In the Matter of THE OHIO POWER COMPANY *and* UTILITY WORKERS UNION OF AMERICA (CIO)

Case No. 8-C-2179.—Decided August 19, 1948

Mr. John A. Hull, Jr., for the General Counsel.

Day, Cope, Ketterer, Raley & Wright, by *Mr. D. W. Raley*, of Canton, Ohio, for the Respondent.

Herman E. Cooper, by *Mr. H. Howard Ostrin*, of New York City, for the Union.

DECISION

AND

ORDER

On May 25, 1947, the Trial Examiner 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.[1]

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-man panel consisting of the undersigned Board Members.*

The Board has reviewed the Trial Examiner's rulings made at the hearing and finds 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.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor

[1] Subsequent to the complaint hearing, the Respondent filed a motion, a supplementary motion, and a further supplementary motion to reopen the record; the Board and Union Counsel filed affidavits in opposition. These motions allege no new material facts not contained in the record of the case and, accordingly, they are hereby denied.

*Chairman Herzog and Members Reynolds and Murdock.

Relations Board hereby orders that the Respondent, The Ohio Power Company, Canton, Ohio, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Utility Workers Union of America (CIO), as the exclusive representative of all its regular employees at the Tidd plant, including control operators, stores attendants, and janitors, but excluding guards, clerical employees, construction employees, probationary employees, part-time employees, laboratory tester, chemist, junior chemist, test engineer, junior test engineer, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action;

(b) In any manner interfering with the efforts of Utility Workers Union of America (CIO), to bargain collectively with it, as the exclusive representative of its employees in the appropriate unit described above.

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

(a) Upon request bargain collectively with Utility Workers Union of America (CIO), as the exclusive bargaining representative of all the employees in the aforesaid bargaining unit, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post in conspicuous places at its plant at Brilliant, Ohio, copies of the notice attached to the Intermediate Report herein marked "Appendix A." [2] Copies of the said notice, to be furnished by the Regional Director for the Eighth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained 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) Notify the Regional Director for the Eighth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[2] This notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" and substituting in lieu thereof the words "A DECISION AND ORDER." In the event that this Order is enforced by decree of a Circuit Court of Appeals, there shall be inserted in the notice, before the words "A DECISION AND ORDER," the words "DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS ENFORCING. . . ."

INTERMEDIATE REPORT

Mr. John A. Hull, Jr, for the General Counsel.

Day, Cope, Ketterer, Raley & Wright, by *Mr. D. W. Raley*, of Canton, Ohio, for the respondent.

Mr. Herman E. Cooper, by *Mr. H. Howard Ostrin*, of New York City, for the Union.

STATEMENT OF THE CASE

Upon an amended charge duly filed by Utility Workers Union of America (CIO), herein called the Union, the General Counsel by the Regional Director for the Eighth Region (Cleveland, Ohio) of the National Labor Relations Board, herein called the Board, issued his complaint dated January 23, 1948, against The Ohio Power Company, Canton, 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, and Section 8 (a) (1) and 8 (a) (5) of the Act, as amended by the Labor Management Relations Act, 1947, Public Law 101, 80th Congress, chapter 120—1st Session. Copies of the complaint together with copies of the charge and notice of hearing thereon were duly served upon the respondent and the Union.

With respect to unfair labor practices, the complaint alleged in substance that the respondent (a) on or about June 13, 1947, and thereafter, refused to bargain collectively with the Union as the exclusive bargaining representative of the respondent's employees within an appropriate bargaining unit, although a majority of the employees in such unit, in an election conducted under the supervision of the Board on May 13, 1947, had designated and selected the Union as their representative for the purposes of collective bargaining, and (b) thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

In its answer, duly filed herein, the respondent admitted certain of the allegations, averred "that the proceedings of the Board and the purported certification of representatives were without jurisdiction or authority, were unwarranted by the facts and otherwise not in accordance with law; that the Board exceeded its statutory jurisdiction and authority by assuming to exercise jurisdiction to determine and establish an appropriate collective bargaining unit and to certify a collective bargaining representative, when from the whole record before it and the evidence submitted it appeared that a question affecting commerce had not arisen when the Board purported to take jurisdiction; that the finding, determination and orders of the Board that control operators, stores attendants and janitors should be included in the collective bargaining unit . . . were arbitrary, capricious, abusive of discretion, and unsupported by substantial evidence upon consideration of the whole record," and denied it had engaged in any unfair labor practices within the meaning of the Act.

