In the Matter of LARUS & BROTHER COMPANY, INC *and* TOBACCO WORKERS INTERNATIONAL UNION LOCAL 219 (AFL)

Case No. 5–R–1413—Decided June 30, 1945

Messrs. Earle K. Shawe and *Sidney Barban,* for the Board

Mr. Joseph Jacobs, of Atlanta, Ga., *Mr. John O'Hare,* of Richmond, Va., *Mr. George Benjamin,* of Richmond, Va., for the AFL

Mr. R. E. Cabell, of Richmond, Va., for the Company.

Witt & Cammer, by *Mr. Samuel Rosenwein,* of New York City, for the CIO.

Mr. Seymour J. Spelman, of counsel to the Board

SUPPLEMENTAL DECISION

AND

ORDER

I STATEMENT OF THE CASE

The major issues for determination in this decision arise out of events occurring after the Board certified Tobacco Workers International Union Local 219 (AFL), herein called the AFL,[1] one of the two unions participating in an election conducted by the Board on March 14, 1944, among employees of Larus & Brothers Company, Inc., Richmond, Virginia, herein called the Company. Specifically, these issues, delineated by the Board in its order dated November 18, 1944, are whether or not

(1) The organization with which the Company has entered into a collective bargaining relationship is the organization certified as the representative under Section 9 (a) in a determination of the Board dated March 31, 1944, within the principles enunciated by the Board in *Matter of Bethlehem-Almeda Shipyard, Inc.,* 53 N. L. R. B. 999,

(2) Such organization provides for equal representation of all employees in the bargaining unit covered by such determination, irrespective of race or color, and

[1] The term "AFL" will be used to indicate Local 219 and the term "International" the parent organization

(3) The collective agreement or agreements made since such certification confers equal rights and privileges to all employees within such bargaining unit, irrespective of race or color.

The above-described issues stem from proceedings begun in 1943, when, on December 17, a hearing was held upon petitions for certification of representatives theretofore filed by the AFL, and by United Cannery, Agricultural, Packing and Allied Workers of America (C. I. O.), herein called the CIO. On February 16, 1944, the Board issued its Decision, Direction of Election, and Order (54 N. L. R B. 1345). It ordered an election among production and maintenance employees in the Company's manufacturing plant; the unit found by the Board to be appropriate for the purposes of collective bargaining was substantially in accordance with that sought by the AFL and opposed by the CIO.

On March 14, 1944, an election was conducted among employees in the appropriate unit under the direction of the Regional Director for the Fifth Region (Baltimore, Maryland). Following the election, a Tally of Ballots was furnished to the parties in accordance with the Rules and Regulations of the Board. The Tally of Ballots shows that of the approximately 579 eligible voters 500 cast valid votes, of which 179 were for the CIO, 315 for the AFL, and 6 for neither. Five void ballots were cast and 3 were challenged.

On March 31, 1944, the Board issued a Certification of Representatives, certifying that the AFL had been designated and selected by a majority of the employees in the appropriate unit as their exclusive representative for the purposes of collective bargaining.

On April 1, 1944, the CIO filed a motion, with supporting affidavits, to rescind the certification of the AFL. The motion alleged that on March 16, 1944, 2 days after the election, George Benjamin, an international vice president of the AFL, had informed five colored employees in the manufacturing plant that Local 219, the certified bargaining agent, would not bargain for them. It was further alleged that Benjamin had told them that the Negro workers would have to form a separate local which would be their bargaining representative, and that because of these representations a group of Negro employees applied for a charter in the International. The motion also claimed that the AFL did not enter the election in good faith and that it had no intention of bargaining for all of the employees in the unit requested by it. The motion further asked that the election be set aside and that a new election be held in the larger unit previously requested by it but rejected by the Board as inappropriate.[2]

[2] Following the Decision and Direction of Election and Order of February 16, 1944, the CIO filed a motion in the form of a telegram asking reconsideration of the unit finding that the manufacturing part of the plant was a separate unit, and renewing its request for a plant-wide unit The Board denied this motion on February 24, 1944.

On April 7, 1944, the Board issued and served upon the parties a Notice to Show Cause why the certification of the AFL should not be rescinded because of refusal to bargain for the Negro employees in the appropriate unit. The AFL responded with a denial of the allegations contained in the CIO's motion, and submitted affidavits in support of its contention that it was in fact bargaining for the Negro employees in the unit. On May 27, 1944, the Board issued its "Order Directing Hearing on Motion to Rescind Certification." Thereafter the AFL filed a motion, supported by a brief and affidavits, to set aside the order. In opposition to this motion the CIO submitted a brief and affidavits. On November 18, 1944, the Board issued an "Order Affirming and Amending Order of May 27, 1944, Directing Hearing on Motion to Rescind Certification." This order denied the AFL's motion to set aside the order of May 27, 1944, and directed that evidence be received on the issues noted above.

