

In the Matter of DIAMOND MAGNESIUM COMPANY and UNITED GAS,
COKE AND CHEMICAL WORKERS OF AMERICA (C. I. O.)

Case No. 8-R-1499.—Decided July 17, 1944

Mr. Frank L. Danello, for the Board.

Mr. Charles J. Smith, of Cleveland, Ohio, and *Mr. Frank J. Blazina*, of Painesville, Ohio, for the Company.

Mr. Wendell Ringholz, of Cleveland, Ohio, for the C. I. O.

Mr. Joseph A. Padway, by *Mr. Robert A. Wilson*, of Washington, D. C., and *Messrs. Jesse Gallagher* and *Anthony Lang*, of Cleveland, Ohio, for Local 496.

Mr. Stanley Denlinger, of Akron, Ohio, and *Mr. William Thomas*, of Cleveland, Ohio, for District 50.

Mr. William R. Cameron, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon petition duly filed by United Gas, Coke and Chemical Workers of America (C. I. O.), herein called the C. I. O., alleging that a question affecting commerce had arisen concerning the representation of employees of Diamond Magnesium Company, Painesville, Ohio, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Louis Plost, Trial Examiner. Said hearing was held at Painesville, Ohio, on May 26, 1944. The Company, the C. I. O., Local Union 496 of the International Hod Carriers', Building and Common Laborers' Union of America, A. F. of L.,¹ herein called Local 496, and District 50, United Mine Workers of America, herein called District 50, appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Trial Examiner's rulings made at the hearing are

¹ The parties stipulated at the hearing that this is the same labor organization as that which the Board certified in *Matter of Diamond Magnesium Company*, 48 N. L. R. B. 67, under the name of Construction and General Laborers Union, Local 496

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

Diamond Magnesium Company, an Ohio corporation, is a wholly owned subsidiary of Diamond Alkali Company. The Company operates a defense plant in Painesville Township, Ohio, built by the Defense Plant Corporation, where it manufactures magnesium and magnesium alloy metals used entirely by the United States Government in the war effort. The value of the raw materials used at the plant, as well as the value of the products made by the plant, exceed \$100,000 annually.

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

II. THE ORGANIZATIONS INVOLVED

United Gas, Coke and Chemical Workers of America is a labor organization, affiliated with the Congress of Industrial Organizations, admitting to membership employees of the Company.

Local Union 496 of the International Hod Carriers', Building and Common Laborers' Union of America is a labor organization, affiliated with the American Federation of Labor, admitting to membership employees of the Company.

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

III. THE QUESTION CONCERNING REPRESENTATION

By letter dated March 30, 1944, the C. I. O. informed the Company that it claimed to represent a majority of the Company's production and maintenance employees and requested recognition as representative of such employees for the purposes of collective bargaining. The Company replied by letter dated April 5, 1944, refusing to recognize the C. I. O. and stating that it considers the present certification of Local 496 as such representative to be effective until otherwise directed by the Board.

On May 14, 1943, following an election conducted by the Board pursuant to a Decision and Direction of Election issued on March 15, 1943,² the Board certified Local 496 as representative of the Company's

² *Matter of Diamond Magnesium Co.*, 48 N. L. R. B. 67, above cited

employees in a production and maintenance unit. Under the auspices of Local 496, a committee selected from among the employees thereafter entered into negotiations with the Company, which resulted in tentative agreement upon all the terms of a collective bargaining contract other than those relating to vacations, maintenance of membership, and wages. During the latter part of June 1943, resort had to the Government's Conciliation Service and the controversy relating to vacations was resolved; an impasse was reached as to the remaining issues, and about August 13, 1943, the dispute was submitted to the War Labor Board. On January 14, 1944, the Regional War Labor Board issued its Directive Order granting maintenance of membership and a check-off provision, but denying the request of Local 496 for an increase in wages. Local 496 thereupon petitioned the National War Labor Board for review of this Directive Order, and no decision had been issued by the latter board at the time of the hearing herein.

Other than the conduct of negotiations and the prosecution of disputed issues before the War Labor Board, above set forth, Local 496 has performed no function as representative of the Company's employees. None of the contract provisions upon which Local 496 and the Company have reached agreement has been enforced, the Company taking the position, to which Local 496 has acquiesced, that it will regard none of the contract provisions as effective until such time as a complete contract has been executed.³ No grievances have been handled by Local 496, although the Company states that grievances amounting in number to approximately a thousand have been adjusted between the Company and its employees individually. The record indicates that, other than certain former construction workers who became members of Local 496 prior to completion of the Company's plant and commencement of production, Local 496 has at present few members within the plant.⁴ Following its certification as collective bargaining representative, Local 496 neither sought nor admitted additional members among the production and maintenance employees. Both at the initial meeting of the committee selected to negotiate the contract, which was composed largely of non-members of the Union, and a meeting of employees held shortly thereafter, Local 496 informed the employees that it would not admit them into membership until after a contract with the Company had been executed.

³ Although, as indicated above, it sought in negotiations with the Company, and obtained by order of the regional panel of the War Labor Board, a provision for maintenance of membership together with a check-off of union dues, Local 496 has abandoned this request and now seeks before the National War Labor Board a reversal of this order and elimination of the check-off. It has circulated among the employees for their signatures cards purporting to bear an agreement whereby the employees shall voluntarily pay union dues in consideration of relinquishment by the Union of the check-off system.

