have been permanently terminated, and are ineligible to vote, whereas the Petitioner claims that they are in temporary layoff status, and eligible to vote.

Early in September 1957 the Employer laid off about 70 employees because of lack of work. On October 15 the 55 employees in this group who had not yet been recalled were notified by the Employer that it had changed their status from "lay-off due to lack of work" to "terminated due to lack of work." Between October 15 and November 9, the Employer laid off for business reasons about 80 more employees, each of whom was told that he was being terminated. All 135 employees thus terminated were told that their insurance coverage was being terminated and that they should seek other employment. On November 11 six employees on leave of absence were notified by the Employer that, because of business considerations, their status was being changed from "leave of absence" to "terminated." The Employer suggested to them also that they look for other work.

It appears that the 146 employees in issue will be offered work, should additional hiring become necessary, before new employees are hired. However, the testimony at the hearing does not indicate that these employees have a reasonable expectancy of further employment with the Employer in the near future. Upon the entire record, we find that the 146 employees have been permanently terminated and are ineligible to vote in the election directed herein.[9]

[Text of Direction of Election omitted from publication.]

[9] *Brown-Forman Distillers Corporation*, 118 NLRB 454; *National Foundry Company of New York, Inc.*, 112 NLRB 1214; *United States Rubber Company*, 86 NLRB 338.

Retail Associates, Inc., Petitioner *and* Retail Clerks International Association, Locals Nos. 128 and 633, AFL–CIO. *Case No. 8–RM–185. April 11, 1958*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Edward A. Grupp, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

On March 28, 1958, the Board granted the request of Retail Clerks International Association, Locals Nos. 128 and 633, AFL–CIO, hereinafter referred to as the Union, for oral argument. On April 8, 1958, the Board heard oral argument in which Retail Associates, Inc., hereinafter referred to as the Association, and the Union participated.

The Board has considered the entire record, the briefs of the parties, and the oral argument in this case, and—for the reasons specifically indicated in an opinion which shall hereafter be issued—finds:

1. The Association is engaged in commerce within the meaning of the Act.

2. The Union involved claims to represent certain employees of the members of the Association.

3. A question affecting commerce exists concerning the representation of certain employees of the members of the Association within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. We find that the following employees of the members of the Association constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act:

All employees of The Lamson Brothers Company (downtown Toledo and Colony stores), The La Salle & Koch Company (Toledo store), and The Lion Dry Goods Company, Inc. (Toledo store), who regularly work 20 hours or more weekly in the selling and nonselling departments, including all sales clerks, all office employees and all wrappers, cashiers, receiving and stock clerks, receiving reserve stockmen and checkers, receiving openers and platform clerks, telephone operators, sewers, fitters, pressers in ladies alteration, customer service bureau clerks, shoe repairmen, and publicity and display division employees,[1] but excluding "extra" or casual employees, appliance repairmen, elevator repairmen, electrical, refrigeration, heating and air conditioning maintenance men, carpenters, painters, finishers, sign painters, elevator operators, maids, elevator starters, porters, waitresses, kitchen help, dishwashers, bus girls, cooks, butcher helpers, baking workers, furniture drivers, furniture helpers, package drivers, furniture finishers, mechanics, mechanics' helpers, warehousemen, employees in the men's alteration shop, the leased department beauty salon employees,[2] watchmen, guards, confidential employees, the head of publicity and all other supervisors as defined in the Act.[3]

[Text of Direction of Election [4] omitted from publication.]

[1] Contrary to the Union's contention, we find that the publicity and display division employees are not professional employees and have a sufficient community of interest with the other employees to warrant their inclusion in the unit *The Fair Department Store*, 107 NLRB 1499, 1502; *Herpolsheimer Company*, 100 NLRB 1452, 1453, 1454

[2] Contrary to the contention of the Association, we find that the lessee, American Yvette Company, has the primary right of control over the terms and conditions of employment of the leased department beauty salon employees and, in accordance with the Board's usual practice, we shall exclude these employees from the unit. *Duane's Miami-Corporation*, 119 NLRB 1331; *The Sperry and Hutchinson Company*, 117 NLRB 1762, 1763; *The Fair Department Store*, 107 NLRB 1501, 1503

[3] With the exception of the publicity and display division employees and the leased department beauty salon employees, the unit description conforms to the stipulation of the parties

[4] The Board has decided to, and hereby does, overrule the *"Loewenstein* doctrine" (75 NLRB 375) and therefore in this RM proceeding is placing the name of the noncomplying Union on the ballot. Member Bean would adhere to the Board's decision in *Loewenstein* and consequently would not reach the merits in the instant case.

