

In the Matter of BASIC REFRACTORIES, INCORPORATED and INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS, FOR ITSELF AND ON BEHALF OF ITS LOCAL UNION No. 641, C. I. O.

Case No. 20-R-885.—Decided March 10, 1944

Thatcher & Woodburn, by Mr. William J. Forman, of Reno, Nev., for the Company.

Mr. Willard Y. Morris, of Denver, Colo., and Messrs. C. L. Pegues, Einar Berg, and A. E. Anz, of Gabbs, Nev., for the Smelter Workers.

Mr. Morley Griswold, of Reno, Nev., for the AFL.

Mr. Robert Silagi, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTIONS

STATEMENT OF THE CASE

Upon a petition duly filed by International Union of Mine, Mill & Smelter Workers, for itself and on behalf of its Local Union No. 641, C. I. O., herein called the Smelter Workers,¹ alleging that a question affecting commerce had arisen concerning the representation of employees of Basic Refractories, Incorporated, Gabbs, Nevada, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Earl S. Bellman, Trial Examiner. Said hearing was held at Reno, Nevada, on September 30, October 1 and 2, 1943. The Company, the Smelter Workers, American Federation of Labor, herein called the AFL, International Union of Hod Carriers, Building and Common Laborers Union, herein called the Laborers, International Union of Operating Engineers, herein called the Engineers, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, herein called the Teamsters, United Brotherhood of Carpenters and Joiners of America, Local 632, herein called the Carpenters, and Culinary Workers, Local 416, herein called the Culinary Workers, the latter six organizations being herein collectively referred to as the AFL,² appeared and participated. All parties

¹ The petition was amended at the hearing to conform the name of the petitioner to that set out above.

² A motion to intervene was made "for and on behalf of each, all and every union, local or international, and all departments thereof, affiliated with and a part of the American Federation of Labor." Intervention was restricted to those unions which specifically moved to intervene and showed an interest in the proceedings

were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the hearing, the AFL filed a motion to dismiss the petition. The Trial Examiner reserved ruling on said motion for the Board. For the reasons stated in Section III, *infra*, the motion is hereby denied. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded an 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

Basic Refractories, Incorporated, is an Ohio corporation with its principal office in Cleveland, Ohio. At Gabbs, Nevada, the Company is engaged in the mining and crushing of brucite ore, all of which is shipped to Maple Grove, Ohio. During the year 1942, approximately 60,000 tons of brucite ore, valued at about \$400,000, were shipped from the mining operations in Nevada to Maple Grove, Ohio.

The Company concedes that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

International Union of Mine, Mill & Smelter Workers, and Local Union No. 641 thereof, affiliated with the Congress of Industrial Organizations, are labor organizations admitting to membership employees of the Company.

International Union of Hod Carriers, Building and Common Laborers Union, International Union of Operating Engineers, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, United Brotherhood of Carpenters and Joiners of America, and Culinary Workers, Local 416, are labor organizations affiliated with the American Federation of Labor and admit to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

During the latter part of 1941 the AFL initiated an organizing campaign in the territory where the Company's property is located. Joint meetings between representatives of the Engineers, Laborers, and Teamsters,³ and the Company were held which culminated in a contract dated January 15, 1942. Said contract is a single instrument

³ There is some evidence that a representative of the Carpenters participated in some of the meetings.

but signed by all three named unions. The contract provides that it “. . . shall continue in full force and effect during the period of the national emergency . . . and/or a period of 2 years . . . whichever is the longer . . .” The contract further provides that after the initial term of the contract has expired it shall be automatically renewed from year to year unless 30 days’ written notice is given by either party prior to the anniversary date. It also provides for periodic renegotiations of the wage scales which were made a part of the contract. Pursuant to this clause, the parties signed a supplemental agreement on November 7, 1942, which increased some of the wage scales and added some new classifications thereto. It is this contract and its supplement which the AFL contends is a bar to a present determination of representatives. We do not agree. The agreement of January 15, 1942, is clearly for an indefinite term and has already run for 2 years. We, therefore, hold that it does not constitute a bar to an election herein.⁴

