

1950

# Utah Labor Relations Board v. Broadway Shoe Repairing Company : Petitioner's Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Clinton D. Vernon; Allen B. Sorensen; Attorneys for Petitioner

---

## Recommended Citation

Brief of Appellant, *Utah Labor Relations Board v. Broadway Shoe Repairing Co.*, No. 7439 (Utah Supreme Court, 1950).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1251](https://digitalcommons.law.byu.edu/uofu_sc1/1251)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# In the Supreme Court of the State of Utah

---

UTAH LABOR RELATIONS  
BOARD,

*Petitioner,*

vs.

BROADWAY SHOE REPAIRING  
COMPANY,

*Respondent.*

Case No. 7439

---

## PETITIONER'S BRIEF

---

**FILED** CLINTON D. VERNON

*Attorney General*

APR - 1 1950

ALLEN B. SORENSEN

Clerk, Supreme Court, Utah

*Assistant Attorney General*

*Attorneys for Petitioner*

---

---

## TABLE OF CONTENTS

	Page
Statement of Facts.....	3
Statement of Points.....	6
Argument .....	7
Point I	
THE EMPLOYER UNIT IS, AS DETERMINED BY THE BOARD, THE PROPER BARGAINING UNIT .....	7
Point II	
THE EXCLUSION IN THE CERTIFICATION OF EMPLOYEES WITH THE RIGHT TO HIRE OR FIRE IS CLEAR AND UNAMBIGUOUS.....	11
Point III	
THERE IS NO BASIS IN LAW OR THE EVIDENCE FOR EXCLUDING FROM THE BARGAINING UNIT EMPLOYEES WITH THE POWER TO "EF- FECTIVELY RECOMMEND" HIRING OR FIRING	16
Conclusion .....	26

## CASES CITED

Allis-Chalmers Mfg. Co. v. NLRB, 162 F. (2d) 435.....	21
Cole Instrument Company, 75 NLRB 348.....	24
Eastern Gas and Fuel Associates v. NLRB, 162 F. (2d) 854	21
Hotel Utah Co. v. Industrial Commission, No. 7212, ....	
Utah ...., 209 P. (2d) 235.....	11, 24

Hotel Utah Co. v. Industrial Commission et al., .... Utah ....., 211 P. (2d) 200.....	7, 10, 11
NLRB v. Wyandotte Transportation Company, 162 F. (2d) 101 .....	19
Packard Motor Car Co. v. NLRB, 330 U. S. 485, 67 S. Ct. 789, 91 L. Ed. 1040.....	18, 21, 22
South East Furn. Co. v. Industrial Commission, 100 Utah 154, 111 P. (2d) 153.....	17
Wilson & Co., Inc. v. NLRB, 162 F. (2d) 310.....	19

### STATUTES CITED

49 Statutes at Large 450, Chapter 372 Section 2.....	17
Utah Code Annotated 1943, Section 49-1-10(3) as amended by Chapter 66, Laws of Utah 1947.....	17, 21
Utah Code Annotated 1943, Section 49-1-16(d) as amended by Chapter 66, Laws of Utah 1947 .....	4, 14
Utah Code Annotated 1943, Section 49-1-17(b).....	7, 17
29 USCA 152(3) .....	21, 24, 27
29 USCA 159(b) .....	18

# In the Supreme Court of the State of Utah

UTAH LABOR RELATIONS  
BOARD,

*Petitioner,*

vs.

BROADWAY SHOE REPAIRING  
COMPANY,

*Respondent.*

Case No.

7439

## PETITIONER'S BRIEF

### STATEMENT OF FACTS

This matter is before the Court on a petition by the Utah Labor Relations Board, hereinafter called the Board, for an order of this Court enforcing an order of the Board issued as the result of a hearing on a charge that the respondent herein is engaged in an unfair labor practice.