Pursuant to notice, a hearing was held on February 24, 1948, at Canton, Ohio, before the undersigned, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the respondent, and the Union were represented at the hearing by counsel. 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 close of the hearing, the undersigned granted a motion by the General Counsel to conform the pleadings to the proof as to

dates and minor variations and reserved ruling on the respondent's motion to dismiss the complaint for lack of proof. The motion is hereby denied. All the parties were afforded opportunity to present oral argument at the close of the hearing, and to file briefs and/or proposed findings of fact and conclusions of law with the undersigned. None of the parties presented oral argument or submitted proposed findings of fact or conclusions of law. Briefs were received from the Union and the respondent.

Upon the entire record [1] of the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, The Ohio Power Company, an Ohio corporation, is engaged in the production, sale and distribution of electrical energy, and owns and operates a power plant at Brilliant, Ohio, known as the Tidd plant, which is involved in this proceeding. The respondent operates its business in 55 counties in the State of Ohio and furnishes energy to Timken Roller Bearing Company, Republic Steel Corporation, Lima Locomotive Company, American Rolling Mills Company and various other industrial concerns which produce goods for shipment to points outside the State. It purchases and receives various equipment, such as turbines and wire, from concerns located outside the States and has interconnections with public utility companies in Pennsylvania, West Virginia and Indiana and transmits or receives electrical energy across State lines through such inter-connections. The respondent concedes, and the undersigned finds, that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

Utility Workers Union of America (CIO) is a labor organization admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

The refusal to bargain

A. The appropriate unit and representation by the Union of a majority therein

On April 14, 1947, the Board issued a Decision and Direction of Election in Case No. 8–R–2463,[2] finding, among other things, that all regular employees of the respondent's Tidd plant, including control operators, stores attendants and janitors, but excluding guards, clerical employees, construction employees, probationary employees, part-time employees, laboratory tester, chemist, junior chemist, test engineer, junior test engineer, and all 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.

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[1] All the parties having joined in the respondent's motion to correct the transcript in certain respects, the undersigned hereby grants the motion and orders the Transcript Clerk to enter the corrections on the face of the record.

[2] *The Ohio Power Company*, 73 N L R. B 384.

On May 13, 1947, pursuant to the Direction of Election, an election by secret ballot was conducted under the supervision of the Regional Director for the Eighth Region. Upon the conclusion of the election, a Tally of Ballots was furnished the respondent and the Union in accordance with the Rules and Regulations of the Board. No objections to the conduct of the election were filed by the respondent or the Union within the time provided therefor. The Tally showed that 50 ballots were cast, of which 22 were for, and 20 against, the Union; and that 8 ballots were challenged. Seven of the challenges were made by the respondent and 1 was made by the Union. The Regional Director, having duly investigated the challenges, on May 20, 1947, issued and duly served upon the respondent and the Union his Report on Challenges. In his report he made certain findings and recommendations sustaining each of the challenges made by the respondent, and not passing upon the challenge made by the Union which would not have affected the results of the election. No exceptions having been filed by the respondent or the Union to the Regional Director's findings and recommendations, the Board on June 10, 1947, adopted them and certified the Union as the representative, for the purposes of collective bargaining, of the employees in the unit heretofore mentioned.

The respondent contests the Board's findings (a) that a question concerning representation had arisen, and (b) that the control operators, stores attendants and janitors are properly part of the appropriate unit. As appears from the Board's Decision and Direction of Election and from the record in the representation proceeding, these precise contentions were raised by the respondent in that case, and were there litigated and decided adversely to the respondent.