OPINION

May 27, 1958

On April 11, 1958, the Board [1] issued a Decision and Direction of Election in the above-entitled proceeding [2] overruling its *Loewenstein* doctrine,[3] finding appropriate a single unit of certain employees of the members of Retail Associates, Inc., hereinafter referred to as the Association, and directing an election among those employees. However, the Board expressly provided that an opinion in this matter would issue at a later date. That opinion and the facts upon which it is based as follows:

The Association consists of department stores named the LaSalle & Koch Company, the Lamson Brothers Company, and the Lion Dry Goods Company, Inc. For nearly 20 years, the Association has represented these and other employers in labor relations matters. Since 1945, Retail Clerks International Association, Locals Nos. 128 and 633, hereinafter referred to as the Union, as member of a council, has been party to contracts with the Association. The Union has had contracts with the Association since 1955. The last of these contracts expired June 1955.

The Association and the Union commenced informal exploratory negotiations in February 1957 looking towards a new contract. Formal negotiations began in April 1957 and continued until October 31, 1957. On and after November 4, 1957, the Union joined together for negotiating purposes with other labor organizations with whom the Association had a bargaining relationship in what was designated as the Central Labor Union Joint Committee. Negotiations continued on this basis until approximately the middle of November 1957, but the parties were unable to reach an agreement.

On November 15, 1957, the Union announced publicly that it had called a strike against the Association, but would actually picket only one of the member stores. The store selected was Tiedtke's, Division of Kobacher Stores, Inc., which up to that time was a member of the Association. The Union picketed Tiedtke's on November 16, 1957. On the same day, Tiedtke's wrote a letter to the Association resigning its membership as of that date and revoking and withdrawing any authority the Association had to act for it. On November 17, 1957, Tiedtke's entered into a separate bargaining agreement with the Union. The Association replied to Tiedtke's letter on November 22, 1957, accepting its withdrawal and resignation as of November 16, 1957. Meanwhile, on November 20, 1957, the Association filed the instant petition.

---

[1] Member Bean dissented.
[2] 120 NLRB 388.
[3] 75 NLRB 375.

Although not completely free from doubt, the record on balance appears to support the conclusion that during the period after Tiedtke's withdrawal and November 22, 1957, there were some further negotiations between the Association and the Union on the then existing associationwide basis. In any event, on November 22, 1957, the Union announced that in furtherance of its strike against the Association it would commence picketing the LaSalle & Koch Company store the next day. Accordingly, early in the morning of November 23, 1957, the Union began to picket LaSalle & Koch. Later the same day the Union notified the Association by telegram that it no longer wished to bargain with the Association as representative of the department stores in an associationwide unit, but at the same time indicated a willingness and desire to negotiate with the management of each of the stores on an individual basis. The picketing of LaSalle & Koch was still continuing at the time the Decision and Direction of Election herein was issued.

The Association in its petition and at the hearing asserts that only a three-store associationwide unit is appropriate. The Union for its part claims to represent the employees of each individual store but contends that only single store units are appropriate. More specifically, the Union maintains that it had, upon notice to the Association, withdrawn from the existing three-store unit; that consequently its disclaimer of representation as to such unit, alleged as appropriate in the petition, was effective; that its compliance with the Act's filing requirements had lapsed and therefore as a noncomplying union it cannot be placed on the ballot; and that for these reasons the Association's petition for an election should be dismissed. Maintaining the affirmative on a plea of equality and equity, the Union insists that this representation proceeding must turn on the central issue of whether a union under the Act has the same right as an employer to withdraw from a multiemployer bargaining unit and pursue bargaining in separate employer units. We disagree that this broad issue need be reached in the circumstances involved here. Under well known Board precedents and policies of the Act, it is fully sufficient, and we hold, that the Union by its conduct here could not and did not effect a change in the appropriateness of the historical multiemployer bargaining unit, nor effectively remove itself from the processes of the Board election machinery, authorized under Section 9 (c) (1) (B) of the Act, by the simple expedient of a disclaimer of representation. Nor, as will be explicated *infra*, can it prevent an election by deliberately permitting its compliance status to lapse.