In June of 1947 Teamsters' Local Union No. 222, A.F. of L., hereinafter called the union, petitioned the

Board to certify that union as the bargaining agent for employees of the respondent (R. 1). Pursuant to that Petition the Board ordered a hearing (R. 2). That hearing was held July 21, 1947 (R. 6 et seq.). An investigation was then made and investigator's report submitted (R. 33). Subsequent to that hearing and investigation, the Board issued its certification as prayed for, on August 26, 1947 (R. 34). The Board on September 26, 1947, amended this certification (R. 36).

Pursuant to this certification the Union attempted to negotiate with respondent for the purpose of entering into a collective bargaining contract. Respondent refused to so negotiate, and the Union filed an unfair labor charge against respondent, November 21, 1947, charging respondent with violation of Section 49-1-16 (d), Utah Code Annotated 1943, as amended by Chapter 66, Laws of Utah 1947 (R. 37 ff.). The charge was investigated and a complaint thereon issued December 1, 1947 (R. 41). A hearing was held before a trial examiner who found an unfair labor practice as charged and recommended that the Board so find and issue a cease and desist order based on such finding (R. 70-71). The respondent filed written objections to the intermediate report, recommendations, findings and conclusions of the trial examiner (R. 72 and 73), and a written motion that oral argument on the matter be heard before the entire Board (R. 74). The Board granted this motion (R. 75), and heard extensive argument on the trial examiner's report. Subsequently, on April 16, 1948, the Board issued its order:

“1. That respondent, Broadway Shoe Repairing Company, cease and desist from any further unfair labor practice as set forth in Section 48-1-16 (1) subsection (d);

2. That the respondent immediately proceed to enter into collective bargaining with complainant;

3. That respondent notify this Board of its compliance with the Board's order.” (R. 104-105).

In its amended certification the Board used the following language:

“A unit appropriate for the purpose of collectively bargaining consists of all shoe repairmen and excluding shine men, counter clerks, part-time workers or supervisory employees with power to hire and fire located in the Broadway Shoe Repairing Shop, 69 East 3 South, Auerbach Company, J. C. Penney Company, 213 South Main, and J. C. Penney Company, 1033 East 21 South.”

It is this certification that respondent objects to.

In its answer to the Board's petition herein, respondent alleges generally:

“\* \* \* that the Board erred in determining that a unit appropriate for the purposes of collective bargaining consisted of all shoe repairmen and excluding shine men, counter clerks, part-time workers and supervisory employees with power to hire or fire, of respondent, that is, the Company, located in the Broadway Shoe Repairing Company shop, 69 East Third South, Salt Lake City, Auerbach Company, Third South and State Street, J. C. Penney Company, 213 South



Main Street and J. C. Penney Company, 1033  
East 21st South, Salt Lake City, Utah.”

Respondent further alleges generally that there was insufficient evidence with which to support said certification.

In his argument to the Board in the second hearing on the unfair labor charge, counsel for respondent urged two errors in the certification—that the correct bargaining unit should not be the employer unit (R. 85), and that the exclusion of supervisory employees with power to hire or fire is unintelligible (R. 87). From argument of counsel and testimony of respondent's witness at the hearing on the unfair labor practice charge, it would appear that a part of the alleged unintelligibility rests in the fact the Board in its order did not exclude from the bargaining unit supervisory employees with the right to “effectively recommend” hiring and firing. We take it that these are the issues raised by respondent's answer, and shall treat them in that order.

## STATEMENT OF POINTS

1. The Board's certification of the employer unit as an appropriate bargaining unit was not erroneous and is supported by the evidence.

2. In view of the facts and circumstances of the case, the exclusion by the Board of “supervisory employees with power to hire or fire” is sufficiently clear to establish the collective bargaining unit.



3. Neither the evidence nor the law requires that the Board exclude from the bargaining unit supervisory employees with the power to "effectively recommend" hiring or firing.

## ARGUMENT

### I

THE EMPLOYER UNIT IS, AS DETERMINED BY THE BOARD, THE PROPER BARGAINING UNIT.

