

In the Matter of MAHONING MINING COMPANY and LOCAL UNION  
#12,509, DISTRICT 50, UNITED MINE WORKERS OF AMERICA

*Case No. 14-C-883.—Decided April 28, 1945*

*Messrs. Kieth W. Blinn and Hugh D. McNew, for the Board.*

*Pope and Driemeyer, by Robert L. Broderick, of East St. Louis, Ill., and Messrs. J. G. Trewartha and R. K. Wisco, both of Rosiclare, Ill., for the respondent.*

*Mr. Harold Stephenson, of Rosiclare, Ill., for the Union.*

*Mr. William C. Baisinger, Jr., of counsel to the Board.*

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon an amended charge duly filed on August 23, 1944, by Local Union #12,509, District 50, United Mine Workers of America, herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Fourteenth Region (St. Louis, Missouri), issued its complaint, dated August 23, 1944, against Mahoning Mining 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 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. A copy of the complaint, accompanied by Notice of Hearing, was duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that all employees of the respondent at its W. L. Davis Mine, Anna L. Davis Mine, and West Green Mine, excluding clerical and supervisory employees, guards, safety men, and the engineer, constitute a unit appropriate for the purposes of collective bargaining; (2) that the Union has been designated and selected by a majority of all employees in said unit as their exclusive representative for the

purpose of collective bargaining pursuant to an election conducted by the Board on July 9, 1942, and has, at all times since the date of the election, continued to be the exclusive representative of the employees in said unit; (3) that on or about September 8, 1943, and at all times thereafter, the respondent, although duly requested, refused to bargain collectively with the Union as the exclusive representative of its employees in said appropriate unit; and (4) that, by such refusal, the respondent violated Section 8 (5) of the Act and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, within the meaning of Section 8 (1) of the Act.

On September 8, 1944, the respondent filed its answer<sup>1</sup> in which, after admitting the facts set forth in the complaint as to its corporate organization and its business operations, it denied the allegations of the complaint with respect to unfair labor practices and set forth affirmative matter, hereinafter discussed, by way of defense.

Pursuant to notice, a hearing was held at Elizabethtown, Illinois, on September 14 and 15, 1944, before Charles E. Persons, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel, and the Union, by one of its officials. All parties 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 beginning of the hearing the respondent moved to amend its answer by correcting the date stated in the final paragraph thereof from September 3 to September 8. At the close of the hearing the Board moved to conform the pleadings to the proof as to minor errors not touching matters of substance. These motions were granted without objection. During the course of the hearing, the Trial Examiner made rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.

On November 4, 1944, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon the parties, finding that the respondent had engaged in and was engaging in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action. Thereafter, the respondent filed exceptions and a brief. The Union has not filed any exceptions. No request for oral argument before the Board was made, and none was held.

---

<sup>1</sup> The time for the filing of the answer was extended by order of the Regional Director issued on September 4, 1944.

The Board has considered the Intermediate Report, the respondent's exceptions and brief, and the entire record in the case, and finds that the exceptions have merit.

Upon the entire record in the case, the Board makes the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT<sup>2</sup>

Mahoning Mining Company, a Delaware corporation having its principal office at Youngstown, Ohio, is engaged in the mining of lead, zinc, and fluorspar at its mines in the vicinity of Cave in Rock, Illinois, and in the operation of a mill at Rosiclare, Illinois, at which it reduces ore produced at its own mines and other mines in the vicinity. During the calendar year 1943, the respondent purchased raw materials and supplies valued in excess of \$100,000, of which more than 50 percent was purchased and shipped from points outside the State of Illinois. During the same year the respondent sold and shipped products valued in excess of \$400,000, of which more than 50 percent was sold and shipped from its operations in the vicinity of Rosiclare, Illinois, to points outside the State of Illinois. The operations of the respondent carried on during the months of 1944, immediately preceding the hearing, were substantially similar to its operations during 1943.

The respondent admits, and we find, that it is engaged in commerce within the meaning of the National Labor Relations Act.