1. Reference should be made to certain established Board principles with regard to union disclaimers in a representation matter as involved here. A disclaimer to be effective must be unequivocal and

must have been made in good faith.[4] A union's "bare statement" of disclaimer is not sufficient to establish that it has abandoned its claim to representation, if the surrounding circumstances justify an inference to the contrary.[5] The union's conduct must not be "inconsistent" with its alleged disclaimer.[6]

For many years the Union has represented and bargained for the employees of the association members in an associationwide unit. This same historical bargaining pattern was renewed and reaffirmed in February 1957 when the Union embarked upon the bargaining negotiations with the Association and, indeed, the Union was in the very midst of such multiemployer bargaining in November 1957 when the events took place which it asserts in opposition to this election. Significantly, the Union declared in its strike call of November 15, 1957, that the strike was directed specifically against the Association. Thus, at a time when the Union admittedly was seeking associationwide bargaining, it implemented its objective of obtaining a common contract from all the members of the Association by the "whipsaw" strategy of picketing Tiedtke's and thereby threatening the other employers with future picketing if all of them did not accept the contract terms demanded by the Union. After Tiedtke's signed a separate contract, there is an indication in the record that further negotiations took place between the Union and the Association. There were no negotiations between the Union and any of the Association members on an *individual* employer basis.[7]

On November 20, 1957, the Association filed a petition alleging the propriety of a three member store associationwide unit. On November 22, 1957, the Union stated that it was seeking to bargain on an associationwide basis by saying that it would strike the Association by picketing LaSalle & Koch the next day. The Union's picketing of LaSalle & Koch was initiated manifestly for the purpose of achieving the same objective as its earlier picketing of Tiedtke's. Only later in the day on November 23, 1957, did the Union for the first time declare that it wished to substitute individual member bargaining for associationwide bargaining, but even then its representation claims included, as they do now, exactly the same employees of all the present members of the Association.

None of the Union's conduct prior or subsequent to the filing of the Association's petition—other than its naked statement of a desire to represent them on a different basis—has been in derogation of its

[4] *Mississippi Valley Structural Steel Company*, 115 NLRB 1288, 1289; *Standard Automotive Manufacturing Company*, 109 NLRB 726; *International Brotherhood of Electrical Workers, AFL–CIO and Local 59 etc. (Textite, Inc.)*, 119 NLRB 1792.

[5] *3 Beall Brothers 3 et al.*, 110 NLRB 685, 687; *The Johnson Bros. Furniture Co.*, 97 NLRB 246.

[6] *H. A. Rider & Sons*, 117 NLRB 517, 518; *McAllister Transfer, Inc.*, 105 NLRB 751.

[7] Tiedtke's withdrew as a member of the Association before it negotiated separately with the Union

consistent claim to representation of the employees of all the member stores alleged as appropriate in the petition.[8] The direct causal connection between the filing of the petition by the Association and the Union's asserted change in position is obvious. Premises considered, it is clear that as the Union has not abandoned its original objective of seeking associationwide bargaining and obtaining a contract with the Association, the Union has not renounced in good faith its representation rights in the associationwide unit.[9] Hence, its alleged disclaimer must perforce be regarded as a tactical maneuver designed to avoid a Board finding that the appropriate unit is the associationwide unit and to thwart the holding of an election therein.

