In the Matter of CLEARFIELD MACHINE COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS

Case No. 6-CA-2.—Decided June 30, 1948

Mr. W. G. Stuart Sherman, for the General Counsel.

Messrs. Frank G. Smith and *Frank A. Whitsett*, of Clearfield, Pa., for the Respondent.

Messrs. Herman Lipsitz and *A. G. Skundor*, of Pittsburgh, Pa., for the Union.

DECISION

AND

ORDER

On December 15, 1947, Trial Examiner John H. Eadie issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices 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 and a supporting brief.

The Board has reviewed the Trial Examiner's rulings made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the additions hereinafter set forth.

We agree with the Trial Examiner's finding that the Respondent, by refusing to bargain with the Union, violated Section 8 (a) (1) and (5) of the Act.[1] The Respondent, in its exceptions, contends that the Board exceeded its authority by conducting a prehearing election on May 15, 1947,[2] and that, in any event, the amended Act provides for a hearing before an election may be conducted, thereby absolving the Respondent from any liability for its admitted refusal to bargain with the Union.

[1] Although the violation began on August 19, 1947, before the effective date of the amendments to the Act, the applicable provisions of Section 8 (1) and (5) of the original Act and Section 8 (a) (1) and (5) of the amended Act are identical.

[2] The Union won the election by a vote of 52 to 33, and was certified on July 31, 1947.

We held, before the passage of the amendments to the Act, that the prehearing election procedure was valid, and not in derogation of statutory requirements.[3] After the effective date of the amendments, we held that prehearing elections conducted before that date continued to be valid.[4] In addition, the courts have consistently held that such procedural changes affect pending cases only to the extent that the procedural steps dealt with in the amendment have not yet been taken.[5] Here, every step in the representation proceeding, including issuance of the Board's certification,[6] was taken before the effective date of the amendments. We find no merit, therefore, in either of the Respondent's contentions.[7]

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 Respondent, Clearfield Machine Company, Clearfield, Pennsylvania, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, as the exclusive representative of all production and maintenance employees of the Respondent, excluding office clerical employees, the shipping clerk, the order clerk, engineering department employees, and assistant foundry foreman, the assistant machine shop foreman, and all other supervisors;

(b) In any manner interfering with the efforts of International Association of Machinists to bargain collectively with it as the exclusive representative of the employees in the aforesaid appropriate unit.

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

(a) Upon request, bargain collectively with International Association of Machinists as the exclusive representative of all production and maintenance employees of the Respondent, excluding office clerical

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[3] *Matter of The Borden Company*, 69 N. L. R. B. 947; *Matter of E. R. Squibb & Sons*, 67 N. L. R. B. 557.

[4] *Matter of Farmers Feed Company, et al.*, 75 N. L. R. B. 617, *Matter of Lehigh River Mills*, 75 N. L. R. B. 280.

[5] See *N. L. R. B.* v. *Whittenburg*, 165 F. (2d) 102, 104–105 (C. C. A. 5), *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261; *N. L. R. B.* v. *Brozen*, 166 F. (2d) 812 (C. C. A. 2). See 1 Sutherland, *Statutory Construction*, Section 1936, p. 438, note 13 (3d Ed. 1943).

[6] *Matter of Clearfield Machine Company*, 74 N. L. R. B. 914.

[7] The Respondent, in its exceptions and its brief, contends that the Trial Examiner erred in refusing to permit the Respondent to inquire into the Union's compliance with various requirements of the amended Act. We find no merit in this contention. See *Matter of Lion Oil Company*, 76 N. L. R. B. 565; *Matter of Ironton Fire Brick Company*, 76 N. L. R. B. 764.

employees, the shipping clerk, the order clerk, engineering department employees, the assistant foundry foreman, the assistant machine shop foreman, and all other supervisors, in respect to grievances, labor disputes, rates of pay, wages, hours of employment, and other conditions of employment, and if agreement is reached on any such matters, embody such understanding in a signed contract;

(b) Post at its plant at Clearfield, Pennsylvania, copies of the notice attached hereto, marked "Appendix A." [8] Copies of said notice, to be furnished by the Regional Director for the Sixth 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 a period of sixty (60) consecutive days thereafter in conspicuous places, including all places were 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) Notify the Regional Director for the Sixth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

MEMBERS HOUSTON and REYNOLDS took no part in the consideration of the above Decision and Order.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order 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 BARGAIN collectively upon request with INTERNATIONAL ASSOCIATION OF MACHINISTS, as the exclusive representative of all employees in the unit described herein with respect to grievances, labor disputes, rates of pay, wages, hours of employment, and other conditions of employment, and if agreement is reached on any such matters, embody such understanding in a signed contract.