In the instant proceeding, the respondent, in support of its view that the control operators should be excluded from the unit as supervisors, sought to adduce testimony relating to matter in existence at the time of the representation hearing. It was not shown that this testimony was newly discovered or unavailable or not known to the respondent at the time of that hearing, or that the respondent had not been given full opportunity to be heard. The issues having already been litigated, the undersigned excluded this testimony offered by the respondent.[3]

[3] *Allis-Chalmers Manufacturing Co.*, v. *N. L R. B.*, 162 F. (2d) 435, 440, and cases there cited. The matter excluded, which is essentially supplementary to and of the same general character as the testimony adduced at the representation hearing, appears in the transcript as a proffer.

This proffer shows that the control operator is employed in the control room where instruments register the operation of the equipment at the plant. He is responsible to the shift operating engineer who spends part of his time in the control room. In the event an emergency is indicated on the instruments and the shift operating engineer is performing other of his duties either in or outside the plant, the control operator would, if he had the opportunity, report it to the engineer; if he did not have the opportunity to do so, he would proceed to meet the situation or at the first opportunity he would reach for the microphone and announce the circumstances on the public address system. The shift operating engineer would generally know independently of the emergency because of the variations in the sound of the operating equipment. Normally, the employees at the plant are directed in their work by their respective supervisors through a series of work orders, but during a minor or major emergency the control operator has authority to requisition and direct the activities of substantially all the employees to keep the plant in operation. Several times during the last winter, for example, when coal deliveries were diverted to another point and the plant used coal from storage which had been frozen and had the effect of clogging the conveying system, the control operators requisitioned men from the maintenance department to hammer on the chutes and poke the coal along to maintain a stream of supply.

The proffer also shows that the respondent plans to add additional sections to the Tidd plant and that when the Tidd plant is developed to its anticipated capacity, its output will be comparable to that of the respondent's Philo plant. The respondent plans at that

Testimony concerning circumstances which had changed subsequent to the representation proceeding was, however, received. The respondent, as new matter, showed that on December 1, 1947, it had changed the method of payment to the control operators from an hourly to a monthly salary basis, and that the control operators are paid an amount in excess of $325 a month. No testimony concerning the other disputed categories was offered.

The change concerning the payment of the control operators is not in the undersigned's opinion sufficient in view of the other factors to warrant their exclusion. Under these circumstances, the undersigned finds, in accordance with the Board's previous determination, that all regular employees at the respondent's Tidd plant, including control operators, stores attendants, and janitors, but excluding guards, clerical employees, construction employees, probationary employees, part-time employees, laboratory tester, chemist, junior chemist, test engineer, junior test engineer, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute, and at all times material herein constituted, a unit appropriate for the purposes of collective bargaining.[4] The undersigned further finds that on and at all times after June 13, 1947, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid bargaining unit and that, pursuant to the provisions of Section 9 (a) of the Act, the Union was on June 13, 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.

B. The refusal to bargain

On June 13, 1947, the Union wrote the respondent, referring to the Board's certification and requesting a meeting to negotiate an agreement. On July 3, 1947, the respondent replied stating in its letter that it had filed a petition with

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time to set up a supervisory organization at the Tidd plant which it considers comparable to that of the Philo plant, where all persons in the supervisory organization are excluded from the bargaining unit. The proposed organizational set-up at the Tidd plant will consist of a shift operating engineer and 4 or 5 control operators, one operator for each of the additional sections to the Tidd plant However, the persons in the organizational set-up at the Philo plant have classifications different from the classifications proposed for the organizational set-up at the Tidd plant, and the Philo plant is radically different in design from the Tidd plant Moreover, it does not appear that the Tidd plant will reach its proposed ultimate capacity in the near future; nor does it appear that the Board has ever passed upon the merits of the exclusion of the classifications at the Philo plant organizational set-up.

