

In the Matter of TIDE WATER ASSOCIATED OIL COMPANY and UNITED
PETROLEUM WORKERS (UNAFFILIATED)

Case No. 2-C-6701.—Decided October 14, 1947

Mr. Bertram Diamond, for the Board.

Cravath, Swaine & Moore, by Messrs. *John H. Morse* and *Richard E. Keresey*, of New York, N. Y.; and *Mr. Matthew F. McCue*, of New York, N. Y., for the respondent.

Brenner, Butler & McVeigh, by *Mr. Edward J. Murphy, Jr.*, of New York, N. Y.; and *Mr. George Herrell*, of Long Island, N. Y., for the Union.

DECISION

AND

ORDER

On March 28, 1947, Trial Examiner Isadore Greenberg issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had unlawfully refused to bargain with the Union as the collective bargaining representative of a unit of its supervisory employees previously found appropriate by the Board,¹ and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the respondent filed exceptions to the Intermediate Report, a supporting brief, and a request for oral argument. In view of our disposition of the case, the Board deems oral argument unnecessary and hereby revokes its previous action granting the respondent's request.

Since the issuance of the Intermediate Report herein, the National Labor Relations Act has been amended so as to exclude "any individual employed as a supervisor" from the definition of "employee" contained in the Act.² Supervisory employees are therefore now outside the coverage of the Act. We are therefore of the opinion, without considering the merits of the case, that it would not effectuate the policies of the Act, as amended, to require the respondent to take any

¹ *Matter of Tide Water Associated Oil Company*, 69 N L R B. 419 The Union won the election and was certified by the Board on August 29, 1946.

² Section 2 (3) and (11) of the Act, as amended.

remedial action in this case, which involves nothing except a refusal to bargain.³ Accordingly, we shall dismiss the complaint.

ORDER

IT IS HEREBY ORDERED that the complaint against the respondent, Tide Water Associated Oil Company, New York, New York, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Mr. Bertram Diamond, for the Board.

Cravath, Swaine & Moore, by Messrs. *John H. Morse* and *Richard E. Keresey*, of New York, N. Y.; and *Mr. Matthew F. McCue*, of New York, N. Y., for the respondent.

Benner, Butler & McVeigh, by *Mr. Edward J. Murphy, Jr.*, of New York, N. Y.; and *Mr. George Heriell*, of Long Island, N. Y., for the Union.

STATEMENT OF THE CASE

Upon a charge duly filed on October 11, 1946, by United Petroleum Workers (Unaffiliated), herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Second Region (New York, New York), issued its complaint dated December 16, 1946, against Tide Water Associated Oil Company, of New York, New York, 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 together with copies of the charge and notices 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: (1) All yard foremen and dispatchers employed by the respondent at its Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees; and all chief clerks employed by the respondent at its Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees, constitute, respectively, units appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act; (2) since October 2, 1946, and at all times thereafter, the respondent has refused to bargain collectively with the Union as the exclusive representative of the respondent's employees in the said units designated by the Board as appropriate for the purposes of collective bargaining, although a majority of the employees in each of the aforesaid units, by secret elections conducted on August 7, 1946, under the supervision of the Regional Director for the Second Region of the Board, selected said Union as their exclusive collective bargaining representative, and the Union on or about September 6, 1946, and September 20, 1946, requested the respondent to bargain collectively in respect to rates of pay, wages, hours of employment, and other conditions of employment, with it as the exclusive representative of all the employees of the respondent in the units described above.

In its answer, duly filed herein, the respondent in substance admitted that the Board had designated the units described in the complaint as being appro-

³ *Matter of Westinghouse Electric Corporation*, 75 N. L. R. B. 1; *L. A. Young Spring & Wire Corporation v. N. L. R. B.*, 163 F. (2d) 905 (C. A.-D. C.).

priate for purposes of collective bargaining; that pursuant to elections among the employees in said units, the Union had been chosen by the employees, and certified by the Board, as the exclusive collective bargaining representative of the employees in said units; and that the respondent, although requested to do so by the Union, has refused to bargain collectively with it as the representative of the aforesaid employees. The answer denies, however, that the respondent has committed any unfair labor practices, and alleges that the employees comprising the units described in the complaint are supervisory employees, hence not "employees" as that term is used in the Act; that the aforesaid employees consequently "cannot constitute units appropriate for the purposes of collective bargaining"; and that the respondent is not required to bargain collectively with the Union as the representative of the aforesaid employees because such Union also represents rank-and-file employees of the respondent, and is controlled by the rank-and-file employees

