

In the Matter of THE SHERWIN-WILLIAMS COMPANY and DISTRICT 50,
UNITED MINE WORKERS OF AMERICA

Case No. 13-R-2102.—Decided January 18, 1944

Mr. T. J. McDowell, of Cleveland, Ohio, and *Mr. C. T. MacKinnon*, of Chicago, Ill., for the Company.

Mr. Alfred Kamin, of Washington, D. C., for District 50.

Mr. Walker Butler, of Chicago, Ill., for the Independent.

Mr. Wm. E. Rodriguez, by *Mr. Harold J. Hopkinson*, of Chicago, Ill., for the A. F. of L.

Miss Melvern R. Krelow, of counsel to the Board.

DECISION
AND
DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon petition duly filed by District 50, United Mine Workers of America, herein called District 50, alleging that a question affecting commerce had arisen concerning the representation of employees of The Sherwin-Williams Company, Chicago, Illinois, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Robert R. Rissman, Trial Examiner. Said hearing was held at Chicago, Illinois, on December 1, 1943. The Company, District 50, Independent Paint-Makers Union, herein called the Independent, and Paint-Makers Local No. 1351 of the Brotherhood of Painters, Decorators & Paperhangers of America, A. F. of L., herein called the A. F. of L., appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the hearing, District 50 moved to dismiss the intervention of the A. F. of L., on the ground that the A. F. of L. had not made a sufficient showing to justify its being given a place on the ballot. The Independent moved to dismiss the petition on the ground that no question concerning representation had existed prior to the filing of the petition on October 12, 1943. The Trial Examiner referred the motions to the Board. For reasons hereinafter set forth, the motions are hereby

denied. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded opportunity to file briefs with the Board.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Sherwin-Williams Company is an Ohio corporation licensed to do business in the State of Illinois, where it is engaged in the manufacture of paint, varnishes, chemicals, and allied products. The Company operates 14 plants throughout the United States. This proceeding involves only the Chicago plant. The principal raw materials used by the Company in the operation of the Chicago plant are lead, linseed oil, zinc, and miscellaneous chemical products. During 1943 the Company purchased for use at the Chicago plant raw materials valued in excess of \$1,000,000, of which 95 percent was shipped to the Chicago plant from points outside the State of Illinois. During the same period the total value of the sales of finished products manufactured at the Chicago plant was in excess of \$1,000,000. A substantial portion of the Company's finished products is distributed throughout the United States, and a substantial portion of the finished products is shipped by the Company from the Chicago plant to points outside the State of Illinois. The Company admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

District 50, United Mine Workers of America is a labor organization, admitting to membership employees of the Company.

Independent Paint-Makers Union is an unaffiliated labor organization admitting to membership employees of the Company.

Paint-Makers Local No. 1351 of the Brotherhood of Painters, Decorators & Paperhangers of America is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

On August 14, 1942, following a consent election which the Independent won,¹ the Company and the Independent entered into a collective bargaining contract. The contract recited that it was to continue in effect until December 31, 1943, and from year to year there-

¹ The A. F. of L. and District 50 also participated in this election.

after, subject, however, to the right of either party to terminate the contract after December 31, 1943, by giving to the other party written notice of its intention to terminate by 30 days prior to the date of termination. On October 13, 1943, the Company and the Independent signed a memorandum of agreement to "renew" the contract of August 14, 1942. The agreement further provided that the new contract should embody provisions for a wage increase, a maintenance of membership clause, and increased vacation benefits, and that it should run from September 16, 1943 to September 16, 1944.² Pursuant to such agreement, on October 19, 1943, the Company and the Independent met and executed the new contract, dated as of October 13, 1943, embodying provisions for wage increase, vacation plan, and maintenance of membership, and incorporating by reference all the provisions of the contract of August 14, 1942, except as modified by the new contract.

On October 12, 1943, District 50 filed a petition with the Board.³ On October 14, 1943, the Company was notified by the Regional Director that the petition had been filed. The Company has not at any time since October 12, 1943, granted recognition to District 50 as bargaining agent of any of the Company's employees.

The Company and the Independent contend that the contract of October 13, 1943, which superseded the contract of August 14, 1942, constitutes a bar to a determination of representatives. We are of the opinion, however, that the premature extension of a contract of reasonable duration for another like period should not operate as a bar to a claim of representation made prior to the expiration date of the extended contract. As we have previously stated in the *Matter of Memphis Furniture Mfg. Co.*:⁴

Were we to hold that the parties to a collective bargaining agreement . . . could forestall a petition for investigation and certification of representatives by entering into a supplemental agreement modifying the contract in advance of the date fixed therein for reopening negotiations, the right of the employees to seek a change of representatives after the lapse of a reasonable time might be defeated. So to hold would require of employees, desiring to change representatives, acceleration of organization

² This memorandum of agreement also provided that "Until completion of the typing of the new contract, this memorandum, together with the old contract, and supplements thereto shall serve as our agreement."

