

In the Matter of AETNA FIRE BRICK COMPANY and UNITED CONSTRUCTION WORKERS, DIVISION OF UNITED MINE WORKERS OF AMERICA, DISTRICT 50

Case No. 9-C-1944.—Decided May 25, 1944

Mr. James A. Shaw and Mr. Thomas E. Shroyer, for the Board.

Miller, Searl & Fitch, by Mr. Chester P. Fitch, of Portsmouth, Ohio, for the respondent.

Mr. Milton E. Harris, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon a charge duly filed on September 3, 1943, by United Construction Workers, Division of United Mine Workers of America, District 50, herein called the Union, the National Labor Relations Board, herein called the Board, by the Acting Regional Director for the Ninth Region (Cincinnati, Ohio), issued its complaint dated September 18, 1943, against Aetna Fire Brick Company, Oak Hill, Ohio, herein called the respondent, alleging that the respondent had engaged in and was 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 thereon, were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance: (1) that all the respondent's production and maintenance employees, excluding supervisory and office employees, constituted a unit appropriate for the purposes of collective bargaining; (2) that the Union at all times since December 29, 1942, was the exclusive representative of all the employees in said unit; and (3) that on or about July 14, 1943, and at all times thereafter, the respondent refused to bargain collectively with the Union as such representative. On or about September 24, 1943, the respondent duly filed its answer, denying the alleged unfair labor practices.

56 N. L. R. B., No. 158.

Pursuant to notice, a hearing was held on October 7, 1943, at Jackson, Ohio, before John H. Eadie, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel; and the Union by a representative. All parties participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. At the close of the hearing, counsel for the Board and the respondent argued orally before the Trial Examiner. Pursuant to permission granted at the hearing, the respondent subsequently filed a brief.

On October 21, 1943, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon the respondent and the Union. In the Intermediate Report, the Trial Examiner found that the respondent had engaged in the alleged unfair labor practices, and recommended that it cease and desist therefrom and take certain affirmative action. Thereafter the respondent duly filed exceptions to the Intermediate Report and a supporting brief.

On February 11, 1944, the Board, upon request of the respondent, ordered that the record "be reopened, [and] that a further hearing be held for the purpose of retaking the testimony which employee John Gray gave at a hearing held before the Regional Director * * * on January 6, 1943, with regard to his challenged ballot." Pursuant to notice, such further hearing was held on February 28, 1944, at Jackson, Ohio, before Trial Examiner Eadie. The Board and the respondent were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence in accordance with the order of the Board. The Union did not appear nor participate in the hearing. At the close of the hearing, counsel for the respondent argued orally before the Trial Examiner. Thereafter the respondent duly filed a brief. During the course of both the original and the reopened hearings and in his Intermediate Report and Supplemental Intermediate Report, the Trial Examiner made rulings on various motions and objections to the admission of evidence.¹ The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.

On March 14, 1944, the Trial Examiner issued his Supplemental Intermediate Report, copies of which were duly served upon the respondent and the Union. In the Supplemental Intermediate Report, the Trial Examiner considered the further evidence adduced at the

¹ At the original hearing, the Trial Examiner rejected the respondent's offer in evidence of the transcript of the April 30, 1943, hearing before the Regional Director, hereinafter fully described. However, the transcript was attached to the exhibit folder, pursuant to his order. In his Supplemental Intermediate Report he based certain findings on this transcript, thereby reversing his original ruling. We find that this transcript is in evidence in this case.

reopened hearing; found that such evidence, considered in conjunction with the evidence introduced at the original hearing, did not serve to change or amend any of the findings, conclusions, or recommendations in his original Intermediate Report; and reiterated all such findings, conclusions, and recommendations. Thereafter the respondent duly filed exceptions to the Supplemental Intermediate Report and a supporting brief. No request for oral argument before the Board at Washington, D. C., was made by any of the parties.

The Board has considered the Intermediate Report, the Supplemental Intermediate Report, the respondent's exceptions and briefs, and the entire record in the case, and finds that the exceptions are without merit insofar as they are inconsistent with the findings, conclusions, and order hereinafter set forth.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, Aetna Fire Brick Company, is an Ohio corporation with its principal office and place of business located at Oak Hill, Ohio, where it is engaged in the manufacture and sale of brick. In 1942 approximately 10 percent of the respondent's raw materials, valued at more than \$5,000, was purchased outside Ohio, and 75 percent of its gross sales of finished products, exceeding \$150,000 in value, was shipped to points outside Ohio. At the hearing the respondent admitted that it was engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

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

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Self-organization among the respondent's employees began late in the summer of 1942. Prior to November 20, 1942, Oscar B. Allen, representing the Union, conferred with certain officials of the respondent, informed them that the Union represented a majority of the employees, requested recognition, and was advised that the respondent was not satisfied that the Union represented a majority of the employees. On November 21, 1942, the Union filed a petition for investigation and certification of representatives, pursuant to Section 9 (c) of the Act.