WE WILL NOT in any manner interfere with the efforts of the above-named Union to bargain with us.

THE BARGAINING UNIT is:

All production and maintenance employees, excluding office clerical employees, the shipping clerk, the order clerk,

[8] In the event this Order is enforced by decree of a Circuit Court of Appeals, there shall be inserted before the words "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS ENFORCING."

engineering department employees, the assistant foundry foreman, the assistant machine shop foreman, and all other supervisors.

CLEARFIELD MACHINE COMPANY,
Employer.

Dated _____ By _____
(Representative) (Title)

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

INTERMEDIATE REPORT

Mr. W. G. Stuart Sherman, for the Board.
Mr. Frank G. Smith and *Mr. Frank A. Whitsett*, of Clearfield, Pa., for the respondent.
Mr. Herman Lipsitz and *Mr. A. G. Skundor*, of Pittsburgh, Pa., for the Union.

STATEMENT OF THE CASE

Upon a charge duly filed by International Association of Machinists, herein called the Union, the General Counsel of the National Labor Relations Board, herein jointly referred to as the Board, by its Regional Director for the Sixth Region (Pittsburgh, Pennsylvania), issued its complaint dated November 5, 1947, against Clearfield Machine Company, 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 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, as amended by Public Law 101—80th Congress, Chapter 120—1st Session, herein called the Act. Copies of the complaint and notice of hearing were duly served on the respondent and the Union.

With respect to the unfair labor practices, the complaint alleges in substance that the respondent since on or about August 19, 1947, and at all times thereafter, has refused to bargain collectively with the Union, although the Union was the representative of a majority of the employees in an appropriate unit. The respondent filed an answer which, in effect, denied jurisdiction of the Board and the commission of any alleged unfair labor practices.

Pursuant to notice, a hearing was held at Clearfield, Pennsylvania, on November 20, 1947, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The Board, the respondent and the Union were each represented by counsel, and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the conclusion of the testimony counsel for the Board moved to amend the pleadings to conform to the proof as to non-substantive matters. The motion was granted without objection. Although offered an opportunity to do so, none of the parties presented oral argument before the undersigned at the hearing. The respondent and the Union have submitted briefs to the undersigned.

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

FINDINGS OF FACT[1]

I. THE BUSINESS OF THE RESPONDENT

The respondent is a Pennsylvania corporation engaged in the manufacture, sale and distribution of grinding and crushing machinery for refractories and mixing machinery for foundries. The respondent also manufactures and services heavy equipment and machines parts for power shovels, bulldozers, and local machine plants. Its principal office and place of business is located at Clearfield, Pennsylvania.

The value of the raw and other materials used by the respondent at its Clearfield, Pennsylvania, plant, for the 12-month period ending May 1, 1947, amounted to approximately $192,000, of which approximately 67 percent was shipped to its said plant from sources outside the Commonwealth of Pennsylvania. During the same period the respondent manufactured finished products and serviced parts of a value of approximately $700,000, of which approximately 67 percent was sold and shipped to points outside the Commonwealth of Pennsylvania.

The respondent employs approximately 91 persons at its Clearfield plant.

The respondent contends that it is not engaged in interstate commerce ". . . to such extent as to affect said commerce and become subject to the provisions of the Labor Management Relations Act, 1947." The undersigned rejects this contention and finds that the respondent is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

International Association of Machinists is a labor organization which admits to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The refusals to bargain*

1. The appropriate unit and representation of a majority therein

The complaint alleges, and in its Decision and Certification of Representatives, dated July 31, 1947,[2] the Board found, that all production and maintenance employees of the respondent, excluding office clerical employees, the shipping clerk, the order clerk, engineering department employees, the assistant foundry foreman, the assistant machine shop foreman, and all other supervisory employees, constitute a unit appropriate for the purposes of collective bargaining.