The AFL also makes the contention that the current Appropriation Act⁵ deprives the Board of jurisdiction to proceed in this matter in view of the existing contract. Since the provision of the statute referred to has no application to a representation proceeding but rather to a “complaint case,” we find no merit in this contention.⁶

On May 17, 1943, the Smelter Workers informed the Company that it represented a majority of the Company’s production and maintenance employes and requested recognition as the collective bargaining representative on their behalf. The Company did not reply to the Smelter Workers’ request and on July 3, 1943, that union filed its petition herein.

A statement of a Board agent, introduced into evidence at the hearing, indicates that the Smelter Workers represents a substantial number of employees in the unit which it claims to be appropriate.⁷

⁴ See *Matter of Los Angeles Shipbuilding and Dry Dock Company*, 40 N L R B 1150. Also *Matter of The Trailer Company of America*, 51 N L R B 1106.

⁵ *Labor-Federal Security Appropriation Act, 1944* 57 Stat 494

⁶ An amendment to the Appropriation Act provides: “No part of the funds appropriated in this title shall be used in any way in connection with a *complaint* case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed . . .” [Italics supplied]

⁷ The Field Examiner reported that the Smelter Workers submitted 16 application-for-membership cards, all of which bore apparently genuine original signatures; that the names of 11 persons appearing on the cards were listed on the Company’s pay roll of July 15, 1943, which contained the names of 30 employees in the appropriate unit, and that all the cards were dated in 1943

At the hearing the Carpenters and the Culinary Workers each presented to the Trial Examiner notarized statements over the signatures of officials thereof, setting forth the names of members in good standing who were employed by the Company. A check of the names on the statements against the Company’s July 15, 1943, pay roll revealed that all three names submitted by the Carpenters appeared on said pay roll, which contained the names of three employees within the unit it alleged to be appropriate. The one name submitted by the Culinary Workers was found on the pay roll which contained four names in the unit claimed appropriate.

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 UNITS; THE DETERMINATION OF REPRESENTATIVES

The Smelter Workers petitions for a unit comprising all production and maintenance employees of the Company at its mine in Gabbs, Nevada, excluding all supervisory, clerical, technical, and professional employees. The AFL contends for five separate units coextensive with the jurisdiction of its affiliates;⁸ however, it agrees to the exclusions above listed. The Company adopts a neutral attitude on the subject, making no objection to any inclusion or exclusion.

The Company's operations consist of removing the overburden and waste which covers the ore beds,⁹ extracting the brucite ore from a large open pit mine by the use of power shovels and trucks, and crushing the ore to a minus 4-inch size at the mill. These operations are integrated and continuous and the functions of the small number of employees are interdependent. The employees taking part in the actual mining operations are those claimed by the Engineers, Teamsters, and Laborers, while the employees sought by the Carpenters repair buildings about the property. The employees whom the Culinary Workers alleges to be a separate appropriate unit perform their work in the kitchen, dining room, and dormitory.

As stated above, the Engineers, Laborers, and Teamsters signed a union-shop agreement with the Company in January 1942. While they are the only labor organizations signatory to the contract, the recognition clause thereof reads as follows:

That the Company hereby recognizes the Local and International Unions, Federations thereof, and Building and Construction Trades Council signatory hereto and the Local Unions affiliated with the American Federation of Labor not signatory hereto but the members of which may from time to time be called upon to render services to the Company as the sole and exclusive collective bargaining representatives of all persons rendering service to the Company under the terms of this Agreement . . .