On or about December 10, 1942, the respondent and the Union entered into a consent-election agreement, which was approved by the Regional Director. The agreement provided in part that "all maintenance and production employees, excluding supervisory and office help," constituted a unit appropriate for the purposes of collective bargaining, and that the Regional Director should conduct a secret-ballot election to determine whether the Union represented a majority of the employees in the said unit. The agreement contained the following further provision:

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.

On December 29, 1942, the election was duly held, resulting in 29 ballots for and 28 against the Union, with 1 additional ballot challenged by the Union on the ground that the voter, Gray, was a supervisory employee and thus did not come within the stipulated bargaining unit.²

On January 6 and April 30, 1943, the Regional Director held hearings, in which the respondent and the Union participated, on the question of whether Gray came within the agreed appropriate unit.

On May 25, 1943, the Regional Director issued and served on the parties a "Report on Consent Election," finding that Gray did not come within the agreed appropriate unit, that the Union had consequently been designated by a majority of 29 to 28 votes, and that the Union was therefore the exclusive representative of all the employees in the said unit.

B. The appropriate unit.

Like the Trial Examiner, we find, in accordance with the agreement of the parties, that all maintenance and production employees, excluding supervisory and office help, at all times material herein constituted, and now constitute, a unit appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment, and that said unit insured to employees of the respondent the full benefit of their rights to self-organization and collective bargaining and otherwise effectuates the policies of the Act.

² In addition to challenging Gray, the Union had originally challenged 1 of the 28 votes against it, but later withdrew this challenge.

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

As found above, the respondent agreed that the Regional Director's determination with respect to the election should be final and binding upon any question (including questions as to the eligibility of voters) not specifically covered in the agreement. The Regional Director duly determined that Gray did not come within the aforesaid unit, and accordingly found that the Union had been designated and selected by a majority of the employees in said unit and therefore was the exclusive representative of all the employees therein.

The respondent contends that, in accordance with the standard announced in our decision in the *Capitol Greyhound* case,³ the Regional Director's determination as to Gray was arbitrary and capricious and for that reason should be reversed by us. However, we find that there is substantial evidence to support the Regional Director's determination, and that consequently the determination was not arbitrary or capricious. Gray works in the yard of the respondent's brick plant. Regularly employed in the yard are four gangs of three employees each, whose task it is to take the bricks from the kilns, after the baking or burning process is completed, and to place them in various racks in a large storage shed or railroad freight cars. Gray, who is not a member of any of these gangs, is instructed by "Lou" Foster, the superintendent or general manager, as to which bricks to have removed from the kilns and where to have them placed. Gray then transmits these instructions to the gangs, but does not ordinarily work as part of any gang. Moreover, Gray is an hourly employee, whereas the employees on the gangs are piece workers; and Gray occasionally transmits their piece-work records to the superintendent. In addition, Gray instructs new employees and at times assigns them to a particular gang. As a result, the employees in the plant regard Gray as a "boss" or "foreman"; and Superintendent Foster lent credence to this general belief by telling a yard employee who had been reassigned by Gray that Gray was a "foreman." Except for the superintendent, the record reveals no other supervisory employee in the yard besides Gray; and Superintendent Foster admitted at the April 30 hearing before the Regional Director that in "running" the gangs Gray took over part of Foster's former duties. Moreover, Gray substituted for the absent superintendent on one occasion.

It is true that there is other evidence in the record indicating that Gray was not a full supervisory employee. However, the Regional Director, whom the respondent had entrusted with the authority to

³ *Matter of Capitol Greyhound Lines, et al*, 49 N. L. R. B. 156, enforced 140 F. (2d) 754 (C. C. A. 6).

make final determinations on eligibility questions, did not give such evidence controlling weight in view of the evidence recited above. Under the circumstances, and regardless of how we might have determined the question if the respondent had not authorized the Regional Director to determine it, we cannot say that the Regional Director's determination was arbitrary and capricious,⁴ or that it lacked substantial support in the record. Accordingly, we shall not disturb his determination that Gray did not come within the appropriate unit.

We find that at all times material herein the Union was 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 at all such times was, and now is, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

D. *The refusal to bargain*

As found above, on May 25, 1943, the Regional Director duly determined that the Union was the statutory representative of the employees in the agreed appropriate unit. The respondent thereupon filed objections to this determination and requested the Board for a hearing thereon. On June 2, 1943, the Board denied the request.

On July 14, 1943, Charles H. Moon, a representative of the Union, in a telephone conversation with Chester P. Fitch, counsel for the respondent, requested a meeting with the respondent for the purpose of negotiating a contract. Fitch replied that he would "contact the Company and wanted to study the question."

On or about July 23, 1943, Moon called Fitch on the telephone and again requested a meeting with the respondent in order to discuss the negotiation of a collective bargaining contract. Fitch replied that the respondent "did not think that the Union represented a majority of the employees at that time," since there were "16 new employees on the Company's pay roll since December 29, 1942," and that the respondent therefore did not consider the Union to be the majority representative. In support of this assertion, Lester F. Simms, general manager of the respondent, testified without contradiction that between December 29, 1942, the date of the election, and June 12, 1943, a date shortly before the Union's request to bargain, there was a "turnover" of 12 or 15 of the respondent's employees. Other than this testimony,

⁴ See, for example, *Matter of Stacy Brothers Gas Construction Company*, 54 N. L. R. B. 651, where we found that certain working foremen were supervisory employees although they did not have authority to hire, discharge, change the status of employees, or recommend such action.

the respondent did not adduce any evidence to rebut the presumption of continuing majority arising from the Regional Director's certification of the Union on May 25, 1943.