In its answer the respondent did not deny the appropriateness of the unit as alleged in the complaint, but averred as follows:

> In answer to the facts set forth in paragraph four, the defendant avers that prior to any hearing or determination, as set forth in said paragraph, the old or former National Labor Relations Board prejudged and predetermined, prior to any hearing, that the employees outlined therein, were an appropriate unit and the hearing and decision rendered thereafter and referred to in said paragraph was only in confirmation of the predetermination made by said Board, said Board having held an election before any hearing

[1] The respondent did not call any witnesses at the hearing. All facts hereinafter set forth either stand uncontradicted in the record or were stipulated to by the parties.

[2] In the *Matter of Clearfield Machine Company*, Case No. 6–R–1726, 71 N. L. R. B. 914.

was held and determination made of what was an appropriate unit, all of which was objected to by defendant, and defendant still objects and questions the right of said Board to predetermine an appropriate unit without a hearing and only holding a hearing to confirm its predetermination.

At the hearing the respondent did not offer any evidence on the question of the appropriateness of the unit. Accordingly, the undersigned finds that all production and maintenance employees of the respondent, excluding office clerical employees, the shipping clerk, the order clerk, engineering department employees, the assistant foundry foreman, the assistant machine shop foreman, and all other supervisory employees, have at all times material herein constituted and do now constitute an appropriate unit within the meaning of the Act; he finds that said unit will insure to the employees of the respondent the full benefit of their right to self-organization and collective bargaining and otherwise effectuate the purposes of the Act.

In its said Decision dated July 31, 1947,[3] the Board certified the Union as the exclusive representative of all employees in the afore-mentioned appropriate unit for the purposes of collective bargaining. The respondent in its answer averred upon information and belief that the Union at the time of the hearing did not represent a majority of the respondent's employees and that the Union ". . . never did by voluntary action of the employees represent them, but secured a number of applications for membership by threatening some of the employees that they would lose their jobs if they did not join, that they would be charged exorbitant and unreasonable initiation fees if they did not join initially." In addition, the respondent's answer sets forth that due to a change in its operations since the holding of the election, a substantial number of employees who participated in the election are no longer working at the respondent's plant. The respondent, however, did not offer any proof on the question of majority at the hearing. Accordingly, the undersigned finds that on and at all times after July 31, 1947, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that pursuant to the provisions of Section 9 (a) of the Act, the Union was on July 31, 1947, and at all times thereafter has been 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.

2. The negotiations

A. G. Skundor, Grand Lodge Representative of the Union, sent the following letter, dated August 6, 1947, to the respondent:

> While at your office Monday afternoon, August 4, 1947, I requested that we set a date and time to start Agreement negotiations between your Company and our Organization in view of the fact that the National Labor Relations Board had certified the International Association of Machinists as the exclusive collective bargaining representative of all your production and maintenance employees. You advised that upon advice from your Attorney, Frank G. Smith, that I should contact him. I then went to the office of Attorney Frank G. Smith to discuss the matter with him and was advised that he was out of the City.
>
> Therefore, please accept this as our formal notice requesting that we arrange for a conference to negotiate an Agreement regarding wages, rates

[3] The election in Case No. 6–R–1726 was conducted by the Board on May 15, 1947.

of pay, hours of employment, and other conditions of employment for the employees in the unit which the National Labor Relations Board has found to be appropriate in its "Decision and Certification of Representatives" dated July 31, 1947 in the matter of the Clearfield Machine Company and the International Association of Machinists, Case No 6–R–1726.

We are prepared to start negotiations on August 18 or 19, 1947. Please advise if these dates are satisfactory to your Company and the time and place that it will be convenient to you to hold the negotiations.

The proposed Agreement we sent you enclosed with our letter addressed to you under date of May 20, 1947 is still our proposal.

Waiting your reply.

Frank G. Smith, respondent's attorney, sent two letters dated August 5 and 7, to Skundor advising him, in substance, that the respondent had not determined whether or not it was going to negotiate or contest the election held by the Board. Finally, Smith sent Skundor the following letter, dated August 19, 1947:

In further reference to the above stated case and your request for meeting with you for collective bargaining purposes, and supplementing my several letters with respect to this subject, you are hereby advised that it is my opinion that the election that was held and the proceedings otherwise, were not proper.

