In the Matter of DAVID I. COHEN, AN INDIVIDUAL, DOING BUSINESS AS GAY PAREE UNDERGARMENT COMPANY *and* INTERNATIONAL LADIES' GARMENT WORKERS UNION

Case No. 21-CA-670.—Decided October 30, 1950

DECISION AND ORDER

On August 11, 1950, Trial Examiner C. W. Whittemore 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 brief in support thereof.

The Board [1] has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modifications set forth below.

1. The Trial Examiner found, and we agree, that the Respondent refused to bargain with the Union, within the meaning of Section 8 (a) (5) of the Act.

The Trial Examiner's finding that the Respondent refused "to negotiate" with the Union upon matters relating to wages and other conditions of employment requires some clarification. It is apparent, and we find, that such characterization of the Respondent's conduct had reference to its lack of good faith during the bargaining negotiations. The record is clear that the Respondent did meet with the Union and discussed various proposals submitted by the Union. But such conduct by the Respondent does not necessarily satisfy its bargaining obligation, for the real question is whether or not the Re-

[1] Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Reynolds and Murdock].

spondent was dealing in good faith or engaged in mere "surface bargaining," without any intent of concluding an agreement on a give-and-take basis.[2] Of course, the Act does not compel agreement, but it does require that both parties enter into negotiations and bargain in good faith in an effort to reach such agreement.

We agree with the Trial Examiner that the record shows, as fully set forth in the Intermediate Report, that the Respondent engaged in negotiations with a predetermination not to make any concession to the Union and to reserve to itself the unilateral power to decide matters of earnings, grievances, and other conditions of employment. This attitude is incompatible with a bona fide endeavor to reach an understanding with the chosen representative of employees, and manifests the negation of the collective bargaining envisaged by the Act.[3] Moreover the Respondent's insistence upon having a contractual right to discharge strikers "whether for union activity or not" further indicates its lack of good faith and constitutes *per se* a violation of Section 8 (a) (5).[4]

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 Relations Board hereby orders that David I. Cohen, an individual doing business as Gay Paree Undergarment Company, Los Angeles, California, his officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Ladies' Garment Workers Union, as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or other conditions of employment;

(b) In any manner interfering with the efforts of International Ladies' Garment Workers Union to bargain collectively with the Respondent.

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

(a) Upon request, bargain collectively with International Ladies' Garment Workers Union as the exclusive representative of all the employees in the appropriate unit, and embody any understanding reached in a signed agreement;

(b) Post at its Anza Village, California, plant, copies of the notice

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[2] *N. L. R. B.* v. *Whittier Mills*, 111 F. 2d 474, 478 (C. A. 5); *N. L. R. B.* v. *Athens Manufacturing Co.*, 161 F. 2d 8 (C. A. 5).

[3] *South Carolina Granite Company*, 58 NLRB 1448; *Atlanta Broadcasting Company*, 90 NLRB 808.

[4] *American National Insurance Company*, 89 NLRB 185. See also *N. L. R. B.* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C. A. 6), certiorari denied, 335 U. S. 814.

attached to the Intermediate Report marked Appendix A.[5] Copies of such notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, 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 Twenty-first Region, in writing, within ten (10) days from receipt of this Order what steps the Respondent has taken to comply herewith.

INTERMEDIATE REPORT

Mr. George H. O'Brien, of Los Angeles, Calif., for the General Counsel.
Mr. A. F. Levy, of Los Angeles, Calif., for the Union.
Mr. Arthur V. Kaufman, of Los Angeles, Calif., for the Respondent.

STATEMENT OF THE CASE

Upon a charge duly filed by International Ladies' Garment Workers Union, herein called the Union, the General Counsel of the National Labor Relations Board,[1] by the Regional Director for the Twenty-first Region (Los Angeles, California) issued his complaint dated June 6, 1950, against David I. Cohen, an individual doing business at Gay Paree Undergarment Company, Los Angeles, California, 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, as amended, Public Law 101 (80th Congress, First Session), herein called the Act. Copies of the complaint, the charge, and a notice of hearing were duly served upon the Respondent and the Union.

With respect to unfair labor practices, the complaint alleges in substance that the Respondent from on or about October 9, 1949, has failed and refused to bargain in good faith with the Union, and thereby has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

The Respondent's answer, duly filed, denies that it has engaged in the unfair labor practices alleged.

Pursuant to notice, a hearing was held on July 11, 1950, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel, the Respondent, and the Union were represented by counsel. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon

[5] This notice, however, shall be and it hereby is, amended by striking from line 3 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 a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words, "A Decree of the United States Court of Appeals Enforcing."

[1] The representative of the General Counsel at the hearing is herein referred to as General Counsel, the National Labor Relations Board as the Board.

the issues. Opportunity was waived to argue orally and to file briefs. Following the hearing, the General Counsel filed with the Trial Examiner and the other parties a "List of Authorities,"—citations of Board cases relevant to issues in this case.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent has his principal place of business in Los Angeles, California, and is engaged in the business of manufacturing ladies' undergarments at plants in Los Angeles, San Diego, and Anza Village, all in California. During the year ending January 25, 1950, the Respondent bought more than $85,000 worth of raw materials, such as rayon, cotton, and other fabrics, of which more than 80 percent in value was shipped to his places of business in interstate commerce from and through States other than California, and sold finished products valued at more than $562,000, of which about 50 percent in value was sold and transported from his places of business in interstate commerce to and through States other than California.