Section 49-1-17(b), Utah Code Annotated 1943, places power in the Board to determine the proper bargaining unit for the purposes of collective bargaining:

"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."

In the case of *Hotel Utah Co. v. Industrial Commission et al.*, ..... Utah ....., 211 P. (2d) 200 (the second Hotel Utah case) this Honorable Court placed the following construction on that grant of power:

"The authority to determine which type of unit is appropriate is vested in the Board and not this court. If the discretion so granted is reasonably exercised, the finding cannot be set aside. It is only in those cases wherein we can find the Board has abused its discretion that we

may interfere. And if appellant seeks to reverse the findings of the Board because of an abuse of discretion in selecting the appropriate unit the burden is on it to establish the abuse."

The certification as finally determined by the Board was as follows:

"A unit appropriate for the purpose of collective bargaining consists of all shoe repairmen and excluding shine men, counter clerks, part-time workers and supervisory employees with power to hire or fire located in the Broadway Shoe Repair Shop, 69 East Third South, Auerbach Company, J. C. Penney Company, 213 South Main, and J. C. Penney Company, 1033 East 21st South." (R. 36).

It is the Board's position that this certification is correct, and that the evidence amply supports it.

The record on the certification hearing shows that the employees involved work for a common employer.

The business representative of the union testified that he was acquainted with the Broadway Shoe Repairing Company, that it operated a shoe repairing business at 69 East Third South Street, at Auerbach's and at J. C. Penney Company in Salt Lake City (R. 8-9), and J. C. Penney Company in Sugarhouse (1033 East 21st South Street, Salt Lake City) (R. 11). He further testified that the employees of the respondent were eligible for membership in the union, that the union had authorizations and designations from seven of the employees to represent them, and that there were ten employees of the respondent altogether (R. 9, 10, and 11). There is

some discussion in the record as to whether all these authorizations and designations may be counted, in that respondent contends some of the employees are supervisory personnel with the right to hire and fire. We shall treat of this later. In any event, from the report of investigation (R. 33), and particularly paragraph 4 thereof, regardless of the theory adopted as to supervisory personnel, the union represents a majority of the employees.

In his report the investigator stated the following:

“Investigation further indicates that the collective bargaining unit should include employees in all four shop’s namely; Broadway Shoe Shop, 69 East 3rd South, Auerbach Company, J. C. Penney Co., 213 South Main St.; and J. C. Penney Co. 1033 East 21st South, *for the reason that employees are shifted from one shop to another whenever necessary.*” (Italics added.)

At the hearing counsel for respondent argued that the employer unit was not appropriate for the reason that the respondent did not have full control over the employees of the various stores. The only testimony offered on this point was that of respondent’s manager to the effect that some of the stores issued payroll checks to the employees and that at the Auerbach store and J. C. Penney store at Sugarhouse the concessionee would be in a position to fire respondent’s employee there (R. 14). However, he further testified that respondent, too, could fire such employee. From the testimony of respondent’s manager on the question of supervisory employees (R. 19-20), it would appear that the employees

at the various stores work directly under the supervision of the respondent. This, together with the fact that employees are shifted from one shop to another whenever necessary, would seem to indicate that all employees of respondent are under close supervision of the respondent and work as an employee unit or team.

There is nothing in the record showing that alleged powers of the concessionaires limit the powers of respondent sufficiently to preclude effective collective bargaining between respondent and the Union. On the other hand, the testimony and inferences drawn therefrom showing a common employer, exercising close supervisory power over its employees, shifting them from shop to shop as required at the moment, apparently at the sole wish and order of respondent, indicate the employer unit is the only practicable collective bargaining unit. If the concessionaires have such limited powers as asserted by respondent, matters connected therewith would seem to be properly a subject of collective bargaining rather than a bar thereto.

