

In the Matter of O. U. HOFMANN, O. F. HOFMANN, AND PHILLIP HOFMANN, INDIVIDUALLY AND AS CO-PARTNERS TRADING AS O. U. HOFMANN & SONS *and* UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, C. I. O.

Case No. 4-C-1375.—Decided March 23, 1944

DECISION
AND
ORDER

On December 30, 1943, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondents had engaged in and were engaging in certain unfair labor practices affecting commerce, 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. Pursuant to notice, oral argument, in which the respondents and the Union participated, was held before the Board in Washington, D. C., on March 2, 1944.

The Board has considered the rulings of the Trial Examiner, and finds that no prejudicial error was committed. The rulings, with one exception noted below, are hereby affirmed. The Board has considered the Intermediate Report, the respondents' exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following exception:

The Trial Examiner found that the Regional Director's determination that Edward Hofmann was ineligible to vote, the sole contested issue in this case, was final and binding and not subject to review; and he accordingly excluded all evidence offered by the respondents as to the basis for the Regional Director's determination. The respondents then offered to prove that the Regional Director's determination was based on the admitted fact that Edward Hofmann, the challenged voter, was the son of O. U. Hofmann, one of the individual co-partners, from which fact the Regional Director concluded that Edward Hofmann was not an employee within the meaning of Section 2 (3) of the

Act.¹ We accept the offer of proof in lieu of evidence, and find that no prejudicial error was committed by the Trial Examiner.

The respondents contend that the Regional Director's conclusion was erroneous on the ground that Edward Hofmann was an employee, not of his parent, but of the co-partnership, because under the applicable local law a co-partnership is a legal entity separate and distinct from the individual co-partners. As we held in *Matter of Blount, et al.*,² in seeking to apply the policy and provisions of the Act to each case we are not bound by common law or local statutory conceptions, although we take such matters into consideration. We find that O. U. Hofmann, O. F. Hofmann, and Phillip Hofmann are employers within the meaning of Section 2 (2) of the Act; that Edward Hofmann, the son of employer O. U. Hofmann, is not an employee within the meaning of Section 2 (3) of the Act; and that the Regional Director's determination was not incorrect as a matter of law.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, O. U. Hofmann, O. F. Hofmann, and Phillip Hofmann, individually and as co-partners trading as O. U. Hofmann & Sons, Philadelphia, Pennsylvania, and their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Electrical, Radio & Machine Workers of America, C. I. O., as the exclusive representative of all their production and maintenance employees, excluding superintendents, foremen, supervisory employees, and office and clerical employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Electrical, Radio & Machine Workers of America, C. I. O., as the exclusive rep-

¹ Section 2 (3) of the Act provides in part that the term "employee" shall not include any individual "employed by his parent."

² 37 N. L. R. B. 662, enfd 131 F. (2d) 585 (C. C. A. 8), cert. den., 318 U. S. 791.

representative of all their production and maintenance employees, excluding superintendents, foremen, supervisory employees, and office and clerical employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout their plant in Philadelphia, Pennsylvania, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to their employees stating: (1) that the respondents will not engage in the conduct from which they are ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondents will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Fourth Region in writing, within ten (10) days from the date of this Order, what steps the respondents have taken to comply herewith.

INTERMEDIATE REPORT

Mr. Eugene M Purver, for the Board.

Mr. Lloyd J. Schumacker, for the respondents.

Mr. Max Helfand, for the Union.

STATEMENT OF THE CASE

Upon a second amended charge duly filed on December 4, 1943, by United Electrical, Radio & Machine Workers of America, CIO, herein called the Union, the National Labor Relations Board, by its Regional Director for the Fourth Region (Philadelphia, Pennsylvania), issued its complaint, dated December 4, 1943, against O. U. Hofmann, O. F. Hofmann, and Phillip Hofmann, individually and as co-partners, trading as O. U. Hofmann & Sons, herein called the respondents, alleging that the respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing were duly served upon the respondents and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the respondents on or about August 13, 1943, and thereafter, refused to bargain collectively with the Union as the exclusive representative of their employees within an appropriate bargaining unit, although the Union represented a majority of the employees in said unit, thereby interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act.

The respondents filed their answer, dated December 13, 1943, which in substance admitted that the unit agreed upon was appropriate and that the respondents refused to bargain with the Union, but denied that they had thereby committed unfair labor practices for the averred reason that the Union did not represent a majority of the employees.

Pursuant to notice, a hearing was held on December 16, 1943, at Philadelphia, Pennsylvania, before David Karasick, the undersigned Trial Examiner duly

designated by the Chief Trial Examiner. The Board and the respondents were represented by counsel, and the Union by its representative. All parties participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties.