#### II. THE ORGANIZATION INVOLVED

Local Union #12,509, District 50, United Mine Workers of America, is a labor organization admitting to membership employees of the respondent.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Background*

##### 1. The mines involved

The respondent owns three fluorspar mines in the vicinity of Cave in Rock, Illinois, known as the W. L. Davis Mine, Anna L. Davis Mine, and West Green Mine, herein referred to as the Davis Mine, Anna Mine, and West Green Mine, respectively. The respondent has operated the Davis Mine continuously since 1939. The Anna Mine was operated by the respondent from 1941 to April or May 1943, at

---

<sup>2</sup> The findings in this Section are based (a) on a stipulation of the parties incorporated in the record; (b) on allegations in the complaint, admitted by the respondent in its answer; and (c) on testimony which is uncontroverted.

which time it was shut down because the respondent was unable to obtain a sufficient number of employees to produce the desired quantity of ore. Thereafter, on July 9, 1943, the respondent entered into a mining contract with J. W. Patton and Sons, an independent contractor, herein called Patton,<sup>3</sup> for the operation of the Anna Mine. The respondent operated its West Green Mine from 1941 to September 1, 1943, when it entered into a contract with Cat Mining Company, hereinto called Cat,<sup>4</sup> to operate the West Green Mine. At the time of the hearing in this proceeding, as theretofore, the operation of the three mines was a constituent part of the business of the respondent. The ore there mined, together with additional amounts brought from other mines in the vicinity, is assayed and milled in the respondent's plant at Rosiclare; and the products are thereafter sold to the United States Government or on the general market.

2. The history of collective bargaining with respect to the Davis, Anna, and West Green Mines

On May 29, 1942, in a representation proceeding involving the respondent and the Union, the Board issued a Decision and Direction of Election,<sup>5</sup> in which it found, on the basis of a stipulation of the parties, that "all employees at the three mines operated by the Company in and near Cave in Rock, Illinois, excluding clerical and supervisory employees, guards, safety men and the engineer, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act."

Pursuant to the Board's Direction of Election, an election by secret ballot was held on July 9, 1942. A majority of the votes having been cast for the Union, on July 30, 1942, the Board certified the Union as the statutory representative of the employees within the appropriate unit as defined above. Thereafter, the respondent and the Union entered into a contract effective from October 1, 1942, to October 1, 1943, and "from year to year thereafter unless, by notice given by either party thirty (30) days prior to the expiration of any year, it be sooner

<sup>3</sup> Patton, an experienced contractor, is a partnership composed of J. W. Patton and his two sons, Paul and Tom. Since the formation of the partnership in 1931, Patton has contracted for hauling, road construction, and mining operations. Patton owns considerable equipment suited to this type of work. At the time of the hearing, among other things, Patton was engaged in hauling operations under separate contracts with two companies not involved in this proceeding.

<sup>4</sup> Cat is a partnership formed in August 1943, by five individuals, four of whom had at various times been employed by the respondent, to engage in independent mining operations. After Cat had entered into the mining contract with the respondent, two of the partners sold their interest in the partnership to the other three partners. The respondent accepted this change in the partnership structure and operations continued under the contract.

<sup>5</sup> *Matter of Mahoning Mining Company and United Mine Workers of America, Gas, Coke, and Chemical Workers, District No. 50, C. I. O.*, 41 N. L. R. B. 497. The Union has since changed its name to that hereinabove set forth.

terminated." Among other things, the agreement included a provision that the respondent "deduct from the earnings of members of [the Union] the amounts each employee authorizes in writing to be deducted" and transmit such amounts to the Union.

*B. The alleged refusal to bargain*

After execution of the contracts with Patton and Cat mentioned above, on September 8 and October 4, 1943, the Union and the respondent through their representatives met for the purpose of collective bargaining. At the first meeting, "various phases of the old contract were discussed and the union members presented certain features which they would like to have incorporated in the new contract"; and it was agreed to have a later meeting after consideration of the new proposals. At the second meeting, union representatives presented a demand that the respondent deduct union dues of three of their members alleged to have been recently transferred from the W. L. Davis to the West Green Mine. The respondent refused, stating that the men in question were not its employees. In the ensuing discussion the respondent informed the Union that the respondent did not recognize the mining employees in the Anna Mine or those in the West Green Mine as employees of the respondent. The respondent asserted that Patton and Cat, respectively, as independent contractors, were the employers of the men in these mines. While refusing to bargain for these men, the respondent stated that it was willing and ready to bargain for employees in the W. L. Davis Mine and for surface men working in the power plant at the West Green Mine.<sup>6</sup> The Union did not find this an acceptable basis for negotiation and withdrew. Thereafter, it filed with the Board charges which give rise to this proceeding.