The Respondent does not contest the allegation that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

International Ladies' Garment Workers Union, an affiliate of the American Federation of Labor, is a labor organization admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain; interference, restraint, and coercion*

1. The appropriate unit; the Union's majority representation

In accordance with a Certification of Representatives issued October 5, 1949, by the Regional Director for the Twenty-first Region (Case No. 21–RC–956), the Trial Examiner finds that on and since that date the Union is and has been the exclusive representative of all the Respondent's employees at its Anza Village plant in an appropriate collective bargaining unit consisting of all production workers, floor help, and packing and shipping workers, but excluding machinists and supervisory employees as defined in Section 2 (11) of the National Labor Relations Act.

2. Negotiating conferences

Only two negotiating meetings were held before the Union filed charges of refusal to bargain. One occurred on October 9 and the second on November 21, 1949. Testimony as to these meetings was elicited from only two witnesses for the General Counsel and one for the Respondent.

At the first conference the Respondent was represented by David Cohen and attorney Arthur Kaufman. The Union was represented by its attorney, A. F. Levy, two officials, and a shop committee consisting of two workers. Although all three witnesses characterized the initial meeting as "exploratory" or as a "general discussion," the policies then enunciated by Cohen cannot be ignored

in determining the question of "good faith" bargaining, the major issue in the case, and in resolving conflicting testimony as to events at the second meeting. It is undisputed that at the opening of the first conference Cohen directed the following remark, in substance, to the shop committee:

> Well, you voted for the Union. I don't know why you did it because you are not going to get anything as a result of it.

When the union counsel pointed out that it was his duty to bargain and enter into an agreement, Cohen replied that he would bargain and sign a contract, but no one would tell him how to run his business.

It is also uncontradicted that at the same meeting Cohen stated:

> (1) that he would hire and fire as he saw fit remaining the "sole judge" on this matter;
>
> (2) that no raise would be granted and that he would be the "sole judge" of earnings and piece rates; and that while he would discuss such points with the Union, he would neither "take the Union's advice" nor submit any dispute to arbitration;
>
> (3) that he would not bargain on a vacation, health, and welfare plan.

At the second conference only Kaufman represented the Respondent, while the Union was represented by its attorney and one official. Each of 26 provisions in a written contract proposed by the Union was discussed, briefly or at length. Much of the testimony concerning arguments made and positions maintained by each of the two parties is in conflict. It appears unnecessary to encumber this report with a complete digest of such contradictory testimony. Findings, therefore, are limited to a summary of ultimate positions taken as established by the preponderance of credible evidence. In resolving conflicts, the Trial Examiner is mindful of the fact that counsel for the Union testified from notes recorded at the conference, while counsel for the Respondent relied upon his recollection of a meeting which had taken place about 8 months before the hearing, and that testimony regarding Cohen's basic policy, outlined at the first conference, is not disputed.

Substantial agreement was reached as to the Union's proposed clauses regarding recognition, a weekly payday, examination by the Union of the Respondent's books to determine if contract provisions were being observed, equal distribution of work among employees at the plant, grievance procedure up to management level, homework for employees, contracting within the shop, authority and agency of shop chairmen, a so-called "saving clause," observance of wage-hour legislation, and the term of the agreement.

The employer's representative rejected union proposals as to substantially all other matters, and as to some refused to offer counterproposals or to negotiate. The checkoff provision was rejected. Proposals for a shorter workweek and overtime were met with a refusal to agree to any change in current practice. The employer refused to consider or to counterpropose any form of arbitration or conciliation of disputes, maintaining adamantly its position that Cohen must remain as the final authority in all controversies and no recourse would be permitted from his decisions. Similar refusal was accorded the Union's proposals as to holidays and holiday pay. When asked to make some counteroffer on this point, Kaufman said that this was a matter for Cohen's "unilateral" decision, and stated that "it is not within the realm of the Union's business to bargain with or tell an employer or request an employer to pay for holidays." As to the Union's proposal concerning a joint method of fixing piecework rates,

the Respondent countered only with the statement that such rates would be fixed unilaterally, as it saw fit.

Concerning proposals as to work stoppages, discharges, and the crossing of picket lines, the employer insisted that while any union protest would be received and discussed, final authority to hire and fire must be Cohen's. Furthermore, Kaufman demanded that a clause be included stating that "the employer's right to discharge is final and the Union shall have no recourse, whether it be to arbitration or to court, on this question." When the union counsel asked for at least a clause recognizing its right to protest discharges because of union activity and the requirement to reinstate under such circumstances, Kaufman said: "No. The employer wants the right to discharge at his will and discretion."