⁸ The AFL affiliates seek separate units embracing the following pay-roll classifications:

- (a) *Engineers*—shovel operator, crusher feeder, crusher oiler, crusher oiler sorter, diamond driller, diamond driller helper, oiler, and mechanic.
- (b) *Teamsters*—truck driver and water truck driver.
- (c) *Laborers*—sampler, sorter, laborer, miner, jack hammerman, carpenter helper, and powderman.
- (d) *Carpenters*—carpenters.
- (e) *Culinary Workers*—cook, dishwasher, waiter, and bull cook, or janitor.

⁹ This work is now largely done by an independent contractor. None of the parties contends that the employees of the contractor should be included in the unit.

Wage scales appear under three headings: "Engineers," "Laborers," and "Teamsters," but all other provisions of the contract including matters such as hours, overtime, grievances, and arbitration, are set out generally for all employees. The contract contains no other provisions or recitals which indicate whether the parties intended, on the one hand, to set up a single industrial unit of the Company's production and maintenance employees or, on the other hand, several craft units to be represented severally by the participating unions. In all events it is clear that the Carpenters and the Culinary Workers took no significant part in the negotiation of this contract or the amendatory agreement.

The contract and the grievance procedure, above described, may not be inconsistent with industrial bargaining, but again, it does not negate the unit contentions of the A. F. of L. unions. As in the *Basic Magnesium* case,¹⁰ issued today, we are of the opinion that the history of bargaining presents conflicting elements with respect to the question of the appropriate unit. In this situation, with regard to the conflicting contentions of the parties and inconclusive bargaining history, we shall permit the scope of the bargaining unit or units to be determined, in part, by the desires of the employees themselves to be ascertained by means of separate elections.

Each of the unions involved herein has submitted sufficient evidence by way of membership cards or participation in a collective bargaining contract to warrant placing them on the ballots in the elections which we shall direct. We are of the opinion that the employees in the units proposed by the A. F. of L. unions, with certain exclusions which we shall specify below, may appropriately constitute separate bargaining units or be merged in the industrial unit requested by the Smelter Workers. We shall consider then the composition of the voting groups.

The Engineers seeks a unit consisting of shovel operators, crusher feeders, crusher oilers, crusher oiler sorters, diamond drillers, diamond driller helpers, oilers, and mechanics. None of the parties objects to the inclusion of the employee categories sought by the Engineers and we shall direct an election in this group.

The Teamsters seeks a unit consisting of truck drivers and water truck drivers. The occupations are those traditionally embraced in such a unit and we shall direct the conduct of an election among the employees in this group.

The Laborers seeks a unit consisting of samplers, sorters, laborers, miners or jackhammer men, carpenter helpers, and powderman. Testimony at the hearing indicated clearly that powdermen in this operation are supervisory employees with authority to hire and discharge.

¹⁰ See *Matter of Basic Magnesium, Incorporated*, 20-R-884, 55 N. L. R. B. 380.

In accordance with the well-settled policy of the Board, we shall exclude powdermen from the laborers' voting group.

The Carpenters seeks a unit composed only of carpenters. Of course this is a craft grouping, and we shall direct an election among such employees.

The Culinary Workers seeks a unit consisting of the cook, the dishwasher, the waiter, and the bull cook. The bull cook is a term applied in the industry to the janitor who keeps the kitchen and dining room clean. Although not under the supervision of the cook, his working conditions and associations argue for his inclusion in this group. Since it appears that the recommendations of the cook may effectively change the status of the dishwasher or of the waiter, we shall exclude the cook from the voting group in the cookhouse.

As the parties agree, we shall exclude from all voting groups all supervisory, clerical, technical and professional employees. The A. F. of L. unions would include in the units they seek all foremen who work with the tools of their trade. Since the foremen classifications discussed in the record have authority effectively to recommend changes in the status of employees, we shall exclude foremen from the voting groups together with 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.