The Union's purported withdrawal on November 23 from the existing three-store bargaining unit was patently for the same reason it deliberately went out of compliance with the filing requirements of the Act—to avoid the Board election sought in the Association petition filed on November 20. Up to that point it continued to press its bargaining demands on the multiemployer basis, demonstrating its acquiescence in the three-store bargaining unit. The right of withdrawal by either a union or employer from a multiemployer unit has never been held, for Board purposes, to be free and uninhibited, or exercisable at will or whim. For the Board to tolerate such inconstancy and uncertainty in the scope of collective-bargaining units would be to neglect its function in delineating appropriate units under Section 9, and to ignore the fundamental purpose of the Act of fostering and maintaining stability in bargaining relationships. Necessarily under the Act, multiemployer bargaining units can be accorded the sanction of the Board only insofar as they rest in principle on a relatively stable foundation. While mutual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit, the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit. Thus, the Board has repeatedly held over the years that the intention by a party to withdraw must be unequivocal, and exercised at an appropriate time.[10]

[8] Contrary to the Union's contention in its brief, the resignation of Tiedtke's from the Association and its signing of a separate contract with the Union did not, in the circumstances here, destroy the associationwide bargaining pattern, or affect the propriety of the three-store associationwide unit in which the election is sought. Indeed, as shown herein, subsequent to Tiedtke's withdrawal and separate contract the Union by positive acts displayed its adherence and consent to the associationwide bargaining pattern. Withdrawal of one member of an association has never been held sufficient to preclude a determination of a unit of the remaining employers to be appropriate particularly when, as here, such withdrawal is aquiesced in by all parties, including the Union

[9] See *N. L. R. B.* v *Spalding Avery Lumber Company*, 220 F. 2d 673 (C. A. 8) cited with approval in *N. L. R. B.* v. *Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U. S. 87.

[10] See, e. g., *McAnary & Welter, Inc.*, 115 NLRB 1029; *Jahn-Tyler Printing and Publishing Company*, 112 NLRB 167.

The decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis. The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disrupting effect on multiemployer collective bargaining which would result if such withdrawal were permitted to be lightly made. The attempted withdrawal cannot be accepted as unequivocal and in good faith where, as here, it is obviously employed only as a measure of momentary expedience, or strategy in bargaining, and to avoid a Board election to test the union majority.

When the Supreme Court's decision in the *Buffalo Linen* case [11] is considered, another reason appears for the Board's refusal to accept as valid the Union's attempted disclaimer. In that case the Court held that the nonstruck members of an association did not violate the Act when they temporarily locked out their employees as a defense to the Union's "whipsaw" strike against one of their members. Thus, when the Union involved herein picketed Tiedtke's and particularly any time during the period in which the Union has been picketing La-Salle & Koch, the present association members could have retaliated by shutting down their operations. However, instead of resorting to the remedy of exercising their defensive right to lockout, they elected to pursue the lesser remedy of having the Association file a petition and requesting the Board to hold an election in the associationwide unit. The Union by its alleged disclaimer is seeking to deprive the association members of any of these remedies. Thus, if the Board were to find the Union's disclaimer effective and valid, the Union would then be placed in the enviable position of enjoying the benefits of its "whipsawing."

In these circumstances to give controlling significance to the Union's naked disclaimer and to allow the Union thereby to render moot the question concerning representation in the associationwide unit would be to permit not only a flagrant abuse of the Board's processes, but a subversion of the employers' right, as enunciated in the Supreme Court's *Buffalo Linen* decision, under certain circumstances, to preserve the integrity of associationwide bargaining. For all the reasons given above the associationwide unit is appropriate.