We agree with the Trial Examiner that the essential question for solution is whether the respondent was obligated under the Act to bargain for the employees working in the Anna and West Green mines after the mining contracts had been entered into with Patton and Cat, respectively.

As disclosed in the record, contracts involving leasing of mining sites are frequently made in the fluorspar mining area in the vicinity of the respondent's operations. The provisions in the respondent's contracts with Patton and Cat are substantially similar and conform, with a single exception,<sup>7</sup> to provisions found in contracts in general

<sup>6</sup> A powerhouse that generates electricity and compressed air is located on the West Green Mine property. The respondent operates this powerhouse and, under the terms of its contract with Cat, sells Cat electricity and compressed air. In the operation of the powerhouse, the respondent employs about seven men, who are referred to as surface employees as distinguished from mine employees. These employees are on the respondent's pay roll and were included in the bargaining unit found appropriate in the representation case.

<sup>7</sup> In this area, mining contracts are customarily entered into for a term of 1 year

usage in this mining area. Each contract states that the respondent, referred to in the contracts as the Company, desires to employ the contractor, referring to Patton or Cat as the case may be, as an independent contractor to deliver fluorspar ore from the respective mine involved. Paragraph 1 of the contract with Cat, dealing with the term of the agreement, is as follows:

The term of this agreement, for the exclusive purpose of delivering fluorspar ore and disposing of waste rock incident to the mining thereof, shall be thirty (30) days from the date first above written; provided, that the term of this agreement shall be and become extended for succeeding thirty (30) day periods thereafter, unless and until either the Company or the contractor shall serve upon the other a written notice of termination, which notice shall be served not less than ten (10) days prior to the expiration of the then current thirty (30) day period, and unless said term shall be sooner terminated by default as herein provided.<sup>8</sup>

Each contractor was to use the machinery, buildings, and equipment of the respondent, the contractor assuming an obligation to keep the same in repair and to replace parts as needed. The contractor also became responsible under the agreements for the extension of air and electric lines and of haulage tracks, as the work progressed. He was to "hire, control and fire [his] own employees and arrange for the method of their compensation entirely in [his] discretion and control." The contracts specifically provided that "there shall be no privity of contract between the Company and the Contractor's employees."

In addition, the contractor was to insure his liability under workmen compensation and occupational disease laws and to obtain adequate public liability insurance.<sup>9</sup> Immediately upon commencing operation, each contractor was to post written notices, notifying all persons that the property was being operated under an agreement with the respondent and that the contractor was assuming liability for all labor performed and supplies and materials used.<sup>10</sup> He was to keep an accurate record of the amount of waste discarded. He was to have access to the

<sup>8</sup> As stated above, this paragraph is quoted from the respondent's contract with Cat, the corresponding provision in the contract with Patton is substantially similar but contains minor variations in phraseology

<sup>9</sup> In practice, the contractors also made Social Security deductions from employees' wages.

<sup>10</sup> A notice posted on September 1, 1943, by Cat at the West Green Mine reads as follows.

*To Whom it May Concern*

This property known as the West Green Mine is operated by the Cat Mining Company under an agreement with the Mahoning Mining Company, and the Cat Mining Company is liable for all labor performed and supplies and materials used by the Cat Mining Company in and upon this property. The Cat Mining Company is responsible for all debts and expenses incurred in the mining operations in and upon this property.

THE CAT MINING COMPANY.

[Signed by each partner]

respondent's mine maps and drill records for guidance in his operations. The contractor was to deliver ore into the mine hopper in minimum and maximum amounts fixed in the contracts.<sup>11</sup>

The contractor further agreed "that he will not through improper mining methods or through violation of any of the requirements of the Statutes of the State of Illinois or the rules and regulations of any official of the State of Illinois, so conduct his operation as to cause loss or damage to the [respondent] or its property or interfere with the ability of the [respondent] upon the expiration of the term of this agreement to enter upon said property and immediately conduct mining operations therein." Each contract also provided that "the contractor shall not assign or subcontract this contract . . . without the written consent of the Company."

