

In the Matter of WEST KENTUCKY COAL COMPANY and UNITED MINE
WORKERS OF AMERICA, DISTRICT No. 23

Case No. 14-C-922.—Decided July 7, 1944

Mr. Ryburn L. Hackler, for the Board.

Wheeler & Shelbourne, by *Mr. James G. Wheeler*, of Paducah, Ky., and *Gordon, Gordon & Moore*, by *Maj. M. K. Gordon*, of Madisonville, Ky., for the respondent.

Mr. E. J. Morgan, and *Fox & Gordon*, by *Mr. B. N. Gordon*, both of Madisonville, Ky., and *Mr. W. K. Hopkins*, of Washington, D. C., for the Union.

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

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon an amended charge duly filed on March 17, 1944, by United Mine Workers of America, District No. 23, herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Fourteenth Region (St. Louis, Missouri), issued its complaint dated March 21, 1944, against West Kentucky Coal Company, Earlington, Kentucky, 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 and 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 that the respondent: (1) on or about February 18, 1944, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the respondent's employees in a unit previously found by the Board to be appropriate for the purposes of collective bargaining, although the Union represented a majority of said employees and had been certified by the Board on February 11,

1944, as the exclusive representative of all the employees in said unit; and (2) on or about December 7, 1943, and thereafter, (a) urged, warned, threatened, and persuaded its employees against joining, remaining members of, or assisting the Union or any other labor organization, and (b) made derogatory and disparaging statements concerning the Union and its leadership. Thereafter the respondent duly filed an answer, denying the alleged unfair labor practices.

Pursuant to notice, a hearing was held on April 17, 1944, at Madisonville, Kentucky, before J. J. Fitzpatrick, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union 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.¹ At the close of the hearing, the Trial Examiner granted a motion by Board counsel, over the objection of the respondent, to conform the pleadings to the proof in formal matters. Counsel for the Board and the respondent argued orally on the record before the Trial Examiner. The parties were given until April 23 to file briefs; none was received from the respondent or the Union.

On May 16, 1944, 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 and was engaging in certain 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; and the Union also filed a brief. One June 20, 1944, oral argument, in which the respondent and the Union participated, was held before the Board at Washington, D. C.

The Board has considered the rulings made by the Trial Examiner on motions and on objections to the admission of evidence, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the 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:

¹ The Trial Examiner precluded the respondent from adducing evidence which had been available to it at the time of the representation hearing relating to the appropriate unit, on the ground that the unit question had been duly heard and determined by the Board. Under such circumstances the appropriate unit was not an issue in the hearing.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is a New Jersey corporation having its principal office and place of business in Earlington, Kentucky. It is engaged in the mining and marketing of bituminous coal, and has mines located in Hopkins, Webster, and Union counties in Kentucky. During the year 1943, the respondent purchased approximately \$2,500,000 worth of materials and supplies, approximately 63 percent of which was transported to its mines from points outside Kentucky. During the same period, it sold approximately 2,918,236 tons of coal, valued in excess of \$3,000,000, approximately 64 percent of which was transported to points outside Kentucky. The respondent does not contest the fact that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

United Mine Workers of America, District No. 23, is a labor organization admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain*

1. The appropriate unit

After the usual proceedings, the Board on January 6, 1944, issued a Decision and Direction of Elections,² finding, among other things, that all the respondent's production and maintenance employees working in North Diamond Mine No. 2, North Diamond Mine No. 3, and Hecla Mine, near Earlington, Kentucky, excluding clerical employees, watchmen, carpenters, members of the sales or technical forces, mine foremen, assistant mine foremen, fire bosses, head electricians, head mechanics, inspectors, weigh bosses, and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, constituted a unit appropriate for the purposes of collective bargaining with the respondent, within the meaning of Section 9 (b) of the Act.

The respondent contends that the foregoing finding is void and of no legal effect, on the ground that the respondent had not been afforded a hearing on the unit question or an opportunity to introduce evidence in support of its contention that only a unit embracing all its six mines was appropriate. However, the record shows that the

² 54 N L R B. 358.

respondent was served with timely Notice of Hearing in the representation case; that, at the opening of such hearing, the respondent appeared specially by counsel and argued in part (1) that neither it nor the Board had authority or legal right to proceed so long as the United States Government remained in operating possession of the mines embraced in the unit, in the absence of specific authorization to the contrary from the Government, and (2) that the United States Government had "indicated definitely" that the respondent should not participate in such hearing;³ that the Trial Examiner advised the respondent that it could participate in the representation hearing without prejudice to its contentions as to the invalidity of the proceeding; and that the respondent nevertheless refused to avail itself of the opportunity thus afforded it to present evidence bearing on the issues, but instead withdrew from the hearing. Under such circumstances, the respondent's contentions as to the invalidity of the representation proceeding are without merit.⁴ In the interests of orderly procedure, it follows that the respondent cannot now be given a second opportunity to prove what it refused to prove at its earlier opportunity.⁵

We find, as did the Trial Examiner, that all the respondent's production and maintenance employees working in North Diamond Mine No. 2, North Diamond Mine No. 3, and Hecla Mine, near Earlington, Kentucky, excluding clerical employees, watchmen, carpenters, members of the sales or technical forces, mine foremen, assistant mine foremen, fire bosses, head electricians, head mechanics, inspectors, weigh bosses, and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, at all times material herein constituted and now constitute a unit appropriate for the purposes of collective bargaining with the respondent, within the meaning of Section 9 (b) of the Act, and that said unit insures 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. Representation by the Union of a majority in the appropriate unit

On February 11, 1944, the Board, after an election held pursuant to the above-mentioned Decision and Direction of Elections and in the

³ There is no evidence to support this latter argument. On the contrary, the Government's possession was specifically conditioned on continuation of the collective bargaining rights of the workers. See *Glen Alden Coal Company v. N. L. R. B.*, 141 F. (2d) 47 (C. C. A. 3).