⁴ The record further discloses that a few weeks before the hearing herein, at a meeting held under the auspices of Local 496, a representative of that organization offered to obtain a new local charter for a union among the Company's employees, if they could obtain a 50 percent membership in the plant . . .

Subsequently, however, Local 496 sought unsuccessfully to obtain memberships. Thus, the testimony of a member of the executive committee of Local 496, formerly a construction worker but now a company employee, reveals that at some time during "the middle of last year" he solicited memberships among the approximately 75 employees in his department, but, after interviewing 35 of such employees without success, was compelled to abandon his attempt because of employee opposition.⁵

Local 496 contends that no election to determine a collective bargaining representative of the Company's production and maintenance employees should be conducted at the present time, and cites in support of its contention our decision in the *Allis-Chalmers* and *Kennecott Copper* cases,⁶ wherein we refused to direct elections in view of the fact, in each case, that consummation of the results of collective bargaining, conducted by a duly certified representative, had been delayed by the submission of disputed issues to the War Labor Board. As we pointed out in the *Landis Machine Company* case,⁷ however, the mere pendency of a dispute before the National War Labor Board does not operate to divest this Board of jurisdiction in a representation proceeding. Nor does the fact that execution of a complete and final contract between a duly certified representative and the Company has been delayed by submission of disputed issues to settlement by orderly governmental procedure, in itself necessarily require us to refuse to proceed to a redetermination of the collective bargaining representative for the employees involved. In each case, it is necessary for us to weigh the proper interest of the employees in continuing to be represented only by a labor organization of their choice, against considerations related to the desirability of maintaining stability in collective bargaining relations. In the instant case, we think that the former interest is the more important, and that no stable and peaceful relations would be achieved by dismissing the petition. As noted above, more than a year has elapsed since our previous certification of a representative for the Company's production and maintenance employees. In view of all the circumstances disclosed by the record herein, including the disclosure of substantial defection among the employees from Local 496, a circumstance which cannot be said to have resulted solely, or in substantial measure, from the submission

⁵ The shift in employee affiliation is further evinced by the statements of the Board's representatives concerning their investigation of interest of the contending labor organizations, which indicate that the C I O at present represents approximately 61 percent, and District 50 approximately 21 percent, of the employees within the appropriate unit. See footnote 9, below.

⁶ *Matter of Allis-Chalmers Manufacturing Company*, 50 N. L. R. B. 306, 52 N. L. R. B. 100; *Matter of Kennecott Copper Corporation, Nevada Mines Division*, 51 N. L. R. B. 1140.

⁷ *Matter of Landis Machine Company*, 54 N. L. R. B. 1440; see also *Matter of Fort Dodge Creamery Company*, 53 N. L. R. B. 928.

of disputed issues to solution by the orderly processes of government, we are of opinion that it will not effectuate the policies of the Act to deny to the Company's employees the opportunity to select a collective bargaining representative at this time, if they so desire.⁸

Statements of the Field Examiner, introduced in evidence, and of the Trial Examiner read into the record at the hearing, indicate that the C. I. O. and District 50 each represents a substantial number of the Company's employees within the unit hereinafter found to be appropriate.⁹

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

The parties agree that all hourly rated and piece-work employees of the Company who are engaged in production and maintenance, including yard employees, but excluding foremen, supervisors, clerical employees, nurses, and main laboratory employees, constitute an appropriate unit.¹⁰ The Company, however, contends that the plant-protection guards should now become a part of the production and maintenance unit, inasmuch as they are no longer militarized, having been discharged from allegiance to the United States Army as of May 19, 1944. However, on October 6, 1943, we directed an election among the Company's guards and on November 12, 1943, Plant Guard Local No. 23456, A. F. L., was certified as their representative. Inasmuch as the guards are now represented by a collective bargaining representative, whose certification is less than 1 year old, we shall exclude the guards from the unit herein.

We find that all hourly and piece-work production and maintenance employees of the Company, including yard employees, but excluding foremen, watchmen, guards, clerical employees, nurses, main laboratory employees, 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, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

⁸ See *Matter of Columbia Protokosite Co., Inc.*, 52 N L R B. 595.

⁹ The Field Examiner reported that the C. I. O. submitted 306 authorization cards, of which 296, dated from January through April 1944, appeared to bear names of employees on the Company's pay roll of April 10, 1944, containing 482 names within the appropriate unit.

The Trial Examiner reported that District 50 submitted 100 cards, dated from February through May 1944, all of which appeared to bear the names of employees on the pay roll above mentioned. Local 496 relies on its previous certification as sufficiently establishing its interest herein.

¹⁰ This is the unit in which, on May 14, 1943, Local 496 was certified as representative.

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

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 Diamond Magnesium Company, Painesville, Ohio, 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 Eighth 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 any 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 Local Union 496 of the International Hod Carriers', Building and Common Laborers' Union of America, A. F. L., by United Gas, Coke and Chemical Workers of America (C. I. O.), or by District 50, United Mine Workers of America, for the purposes of collective bargaining, or by none.