As concerns the issue of the Union's disclaimer and purported withdrawal from the associationwide bargaining unit, we rely exclusively upon the foregoing grounds. However, the Union argues strongly that under the Board's rules it may *never* be given the opportunity to withdraw from multiemployer bargaining although such a right is accorded employers. While, as indicated above, this extreme question

[11] See footnote 9, *supra*.

does not arise in this case, we believe it reasonable to establish in appropriate future cases, where such issues are squarely presented, specific ground rules, resting upon existing principles and policies under the Act, to govern questions of representation in multiemployer bargaining units. Among other things, the timing of an attempted withdrawal from a multiemployer bargaining unit, as Board cases show, is an important lever of control in the sound discretion of the Board to ensure stability of such bargaining relationships. We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances. It is clear that under the ground rules to be promulgated, we would reach the same result as found in the present case.[12]

2. Shortly after the close of the hearing of this case, the Union permitted its compliance with the filing requirements of the Act to lapse and the Board was administratively advised that the Union had no present intention of seeking renewal. The Union contended that application of the Board's *Loewenstein* doctrine required dismissal of the Association petition on the ground that there was no labor organization claiming to be recognized as bargaining representative which was in compliance with the filing requirements of the Act and thus qualified to appear on the ballot, if an election was directed.

In the *Loewenstein* case, the Board held that in these circumstances it was neither as a matter of law authorized to, nor as a matter of policy should it, proceed to an election on an employer's petition. The Board has now concluded that the *Loewenstein* doctrine should be reversed.[13] The reasons therefor will be detailed hereinafter.

The Board in *Loewenstein* construed Section 9 (c) (1) (B) and 9 (f) and (h) of the Act as precluding it from directing an election on an employer's petition where the only union which makes a claim of majority representation is not in compliance.

Section 9 (c) (1) (B) prescribes that a petition filed with the Board by an employer shall allege "that one or more individuals or labor

[12] Member Jenkins considers it inappropriate to express, as his colleagues are doing here, a view with respect to ground rules which, in his opinion, are inapplicable to this case. To do so is to disregard the well-entrenched policy of the courts and this Board of uttering no abstract generalizations unnecessary to a concrete decision.

[13] Other cases applying the "*Loewenstein* doctrine" and which, of course, are also overruled are: *Staten Island Cleaners, Inc.*, 93 NLRB 396; *The Federal Refractories Corporation*, 100 NLRB 257; *Law Tanning Company*, 109 NLRB 268; *Darling and Company*, 116 NLRB 374; *Mine and Mill Supply Company*, 118 NLRB 1536; *Sprouse-Reitz Co., Inc.*, 119 NLRB 644.

organizations have presented to him a claim to be recognized as the representative defined in section 9 (a)."

As originally enacted, and as they appeared when *Loewenstein* was decided, Section 9 (f) and (h) provided, in pertinent part, that:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10 . . . [unless such labor organization shall have complied with the filing requirements of said sections as prescribed therein.] [14]

In interpreting the above subsections, the Board reasoned that: the question concerning representation referred to in Section 9 (f) and (h), although brought to the Board's attention by the employer's own petition under Section 9 (c) (1) (B), is—in the words of Section 9 (f) and (h)—"raised by a labor organization"; the question is raised by the affirmative claim made by the union that it represents a majority of the employees of the employer within an appropriate unit and, absent such claim, the Board would be without jurisdiction to proceed with its investigation under Section 9 (c) (1) (B); although it is the employer's petition in such a case that sets the Board's machinery in motion, it is an individual's or a labor organization's initial claim for recognition that makes it possible for the employer to invoke that machinery; it is therefore the claiming individual or labor organization that raises the question concerning representation, not the employer; as subsections (f) and (h) of Section 9 speak in terms of questions raised, rather than of petitions filed, by unions, the statutory language supports the application of these subsections to proceedings instituted by petitions filed by employers; and, in view of the foregoing, an employer's petition must be dismissed if the union claimant is not in compliance with Section 9 (f) and (h).

Members Jenkins and Fanning, who have not had a previous opportunity to pass upon this question, agree with and adopt Member Rodgers' construction of the language of Section 9 (f) and (h) as expressed by him in his dissent in the *Darling* case.[15] In the opinion of these three members, the Board in *Loewenstein* misinterpreted and misapplied the pertinent statutory language. For, the words of Section 9 (f) and (h) do not refer to employer petitions, but merely prohibit the investigation of questions concerning representation "raised by a labor organization under subsection (c) of this section,"—words

[14] The language "no petition under section 9 (e) (1) shall be entertained" has since been eliminated from Section 9 (f) and (h). Section 9 (e) (1) referred to union petitions for authority to execute union-security agreements.