It is conceded that the evidence contained in the record supporting the certification of the employer unit as appropriate for the purpose of collective bargaining is not abundant; however, as in the case of *Hotel Utah Co. v. Industrial Commission*, supra, this evidence is uncontradicted, and the evidence offered that the respondent does not have complete control over its employees is fragmentary and, in view of the rest of the record, is not persuasive for the proposition that the unit certified is not appropriate.

We respectfully submit that the Board exercised its discretion in certifying the collective bargaining unit in a reasonable manner. Furthermore, we submit that the burden is on the respondent to show wherein this discretion was abused, and this showing has not been made. *Hotel Utah Co. v. Industrial Commission*, supra.

## II

THE EXCLUSION IN THE CERTIFICATION OF EMPLOYEES WITH THE RIGHT TO HIRE OR FIRE IS CLEAR AND UNAMBIGUOUS.

We are at a loss to understand wherein the exclusion, in the Board's certification, of employees with the right to hire or fire is in any way ambiguous or unintelligible. We take it to mean exactly what it says, to be clear, and to permit of no alternative interpretation.

By way of preliminary comment, we understand the same exclusion was used by the Board in the cases of *Hotel Utah Co. v. Industrial Commission*, No. 7212, ..... Utah ..., 209 P. (2d) 235, and *Hotel Utah Co. v. Industrial Commission*, No. 7290, supra, and apparently presented no difficulty to respondents in those cases.

In its conclusions preliminary to the order of the Board, of which it now seeks enforcement, the Board stated:

"The Board concludes that the precedents established in Case No. 530, Boston Factory Shoe Rebuilders, Respondent, and Teamsters Local Union No. 222, Petitioner, and Case No. 531,

Z.C.M.I. Shoe Repair Department, Respondent, and Teamsters Local Union No. 222, Petitioner, in which the Board designated representatives of management by the language 'supervisory employees with the right to hire or fire' fully protects management in its right of representation in the operation of its business." (R. 105).

Apparently for the purpose of making the record unequivocal on this point, the Board later, on its own motion, incorporated the arbitrator's decision in those cases into the record now before this Honorable Court. (R. 125). In those cases the Board had used similar exclusionary language in its certification. An arbitrator was appointed to answer the question, "What men, if any, are working foremen or otherwise or supervisors with the right to hire and fire within the meaning and interpretation of the Utah Labor Relations Board's Order . . ." (R. 113). The arbitrator stated in part:

"The investigation does not disclose that such [managerial] responsibility has been entrusted to this person as being entirely responsible for the profit (sic) operation of the establishment. There is no doubt that the manager of the Respondent has certain responsibilities entrusted to him such as the orderly operation of the establishment, the responsibility to see that the business is operating at such times as the field supervisor is absent from the immediate territory and with such authority to suggest or to recommend the addition or the reduction of personnel within the operation but full authority is not placed in the manager as to the complete operation of the business under the company rules and policy.



It is to be noted that the full responsibility for the profitable operation of the business is not invested in the manager of the store but in the supervisor of the district. Additions to the working force of a store are approved or disapproved by the supervisor of the district and the installation or the increase of any additional machinery is also vested in the supervisor of the district. \* \* \*.

It is the writer's opinion that the Utah Labor Relations Board meant that supervisory employees with the right to hire and fire within this unit would have the authority to add to their operating staff if added business would require such action without consultation with any other party and that the same criterion would apply if it should become necessary to reduce the personnel. \* \* \* (R. 114, 115).

We quote the above, not as authority, but as a well-stated clarification—if any is needed—of what the Board means by “supervisory employees with the right to hire or fire.”

