

In the Matter of SWIFT AND COMPANY *and* UNITED PACKINGHOUSE
WORKERS OF AMERICA, C. I. O., LOCAL 49-A

Case No. 2-C-5693.—Decided August 31, 1945

DECISION

AND

ORDER

On April 6, 1945, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions to the Intermediate Report and a supporting brief. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.

On August 21, 1945, the Board heard oral argument at Washington, D. C. The respondent appeared by counsel and participated in the argument; the Union did not appear.

The Board has considered the Intermediate Report, the respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Swift and Company, Jersey City, New Jersey, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Packinghouse Workers of America, C. I. O., Local 49-A, as the exclusive representative of all plant clerks, standards department checkers, storeroom clerk, and commissary employees, at its Jersey City plant, but excluding time and employment office employees, time-study employees, store-room laborer, head storekeeper, chief clerk, fire marshal and all supervisory employees with authority to hire, promote, discharge, discipline,

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or otherwise effect changes in the status of employees, or effectively recommend such action;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Packinghouse Workers of America, Local 49-A, affiliated with the Congress of Industrial Organizations, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain collectively with United Packinghouse Workers of America, C. I. O., Local 49-A, as the exclusive representative of all its employees in the aforesaid appropriate unit;

(b) Post at its plant at Jersey City, New Jersey, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Second Region (New York City) in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

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

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a decision and order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not refuse to bargain with United Packinghouse Workers of America, C. I. O., Local 49-A, as the exclusive representative of our employees in the bargaining unit described herein.

We Will Not engage in any like or related act or conduct interfering with, restraining, or coercing our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization,

to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this union, or any other labor organization.

We Will Bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All plant clerks, standards department checkers, storeroom clerk, and commissary employees at the Jersey City plant of Swift and Company, exclusive of time and employment office employees, time-study employees, storeroom laborer, head storekeeper, chief clerk, fire marshal and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

SWIFT AND COMPANY,
By _____
(Representative) (Title)

Dated _____

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

INTERMEDIATE REPORT

Mr. Jerome P. Macht, for the Board.

Mr. John P. Staley, of Chicago, Ill., *Mr. L. A. Ackley*, of New York City, and *Mr. William F. Joy*, of Boston, Mass., for the respondent.

Mr. Meyer E. Stern, of New York City, for the Union.

STATEMENT OF THE CASE

Upon an amended charge duly filed by United Packinghouse Workers of America, C. I. O., Local 49-A, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Second Region (New York City), issued its complaint dated March 1, 1945, against Swift and 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. Copies of the complaint accompanied by notice of the hearing were duly served upon the respondent and the Union.

With respect to unfair labor practices, the complaint alleged in substance that the respondent, on or about June 9, 1944, and November 16, 1944, and thereafter, refused to bargain collectively with the Union as the exclusive bargaining representative of the respondent's employees within an appropriate bargaining unit although a majority of the employees in such unit, in an election conducted under

the supervision of the Board on May 24, 1944, had designated and selected the Union as their representative for the purposes of collective bargaining, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The respondent thereafter filed its answer in which it admitted that on May 24, 1944, a majority of the employees in the unit described in the complaint, in an election conducted under the supervision of the Board, had affirmatively expressed their desire to be represented by the Union, and that, on approximately the dates mentioned in the complaint and thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of the employees in such unit; but denied that the unit was appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act, and further denied that it had engaged in any unfair labor practices within the meaning of the Act.

Pursuant to notice, a hearing was held on March 21 and 22, 1945, at New York City, before the undersigned, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented at the hearing by counsel and the Union by a representative. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the Board's case, the undersigned granted a motion of counsel for the Board to conform the pleadings to the proof as to dates and minor variations and denied the respondent's motion to dismiss the complaint for want of proof. At the close of the hearing the respondent again moved to dismiss the complaint for lack of proof. Ruling on that motion was reserved. The motion is hereby denied. The parties did not avail themselves of the opportunity afforded them to present oral argument before the undersigned. On April 3, 1945, the respondent filed a brief.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Swift and Company, an Illinois corporation with its principal place of business at Chicago, Illinois, maintains a branch plant at Jersey City, New Jersey, which alone is involved in this proceeding. At the Jersey City Plant, the respondent is engaged in processing and preparing hogs for sale and distribution as pork and pork products. During the past year, in the conduct of its business operations at its Jersey City plant, the respondent purchased hogs valued in excess of \$1,000,000, of which about 90 percent was shipped to it from points outside the State of New Jersey. During the same period the respondent produced and processed at its Jersey City plant pork and pork products valued in excess of \$1,000,000, of which approximately 75 percent was shipped by it to points outside the State of New Jersey. The respondent admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATION INVOLVED

United Packinghouse Workers of America, Local 49-A, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent.

III THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain*

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

On April 29, 1944, the Board issued a Decision and Direction of Election in Case No. 2-R-4409 (56 N. L. R. B. 147), finding, among other things, that all plant clerks, standards department checkers, storeroom clerk and commissary employees of the respondent's Jersey City plant, exclusive of time and employment office employees, time-study employees, storeroom laborer, head storekeeper chief clerk, fire marshal and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

On May 24, 1944, pursuant to said Direction of Election, an election by secret ballot was conducted under the supervision of the Regional Director for the Second Region. Upon the conclusion of the election, a Tally of Ballots was furnished the respondent and the Union in accordance with the Rules and Regulations of the Board. No objections were filed by the respondent or the Union within the time provided therefor. The Tally showed that of approximately 29 eligible voters, 23 cast valid votes, of which 20 were for the Union and 3 against. Two ballots were challenged. On June 5, 1944, the Board certified the Union as the representative for the purposes of collective bargaining of the employees in the unit heretofore mentioned.

The respondent contests the appropriateness of the unit found by the Board, urging (a) that plant clerks and standards department checkers perform management functions; (b) that since an affiliated local of the Union is the recognized bargaining representative of the production and maintenance employees at the respondent's plant here involved, it would not effectuate the policies of the Act for the Union to represent the employees in the unit for which it was certified; and (c) that, in any event, the said unit is heterogeneous in character. As appears from the Board's Decision and Direction of Election and from the record in the representation proceeding (Case No. 2-R-4409), these precise contentions were raised by the respondent in that case, and there litigated and decided adversely to the respondent.

In the instant proceeding, the respondent sought to introduce testimony as to the duties and responsibilities of each individual employee who, according to its view, was a member of the unit at the time of the hearing. This proof was offered by the respondent in support of its position that the unit was comprised of management employees. While making its offer, the respondent conceded that proof of the same general character, although less detailed, was adduced by it in the representation proceeding in which it participated and was given full opportunity to be heard.¹ Likewise, the respondent conceded that the testimony

¹ However, with respect to one employee, A. Kalofsky, who, wholly apart from his regular duties as a plant clerk, supervises, according to the respondent's offer of proof, a wrap and pack gang during a 3-hour shift, the respondent claimed that it neglected to adduce proof in the representation proceeding concerning his supervisory duties, although it admitted that such proof was available to it at the time. The certified unit, it is noted, is defined in terms of job description and not named individuals, and expressly excludes therefrom all employees possessing the supervisory attributes described in the exclusion clause of the unit finding. Assuming without deciding that the proffered evidence would establish that Kalofsky had supervisory status within the exclusionary provision of the unit finding, it would nevertheless not affect the appropriateness of the unit. It does not appear whether Kalofsky's ballot was one of the two challenged. Even if he voted and his ballot were improperly counted, it could not affect the Union's majority.

offered by it in the instant proceeding was known to it at the time of the hearing in the representation proceeding and that the witnesses who would give such testimony were available at that time. Moreover, it was admitted that no change of circumstances had occurred since that time with respect to the general character of the unit, the duties and responsibilities of the employees comprising the unit,² or the Union's representation of a majority therein. Under the circumstances, the undersigned excluded the testimony so offered by the respondent. As the Board stated in the Pacific Greyhound case:³

While the determinations, findings, conclusions, and certification of the Board in a representation proceeding are not *res judicata* in a subsequent complaint proceeding before the Board under Section 10 (b) and (c), we think it both the intent of the statute and sound administrative policy that parties in interest to such representation proceeding cannot try and have heard *de novo* in the subsequent complaint proceeding questions or matters adjudicated in the previous proceeding in the absence of cogent showing of possible error in such proceeding.

* * * * *

We think it equally within the statutory intent and sound administrative practice that parties in interest to a representation proceeding cannot in a subsequent complaint proceeding require the Board to withhold presumptive effect from its previous determinations, findings, conclusions, and certification, on the ground that the Board in the representation proceeding failed to consider matters or evidence which the parties there could have presented but which they failed to do without apparent reasonable cause. In the instant case the parties had their opportunity to be heard by the Board with regard to such matters in the Representation Proceedings, and the fact that they did not avail themselves thereof does not entitle them as a matter of right to a second opportunity.

The undersigned finds, in accordance with the Board's previous determination, that all plant clerks, standards department checkers, storeroom clerk and commissary employees of the respondent's Jersey City plant, exclusive of time and employment office employees, time study employees, storeroom laborer, head storekeeper, chief clerk, fire marshal and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, constitute and at all times material herein constituted a unit appropriate for the purposes of collective bargaining. The undersigned further finds that on and at all times after May 24, 1944, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid bargaining unit and that, pursuant to the provisions of Section 9 (a) of the Act, the Union was on May 24, 1944, and at all times thereafter has been and is now the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining with re-

² There was one exception. The respondent offered to prove that one employee, A. Majkowski, by reason of certain additional duties, responsibilities, and authority delegated to him only 2 weeks before the hearing in the present proceeding, had acquired supervisory status. Much of what has been said in the preceding footnote is applicable here. The Board did not certify a unit of named employees but a unit of employees in defined job categories. Assuming, again without deciding, that Majkowski's duties have so changed as to place him outside the unit, it is nevertheless irrelevant to any consideration of the appropriateness of the unit and to the issues of this case.