At the close of the hearing, counsel for the Board moved to conform the complaint to the proof with respect to formal matters. A similar motion was made by counsel for the respondents with respect to the answer. Both motions were granted without objection. Counsel for the Board and for the respondents presented oral argument before the undersigned at the close of the hearing. The parties were given opportunity to file briefs with the undersigned. No briefs have been received.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

O. U. Hofmann and his two sons, O. F. and Phillip Hofmann, are co-partners, doing business under the name of O. U. Hofmann & Sons. The respondent partners maintain a single manufacturing plant and place of business at Philadelphia, Pennsylvania, where they are engaged in the manufacture and sale of welded steel products and general machine work. For the period of approximately one year, the respondents have purchased raw materials valued at about \$50,000, approximately 20 percent of which was shipped to the respondents' plant from places located outside Pennsylvania. During the same period of time, the respondents sold finished products valued in excess of \$100,000, approximately 50 percent of which was shipped from the plant of the respondents to places located outside Pennsylvania. For the purposes of this proceeding, the respondents concede that they are engaged in commerce within the meaning of the Act.¹

II. THE ORGANIZATION INVOLVED

United Electrical, Radio & Machine Workers of America, affiliated with the Congress of Industrial Organizations, is a labor organization which admits to membership employees of the respondents.

III. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain collectively; interference, restraint, and coercion*

1. Background

The Union began organization of the respondents' employees in June 1943, and on July 9 filed a Petition for Investigation and Certification of Representatives with the Regional Office of the Board in Philadelphia.² On August 5, 1943, the respondents and the Union entered into a consent election agreement, and pursuant thereto an election was conducted under the supervision of the Regional Director on August 10, 1943. Of 45 ballots cast, 1 ballot was challenged by the Union, 1 ballot was void, 22 ballots were cast for and 21 ballots against the

¹ The foregoing facts and figures are derived from a stipulation entered into between the parties at the commencement of the hearing.

² Case No. 4-R-1190.

Union. On August 12, an informal hearing was held by the Regional Director for the purpose of investigating the facts with respect to the challenged ballot. As a result of the hearing so held, the Regional Director informed the parties that he sustained the challenge and ruled that the voter was ineligible to participate in the election. His "Report on Consent Election," noting the fact that he had sustained the challenge and designating the Union as the exclusive bargaining representative of the employees in the agreed unit, was issued on August 16, 1943.

On August 20, 1943, the respondents filed with the Regional Office "Objections To Report on Consent Election," wherein they stated in substance that the Regional Director had erred in sustaining the challenge with respect to the one challenged ballot, and had erred in finding that the Union had been selected by a majority and was therefore the exclusive bargaining representative of the employees in the agreed unit. On August 23, the Regional Director, by letter, informed counsel for the respondents that after due consideration the objections to the "Report on Consent Election," were overruled, citing, in support of his action, Sections III, VIII, and IX of the consent election agreement.³

2. The appropriate unit

The consent election agreement, to which the respondents were parties, provided that all production and maintenance employees, excluding superintendents, foremen, supervisory employees, and office and clerical employees, constitute an appropriate bargaining unit. The respondents admit in their answer and conceded at the hearing, that the unit so agreed upon is appropriate.

In accordance with the consent election agreement, the undersigned finds that all production and maintenance employees, excluding superintendents, foremen, supervisory employees, and office and clerical employees, at all times material herein constituted and that they now constitute a unit appropriate for the pur-

³ The sections of the consent election agreement to which reference was so made provide as follows:

III Procedure

Said election shall be held in accordance with the Act, the Rules and Regulations and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question (including questions as to the eligibility of voters) raised by either party hereto relating in any manner to the election and not specifically covered in this Agreement.

VIII. Objections

Objections to the conduct of the ballot or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five (5) days after the closing of the polls and copies of such Objections must be served upon the other party. If Objections are duly filed, the Regional Director shall promptly investigate the matters contained in such Objections.

IX. Election Report

The Regional Director shall, upon the completion of his investigation of the Objections, if any, or otherwise upon the expiration of the period within which Objections may be filed, issue a Report on Consent Election. Such Report shall contain a tally of the results of the ballot and the Regional Director's rulings, if any, on challenged ballots and Objections. If Objections are sustained, the Regional Director may in his Report include an Order voiding the results of the election and in that event shall be empowered to conduct a new election under the terms and provisions of this Agreement at a date, time, and place to be determined by him. If Objections are overruled or if none have been filed, the Regional Director shall, in his Report, include a finding and determination as to whether the employees in the Unit have selected the Union as their bargaining representative.

poses of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment, and that said unit insures to employees of the respondents the full benefit of their right to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

3. Representation by the Union of a majority in the appropriate unit

The Regional Director, in his "Report on Consent Election," found that the Union had been designated and selected by a majority of the employees in the agreed unit as the exclusive bargaining representative. In arriving at this finding, the Regional Director ruled that the one voter whose ballot was challenged was not eligible to participate in the election. The final tally thus showed that, of the 43 valid ballots cast, 22 votes were cast for and 21 votes against the Union.