At the certification hearing, and in argument at both hearings on the unfair labor charge, counsel for respondent urged that the Board designate by name or particular job which employees did and which did not come within the exclusion. We do not deny that the Board could have followed that procedure; we maintain that to do so would be bad administrative practice, for the reason that the Board would thus become involved in detail work which, we believe, properly is a subject of collective bargaining. The Board having defined the inclusion-exclusion line for the bargaining unit, it then



11 becomes a question of fact in each instance on which side of that line a particular employee belongs. The employees and the employer are in a better position to determine this than is the Board. Only when they become dead-locked as regards the facts in the case of a particular employee or employees should the aid of the Board be invoked. It is to be noted that either party may thus invoke the aid of the Board under the provisions of 49-1-16, Chapter 66. Laws of Utah 1947.

It may be remembered that the charge out of which grew the order here sought to be enforced was that respondent refused to bargain collectively with the union (R. 37). The Record supports this charge. Respondent's manager testified as follows on this matter (R. 59-60):

“Q. Your quarrel with the Board's certification, I suppose, is that it includes employees who have the right to hire and fire in the unit.

A. That is right, the second certification.

Q. And you think they should be excluded?

A. Yes.

Q. And therefore you have ignored the certification?

A. Not ignored the certification.

Q. You have refused to bargain?

A. The interpretation has been wrong, in my sense. I believe shoe repairmen should be excluded who have the right to hire and fire.

Q. And to precipitate this matter, you have refused to bargain because the certification

includes what you think are employees with the right to hire and fire?

A. That is right."

The secretary of the union testified on this matter in part as follows:

"Q. Would you state in your own language, Mr. Latter, what you have done in order to protect your principal's interest in this unit, and prepare to represent the men composing the unit in this case, with respect to negotiating a contract with Mr. Bollinger and Mr. Callister?

A. After receiving the amended certification of the Board, we presented to the Respondent in this case, or the Employer, Mr. Bollinger, and his attorney, Mr. Callister, a proposed agreement which had been put together by the employees, covered by the certification. At the time we presented the contract, we asked for a meeting for the purpose of discussing the contract, and Mr. Callister on some occasion did meet with our Mr. Gilbert who is Business Agent for the Teamsters Union. Mr. Gilbert kept me closely advised as to what was going on in the situation, and complained to me about the fact that they were unable to discuss the terms of the agreement.

MR. CALLISTER: We will stipulate that we would not discuss the terms of the agreement, our position being that we could not agree as to what the unit was, and we told them that until such time as we agreed on what the unit was, we could not discuss it.

VIIA: MR. BECK: That is all right.

Q. Now what did you do—inviting your attention to what Mr. Callister has just said, what did you do with respect to following up the certification to get a contract ultimately negotiated; what did you do in that respect to get a contract?

A. We asked Mr. Callister to discuss a bargaining agreement, and I had one meeting on November 6th, after Gilbert had failed to discuss an agreement. On November 6th, a meeting was set with Mr. Callister and he would not discuss the terms of the agreement with us."

It may be seen from the above that no real attempt to bargain collectively on the subject of the inclusion-exclusion line of the certification was made. It may be further seen that the so-called ambiguity and unintelligibility in fact resolves itself to a difference of opinion as to whether there should be excluded from the unit those employees with the right to "effectively recommend" hiring and firing.

### III

THERE IS NO BASIS IN LAW OR THE EVIDENCE FOR EXCLUDING FROM THE BARGAINING UNIT EMPLOYEES WITH THE POWER TO "EFFECTIVELY RECOMMEND" HIRING OR FIRING.

Throughout the hearings on the unfair labor charge, respondent argued that the exclusion of supervisory employees with the power to hire or fire was ambiguous

and unintelligible. We believe, however, that actually respondent's position is that the certification *should* have excluded, in addition to those employees with authority to add to their operating staff or decrease such staff without consultation with any other person, those persons designated by respondent as having the power to "effectively recommend hiring and firing." That is, respondent wishes to exclude those employees which *it* designates as having authority to "recommend" hiring and firing. If this is so, then respondent's position is not that the certification is ambiguous and unintelligible, but that it is erroneous. It is the Board's position that the certification does not exclude those who can "effectively recommend" such action, and that there is no error in this particular in that certification.