The Respondent refused to negotiate the proposal for a 15-cent hourly increase in pay for all employees, and flatly declined to make any counterproposal, although directly asked to do so. As to a minimum scale of wages, Kaufman said that while the company would pay wages equal to those paid by competitors or required by law, it would agree to no contractual clause binding it as to any rates.

Although Kaufman agreed to include a clause recognizing the right to strike, he insisted that such right be conditioned by the following qualification: 'But if any worker does strike for higher wages, better conditions, et cetera, the employer shall have the right to discharge said worker. If any worker strikes because another worker has been fired, whether for Union activity or not, she may strike but all strikers are to be discharged."

The employer refused to negotiate the proposal concerning equal distribution of work between its three Los Angeles factories, only one of which is organized. It likewise refused to negotiate as to the proposal for vacation, health, and welfare benefits.

Upon reaching the end of the proposals, Kaufman said to the union representatives: "This is the contract we offer you. If you want it, take it. If you don't want it, go ahead and strike."

3. Conclusions

In the light of Cohen's opening declaration to the shop committee to the effect that they would not "get anything as a result" of voting for the Union, and of Kaufman's blunt summary of the Respondent's position of "take it" or "strike," after discussing specific union proposals; the Trial Examiner is unable to perceive "good faith" bargaining by the Respondent at either of the two conferences held by the parties. At the hearing Kaufman insisted that the reason negotiations broke down was the Union's adamant position that it must have a "job security" clause, and that on all other matters further bargaining conferences might well have produced agreement. More credible testimony, including parts of his own detailed account of negotiations at the second meeting, refute Kaufman's claim.[2]

General Counsel cites as controlling in this case *American National Insurance Company* (89 NLRB 185) in which the Board said, in part:

[2] Doubt upon the accuracy of Kaufman's recollection generally is cast by the contradiction apparent in the following quotation from his own testimony: "No discussion of any kind was had with reference to Union activities. The matter of discharge for Union activities—the matter was not raised. No statement was made by me that any employee was discharged for Union activities, and as a matter of fact I stated to him that he knows my client has not discharged employees for Union activities; but on the contrary has hired girls he knows have been guilty of Union activities."

> It is clear that from the inception of negotiations the chief obstacle to agreement was the Respondent's inflexible position that it would not conclude any contract with the Union unless it accepted the Respondent's so-called prerogative clause, either in the original or amended form, as described in the Intermediate Report. By this clause the Respondent sought to reserve to itself the exclusive right to determine unilaterally such terms and conditions of employment as working rules, work schedules, the establishment of extra shifts, lay-off policy, lunch periods, the granting of leave of absence, and the distribution of overtime. . . . Nor was the Union any more successful in its offer to accept the Respondent's demands provided that disputes arising under the contract were made subject to arbitration. The Respondent refused to qualify its asserted management prerogatives.

The Trial Examiner finds merit in General Counsel's claim. In major and substantial respects the Respondent here involved likewise refused to yield upon or to negotiate concerning any matter which it considered management prerogative, or to negotiate concerning any form of arbitration or conciliation of disputes which might arise under the contract. The Respondent's insistence that a clause be included which would insure that the "employer's right to discharge is final and the Union shall have no recourse, whether it be to arbitration or to court," was plainly an effort to deprive that organization of its legal right to represent the Respondent's employees. Similarly restrictive of employees' rights under the Act was the Respondent's insistence upon the Union's agreement to a provision permitting the employer to discharge strikers "whether for Union activity or not."

Accordingly, the Trial Examiner concludes and finds that the Respondent, by refusing to negotiate upon matters clearly within the realm of collective bargaining, such as holidays, wages and piecework rates, a general increase, distribution of work among its three factories, arbitration of disputes, and vacation, health, and welfare benefits, by insisting upon clauses depriving the Union of the right to protest discharges beyond the level of the employer himself, and by the lack of good faith evident from its whole course of purported bargaining with the Union, has failed to perform its statutory obligation to bargain, in violation of Section 8 (a) (5) of the Act, and thereby has interfered with, restrained, and coerced its employees in the exercise of their guaranteed rights in violation of Section 8 (a) (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It has been found that the Respondent has refused to bargain collectively with the Union, thereby interfering with, restraining, and coercing its employees. It will therefore be recommended that the Respondent cease and desist therefrom and, also, that it bargain collectively with the Union with respect to wages, hours,

and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed contract.

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

CONCLUSIONS OF LAW

1. International Ladies' Garment Workers Union is a labor organization within the meaning of Section 2 (5) of the Act.

2. All production workers, floor help, and packing and shipping workers employed by the Respondent at its Anza Village, California, plant, excluding machinists, and supervisory employees as defined in Section 2 (11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. International Ladies' Garment Workers Union was, on October 5, 1949, and at all times since has been, the exclusive representative within the meaning of Section 9 (a) of the Act of all employees in the aforesaid unit for the purposes of collective bargaining.

4. By refusing to bargain collectively with International Ladies' Garment Workers Union, as the exclusive bargaining representative of the 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 has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby 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.

[Recommended Order omitted from publication in this volume.]