Upon the basis of the entire record and in conformance with the foregoing conclusions, we shall order the conduct of elections among the employees of the Company within each of the groups listed below, excluding from each group clerical employees, technical employees, professional employees, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

Group 1. All employees performing the work of shovel operator, crusher feeder, crusher oiler, crusher oiler sorter, diamond driller, diamond driller helper, oiler, and mechanic, to determine whether they desire to be represented by the Smelter Workers or by the Engineers for the purposes of collective bargaining, or by neither;

Group 2. All employees performing the work of truck driver and water truck driver, to determine whether they desire to be represented by the Smelter Workers or by the Teamsters for the purposes of collective bargaining, or by neither;

Group 3. All employees performing the work of sampler, sorter, laborer, miner or jackhammer man, and carpenter helper, but excluding powdermen, to determine whether they desire to be represented by the Smelter Workers or by the Laborers for the purposes of collective bargaining, or by neither;

Group 4. All employees performing the work of carpenter, to determine whether they desire to be represented by the Smelter Workers

or by the Carpenters for the purposes of collective bargaining, or by neither;

Group 5. The dishwasher, the waiter, and the bull cook, but excluding the cook, to determine whether they desire to be represented by the Smelter Workers or by the Culinary Workers for the purposes of collective bargaining, or by neither.

We will make no final determination of the appropriate unit or units pending the results of the elections.

Those eligible to vote in the elections which we shall direct shall be the employees of the Company described in the voting groups above who were employed during the pay-roll period immediately preceding the date of the Direction of Elections herein, subject to the limitations and additions set forth therein.¹¹

DIRECTION OF ELECTIONS

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 Basic Refractories, Incorporated, Gabbs, Nevada, elections 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 Twentieth 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 voting groups below, 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 any who have since quit or been discharged for cause, and have not been rehired or reinstated prior to the date of the election, and excluding further all clerical, technical, and professional employees, as well as all supervisory employees with authority to hire, promote, discharge, discipline, or

¹¹The American Federation of Labor does not desire to participate in elections in the above groups and consequently will not appear on the ballots. The several A F of L unions desire to appear on the ballots as in the Direction. The Smelter Workers desired to appear on the ballot as "for itself, and on behalf of its Local Union No. 641, CIO." We stated in a recent case involving a similar request, that such designation appeared ambiguous, and accordingly placed only the Local on the ballot. See *Matter of Phelps Dodge Corporation, Copper Queen Branch, Mines Division*, 54 N. L. R. B. 1293.

otherwise effect changes in the status of employees, or effectively recommend such action:

Group 1. All employees performing the work of shovel operator, crusher feeder, crusher oiler, crusher oiler sorter, diamond driller, diamond driller helper, oiler, and mechanic, to determine whether they desire to be represented by International Union of Mine, Mill & Smelter Workers, Local Union No. 641, CIO, or by Operating Engineers, Local 12, A. F. of L., for the purposes of collective bargaining, or by neither;

Group 2. All employees performing the work of truck driver and water truck driver, to determine whether they desire to be represented by International Union of Mine, Mill & Smelter Workers, Local Union No. 641, CIO, or by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 523, A. F. of L., for the purposes of collective bargaining, or by neither;

Group 3. All employees performing the work of sampler, sorter, laborer, miner or jackhammer man, and carpenter helper, but excluding powdermen, to determine whether they desire to be represented by International Union of Mine, Mill & Smelter Workers, Local Union No. 641, CIO, or by General Open Pit, Quarry and Mill Workers Union, Local 313, A. F. of L., for the purposes of collective bargaining, or by neither;

Group 4. All employees performing the work of carpenter, to determine whether they desire to be represented by International Union of Mine, Mill & Smelter Workers, Local Union No. 641, CIO, or by United Brotherhood of Carpenters and Joiners of America, Local 632, A. F. of L., for the purposes of collective bargaining, or by neither;

Group 5. Dishwashers, waiters, and bull cooks, but excluding the cook, to determine whether they desire to be represented by International Union of Mine, Mill & Smelter Workers, Local Union No. 641, CIO, or by Culinary Workers, Local 416, A. F. of L., for the purposes of collective bargaining, or by neither.