The respondent agreed to furnish each contractor compressed air at a stated price per shift and was to have the "right at all times to enter said property and all underground workings thereof for purposes of inspecting, surveying and sampling." The respondent was to haul the ore from the shaft hopper of each mine to its mill in Rosiclare, Illinois; weigh and assay it; and pay a basic rate "per net dry ton" based on a specified calcium fluoride content.<sup>12</sup> There were also bonus payments provided for one of higher content and penalties for ore assaying a lower given percentage in calcium fluoride content.<sup>13</sup>

It appears that in operation all the terms and provisions of the contracts have been observed. Patton commenced operations at the Anna Mine on July 9, 1943. None of the men employed by Patton to work in the mine were former employees of the respondent. Many of them had been in Patton's employ for 4 or 5 years. Patton maintains an office in Elizabethtown, Illinois, where its pay roll is prepared and pay checks are issued for all its employees, including the workers at the Anna Mine. Patton pays the men at the Anna Mine on different dates than the pay days established by the respondent. Paul Patton, one of the partners, is in charge of the mining operations of Patton. He regularly worked full time in the Anna Mine and was in charge of operations, supervising the employees, determining the mining methods to be used, and selecting the areas in the mine to be exploited. The record

---

<sup>11</sup> 200 to 400 tons per week in the case of the Anna L. Davis Mine; 100 to 200 tons per day at the West Green Mine.

<sup>12</sup> Fifty-five percent at the Anna L. Davis; 50-55 percent at the West Green.

<sup>13</sup> There was a supplementary agreement between the respondent and Cat to the effect that, at the end of the first month of operations at the West Green Mine by Cat, Cat would present to the respondent an accurate record of tonnage mined and waste discarded and of all costs incurred. The data was to provide a basis for determining a new price per ton of ore mined. Accordingly on October 1, 1943, the parties met and agreed to a reduction in price from \$2.50 to \$2.10 per ton. Records introduced in the hearing show that, despite the cut in price, Cat received approximately \$2.50 per ton of ore mined in November 1943. The reduction in price per ton of ore was counterbalanced by bonus payments, the calcium fluoride content having been raised from 51 to 55 percent in September to 59 to 62 percent in November.

reflects no interference by the respondent with Patton's control of the selection, supervision, or discharge of employees working in the Anna Mine.

According to uncontradicted testimony of Paul Patton, sometime in July 1944, he was advised by the respondent that it would soon have a sufficient supply of ore of the type produced at the Anna Mine to last for a considerable period of time. Accordingly, the respondent and Patton agreed that Patton should discontinue operations at the Anna Mine until the respondent had reduced the stockpile of ore at its mill. Consequently, on or about August 25, 1944, Patton ceased operations at the Anna Mine and, pursuant to a separate contract with the respondent, commenced operations on certain of the respondent's property at Salem, Kentucky, where Patton was still working at the date of the hearing. Paul Patton and John G. Trewartha, the respondent's general manager, who had signed the contract relating to operation of the Anna mine, testified that they regarded performance under that contract as temporarily suspended until such time as the respondent had need for more ore from the Anna Mine.

Cat commenced operations at the West Green Mine under its contract with the respondent on September 1, 1943. On September 8, 1943, the date of the alleged refusal to bargain, 5 of the 7 production employees working at the West Green Mine were persons who had been in the employ of the respondent prior to September 1, 1943.<sup>14</sup> Of these 5 persons, 2 had worked as guards at the respondent's W. L. Davis Mine<sup>15</sup> immediately prior to the time they went to work for Cat as skilled laborers at 14 cents more per hour than they had earned as guards; 1 had been employed at the W. L. Davis Mine, in a capacity not revealed in the record, immediately prior to employment at the West Green Mine; and the remaining 2 persons were formerly employed at the W. L. Davis Mine but had not worked for the respondent for several months prior to the time that they were hired by Cat. Harold Kitelinger, one of Cat's partners, testified, without contradiction, that, in the latter part of September 1943, Cat had a full crew of about 26 men. It does not appear, however, whether all 26 of these employees then worked at the West Green Mine or whether any of the additional 19 persons hired were former employees of the respondent.<sup>16</sup> Kitelinger testified that all persons hired by Cat when

<sup>14</sup> The respondent operated the West Green Mine until Cat took over on September 1, 1943. The record does not disclose what happened to the persons employed at West Green by the respondent prior to September 1, except as hereinafter disclosed.