³ The record indicates that continuously since June 1942, the date of the consent election hereinabove referred to, District 50 has held at least one meeting each month, and since June 1943, at least two meetings each month, among the employees at the Chicago plant, and regularly each month distributed at the employees' gate handbills, leaflets, and bulletins among such employees. It was thus generally known at the plant that District 50 was actively engaged in maintaining its membership and organizing the employees.

⁴ 51 N. L. R. B. 1447.

activities so that they would be ready to assert a claim of majority representation at any time the contracting parties might elect to discuss modification of the existing agreement, thus leading to dissatisfaction or unrest under the existing agreement instead of stabilized labor relations.

In accordance with the foregoing principle, we find that to hold the agreement of October 13 a bar would operate unreasonably to prevent the exercise of the right of the employees to select a new bargaining representative, if they so desire. Since the August 14, 1942, contract was superseded by the agreement of October 13, 1943, and since the latter contract cannot operate to prevent the selection of a new bargaining representative under the principle set forth above, we find that the contract of October 13, 1943, does not constitute a bar to a present determination of representatives.

Statements of the Regional Director and the Trial Examiner introduced into evidence at the hearing, indicate that District 50 represents a substantial number of employees in the unit hereinafter found appropriate.⁵

We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

With the exception of the inclusion in or exclusion from the unit of group leaders, the parties agreed that the appropriate unit should consist of all hourly paid production and maintenance employees, including hourly paid laboratory employees, but excluding supervisory employees, foremen, assistant foremen, watchmen, uniformed guards, salaried clerical employees, time-study employees, cooperative students, and employees covered by written or oral collective bargaining agreements with the United Brotherhood of Carpenters and Joiners of America, the International Association of Machinists,

⁵ The Regional Director reported that District 50 presented 647 designations, all bearing apparently genuine signatures. Of the 647 designations, 512 bear the names of persons whose names appear on the Company's pay roll of October 18, 1943; 382 are dated between January 1942 and October 1943; 130 are undated. The Company's pay roll contains the names of 1,388 persons in the unit.

At the hearing, District 50 submitted to the Trial Examiner 73 additional cards, all bearing apparently genuine signatures. The Trial Examiner reported 15 cards were duplicates of those previously presented to the Regional Director, and 9 bore the names of persons not on the pay roll. Forty-nine cards bear the names of persons whose names appear on the Company's pay roll, 34 dated in October and November 1943, 15 undated.

The Regional Director further reported that the A. F. of L. presented 147 cards, all bearing apparently genuine signatures. Of the 147 cards submitted, 84 bear the names of persons whose names appear on the Company's pay roll, and were dated between August and November 1943. We shall accord the A. F. of L. a place on the ballot.

The Independent relies upon its contract of October 13, 1943, to establish its interest.

the International Union of Operating Engineers, the Steamfitters Protective Association, the International Brotherhood of Electrical Workers, the Asbestos Workers Union, and the Bricklayers and Stone Masons Union. With respect to the group leaders, District 50 seeks their exclusion on the ground that they are supervisory employees, whereas, the Company and the Independent maintain that they are not supervisory employees and desire their inclusion.⁶ The A. F. of L. takes no position.

The Company employs approximately 40 group leaders at the Chicago plant. They are responsible to line foremen or assistant foremen whose instructions they relay to the respective groups of employees with whom they work, such groups consisting of a minimum of 3 and a maximum of 18 persons. The group leaders perform the same type of work as that of the other members of their crews. They are hourly paid employees, whereas the foremen and assistant foremen are paid on a salary basis.⁷ They have no authority to recommend hire or discharge, nor do they have any authority to discipline any of the persons with whom they work. We conclude that the group leaders are not supervisory employees, and we shall include them in the unit.

We find that all hourly paid production and maintenance employees, including hourly paid laboratory employees, and group leaders, but excluding watchmen, uniformed guards, salaried clerical employees, time-study employees, cooperative students, foremen, assistant foremen, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, and employees covered by written or oral collective bargaining agreements with the United Brotherhood of Carpenters and Joiners of America, the International Association of Machinists, the International Union of Operating Engineers, the Steamfitters Protective Association, the International Brotherhood of Electrical Workers, the Asbestos Workers Union, and the Bricklayers and Stone Masons Union, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. THE DETERMINATION OF REPRESENTATIVES

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of the Direction of Election

⁶ Group leaders are covered by the Independent's contract.

⁷ With the exception of six foremen, who are hourly paid.

herein, subject to the limitations and additions set forth in the Direction.⁸

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 3, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with The Sherwin-Williams Company, Chicago, Illinois, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Thirteenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, to determine whether they desire to be represented by District 50, United Mine Workers of America, Local No. 12268, or by Independent Paint-Makers Union, or by Paint-Makers Local No. 1351 of the Brotherhood of Painters, Decorators & Paperhangers of America, A. F. of L., for the purposes of collective bargaining, or by none.

⁸ District 50 requested that if the Board directs an election herein its name appear on the ballot as "District 50, United Mine Workers of America, Local No. 12268." The request is hereby granted.