On August 11, 1943, representatives of the respondent and the Union met again in the respondent's office, this time in the presence of a federal conciliator. Joseph T. McNerlin, an officer of the Union, testified without contradiction and we, like the Trial Examiner, find that a representative of the Union again asked the respondent to bargain collectively with the Union; that Fitch replied that the respondent would not bargain with the Union unless another election was held to prove that the Union had a majority "to date"; that the Union then offered to show the respondent the membership application cards of the new employees in order to prove a continuing majority; that the respondent would not accept these application cards as proof thereof; that the Union then proposed that the conciliator be delegated to interview the new employees to verify the Union's claim; that the respondent refused to agree to this proposal; and that all but one of the new employees had become members of the Union. McNerlin further testified without contradiction that Fitch then said that if the Union went to court to establish its right to bargain collectively with the respondent, the Union would "be a year and a half before you get any recognition."

We are convinced, as was the Trial Examiner, that on or about July 23, 1943, and at all times thereafter the respondent violated its statutory duty to bargain collectively with the Union as the representative of its employees in the aforesaid appropriate unit. The respondent in effect concedes that it refused to bargain with the Union, but contends that the facts in this case rebut the normal presumption that the Union's majority continued until the date of the refusal to bargain. In support of its contention, the respondent adduced no affirmative evidence that a majority of the employees no longer desired the Union to represent them, but offered only the speculative evidence that there had been a turnover of some 16 employees in the appropriate unit since the election. Yet when the Union at the August 11 meeting offered the respondent proof that 15 of the 16 new employees had joined the Union, the respondent flatly rejected the Union's offer. Under these circumstances, the showing made by the respondent is clearly insufficient to relieve it of its statutory duty to bargain collectively with the representative of its employees.⁵ Moreover, the Union's majority status was not established until the Regional Di-

⁵ *Valley Mould & Iron Corp. v. N. L. R. B.*, 116 F. (2d) 760 (C. C. A. 7); *N. L. R. B. v. Whittier Mills Company, et al.*, 111 F. (2d) 474 (C. C. A. 5); *N. L. R. B. v. Highland Park Manufacturing Company*, 110 F. (2d) 632 (C. C. A. 4); *N. L. R. B. v. Piqua Munising Wood Products Company*, 109 F. (2d) 552 (C. C. A. 6).

rector's determination of May 25, 1943. In the interests of stable labor relations, a bargaining representative elected by a majority of the employees in an appropriate unit "must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."⁶ No such reasonable period has elapsed in this case, and the record discloses no persuasive reason for departing from this principle. We therefore find no merit in the respondent's contentions.

We find, as did the Trial Examiner, that on or about July 23, 1943, and at all times thereafter the respondent refused to bargain collectively with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, thereby interfering with, restraining, and coercing its 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 respondent set forth in Section III, above, occurring in connection with the operations of the respondent 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

Having found that the respondent has engaged in certain unfair labor practices affecting commerce, we shall order it to cease and desist therefrom and to take certain affirmative action, which we find will effectuate the policies of the Act.

We have found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in the aforesaid appropriate unit. We shall order that the respondent bargain collectively with the Union upon request.

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

CONCLUSIONS OF LAW

1. United Construction Workers, Division of United Mine Workers of America, District 50, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All the respondent's maintenance and production employees, excluding supervisory and office help, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

⁶ *Franks Brothers Company v N. L. R. B.*, 321 U. S. 702. See also *N. L. R. B. v. Appalachian Electric Power Company*, 140 F. (2d) 217 (C. C. A. 4); *N. L. R. B. v. Century Oxford Manufacturing Company*, 140 F. (2d) 541 (C. C. A. 2).

3. United Construction Workers, Division of United Mines Workers of America, District 50, at all times material herein was, and now is, the exclusive representative of all the employees in the aforesaid appropriate unit within the meaning of Section 9 (a) of the Act.

4. By refusing on or about July 23, 1943, and at all times thereafter, to bargain collectively with United Construction Workers, Division of United Mine Workers of America, District 50, as the exclusive representative of the employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is 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.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and 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 respondent, Aetna Fire Brick Company, Oak Hill, Ohio, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Construction Workers, Division of United Mine Workers of America, District 50, as the exclusive representative of all its maintenance and production employees, excluding supervisory and office help, 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 its 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 Construction Workers, Division of United Mine Workers of America, District 50, as the exclusive representative of all its maintenance and production employees, excluding supervisory and office help, in respect to rates

of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout its plant and yard at Oak Hill, Ohio, 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 respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

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

CHAIRMAN MILLIS took no part in the consideration of the above Decision and Order.