, but it is silly to argue

that the Board had other cases in mind. The point is trifling.

In support of the power of the Board to issue such an order we cite the following case:

National Labor Relations Board vs. Cheney Cal. Lumber Co., 327 U. S. 385:

“The court below struck out from the Board’s order paragraph 1 (b) whereby the Company was ordered, after appropriate treatment of the unfair labor practice arising from prohibited discharge of employees to cease and desist from ‘(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act’.

“The Court found warrant for its excision of this provision in National Labor Relations Board vs. Express Pub. Co., 312 U. S. 426, 85 L. ed. 930, 61 S. Ct. 693, *supra*. That case, however, recognized that it was within the power of the Board to make an order precisely like 1 (b). It merely held that whether such an inclusive provision as 1 (b) is justified in a particular case depends upon the circumstances of the particular case before the Board. See 312 U.S. at 433, 437, 438. Here the trial examiner recommended the inclusion of 1 (b) on the basis of his review of past hostilities by the company against efforts at unionization; no exception was made either to the findings or this recommendation; upon full

consideration of the record the Board adopted the trial examiner's recommendation; no objection was raised by the Company until after the Board sought judicial enforcement of this order. The objection comes too late." . . .

On page 389 of 327 U. S.: "Justification of such an order, which necessarily involves consideration of the facts which are the foundation of the order, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse 'the failure or neglect to urge such objection'. Congress desired that all controversies of fact, and the allowable inferences from the facts, be thrashed out, certainly in the first instance, before the Board. It was therefore not within the power of the court below to make the deletion it made."

We see no merit in Petitioner's Assignment No. 4.

#### PETITIONER'S ASSIGNMENT OF ERROR NO. 5

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

In this behalf we invite the court's attention to the paragraph on page 32 of Petitioner's brief, to-wit:

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

The mere fact that it is admitted the Hotel Utah Company is in business in Salt Lake City, Utah; that

it operates a laundry; and that about 30 of such laundry employees have asked the Utah Labor Relations Board to certify the union as their collective bargaining agent; that the Board took jurisdiction and certified the union, in writing, as the collective bargaining agent for all the employees in Petitioner's laundry unit; that the Board found the Company guilty of unfair labor practices—would seem abundantly clear that state commerce was affected.

Assume the National Labor Relations Board has concurrent jurisdiction or even exclusive jurisdiction in the premises. That is a defense for the Company to raise—and maybe they don't want it raised; maybe they are happy the National Labor Relations Board does not have jurisdiction, if it does not have. At any rate the Company admits it is in business in Utah, and if they are guilty of violating the Board's express order, and the Company admits that it is guilty of such violation—then and in that event, it is perfectly obvious, that such violation affects intrastate commerce—and a fortiori, Interstate Commerce would also be affected if such commerce is involved here. Whatever the consequence, Petitioner's last mentioned statement just does not square with the law or the facts. We submit an illustration, and quote from the opening paragraph and paragraphs 1, 2 and 7 of the charge:

“Comes now the petitioner and pursuant to Title 49-1 Utah Code annotated 1943, as amended 1947, and the rules and regulation of Utah Labor

Relations Board, does hereby charge as follows, to-wit:

I.

“That respondent who’s address is South Temple and Main streets in Salt Lake City and County, State of Utah, is engaged in a general hotel business in said city, and as such has engaged in and is engaging in unfair labor practices pursuant to said title and especially paragraphs d, c, b and a, of Section 49-1-16 thereof and Section 49-1-15 thereof.

II.

“That petitioner is an affiliate of American Federation of Labor, that petitioner’s address is 59 South State Street in said city. That petitioner is now, and ever since the 5th day of August, 1948, has been the duly authorized collective bargaining representatives of a majority of respondents employees in a collective bargaining unit appropriate for the purposes of collective bargaining on behalf of such employees respecting hours, wages, and conditions of employment.

VII.