Pursuant to notice, a hearing was held in New York, New York, on January 9, 1947, before the undersigned, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues, was afforded all parties. At the opening of the hearing, counsel for the respondent moved to dismiss the complaint on the general ground that the Board does not have jurisdiction over the subject matter thereof, basing such general contention of lack of jurisdiction on the same specific contentions which have been above summarized from the respondent's answer. This motion was denied. At the close of the hearing, upon renewal of the same motion by counsel for the respondent, the undersigned reserved ruling thereon. The motion is hereby denied. Although afforded opportunity to do so, none of the parties presented oral argument to the undersigned, nor filed with the undersigned, briefs or proposed findings of fact or conclusions of law.

On the basis of the foregoing, and on the entire record, after having heard and observed all the proceedings and considered all the evidence, the undersigned makes the following.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, Tide Water Associated Oil Company, a Delaware corporation with one of its principal offices at New York City, is engaged in producing, transporting, refining, and marketing petroleum and petroleum products throughout the United States and foreign countries. It utilizes a fleet of ocean-going tankers to transport crude petroleum and manufactured products to and from its refineries and marine terminals, and from its suppliers to its customers located in various States of the United States. The respondent also has producing operations, bulk plants, and service stations located throughout the United States. The respondent's plants involved in these proceedings are the bulk plants and offices located in Long Island City, Westbury-Roslyn, and Yonkers, all in New York, where the respondent stores and distributes petroleum products and accessories. During the calendar year ending November 30, 1946, approximately 98 percent of the petroleum products stored in and distributed from these three bulk plants was shipped from the respondent's refinery in Bayonne, New Jersey. During the same period, more than 99.9 percent of the respondent's sales from these bulk plants, amounting respectively to in excess of \$2,700,000, \$800,000, and \$800,000, was confined within the State of New York, and petroleum products

valued at approximately \$2 000, were shipped from these three plants to points outside the State of New York.

The respondent does not deny, and the undersigned finds, that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

United Petroleum Workers (Unaffiliated) is a labor organization admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain*

1. The appropriate units; representation by the Union of a majority therein

On July 11, 1946, after the usual proceedings, the Board issued a Decision and Direction of Elections,¹ in which it found that: (a) All yard foremen and dispatchers at the respondent's Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees, and (b) all chief clerks at the respondent's Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees, constitute, respectively, units appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

On August 7, 1946, pursuant to said Direction of Elections, elections by secret ballot were conducted under the supervision of the Regional Director of the Board for the Second Region, among the employees in the above-described bargaining units. The Tallies of Ballots showed that of the approximately nine eligible voters in the first of the said units, nine cast valid votes, of which seven were for the Union, and two against, and that of the approximately three eligible voters in the second of the said units, three cast valid votes, all of which were for the Union. No objections were filed by any of the parties within the time provided therefor, and, on August 29, 1946, the Board certified the Union as the exclusive representative for the purposes of collective bargaining, of the employees in the two units hereinabove described.

The respondent contests the appropriateness of the units found by the Board. In substance, the respondent's position herein is, as it was in the representation proceeding leading to the Board's Direction of Elections and Certification of Representatives, that:

1. The employees comprising both of the two units herein involved are supervisory personnel, and hence are not "employees" as that term is used in the Act;
2. That the said employees therefore cannot constitute units appropriate for purposes of collective bargaining;
3. That because the Board in finding that the aforesaid units were appropriate for said purposes, "failed to consider the public welfare and interest as a material factor in selecting" the units, its Direction of Elections and Certification of Representatives are void;
4. That the Union represents, and is controlled by, the respondent's rank-and-file employees; and
5. That, consequently, the respondent is not by law required to bargain collectively with the Union as a representative of the employees herein involved

Identical contentions were urged by the respondent and fully considered by the Board in the representation proceeding, and there ruled upon adversely to

¹ *Matter of Tide Water Associated Oil Company*, Case Nos 2-R-5736 and 2-R-5737, 69 N L R B 419

the respondent.² In the instant complaint proceeding, the respondent adduced no further evidence, and in substance relied upon the same arguments. The undersigned therefore feels that the Board's determination as to the appropriate units in the representation proceeding is fully dispositive of the contentions with respect thereto advanced by the respondent. The undersigned is not persuaded by anything in the record herein that he should not adhere to the findings of the Board in the representation case.