Due to those facts, and other matters, we have decided to question this procedure which you instituted, and in view of the fact that the only way that this be done is by further action on your part, and our not negotiating at the present time, we have decided not to meet with you for the purpose of negotiating, but to adopt the procedure herein mentioned.

3. Conclusions

At the hearing the respondent admitted that it had refused to bargain with the Union on and at all times after August 19, 1947. In its brief the respondent's contentions are set forth as follows:

(1) The company is not engaged in interstate commerce to such extent as to affect said commerce and become subject to the provisions of the Labor Management Relations Act, 1947.

(2) In view of the improper proceedings in predetermining an appropriate unit and holding an election prior to a hearing, the defendant was not guilty of any unfair labor practice, because before any complaint was filed in the case and determination made in respect thereto, the Labor Management Relations Act, 1947, was passed, which made it mandatory that a hearing be held before any election.

The undersigned has found above that the respondent is sufficiently engaged in commerce within the meaning of the Act to be subject to the jurisdiction of the Board. The undersigned also does not find any merit in the second contention of the respondent, since the Board's Decision in Case No. 6–R–1726 was rendered prior to the effective date of the Labor Management Relations Act, 1947, which was August 22, 1947. An employer's refusal to grant recognition to a certified representative generally has been held to constitute *per se* an illegal refusal to bargain.[4] Further, the Board in a recent Decision[5] held that the

[4] *Black Diamond S. S. Corporation* v. *N. L. R. B.*, 94 F. (2d) 875, *N. L R. B* v *Calumet Steel Division of Borg-Warner Corporation*, 121 F. (2d) 366; *Pittsburgh Plate Glass Company* v. *N. L. R. B*, 313 U. S 146.

[5] *Matter of Underwood Machinery Company*, 74 N. L. R. B. 641.

employer's contention that the Board exceeded its authority in a prior representation proceeding by conducting a prehearing election, was not a valid defense of its refusal to bargain.

Accordingly, the undersigned finds that on August 19, 1947, and at all times thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of its employees within the appropriate unit, and thereby interfered with 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 failed and refused to bargain with the Union as the representative of its employees in the appropriate unit, it will be recommended that it cease and desist therefrom and that, upon request, the respondent bargain collectively with the Union with respect to wages, hours and other terms and conditions of employment.

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

CONCLUSIONS OF LAW

1. International Association of Machinists is a labor organization within the meaning of Section 2 (5) of the Act.
2. All production and maintenance employees of the respondent, excluding office clerical employees, the shipping clerk, the order clerk, engineering department employees, the assistant foundry foreman, the assistant machine shop foreman, and all other supervisory employees, constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.
3. International Association of Machinists was on July 31, 1947, and at all times thereafter has been, the exclusive representative of all the employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.
4. By refusing to bargain collectively with International Association of Machinists, as exclusive bargaining representative of employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.
5. By said acts the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (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 foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respond-

ent, Clearfield Machine Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, as the exclusive representative of all employees in the unit hereinabove found to be appropriate;

(b) In any manner interfering with the efforts of International Association of Machinists to bargain collectively with it.

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

(a) Upon request bargain collectively with International Association of Machinists, as the exclusive representative of all the employees in the aforesaid unit;

(b) Post at its plant at Clearfield, Pennsylvania, 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 Sixth 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 respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Sixth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply therewith.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 22, 1947, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D C., an original and six 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 six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, 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.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

JOHN H. EADIE,
Trial Examiner.

Dated December 15, 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, as amended, we hereby notify our employees that:

WE WILL BARGAIN collectively upon request with INTERNATIONAL ASSOCIATION OF MACHINISTS, as the exclusive representative of all the employees in the bargaining unit, and

WE WILL NOT in any manner interfere with the efforts of the above-named union to bargain with us. The bargaining unit is:

All production and maintenance employees of the respondent, excluding office clerical employees, the shipping clerk, the order clerk, engineering department employees, the assistant foundry foreman, the assistant machine shop foreman, and all other supervisory employees.

CLEARFIELD MACHINE COMPANY,
Employer.

Dated_____ By_____
(Representative) (Title)

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