<sup>15</sup> The W. L. Davis Mine, which is still operated exclusively by the respondent, together with the Anna and West Green Mines, comprised the operational unit which the Board previously found to be appropriate.

<sup>16</sup> At the date of the hearing, in addition to operating the West Green Mine, Cat was engaged under a separate contract in performing developmental work at another of the respondent's mines known as the East Green Mine. This mine is not within the unit heretofore determined by the Board to be appropriate.

it commenced operating under the contract with the respondent, were considered by Cat as newly hired employees, and that Cat did not recognize the seniority which any of these persons may have acquired while working for the respondent. As in the case of Patton, the record reflects no interference by the respondent with Cat's control of the selection, supervision, or discharge of employees working in the West Green Mine.<sup>17</sup>

Upon the basis of the foregoing, we do not agree with the Trial Examiner's conclusion that the respondent exercises or has the right to exercise sufficient control over the respective operations of Patton and Cat at the Anna and West Green Mines to establish that the respondent is an employer of the persons working in these two mines within the meaning of the Act.

The record shows, as the Trial Examiner finds, that it is common practice in the fluorspar mining industry for mine owners to contract out the operation of their mines to others. It is undisputed that the mining contracts here involved are substantially similar to the mining contracts customarily used in the industry. There is neither claim nor evidence that the respondent entered into the contracts with Patton and Cat for the purpose of evading any obligation of the respondent under the Act. Examination of the contracts shows that the contracting parties clearly intended that Patton and Cat were to operate the Anna and West Green Mines, respectively, as independent contractors free from any control by the respondent with respect to the method of operation or with respect to the hire, discharge, hours, wages, or other terms or conditions of employment of the persons working in the two mines. Thus, each of the contracts provided:

1. That there "shall be no privity of contract between the [respondent] and the contractor's employees. . . .

2. That the contractor "shall select, control and fire his own employees, and arrange for the method of their compensation entirely in the discretion and control of the contractor, and shall have exclusive control over the mining operations during the term hereof."

3. That the contractor was to take out and pay for all types of insurance necessary for the protection of its employees while operating the mine; and

---

<sup>17</sup> Employee Clifford Edwards, who worked for Cat in the West Green Mine as a mucker, testified, without contradiction, that the respondent's Mine Superintendent V. G. Smith customarily inspected the West Green Mine two or three times a week and that, on one such occasion, Edwards overheard Smith tell Kitelinger that the ore on which Edwards was working "wasn't what it ought to be" and that more of it should not be mucked. Thereafter, Kitelinger told Edwards to "go over to another place and go to mucking." On cross-examination, however, Edwards testified that this was the only occasion on which he had heard Smith give advice or directions to representatives of Cat.

4. That the contractor was to post notices on the mine property concerning its liability for all labor performed and debts and expenses incurred by it while operating the mine.

It is undisputed that the above-stated provisions of the contracts, as well as all others, have been observed by all parties since the contractors commenced operations under the respective contracts.

General Manager Trewartha testified, without contradiction, that, inasmuch as the respondent was unfamiliar with the capabilities of Patton and Cat at the time the mining contracts were executed, the respondent insisted upon short-term contracts to enable it to retake possession of the mines on short notice in the event that the contractors proved unable to supply a sufficient amount of ore. Moreover, merely because the contracts are month to month agreements, terminable on 10 days' notice, it does not necessarily follow, that the persons working in the Anna or West Green Mines would be severed from the contractor's pay roll should the contracts be terminated. Both Patton and Cat hold themselves out to the world as independent contractors and, as disclosed by the record, at the date of the hearing both were engaged in performing work under other contracts. As previously noted, many of the persons working at the Anna Mine have been employed by Patton for 4 or 5 years. The usual employment relationship is terminable at will. Thus, the employment security of the workers at the Anna and West Green Mines is not fundamentally unlike that of the ordinary employee. Furthermore, it does not necessarily follow that the respondent would retain such workers in the event of cancelation of the contracts. Besides, so long as these contracts remain in force, the contractors have exclusive control over the subjects of collective bargaining as to the workers here in question, and they may bargain collectively with the contractors with respect to such employment. In other words, so far as appears, the contractors are the real employers.