[15] See footnote 13, *supra*.

which, in their context, have application only to representation petitions filed by unions. Thus, as originally enacted, the words "raised by a labor organization under subsection (c) of this section" in the first clauses of Section 9 (f) and (h) were followed directly by the language:

> No petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10. . . .

The language of these latter clauses clearly refers to procedural steps taken by labor organizations under the Act—that is, the filing with the Board of a union-security authorization petition, or a charge. The direct conjunction of these clauses with the words "raised by a labor organization under subsection (c) of this section," demonstrates that these latter words also refer to a procedural step taken by a labor organization—that is, the filing of a representation petition. In its context, therefore, these members do not think it material that the first clauses of Section 9 (f) and (h) speak of questions raised rather than petitions filed and the emphasis that the Board in *Loewenstein* placed on this fact seems to them to be unwarranted. Accordingly, they find no legal or statutory impediment to placing a union claimant's name on the ballot and directing an election on an employer's petition where the union is not in compliance with the filing requirements of the Act.

With respect to the policy question, the Board in *Loewenstein* held that it should not entertain an employer's petition where recognition is requested by a noncomplying union. The Board reasoned that: a fundamental objective Congress sought to achieve in Section 9 (f) and (h) was to prevent a noncomplying union from being beneficiary of any Board investigation of a question concerning representation by withholding the processes of the Act from such labor organization; if a noncomplying union were placed on the ballot and won the election, the Board would not issue a certification to it, but a victory at the polls—even without a later certification—would confer certain moral and practical advantages on the union which the basic policy of Congress appeared to discountenance; while this conclusion might sometimes result in depriving an employer of information which the Act would permit him to secure if only a complying union was affirmatively claiming representative status, conflicting policy considerations were before the Board; and, the exclusion of a noncomplying union from the ballot in a case where the employer was the petitioner was more nearly consistent with the supervening policy of denying the imprimatur of Government to such a labor organization.

Chairman Leedom and Members Rodgers, Jenkins, and Fanning interpret the recent decision of the Supreme Court in the *Bowman*

case [16] as effectively undermining the policy basis for the *Loewenstein* doctrine.[17] In that case, the Board had issued a Decision and Order [18] finding that the employer had rendered illegal support and assistance to District 50, United Mine Workers of America—a noncomplying union—thereby violating Section 8 (a) (2) of the Act. In accord with the Board's standard remedy, the employer was ordered to cease recognizing District 50 and to withdraw and withhold recognition from it unless and until it shall have been certified by the Board as the exclusive bargaining representative of the employees.

The Supreme Court held that the Board's Order conditioning the future recognition of an assisted noncomplying union on a Board certification constituted an abuse of the Board's discretionary power in that a noncomplying assisted union is not eligible for a Board certification and therefore employees might never have an opportunity to select it as their representative. The Court concluded, however, that the Board did have the power to condition such recognition upon an election not followed by a certification. An election, the Court stated, "would properly reconcile the objectives of eliminating improper employer interference and preserving the employees' full choice of a bargaining representative." It would "achieve the Board's prime objective in these cases, *viz.*, to 'demonstrate that . . . [the assisted union's] right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion.' "

The Board recognizes that this case arose in the posture of Court consideration of appropriate implementation of the Board's remedial powers under Section 10 of the Act and, indeed, that the Court stated that the prohibitions of Section 9 (f), (g), and (h) and the requirement of Section 9 (c) of Board-conducted elections "are concerned not with remedial orders under Section 10 (c), but with questions of representation and unfair labor practices 'raised by a labor organization.' " However, the Board cannot disregard either the language of the Court heretofore referred to or the following statements of the Court which, in the Board's opinion, taken together, render untenable the policy basis for the *Loewenstein* doctrine: "The single objective of § 9 (f), (g), and (h) was 'to stop the use of the Labor Board' by noncomplying unions."; "Nothing in the subsections . . . is a barrier to the conduct by the Board of an election not followed by a certification. . . ."; " 'Subsections (f) (g) and (h) of § 9 merely