[4] The respondent contends that the control operators are supervisors under the Act as amended by the Labor Management Relations Act, 1947 This contention assumes that the record does not support a finding that the control operators are not supervisors under the terms of the amendment Even if this assumption were accepted, the contention lacks merit for it does not appear that the amendment has become operative as to this case Section 103 of the amendment provides that it shall not "affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification . . . ," and 1 year has not elapsed since the certification. Aside from this literal interpretation, it would appear that when, as here, an employer has contested and has refused to honor a certification, the period during which the certification has not had an opportunity to function should be tolled from the computation of the 1-year period. *N. L. R. B* v *P. Lorillard Co.*, 314 U. S. 512; *Franks Bros Co.* v. *N. L. R. B.*, 321 U. S. 702; *N. L. R. B* v. *Gatke Corp*, 162 F. (2d) 252

the United States Circuit Court of Appeals for the Sixth Circuit for a review of the Board's findings in the representation proceeding and that it would not arrange a meeting until the issue was disposed of by the Court. Thereafter on November 3, 1947, the Union again requested a bargaining meeting pointing out that the Court had dismissed the respondent's petition for review.[5] At about this time, too, William R. Munger, the Union's vice president, telephoned Harold Turner, the respondent's vice president, and inquired about bargaining. Turner stated that the respondent still refused to bargain with the Union, explaining that the respondent was in the same position as it had been before it had filed the petition for review with the Court, for the Court in dismissing the petition had not passed upon the substantive issues. Turner also indicated that the principal issue in the controversy concerned the control operators. Thereupon Munger inquired if the respondent would consider negotiating a contract pending and subject to an adjudication of this issue, and Turner declined to enter into such an arrangement. By letter dated November 18, 1947, the respondent explained to the Union that its failure to reply to the Union's letter of November 3 was due to the illness of Turner. By the end of November there was another exchange of letters between the parties with the Union requesting and the respondent refusing to bargain. The respondent repeated its opposition to the Board's unit determination and stated that if the Union wished to abandon its claim relating to the inclusion of the job classifications to which the respondent had objected, the respondent would be willing to commence negotiations with the Union as representative of the remainder of the unit.

The undersigned accordingly finds that the respondent on June 13, 1947, and at all times thereafter has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit 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

It is found that 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. It having been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent upon request bargain collectively with the Union.

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. Utility Workers Union of America (CIO) is a labor organization, within the meaning of Section 2 (5) of the Act.

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[5] *Ohio Power Company* v *N L R. B*, 164 F. (2d) 275

2. All regular employees of the respondent's Tidd plant including control operators, stores attendants and janitors, but excluding guards, clerical employees, construction employees, probationary employees, part-time employees, laboratory tester, chemist, junior chemist, test engineer, junior test engineer, and all 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 collective bargaining within the meaning of Section 9 (b) of the Act.

3. Utility Workers Union of America (CIO) was on June 13, 1947, and at all times thereafter has been the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 13, 1947, and at all times thereafter, to bargain collectively with Utility Workers Union of America (CIO), 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 and 8 (a) (5) of the Act, as amended.

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 and Section 8 (a) (1) of the Act, as amended.

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, The Ohio Power Company, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Utility Workers Union of America (CIO) as the exclusive representative of all its regular employees at its Tidd plant, including control operators, stores attendants, and janitors, but excluding guards, clerical employees, construction employees, probationary employees, part-time employees, laboratory tester, chemist, junior chemist, test engineer, junior test engineer, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action; and

(b) Engaging in any other acts in any manner interfering with the efforts of Utility Workers Union of America (CIO) to negotiate for or represent the employees in the aforesaid unit 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 Utility Workers Union of America (CIO), as the exclusive bargaining representative of all the employees in the bargaining unit 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 in conspicuous places at its plant at Brilliant, Ohio, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Eighth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent imme-

diately upon receipt thereof and maintained by it for a period of 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; and

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

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

As provided in Section 203.46 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 thereto shall be deemed waived for all purposes.

MAX M. GOLDMAN,
Trial Examiner.

Dated March 25, 1948.

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 UTILITY WORKERS UNION OF AMERICA (CIO) to negotiate for or represent the employees in the bargaining unit described below.

WE WILL BARGAIN collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to 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 unit is:

All our regular employees of the Tidd plant including control operators, stores attendants and janitors, but excluding guards, clerical employees, construction employees, probationary employees, part-time employees, laboratory tester, chemist, junior chemist, test engineer, junior test engineer and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

THE OHIO POWER COMPANY,
Employer.

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.