The single incident related by employee Edwards, considered in the light of other evidence in the record, does not, in our opinion, establish that the respondent possesses the right to control the operations of Cat. Cat was composed of experienced miners but inexperienced contractors. Mine Superintendent Smith was well qualified by his experience with the respondent, particularly in connection with the West Green Mine, to advise Kitelinger with respect to contract operations. It is reasonable to infer that Kitelinger received and Smith gave such advice as an incident of the joint interest of the parties in profitable operation of the venture. It is also significant that, although Edwards saw Smith inspecting the mine two or three times a week, this is the

only occasion that he heard Smith give any advice or instruction to representatives of Cat.

As mentioned above, at least a month prior to the interruption of operations at the Anna Mine, Patton and the respondent had mutually agreed to close the mine for an indefinite period, and Patton had entered into a separate agreement with the respondent to perform work at another location until such time as the Anna Mine should be reopened. This temporary departure from the terms of Patton's contract was not unilaterally made on the spur of the moment, as the Trial Examiner infers, but was a mutual understanding of the parties for a temporary cessation of performance under the contract.

In reaching his conclusion that the respondent occupied the position of an employer as to the workers in the Anna and West Green Mines, the Trial Examiner relied strongly upon the Board's decision in the *Kendall* case.<sup>18</sup> We are of the opinion that the instant case is distinguishable from the *Kendall* case. In the case before us there is no showing that either Patton or Cat performed their mining operations according to any plan, general or otherwise, formulated by the respondent. Nor, except for the single incident related by employee Edwards, has any representative of the respondent ever offered any suggestion as to the operational methods to be used by Patton or Cat. The virtual absence of control by the respondent over the operations of Patton and Cat or of the employees in the mines, in our opinion, clearly distinguishes this case from the *Kendall* case. We have consistently declined to find the existence of an employer-employee relationship between the employees of an independent contractor and a so-called employer for whom the contractor is performing work in the absence of economic facts demonstrating the need for the establishment of

---

<sup>18</sup> *Matter of S. A. Kendall, et al.*, 38 N L R. B. 1071. In that case the Kray Coal Company owned four mines in West Virginia which were operated respectively by four mining contractors under separate contracts identical in substance. The contracts provided (1) that the contractor was to properly mine and deliver coal to Kray; (2) that Kray was to pay a stated price for each ton of coal delivered; (3) that the coal was to be mined in a manner satisfactory to Kray and in conformity with West Virginia mining laws; and (4) that the contract could be terminated upon 7 days' written notice by either party. In practice each contractor was required to perform his mining operations according to a general plan formulated by Kray. A representative of Kray made periodic inspections of each mine, and his instructions and suggestions as to operating methods to be used were followed by the contractors. Upon these facts the Board found that, inasmuch as Kray owned the mines and a substantial portion of the mining equipment in them and received almost their entire output of coal, his interest in the contractor's operation of the mines was substantial. The Board further found that Kray retained a substantial degree of control over the operations of the contractors and the employees in the mines not only by virtue of the power to cancel the contracts on 7 days' notice but also by reason of the supervision exercised through Kray's representatives, who inspected the mine and instructed the contractors as to the method of operation to pursue. Under these circumstances, the Board concluded that an employer-employee relationship existed not only between the contractors and their respective employees but also between the employees of the contractors and Kray. Accordingly, the Board found Kray and the contractors to be co-employers.

collective bargaining between them or evidence that such employer exercises, or has the right to exercise, a substantial degree of control over the employees of the contractor.<sup>19</sup> Here there is no such showing.