The respondent contends that the Regional Director erred in finding that the one person whose ballot was challenged was ineligible to vote. For the reasons stated hereafter, the undersigned finds this contention to be without merit.

The undersigned finds that on and at all times since August 10, 1943, the Union has been the bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that by virtue of Section 9 (a) of the Act, the Union has been at all times since August 10, 1943, and is now, the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

4. The refusal to bargain

On August 12 and again on September 13, the Union wrote to the respondents, requesting that the parties meet for the purpose of negotiating a collective bargaining agreement, and on the latter date enclosed a copy of a proposed contract. Counsel for the respondents conceded at the hearing that the respondents failed to reply to either of these requests by the Union to bargain.

5. Concluding findings

As noted above, the respondents raise no question as to the appropriateness of the unit, and admit that they have refused to bargain with the Union. They contend, however, that the Regional Director erred in ruling that the one person whose ballot was challenged was ineligible to vote, that the Union therefore did not represent a majority of the employees in the unit,⁴ and that the action of the respondents in refusing to bargain with the Union under such circumstances has not been in violation of the Act. In support of their position, the respondents sought to introduce evidence which they contended would show that the Regional Director had ruled erroneously with respect to the one challenged ballot. Upon objection, the undersigned excluded such evidence.⁵ The undersigned finds

⁴ As noted above, the Union won the election by one vote after the one ballot challenged had been ruled invalid by the Regional Director. Counsel for the respondents admitted at the hearing that the respondents did not know whether the challenged ballot had been cast for or against the Union.

⁵ The respondents cited the Board's decision in *Matter of the Monte Glove Company, Inc.*, 17 N. L. R. B. 405, as authority for their position that they were entitled to review the findings of the Regional Director made pursuant to the consent election agreement in Case No. 4-R-1190. The case so cited is not in point, however, since the consent election agreement there involved provided only that disputes "concerning the eligibility of a particular employee, and challenged ballots, shall be determined by the Regional Director," and did not, as in the consent election agreement here involved, provide that any such determination should be "final and binding."

that the Regional Director's determination with respect to the challenged ballot in this case is final and binding upon the parties, as expressly provided in the consent election agreement,⁶ and is not subject to review.

Accordingly, the undersigned finds that the respondents, on or about August 16, 1943,⁷ and at all times thereafter, have refused to bargain collectively with the Union as the exclusive representative of their employees in the unit hereinbefore found appropriate, and have thereby interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondents set forth in Section III above, occurring in connection with the operations of the respondents described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V THE REMEDY

Since it has been found that the respondents have engaged in unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that the respondents refused to bargain collectively with the Union as the exclusive representative of their employees in an appropriate unit, it will be recommended that the respondents, upon request, bargain collectively with the Union.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. United Electrical, Radio & Machine Workers of America, CIO, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All production and maintenance employees of the respondents, excluding superintendents, foremen, supervisory employees, and office and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. United Electrical, Radio & Machine Workers of America, CIO, was on August 10, 1943, and at all times thereafter has been, the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with United Electrical, Radio & Machine Workers of America, CIO, as the exclusive representative of their employees in an appropriate unit, the respondents have engaged in and are engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act

5. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondents have en-

⁶ See footnote 3, *supra*.

⁷ Although the record indicates that the parties were orally informed of the Regional Director's determination on August 12 and the Union requested the respondents to bargain in a letter sent to them on August 13, the "Report on Consent Election," which found that the Union had been designated by a majority of the employees, was not issued until August 16. Cf. *H. G. Hill Stores, Inc.*, 49 N. L. R. B. 194.

gaged in and are engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6 The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondents, O U Hofmann, O. F. Hofmann, and Phillip Hofmann, individually and as co-partners, trading as O. U. Hofmann & Sons, Philadelphia, Pennsylvania, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Electrical, Radio & Machine Workers of America, CIO, as the exclusive representative of all production and maintenance employees of the respondents, excluding superintendents, foremen, supervisory employees, and office and clerical employees;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing their employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2 Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with United Electrical, Radio & Machine Workers of America, CIO, as the exclusive representative of all production and maintenance employees of the respondents, excluding superintendents, foremen, supervisory employees, and office and clerical employees;

(b) Post immediately in conspicuous places in their plant in Philadelphia, Pennsylvania, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondents will not engage in the conduct from which it is recommended that they cease and desist in paragraph 1 (a) and (b) of these recommendations; and (2) that the respondents will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) File with the Regional Director for the Fourth Region on or before ten (10) days from the date of the receipt of this Intermediate Report, a report in writing setting forth in detail the manner and form in which the respondents have complied with the foregoing recommendations.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondents notify said Regional Director in writing that they have complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondents to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D C, an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other

part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

DAVID KARASICK

Trial Examiner

Dated December 30, 1943.