This Honorable Court in the case of *South East Furniture Co. v. Industrial Commission*, 100 Utah 154, 111 P. (2d) 153, held that interpretations given by Federal courts to the provisions of the Wagner Act, from which provisions of the Utah statutes were copied almost verbatim, would be considered by this Court in interpreting such Utah statutes. Section 49-1-10 (3), Utah Code Annotated 1943, as amended by Chapter 66, Laws of Utah 1947, defines the word "employee" under the Utah act. This definition is practically verbatim the same as used in the Federal statute, Chapter 372, Section 2, 49 Statutes at Large 450 (29 USCA 152(3) prior to its amendment by the Labor-Management Relations Act of 1947.) Section 49-1-17 (b) which provides that the Board shall designate the appropriate unit for collective bargain-



ing is also practically identical with the Federal Act found in 29 USCA, Section 159 (b). We may, therefore, properly rely upon the interpretation placed by Federal courts on this question.

In the leading case of *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 67 S. Ct. 789, 91 L. Ed. 1040, the United States Supreme Court held that foremen were not excluded from the rights of self-organization, collective bargaining, and other concerted activities as assured to employees generally by the National Labor Relations Act. We quote from the opinion in that case:

“Even those who act for the employer in some matters, including the service of standing between management and manual labor, still have interests of their own as employees. Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he serves his master in others. And we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests.

The company's argument is really addressed to the undesirability of permitting foremen to organize. It wants selfless representatives of its interest. It fears that if foremen combine to bargain for themselves, they will sometimes be governed by interests of their own or of their fellow foremen, rather than by the company's interest. There is nothing new in this ar-

gument. It is rooted in the misconception that because the employer has the right to whole-hearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work. But the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms."

Following this precedent the Court of Appeals of the Sixth Circuit, in the case of *NLRB v. Wyandotte Transportation Company*, 162 F. (2d) 101, held on the same reasoning that the first, second and third mates employed on the company's vessels were employees within the National Labor Relations Act and as such were entitled to organize for bargaining purposes, though their work at times involved independent responsibility for the property of the employer and for its personnel relations.

The Court of Appeals of the Eighth Circuit, in the case of *Wilson & Co., Inc. v. NLRB*, 162 F. (2d) 310, held that guards of the company's plant could properly belong to a collective bargaining unit. We quote from that opinion:

"It is further argued that 'the functions and obligations' of the guards 'are of a dual character.' They have an obligation to their employer and also to the government and the state; and that in case of a strike of their fellow members of the union they would be subjected to the influence of opposing loyalties; that they might be called upon to protect the property of the peti-

tioner against their comrades as well as the property of the government or of the community or of other members of the community at the same time. It is contended that the Board erred in failing to consider these incompatible duties imposed upon the guards.

The possibilities thus imagined are not impossible and they might occur; but they do not prove that the guards are not 'employees' within the meaning of the Act or that they do not constitute a practical unit for collective bargaining. As said in *Jones & Laughlin Steel Corp. v. National Labor Relations Board*, 5 Cir., 146 F. 2d 833, 835, certiorari denied, 325 U.S. 886, 65 S. Ct. 1575, 89 L. Ed. 2000, 'The general fear that all classes of employees may make common cause in case of future disputes is always present because such co-operation is always possible.' But these facts and fears do not except the guards from the benefits of the Act.

The petitioner next contends that the affiliation of the guards in the same union with the plant production and maintenance employees, even though they are in a separate bargaining unit, is contrary to public policy. This contention presents an erroneous conception of the meaning of the term 'public policy' and of the function of courts. In *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 340, 17 S. Ct. 540, 559, 41 L. Ed. 1007, the Supreme Court said:

The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law-making power speaks upon a particular subject, over which it has con-



stitutional power to legislate; public policy in such a case is what the statute enacts.”