The Trial Examiner further reasoned that, since the Board has previously determined that all employees working at the three mines, W. L. Davis, Anna, and West Green, when operated by the respondent, constituted an appropriate unit, and the respondent and the Union had entered into a contract covering such employees, effective until October 1, 1943, the respondent, although privileged to contract out the operations of its mines, was obligated under the Act, as well as by the contract, to maintain collective bargaining relations with the Union as the statutory representative of the persons within the appropriate unit. Applying this principle, the Trial Examiner found that, by failing to incorporate the provisions of its collective bargaining contract with the Union in the mining contracts which it had entered into with Patton and Cat prior to the expiration date of the bargaining agreement and by its subsequent refusal to bargain with the Union as to the persons working at the Anna and West Green Mines, the respondent refused to bargain collectively within the meaning of Section 8 (5) of the Act.

We do not agree with the Trial Examiner. The Board has recognized that its finding with respect to the appropriate unit in a particular business may subsequently become inappropriate due to changes in the business structure, operational methods of the employer, or the extent of union organization among the employees.<sup>20</sup> Thus, where conversion of a factory from peacetime to war production has produced fundamental changes in the employer's manufacturing operations, the Board has found that previous bargaining units, although appropriate when established, lost their identities and may no longer be considered appropriate.<sup>21</sup> Since changing conditions in industry necessitate revision of bargaining units which will best effectuate the policies of the Act, the Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith, without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change. Also, none of the persons working for Patton at the Anna

---

<sup>19</sup> Cf. *Matter of Firesafe Builders Corp*, 57 N. L. R. B. 1803; *Matter of Consolidated Vultee Aircraft Corporation and Studio Commissary Service Company*, 57 N. L. R. B. 1680; and *Matter of Markham and Callow, Incorporated*, 13 N. L. R. B. 963

<sup>20</sup> *Mills Industries Incorporated, et al.*, 57 N. L. R. B. 467.

<sup>21</sup> *Marshall Stove Company*, 57 N. L. R. B. 375.

Mine were former employees of the respondent. So far as the record shows, only three employees working for Cat at the West Green Mine, on September 8, 1943, had been employed by the respondent immediately prior to being hired by Cat, and each of them was considered by Cat to be a newly hired employee. Thus, we are not concerned here with a situation in which an employer has contracted out all or a part of his operations and the contractor has continued the employer's business with the same employees. Finally, it is undenied that, at all times material, the respondent has been willing to bargain with the Union as to the employees at the W. L. Davis Mine and the surface employees at the West Green Mine who are within the unit previously established by the Board and the bargaining agreement. We conclude that the respondent has thereby satisfied its obligations under the Act.

Having found that the record fails to support the Trial Examiner's finding that the respondent exercises or has the right to exercise sufficient control over the respective operations and employees of Patton and Cat at the Anna and West Green Mines to establish an employer-employee relationship between the respondent and those employees, and having found no basis under the Act for the Trial Examiner's conclusion that the respondent violated Section 8 (5) of the Act by failing to incorporate the provisions of its collective bargaining contract with the Union in the mining contracts with Patton and Cat or by subsequently refusing to bargain with the Union for the persons working in the Anna and West Green Mines, we conclude, contrary to the Trial Examiner, that the respondent has not refused to bargain collectively within the meaning of Section 8 (5) of the Act.<sup>22</sup> Accordingly, we shall dismiss the complaint.

Upon the entire record in the case, the Board makes the following:

#### CONCLUSIONS OF LAW

1. The operations of the respondent, Mahoning-Mining Company, Youngstown, Ohio, herein involved, occur in commerce, within the meaning of Section 2 (6) and (7) of the Act.

2. Local Union #12,509, District 50, United Mine Workers of America, is a labor organization, within the meaning of Section 2 (5) of the Act.

3. The respondent has not engaged in unfair labor practices, within the meaning of Section 8 (1) and (5) of the Act, as alleged in the complaint.

---

<sup>22</sup> In view of our decision, we have no occasion to determine the appropriate unit, as such, or to pass upon the Union's claimed status as majority representative at the time of the alleged refusal to bargain.

**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 complaint issued herein against the respondent, Mahoning Mining Company, Youngstown, Ohio, be, and it hereby is, dismissed.

CHAIRMAN MILLIS took no part in the consideration of the above Decision and Order.