[16] *N L R B v District 50, UMW (Bowman Transportation, Inc.)*, 355 U S 453

[17] Chairman Leedom also finds in the Supreme Court's decision very persuasive reasons for agreeing, as he does, with the rejection of the legal basis for the *Loewenstein* doctrine. Member Rodgers considers the decision as constituting confirmation of the views expressed by him in his dissent in the *Darling* case, footnote 13, *supra*, with respect to the policy basis for the *Loewenstein* doctrine

[18] 112 NLRB 387

describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance.' "; and, "Congress did not in § 9 (f), (g), and (h) make the filing required by those subsections compulsory or a condition precedent to the right of a noncomplying union to be recognized as the exclusive representative of the employees."

As the Board reads the entire opinion of the Supreme Court in the *Bowman* case, the Court is clearly indicating that the Board should not concern itself solely and exclusively, as it did in *Loewenstein*, with an objective of Congress to deny the benefits of the Act to a noncomplying union. On the contrary, primary consideration must be given to the rights of the noncomplying union, the employees, and the employer. With regard to the rights of, and advantages to, a noncomplying union the Court points out that they should be restricted solely to the limited extent expressly provided in Section 9 (f), (g), and (h). With respect to the rights of the employees, the Board is very impressed with the vigorous emphasis placed by the Court in *Bowman* upon the fact that the Board, in fashioning its remedy for the unfair labor practices found, must take into account and preserve "the employees' full choice of a bargaining representative." In the Board's opinion, parity of reasoning requires the conclusion that in a *Loewenstein* situation decisive weight should be given to the interests of the employer and the employees in resolving the representative status of a union which is seeking recognition, even though by virtue of its noncompliance the union itself could not directly petition the Board for an election. Accordingly, in a proceeding instituted by an employer's petition,[19] the Board shall henceforth place the name of a noncomplying union claimant on the ballot and direct an election, provided, however, that if the union wins the election and is not in compliance, only the arithmetical results will be certified.

The Board realizes that, as was noted in the *Loewenstein* case, the noncomplying union claimant's victory at the polls may confer upon it certain advantages. However, this is likewise true with respect to the conduct of an election involving the noncomplying assisted union in the *Bowman* case. Moreover, it is the Board's opinion that any benefit which the union may derive from having its status determined in a Board election should be regarded, as the Court appears to have suggested in *Bowman*, as of an incidental character and not contrary to the letter and spirit of Section 9 (f), (g), and (h).

[19] Cf. *Harris Foundry & Machine Company*, 76 NLRB 118, placing the name of a noncomplying union on the ballot in a proceeding instituted by a decertification petition.

Having duly considered the briefs, the record in this case, and having accorded the Union an opportunity for oral argument, and being fully advised of all the problems which are presented by this case, the Board, after due deliberation and consideration of the complexity of the issues involved, and after having had due regard for the rights of the parties and the public involved herein, has come to the conclusions hereinabove set out.

MEMBER BEAN, dissenting:

I would adhere to the long-established rule first enunciated in the *Herman Loewenstein* case and therefore dismiss this petition because the Union named as claiming recognition is not in compliance with the filing requirements of the statute. In my opinion, the statute, read in its entirety, denies to noncomplying unions not only direct benefits from this administrative agency, but also such indirect assistance as would inhere in a majority vote for a union which is denied only the technical formality of a paper certificate.

Atomic Projects & Production Workers, Metal Trades Council, AFL–CIO, and its President, William F. Leverenz, Jr.; and Office Employees International Union, Local No. 251, and its President, Peter J. Cook, *and* New Mexico Building Branch, Associated General Contractors of America. *Case No. 33–CC–16. April 14, 1958*

DECISION AND ORDER

On December 9, 1957, Trial Examiner James R. Hemingway issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices,[1] and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, recommendations, and conclusions of the Trial Examiner.

[1] With the exception of Respondent Peter J Cook, as to whom the Trial Examiner recommended dismissal as there was no evidence of his participation in the events in question.