The Court of Appeals of the Seventh Circuit in the case of *Allis-Chalmers Mfg. Co. v. NLRB*, 162 F. (2d) 435, held that inspectors charged with the duty of inspecting materials and workmanship for the purpose of insuring that the employer's product met its specifications and those of its customers were employees within the National Labor Relations Act and properly constituted a unit for the purposes of collective bargaining against the contention that they were representatives of management and not entitled to the benefit and protection of the Act.

The Court of Appeals for the Sixth Circuit, in the case of *Eastern Gas and Fuel Associates v. NLRB*, 162 F. (2d) 854, followed the case of *Packard Motor Car Co. v. NLRB*, cited above, on the question as to whether or not foremen could properly join a union controlled and dominated by, or identical with, a union representing the rank and file employees under the foreman's supervision. On petition for rehearing (162 Federal 2d 866), the Court amended this order as regards foremen, but it did so in view of the amendment to the definition of “employee” as found in 29 USCA 152 (3), made by the Labor-Management Relations Act of 1947, which specifically excludes “any individual employed as a supervisor.” The Utah Legislature has *not* so amended Section 49-1-10 (3), Utah Code Annotated 1943, as amended by Chapter 66, Laws of Utah 1947. The Utah Labor Relations Board is thus not required by law to

exclude from a designated bargaining unit foremen or supervisory personnel. In the certification hearing attacked, the Board did exclude "supervisory personnel with the power to hire and fire." It did *not* exclude supervisory personnel with the power to "effectively recommend" hiring and firing.

At the first hearing on the unfair labor charge a representative of the respondent testified that certain employees, who they contended should not be included within the bargaining unit, had the power to "effectively recommend" hiring and firing (R. 57). There is no testimony indicating such power was ever exercised. He further testified at the certification hearing that these particular employees were paid at a different rate and that the respondent worked through them in establishing and carrying out management's policies (R. 19-20). This same person also at the certification hearing testified to the fact that these employees did the same shoe repairing work as the other employees (R. 17-18). As stated above, the investigator further reported that these "foremen" or supervisory personnel do shoe repairing on a full-time basis and that all employees are shifted from one shop to another whenever necessary. In the *Packard Motor Car Company* case cited above the Court took into consideration differences in pay and responsibilities of foremen. We quote from the Court's statement of facts:

"The function of these foremen in general is typical of the duties of foremen in mass production industry generally. Foremen carry the responsibility for maintaining quantity and quality

of production, subject, of course, to the overall control and supervision of the management. Hiring is done by the labor relations department, as is the discharging and laying off of employees. But the foremen are provided with forms and with detailed lists of penalties to be applied in cases of violations of discipline, and initiate recommendation for promotion, demotion and discipline. All such recommendations are subject to the reviewing procedure concerning grievances provided in the collectively-bargained agreement between the Company and the rank and file union.

The foremen as a group are highly paid and, unlike the workmen, are paid for justifiable absence and for holidays, are not docked in pay when tardy, receive longer paid vacations, and are given severance pay upon release by the Company.”

In the case at bar it cannot be said that the Board was not apprised of the difference in position between the “supervisory” employees and other employees of respondent. This matter was argued extensively before the full Board (R. 82 et seq.). The Board decided not to place these particular employees within the exclusion. In support of this decision the Board had evidence that the particular employees concerned did full-time shoe repair work, the same as other employees; that these employees, while they may have had the power to “effectively recommend” hiring and firing of other employees, did not have the power to increase or decrease the operating personnel without consultation with any other person; and that these employees were shifted from shop to shop according to the exigencies of the moment. Op-

posed to this was testimony of a representative of respondent that these employees had the power to "effectively recommend" hiring and firing.