Pursuant to notice, a hearing was held at Richmond, Virginia, from January 3 to and including January 5, 1945, before Frank Bloom, who was duly designated Trial Examiner. The Board, the Company, the CIO, and the AFL were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. After the receipt of testimony counsel for the CIO and AFL made oral argument, which is contained in the record, and filed briefs with the Trial Examiner.[3]

On February 23, 1945, pursuant to the order of the Board, the Trial Examiner issued and served upon the parties a Report and Recommendation, setting forth his findings of fact and recommendations as to the disposition of the case. Thereafter, exceptions to the Report and Recommendations were filed by the AFL and the CIO.

Pursuant to notice, a hearing was held before the Board at Washington, D. C., on June 21, 1945, for the purposes of oral argument. The AFL and the CIO were represented by counsel and participated in the argument. In addition, the American Civil Liberties Union and the National Lawyers Guild were permitted to intervene and participate in the argument as *amici curiae*. The Company took no part in the oral argument. The Board has considered the Trial Examiner's Report and Recommendations, the exceptions filed by the unions, and the contentions advanced at the oral argument before the Board.

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

[3] Counsel for the Company made no oral argument, stating that it desired to maintain a neutral attitude. It did not file a brief, presumably for the same reason

II. FINDINGS OF FACT

A. *Background of labor relations involved herein*

1. The Company's business and operations

Larus & Brother Company, Inc., is a corporation engaged in the manufacture and sale of tobacco products. Its principal place of business is in Richmond, Virginia, where it operates various establishments necessary to its business. Manufacturing operations are carried on in two connected buildings. A stemmery is located in an adjoining block. The stemmery and other establishments are not directly involved in this proceeding, which is confined to the manufacturing operations.

2. Collective bargaining history before the election of March 1944

In 1937, following consent elections, two separate collective bargaining units were established among employees in the Company's manufacturing plant. One unit was composed of white production and maintenance employees, represented at one period by the Larus Employee's Association (now defunct) and later by the AFL, and a second unit was composed of all colored production and maintenance employees, represented by the CIO. In 1941, again following a consent election, a third bargaining unit was established, composed of all production and maintenance employees at the stemmery plant, represented by the CIO. There has been no collective bargaining history in the leaf and raw material warehouses. Until the election of March 1944, and the resultant certification of the AFL as representative of the employees in the manufacturing plant, the Company maintained collective bargaining relations with the CIO and AFL on this three-unit basis, pursuant to three separate bargaining agreements.

B. *Units sought by the CIO and AFL in 1943, the appropriate unit found by the Board in February 1944*

At the hearing in December 1943, as in its petition previously filed, the AFL sought a unit composed of all production and maintenance employees, excluding watchmen, truck drivers, laboratory, advertising, mimeograph, and kitchen employees. The CIO asked for a unit including the stemmery and warehouse employees but otherwise the same as that sought by the AFL.

As noted heretofore, on February 16, 1944, the Board directed that an election be held among the employees in the manufacturing plant, upon a one-unit basis. The Board found that the stemmery constituted a separate unit because of its physical separation from the manufacturing plant and because of its history as a separate bargaining unit since 1941; accordingly, the CIO's petition for the plant-wide unit was dismissed. Kitchen and warehouse employees were excluded from both units. In the same

decision, on the question of bargaining based upon racial units the Board stated:

> All parties are agreed that bargaining on the basis of racial units in the manufacturing plant should be abandoned, and, indeed this Board is committed to the policy that "the color or race of employees is an irrelevant and extraneous consideration in determining in any case, the unit appropriate for the purposes of collective bargaining." (Citing *Matter of U.S. Bedding Company,* 52 N. L. R. B. 382.)

C. *Events following the election of March 41, 1944*

With respect to events after the election of March 14, 1944, the Trial Examiner made the following findings of fact:

1. Immediately after the election, a move was initiated by George Benjamin, vice president of the International and himself a Negro, to set up a segregated local, within the structure of the International Union, separating for collective bargaining purposes the white and colored employees in the unit found by the Board to be appropriate. As a direct result of his efforts, a segregated local for Negro employees—Local 219-B—was established. Local 219, the certified local, remained—as it always had been—the local for white employees.