³ *Matter of Pacific Greyhound Lines*, 22 N. L. R. B 111. See also, *Pittsburgh Plate Glass Company v. N. L. R. B.*, 313 U. S. 146, aff'g 113 F. (2d) 698 (C. C. A. 8), enf'g 15 N. L. R. B. 515.

spect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The refusal to bargain

On June 1, 1944, the Union wrote to the respondent, referring to the election results and requesting that the employees in the unit be included under its master contract covering production and maintenance employees. On June 9, 1944, the respondent replied, stating that it did not agree that the employees in the certified unit "should come under the master agreement because the basis of payment and working conditions of this group are altogether different than production and maintenance employees." On June 16, 1944, the general counsel of the Union addressed a further letter to the respondent, stating that while he preferred to have the unit in question included under the master agreement "if at all practical," nevertheless, "if there are reasons for your believing at this time that this would not be a practical procedure I would appreciate your advising me to that effect." The respondent did not respond to the letter of June 16, nor did it otherwise thereafter communicate with the Union. Following its failure to receive a reply to its last letter, the Union referred the matter to the Conciliation Service of the United States Department of Labor. Under date of November 16, 1944, the respondent in a letter to the conciliator, a copy of which it forwarded to the Union, wrote, in part, as follows:

While the National Labor Relations Board conducted an election and certified the Union as bargaining agent for these employes, the Company desires to exercise its right of appeal from the action of the National Labor Relations Board. The only manner in which it can appeal is by refusing to bargain, and defending against whatever complaint may be prosecuted by that Board for refusal to bargain, and appealing any order resulting . . .

The Company refuses to bargain with the Union on matters relating to plant clerks, . . .

The respondent admits its refusal to bargain, although it does not concede that its refusal occurred necessarily on the specific dates alleged in the complaint. It is, of course, clear that the respondent's letter of November 16, 1944, constituted an absolute refusal to bargain, and the undersigned so finds. While the respondent's letter of June 9, 1944, did not constitute a refusal to bargain, and as the record shows was not construed as such by the Union, the respondent's failure to respond to the Union's letter of June 16, 1944, which in substance proposed to negotiate the question of inclusion under the master contract, especially when viewed in the light of the respondent's ultimate stand as expressed in its letter to the conciliator, constituted, as the undersigned finds, a refusal to bargain.

The undersigned finds that the respondent on June 16, 1944, as well as on November 16, 1944, and at all times thereafter has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Since it has been found that the respondent has engaged in unfair labor practices it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent upon request bargain collectively with the Union.

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

CONCLUSIONS OF LAW

1. United Packinghouse Workers of America, C. I. O., Local 49-A, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All plant clerks, standards department checkers, storeroom clerk and commissary employees of the respondent's Jersey City plant, exclusive of time and employment office employees, time-study employees, storeroom laborer, head storekeeper, chief clerk, fire marshal and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. United Packinghouse Workers of America, C. I. O., Local 49-A, was on May 24, 1944, and at all times thereafter has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 16, 1944, as well as on November 16, 1944, and at all times thereafter, to bargain collectively with the United Packinghouse Workers of America, C. I. O., Local 49-A, as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case, the undersigned recommends that the respondent, Swift and Company, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Packinghouse Workers of America, C. I. O., Local 49-A, as the exclusive representative of all its employees employed at its Jersey City plant as plant clerks, standards department checkers, storeroom clerk and commissary employees, but excluding time and employment office employees, time-study employees, storeroom laborer, head storekeeper, chief clerk, fire marshal and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form

labor organizations, to join or assist United Packinghouse Workers of America, Local 49-A, affiliated with the Congress of Industrial Organizations or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain collectively with United Packinghouse Workers of America, C. I. O., Local 49-A, as the exclusive representative of all of its employees in the aforesaid appropriate unit;

(b) Post at its plant at Jersey City, New Jersey, copies of the notice attached to the Intermediate Report herein, marked "Appendix A." Copies of said notice to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) File with the Regional Director for the Second Region on or before ten (10) days from the date of the receipt of this Intermediate Report, a report in writing setting forth in detail the manner and form in which the respondent has complied with the foregoing recommendations.

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

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective July 12, 1944, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

ARTHUR LEFF,
Trial Examiner.

Dated April 6, 1945.

APPENDIX A

NLRB 582
(9-1-44)

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a trial examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Packinghouse Workers of America, C. I. O., Local 49-A, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this union, or any other labor organization.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All plant clerks, standards department checkers, storeroom clerk and commissary employees of the Jersey City plant of Swift and Company, exclusive of time and office employees, time-study employees, storeroom laborer, head storekeeper, chief clerk, fire marshal and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

SWIFT AND COMPANY,

By _____
(Representative) (Title)

Dated _____

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