In this connection it is of interest to note that even under the Labor-Management Relations Act of 1947 (29 USCA 152 (3) ) the National Labor Relations Board held in the matter of Cole Instrument Company, 75 NLRB 348, that so-called "supervisors" who spend at least 80% of their time doing routine, non-supervisory work, and who outnumber rank and file workers, are not supervisory employees within the meaning of the Act and may be included within a bargaining unit with rank and file workers, even though they act occasionally as group leaders and receive a 10c per hour wage differential over other workers. This is offered, not as authority, but as indicative of the interpretation of "supervisory employees" under the exclusion of such personnel made by the Labor-Management Relation Act of 1947. We repeat that this exclusion is not found in the Utah act.

This Honorable Court, in the second Hotel Utah case cited above, said that, "The authority to determine which type of unit is appropriate is vested in the Board and not in this Court. If the discretion so granted is reasonably exercised, the finding cannot be set aside." We respectfully submit that the Board properly determined not to exclude from the bargaining unit employees with the power to "effectively recommend" hiring and firing, that this decision was based on ample evidence, was reasonable, and that respondent has failed to carry the burden of showing that the Board abused its dis-

retion. It is of interest to note that at the first hearing on the unfair labor charge respondent maintained that the inclusion-exclusion line in the certification was not clear, but that respondent would be willing to abide by the certification if the Board interpreted it (R. 60). We quote herewith that portion of the testimony:

“Q. You said a few moments ago that you did not agree with the interpretation placed on this amended certification by the Union?

A. That is right.

Q. Your interpretation being that it excludes men with the right to hire and fire?

A. Yes.

Q. You are willing to abide by the Certification if it is interpreted?

A. Yes.”

In the order of the Board which it here seeks to have enforced, the Board undertook to interpret what was meant by “supervisory employees with the power to hire and fire,” by referring to prior cases before the Board (R. 105). Later to further clarify the matter the Board incorporated in the record the arbitrator’s decision in those prior cases (R. 113- 114). We respectfully submit that the Board’s certification in which it excluded from the bargaining unit those employees with the right to hire or fire, is clear and intelligible and that the Board committed no error in such certification.

## CONCLUSION

In concluding we repeat that the certification record is not replete with evidence on the question of the designation of the employer unit as an appropriate bargaining unit. However, there is sufficient in the record to justify the Board's certification of such employer unit. There is a common employer which exercises immediate managerial control over all employees within the designated unit. The employees are shifted by the employer from shop to shop of the employer as demands of business require. Regardless of the question as to including or excluding supervisory personnel with the right to "effectively recommend" hiring and firing, a majority of the employees of respondent have designated their choice of the particular bargaining unit. We respectfully submit that, as regards designation of the employer unit for purposes of collective bargaining, the record supports this designation and the respondent has not carried the burden placed on him by this Court of showing an abuse of discretion by this Board.

We further respectfully submit that in drawing the inclusion-exclusion line respecting supervisory personnel, the Board in its certification has been clear and unambiguous. That is, those supervisory employees who have the right to hire or fire—to add to their operating staff if added business would require such action, or to decrease such staff without consultation with any other party—are not to be included within the unit. All other shoe repairmen employed by respondent are within the unit.



We further respectfully submit to this Honorable Court that as regards such supervisory personnel the Board committed no error. The Board is not required, as is the National Labor Relations Board under the Labor-Management Relations Act of 1947, to exclude "any individual employed as a supervisor"; that the Board, if the record so supports it, may properly include in the bargaining unit employees who perform work as other employees, even though incidental to their work they may have a limited supervisory capacity in that they are charged with the continuance of the operations in the absence of a manager, and even though they may enjoy a slight wage differential, and may "effectively recommend" hiring and firing of other employees; that the record supports such inclusion; and that here again the respondent failed to discharge its burden of showing that the Board abused its discretion in establishing such inclusion.

The Board respectfully requests that this Honorable Court issue its order enforcing the order of the Board in this matter.

Respectfully submitted,

CLINTON D. VERNON

*Attorney General*

ALLEN B. SORENSEN

*Assistant Attorney General*

*Attorneys for Petitioner*