The undersigned therefore finds that the following groups of employees constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

1. All yard foremen and dispatchers at the respondent's Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees.

2. All chief clerks at the respondent's Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees.

The undersigned further finds that on and at all times after August 7, 1946, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid bargaining units, and that, pursuant to the provisions of Section 9 (a) of the Act, the Union was on August 7, 1946, and at all times thereafter has been and is now the exclusive representative of all employees in the aforesaid units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The refusal to bargain

It is undisputed that on September 6, 1946; and again on September 20, 1946, the Union requested the respondent to bargain collectively with it as the exclusive representative of all the employees in the above-described appropriate units and that on October 2, 1946, as well as at all times thereafter, the respondent refused to do so.

The undersigned finds that the respondent on October 2, 1946, and at all times thereafter, has refused to bargain collectively with the Union as the exclusive representative of its employees in appropriate units and has thereby interfered with, restrained, and coerced 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

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Because of the basis of the respondent's refusal to bargain as indicated by the facts found, and because of the absence of any evidence that danger of other

² Since the Board's decision in the representation proceeding, its position that supervisory employees are "employees" within the meaning of the Act, and may properly be found to constitute units appropriate for the purposes of collective bargaining, has been sustained by the Supreme Court. *Packard Motor Car Co v. N. L. R. B.*, decided 330 U. S. 485.

unfair labor practices is to be anticipated from the respondent's conduct in the past, the undersigned will not recommend that the respondent cease and desist from the commission of any other unfair labor practices. Nevertheless, in order to effectuate the policies of the Act, the undersigned will recommend that the respondent cease and desist from the unfair labor practices found and from any other acts in any manner interfering with the efforts of the Union to negotiate for or represent the employees as exclusive bargaining agent in the units herein found appropriate.

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 Petroleum Workers (Unaffiliated), is a labor organization within the meaning of Section 2 (5) of the Act.

2. The following groups of employees constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

(a) All yard foremen and dispatchers at the respondent's Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees;

(b) All chief clerks at the respondent's Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees.

3. United Petroleum Workers (Unaffiliated), was on August 7, 1946, and at all times thereafter has been, the exclusive representative of all employees in the aforesaid units for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act

4. By refusing on October 2, 1946, and at all times thereafter, to bargain collectively with United Petroleum Workers (Unaffiliated), as the exclusive representative of all its employees in the aforesaid units, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

5. By said acts, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and 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.

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 respondent, Tide Water Associated Oil Company, of New York, New York, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain with United Petroleum Workers (Unaffiliated), as the exclusive representative of all yard foremen and dispatchers employed at its Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees; and of all chief clerks employed at its Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees;

(b) Engaging in any other acts in any manner interfering with the efforts of United States Petroleum Workers (Unaffiliated), to negotiate for or represent the employees in the aforesaid units as exclusive bargaining agent.

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

(a) Upon request bargain collectively with United Petroleum Workers (Unaffiliated), as the exclusive bargaining representative of all employees in the bargaining units described herein, with respect to wages, rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached embody such understanding in a signed agreement;

(b) Post at its Long Island City, Westbury-Roslyn, and Yonkers plants, copies of the notice attached to the Intermediate Report herein, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) File with the Regional Director for the Second 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 respondent has complied with the foregoing recommendations.

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

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, 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, and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, 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. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

ISADORE GREENBERG,
Trial Examiner.

Dated March 28, 1947.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not engage in any acts in any manner interfering with the efforts of United Petroleum Workers (Unaffiliated) to negotiate for or represent the employees in the bargaining units described below.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining units described below with respect to wages, rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. **The bargaining units are:**

1. All yard foremen and dispatchers at our Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees.
2. All chief clerks at our Long Island City, Westbury-Roslyn, and Yonkers plants, excluding all other employees.

TIDE WATER ASSOCIATED OIL COMPANY,

By _____
(Representative) (Title)

Dated_____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.