*“That such unfair labor practices on the part of respondent are unfair labor practices affecting intrastate commerce and the orderly operation of industry within the meaning of said act.”*

We quote paragraph 1 and 2 of the Board’s complaint:

“1. That the Hotel Utah Company, hereinafter referred to as Respondent, is a corpora-

tion organized under the laws of the State of Utah and as such is doing business in Salt Lake City, Utah.

“2. That Respondent is an employer within the meaning of Title 49-1-10, Sub-section (2).”

We quote paragraphs 1, 6, 8 and 9 of the Board’s findings of fact:

“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.

“6. That the Utah Labor Relations Board certified the Petitioner as the legally selected and designated agent of the employees of respondent in the above described unit for the purposes of collective bargaining on August 5, 1948.

“8. That Respondent did refuse to bargain with Complainant on the grounds: (a) That the unit found by the Board was not an appropriate unit. (b) That the Board’s method of determining the Collective Bargaining Representative, if any, was not in conformity with the Utah Labor Relations Act.

“9. That Respondent did refuse to bargain.”

We quote paragraph 1 of the Company’s Answer to the Board’s Complaint.

“1. Admits the allegations contained in paragraphs 1 and 2.”

Obviously, it was alleged, admitted, proved and



found that the Hotel Utah Company was in intrastate business in Utah. That it was guilty of certain unfair labor practices, manifestly that could not be so unless its business was affected, at least to some extent—good, bad, or indifferent in such a labor controversy.

Teamsters Local Union No. 222 and the Industrial Commission vs. Strevell-Paterson Hardware Co., 174 Pac. 2d 164, 1948:

“As we read the case the jurisdiction of the Board in each particular case does not depend upon a finding by it to the effect that the act or acts complained of affect interstate commerce, but whether in fact the act or acts complained of actually do or may reasonably affect the free flow of interstate commerce. In the instant case defendant admitted it was engaged in intrastate commerce. That being so, the Board had jurisdiction to hear the matter and make the order complained of if there was sufficient evidence of acts of defendant which would affect intrastate commerce . . .”

Petitioner's assignment of error No. 5 has no merit.

IN CONCLUSION WE RESPECTFULLY SUBMIT

### I.

That the Board's findings of fact were more detailed, full and comprehensive than the Statute requires. That such findings were concurred in and agreed to unanimously by the Board.

### II.

That the method of selecting a collective bargaining

agent is strictly within the discretion of the Board—that all of the evidence introduced supports the Board's procedure in fixing the collective bargaining agent; that the evidence was far more than ample and sufficient.

### III.

That Section 49-1-17 Sub-section (b) Utah Code Annotated provides that the Board shall decide in each case, respecting the welfare of the employees; the insurance of self-organization and collective bargaining in behalf of employees. That the Board shall decide in the interest of the employees, commensurate with effectuating the policies of the Act, whether the collective bargaining unit shall be a *craft*, plant, employer, or a combination sub-division unit.

The selection of a collective bargaining unit entirely rests within the discretion of the Board. The Board decided that the unit most suitable to serve the best interest of all parties should be a craft unit—indeed the Board could not very well have decided otherwise, unless there occurred some reason to ignore the evidence, for the reason, that the evidence and all the evidence and all the witnesses (excepting Mr. Callister) support the selection of a craft bargaining unit; moreover a craft unit was the unit desired by these employees.

### IV.

That the order of the Board must be construed in accordance with the facts in this case. The portion there-

of which orders the Company to “cease and desist from any further unfair labor practices” must necessarily apply only to those practices under consideration by the Board in the instant case. We submit that to substitute the word “such” for “any” would effectuate no substantive change in the order.

## V.

The Union alleged and the Company admitted, commerce as contemplated in the Act.

We respectfully pray the Court to enter its decree to the end that the order of the Utah Labor Relations Board herein be forthwith enforced.

All of which we respectfully submit.

CLINTON D. VERNON,  
*Attorney General*

MARK K. BOYLE,  
*Assistant Attorney General*  
*Attorneys for Defendant,*  
*Utah Labor Relations Board*

CLARENCE M. BECK,  
REID W. NIELSON,  
*Attorneys for Defendant,*  
*Laundry Workers Local*  
*Union No. 316.*