⁴ See *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, *N. L. R. B. v. Mackay Radio & Telegraph Company*, 304 U. S. 333, 350.

⁵ See *Pittsburgh Plate Glass Company v. N. L. R. B.*, 313 U. S. 146, 162; *N. L. R. B. v. Annett Shoe Manufacturing Company*, 93 F. (2d) 367 (C. C. A. 1).

absence of any objections having been filed to the election, certified the Union as the statutory representative of all the employees in the foregoing appropriate unit. The respondent did not adduce any evidence tending to controvert the Union's majority in said unit.

We find, as did the Trial Examiner, that at all times material herein the Union was the duly designated 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 the respondent with respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

On February 14, 1944, the Union by letter requested the respondent to bargain with it as the statutory representative of the employees in the said unit. In a letter directed to the Union, date February 18, 1944, the respondent replied that it contested the validity of the representation case and refused to meet or to negotiate with the Union.

We find, as did the Trial Examiner, that on February 18, 1944, 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.

B. Interference, restraint, and coercion

On January 21 and 22, 1944, a few days before the election, the respondent published in local newspapers a full-page notice, entitled "A Statement to Our Employees and the Public Relative to Election Ordered by National Labor Relations Board," declaring that the respondent would continue to bargain with its employees individually until "all our production employees" should vote for a union in an election in which "all cast their ballots." The statement also declared that the impending election "might result in a minority imposing their will on a majority of our employees." The respondent thus sought to discourage its employees from voting for the Union, by refusing to accept the Board's finding as to the appropriate unit, by misrepresenting the election as a perversion of majority rule, and by declaring that it would recognize a union only if the union won an election held on the respondent's own terms in a unit rejected by the Board. The respondent contends that the Statement was privileged by the First Amendment of the Constitution of the United States, and cites in sup-

port the case of *N. L. R. B. v. Virginia Electric & Power Company*.⁶ However, that case is distinguishable in that it did not involve statements implying that the respondent would refuse to perform its legal duty to recognize and bargain with the employees' exclusive representative in a unit which the Board had duly found appropriate, even if the Union were to win a Board-conducted secret-ballot election and be certified by the Board; nor did the case involve a misrepresentation of the effect of the election by advising the employees that the election might result in a minority imposing their will on a majority. Under the circumstances here presented and in view of the unfair labor practices hereinbefore found, we find that the respondent's Statement constituted "an affirmative act of the respondent in its offensive against the Union,"⁷ and amounted to coercion of, or pressure against, the employees to vote against the Union.

We find, as did the Trial Examiner, that the respondent, by the Statement, has interfered with the conduct of a Board election and has unlawfully attempted to influence the result of that election in such manner as to constitute interference with, restraint, and coercion of its employees in their 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 the entire record in the case, the Board makes the following:

⁶ 314 U. S. 469

⁷ *N. L. R. B. v. M. E. Blatt Company*, 143 F. (2d) 268 (C. C. A. 3) Cf. *N. L. R. B. v. The Brown-Brockmeyer Company*, 143 F. (2d) 537 (C. C. A. 6)

CONCLUSIONS OF LAW

1. United Mine Workers of America, District No. 23, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All the respondent's production and maintenance employees working in North Diamond Mine No. 2, North Diamond Mine No. 3, and Hecla Mine, near Earlington, Kentucky, excluding clerical employees, watchmen, carpenters, members of the sales or technical forces, mine foremen, assistant mine foremen, fire bosses, head electricians, head mechanics, inspectors, weigh bosses, and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, at all times material herein constituted and now constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. United Mine Workers of America, District No. 23, 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 February 18, 1944, and at all times thereafter to bargain collectively with United Mine Workers of America, District No. 23, as the exclusive representative of all its 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, West Kentucky Coal Company, Earlington, Kentucky, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Mine Workers of America, District No. 23, as the exclusive representative of all its production and maintenance employees working in North Diamond Mine No. 2, North Diamond Mine No. 3, and Hecla Mine, near Ear-

ington, Kentucky, excluding clerical employees, watchmen, carpenters, members of the sales or technical forces, mine foremen, assistant mine foremen, fire bosses, head electricians, head mechanics, inspectors, weigh bosses, and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Mine Workers of America, District No. 23, or any other labor organization, 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 Mine Workers of America, District No. 23, as the exclusive representative of all its employees in the appropriate unit set forth in paragraph 1 (a) of this Order, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places at all its mines, 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 paragraph 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 Fourteenth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.