2. Upon Benjamin's advice and urging, 15 of the Negro employees applied for a charter in the International. On March 31, 1944, the charter was issued and the Negro local came into being. At first it was described in the charter as Local 245, but later a new charter was issued and the name of the local was changed, retroactively to March 31, 1944, to Local 219-B.

3. Local 219 and Local 219-B are separate and distinct entities. Each has a separate charter, separate treasury, separate set of officers, separate committees and a separate delegate to the International convention. Legally, under the International constitution, each is an autonomous organization.

4. Negotiations for a contract with the Company were conducted by a joint committee, consisting of four representatives from the white local and four from the colored. After many meetings, a contract was agreed upon. It was read to the members of both locals at their respective meetings and its terms were approved. The contract was signed on April 28, 1944, by representatives of the Company, the International, and Local 219. It was also signed by Richard Pate, president of Local 219-B, but it was not signed by him in that representative capacity.

5. The contract, by its terms, is between Local 219 and the Company. It contains no mention of 219-B. The agreement expressly recognized Local 219 as the sole bargaining agent for all the employees in the unit. At the hearing, the Company stated that it had not bargained with, and did not consider itself contractually bound to Local 219-B. Local 219-B is not an

express party to the contract, although its president was one of the signatories on behalf of the union.

6. Although comparatively few grievances have been handled, it appears that the two committees work together, as a unit, in the higher levels of the contractual grievance procedure, but that in lower levels the committees act separately in handling grievances of white and colored employees—219 for white and 219-B for colored. A Labor-Management Committee, provided for in the contract, has been established with three white and two colored employees serving upon it.

7. The contract contains both a maintenance-of-membership and a check-off provision. Employees who were members of Local 219 at the time of the signing of the contract are required to remain members for the life of the agreement, and employees joining 219 during the contract term are likewise required to maintain such membership. The check-off provision, although actually governing only members of 219, has been applied to members of 219-B as well. Dues checked off for both unions are mailed by the Company to Local 219, which then transfers to 219-B those dues deducted from the wages of members of the latter local.

8. The contract contains, *inter alia*, a seniority provision and a so-called job-pulling provision.[4] It was shown at the hearing that the plant-wide seniority provided for in the divisions where the colored workers predominate likewise existed in the contract which the Company had previously had with the CIO. Its inclusion in the present contract was at the request of the committee of Local 219-B in the belief that it was in the best interests of the Negro employees. It was not shown at the hearing that this clause worked any discriminatory injury to the Negro employees on the basis of race and we therefore find, as did the Trial Examiner, that the clause is not discriminatory. The job-pulling provision is also a carry-over from previous contracts and was not included in this contract for the purpose of freezing Negro workers in their jobs. Originally included in an AFL contract at the insistence of the Company, its purpose is to prevent any worker, white or colored, from interpreting the seniority provision as entitling him to a job held by another person at the time of the signing of the contract because of his, the job claimant's, greater seniority. We find, as did the Trial Examiner, that this clause is not discriminatory.

9. As has been stated above, Local 219-B is not a party to the contract and as a union accordingly has no rights thereunder. The record shows that Negroes were permitted to speak freely and participate as members of

[4] Article III, paragraph 7 of the contract, the seniority provision, reads as follows
The operations in the plant by the employees in the Processing Division, Shipping, Receiving Division, and Service employees in other divisions shall continue to be so performed so long as is practicable and so far as the provisions of this contract with respect to seniority.
Article III, paragraph 10 of the contract, the "job pulling" provision, reads as follows:
No employee because of seniority or length of service shall be permitted to claim any job other than his own at the time of the signing of this contract.

committees working with white committees in meetings with the Company. However, while the white committee met with the Company pursuant to the certification and contract, it appears that the committee of Local 219-B participated by sufferance of both the Company and the white Local, 219. This is not to say that the colored employees in the *unit* (as distinguished from the *union*) have no rights under the contract; insofar as the contract deals with such matters as wages, hours, and working conditions, they, as well as the members of 219 and those employees who belong to neither union, are covered by it.

The record supports all of the foregoing findings of fact made by the Trial Examiner and we hereby adopt them.

III. THE LEGAL ISSUES

It is the CIO's position that the record proves that the AFL has violated its duty as the statutory bargaining agent and that, therefore, its certification should be rescinded.

This Board has been vigilant within the limited powers given it by Congress to see to it that certifications under the National Labor Relations Act should not be made the vehicle of discriminatory racial practices by labor organizations. We have consistently refused to recognize a petiton for representation if the petition proposes, either explicitly or implicitly, to exclude Negroes from the bargaining unit on the basis of race [5] We have also refused to entertain petitions from joint bargaining representatives which do not admit locals composed of colored employees to the councils of the bargaining organization. Thus, in a recent case[6] in which a metal trades council filed a petition for an election among all the employees in a shipyard, we deferred issuing a direction of election upon a showing that two affiliates of the council, the Boilermakers and the Machinists, refused to admit Negro and Oriental employees of the yard classified in those crafts. When the petitioner, however, by amendment, admitted to its enumerated list of constituent locals the organizations which took the colored craftsmen into membership, we felt constrained to grant the election. In our decision, we said (p. 1016):

> We entertain grave doubt whether a union which discriminately denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race. Such bargainings might have consequences at variance with the purposes of the Act. If such a representative should enter into a contract requiring membership in

[5] *Matter of Aetna Iron and Steel Co*, 35 N L R B 136; *Matter of American Tobacco Co*, 9 N. L R. B. 579; *Matter of Union Envelope Co*, 10 N L R B 1147, *Matter of Interstate Granite Corp.*, 11 N. L. R. B 1046; *Matter of Utah Copper Co.*, 35 N. L R. B 1295, *Matter of Georgia Power Co*, 32 N. L. R B. 692.

[6] *Matter of Bethlehem-Alameda Shipyard, Inc.*, 53 N. L. R B 999.

the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership. In these circumstances, the validity under the proviso of Section 8 (3) of the Act of such a contract would be open to serious question.

This Board has no express authority to remedy undemocratic practices within the structure of union organizations,[7] but we have conceived it to be our duty under the statute to see to it that any organization certified under Section 9 (c) as the bargaining representative acted as a genuine representative of all the employees in the bargaining unit. Lacking such authority to insist that labor organizations admit all the employees they purported to represent to membership, or to give them equal voting rights, we have in closed shop situations held that where a union obtained a contract requiring membership as a condition of employment, it was not entitled to insist upon the discharge of, and the employer was not entitled to discharge, employees discriminately denied membership in the union. In such situations, being without power to order the union to admit them, we have ordered employers to reinstate them.[8]

Although these decisions were criticized vigorously by some sections of organized labor on the ground that the Board was assuming to do indirectly what it was without power to do directly, the Supreme Court ultimately upheld these policies. In a 5 to 4 decision, that Court upheld a Board order requiring the reinstatement of several employees who had been denied membership in the contracting union because of prior activity in behalf of a rival union.[9] Similarly, under the Railway Labor Act, where no such policies have been developed administratively, the Supreme Court has held that unions purporting to act as exclusive representatives under that statute may not rely upon their statutory status to place colored workers in the bargaining unit at a disadvantage with respect to promotions and seniority. In reaching this result, the Supreme Court construed the language in the Railway Labor Act similar to that in the National Labor Relations Act as invalidating collective agreements negotiated by railway employees (admitting only white employees to membership), with certain carriers which tended to disqualify Negro firemen from occupations on

[7] The Board has no authority to issue orders against labor organizations. Section 10, National Labor Relations Act.

[8] *Matter of Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310, *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 46 N. L. R B. 1040; *Matter of Wallace Corporation*, 50 N L R. B 138.

[9] *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248. And see *Hunt* v *Crumboch*, decided by the Supreme Court June 18, 1945, in which the Court cited the *Steele, Tunstall*, and *Wallace* cases and observed: "Those cases stand for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it purports to represent."

better runs and looked to their ultimate elimination from certain classifications.[10]

These holdings give support to many decisions of this Board in which we have said that there is a duty on the statutory bargaining agent to represent all members of the unit equally and without discrimination, on the basis of race, color or creed.[11]

The CIO urges that by establishing Local 219-B, the AFL has, in effect, subverted the Board's findings that bargaining should be conducted on the basis of a single unit, including all employees, white and Negro alike. The record does not support this contention. Bargaining has been conducted by a joint committee of whites and Negroes, grievances have been prosecuted jointly, and there is a single contract covering all employees in the bargaining unit. The fact that a separate local has been established for the Negro employees does not, in our opinion, constitute, *per se*, a subversion of our unit finding.[12]

The CIO makes the additional contention that we should go much further than we have in any decided case and hold, as a matter of law, that irrespective of whether or not the collective bargaining contract discriminates on the basis of race or non-membership in the exclusive representative, or otherwise imposes obligations with respect to membership in a labor organization, the exclusive bargaining representative must admit to membership all employees in a bargaining unit. Such a contention immediately raises a serious question concerning our statutory authority. In condemning the discriminatory practices before it in the *Steele* case, *supra*, the Supreme Court said:

> "... *While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership*, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith ". (Emphasis supplied.)[13]

Despite this unequivocal language, the argument was made that it might be disregarded in the light of a more recent decision of the Supreme Court,

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[10] *Steele* v. *Louisville & N. R. Co., et al*, 65 S. Ct. 227; *Tunstall* v *Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No 76, et al*, 65 S Ct 236

[11] See, for example, *Matter of Carter Mfg Co*, 59 N L R B 804, *Matter of Bethlehem-Alameda Shipyard, Inc*, *supra*.

[12] *Matter of Atlanta, Oak Flooring*, 62 N L R B 973

[13] While the Act being construed in the *Steele* case was the Railway Labor Act, the same reasoning, except where contracts are involved imposing employment restrictions on the basis of union membership, holds true for the National Labor Relations Act, since in both statutes the majority representative is the exclusive representative of all employees, the theory of the responsibility of the majority representative toward minority groups grows out of this exclusive status in the unit Unlike the National Labor Relations Act the Railway Labor Act does not permit closed-shop or other such restrictive contracts

passing upon a New York statute forbidding labor organizations to deny a person membership by reason of race, color or creed. In this case,[14] the constitutionality of the New York statute was attacked by a railway labor organization on the ground that the due process clause prevented such legislation interfering with the union's right to selection of membership, and abridgement of its property rights and liberty of contract. The Supreme Court found no constitutional basis in the practice of racial discrimination by labor organizations and rejected this argument. While the holding in this case was confined to the powers of a state legislature, we do not doubt that the broad language of the decision makes it equally plain that Congress possesses such power with respect to labor organizations dealing with employment affecting interstate commerce. But a holding that certain powers reside in a state legislature or Congress affords no clear basis for the inference that such power resides in an administrative agency which is solely a creature of Congress.

In any event, the sole question necessary for us to determine is simply this:

> Was there a failure upon the part of the A. F L. in this case to represent all the members of the bargaining unit equally and without discrimination on the basis of race, color or creed?

We think that while there was no discriminatory practice as to wages, hours and working conditions against the Negro employee in this bargaining unit, the A. F. L. did fail to perform its full statutory duty under the certification. The certification ran only to Local 219 and not to Local 219-B, and the contract named only Local 219. However, the check-off, and inferentially the maintenance-of-membership requirement, was applied to the members of both locals.[15] Thus, the certified union used its statutory power as exclusive representative to compel dues payments, and continuance of membership, with respect to an organization which was not the certified union and which, under the certification and the contract, had no legal standing. We think that this was a clear abuse of the standard of

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[14] *Railway Mail Association* v *Corsi, etc., et al*, 16 LRR 610 (June 18, 1945)

[15] Article XI of the contract provided

> Employees who are now members of the Union must remain members in good standing for the life of this agreement
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> New employees or other employees coming into the Union must remain in the Union for the term of this cotnract
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> New employees will be required to see the business agent of the Union within two weeks after they have been employed in order that the Union may have an opportunity to present their viewpoint.
>
> This is to enable such employees to make an impartial decision concerning union membership
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> The Union will submit to the Company by the first of each month an alphabetical list of its members properly signed by the authorized officer of the union and the amount due the Union for the current month will be deducted by the employer from each employee's pay, an amount not to exceed $1 25 per month A check will be mailed by the Company on the thirtieth of each month to the financial secretary of the local Union.

conduct imposed upon the exclusive representative under Section 9 (a) of the Act.

If it were not for the additional circumstances set forth below, we should rescind the AFL's certification. However, the contract has now expired and more than a year has passed since the AFL was certified. In a written motion to the Board and at the oral argument, the AFL voluntarily relinquished its certification and requested the Board to conduct a new election [16] It declared its willingness to accept whatever conditions the Board should impose upon its new petition. Since the contract has expired and since the AFL has relinquished its certification, the issue of discrimination under the old certification is now moot. If the AFL desires to file a new petition, it may do so in the name of Local 219 and 219-B, as joint petitioners. This will bring the petition within the principles laid down in our recent decision in the *Atlanta Oak Flooring* case,[17] and within the views here expressed. If the CIO should desire to participate in a new election it may do so by filing a separate petition or by filing a motion to intervene in any proceedings which may be instituted by the AFL. To the extent that the conclusions and recommendations of the Trial Examiner are inconsistent with this decision, they are hereby modified.

ORDER

Upon the basis of the above findings of fact and upon the entire record in the case, it is hereby ordered that the motion of the CIO be, and it hereby is, dismissed.

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[16] Since the AFL has effectively relinquished its certification, we hereby deny its alternative motion to amend the certification

[17] *Matter of Atlanta Oak Flooring, supra*