

In the Matter of NATIONAL GYPSUM COMPANY and UNITED GAS, COKE
AND CHEMICAL WORKERS OF AMERICA, LOCAL UNION 247, CIO

Case No. 3-R-991.—Decided October 11, 1945

Mr. Douglas C. Jeffrey, of Akron, N. Y., and Mr. William M. North,
of Buffalo, N. Y., for the Company.

Mr. Charles A. Doyle, of Niagara Falls, N. Y., for the CIO.

Mr. Tony Gallo, of Chicago, Ill., Mr. Samuel R. Diskan, of Phila-
delphia, Pa., and Mr. Neil Cunningham, of Buffalo, N. Y., for
the AFL.

Mr. Joseph D. Manders, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon a petition duly filed by United Gas, Coke and Chemical Workers of America, Local Union 247, CIO, herein called the CIO, alleging that a question affecting commerce had arisen concerning the representation of employees of National Gypsum Company, Clarence Center, New York, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Eugene von Wellsheim, Trial Examiner. The hearing was held at Buffalo, New York, on June 11, 1945. The Company, the CIO, and United Cement, Lime and Gypsum Workers of America, Local Union 105, AFL, herein called the UCLGW, appeared and participated. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the hearing the AFL moved for dismissal of the petition. For reasons set forth in Section III, *infra*, the motion is denied. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded an opportunity to file briefs with the Board.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

National Gypsum Company, a Delaware corporation, is engaged in the manufacture of wall plaster and wallboard. These products require the use of gypsum which is mined at the Company's Clarence Center, New York, plant, the sole plant involved in the present proceeding. During the fiscal year ending April 30, 1945, the Company used raw materials at its Clarence Center plant valued in excess of \$100,000, approximately 25 percent of which is shipped to this plant from points outside the State of New York. During the same fiscal period, the Company manufactured finished products at the Clarence Center plant valued in excess of \$300,000, approximately 60 percent of which was shipped to points outside the State of New York. The Company admits that its operations at the Clarence Center plant affect commerce within the meaning of the National Labor Relations Act, and we so find.

II. THE ORGANIZATIONS INVOLVED

United Gas, Coke and Chemical Workers of America, Local Union 247, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

United Cement, Lime and Gypsum Workers, Local Union 105, affiliated through its international with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

In a letter dated April 12, 1945, the CIO notified the Company of its desire to be recognized as the exclusive bargaining representative of the Company's employees. The Company refused to recognize it. At the hearing the UCLGW moved for dismissal of the petition herein, contending that the CIO's notice was not timely; and that its current agreement, allegedly renewed on April 1, 1945, is a bar to a direction of election at this time. The Company takes a neutral position in the matter.

The UCLGW has been the exclusive bargaining representative of the Company's employees at the Clarence Center plant since 1939. In 1939 and each year thereafter, the Company and the UCLGW entered into a written collective bargaining agreement. The last agreement between these parties, executed on April 2, 1944, provides

that it shall "continue in effect until May 1, 1945, and each year thereafter unless thirty (30) days' notice is given in writing by either party prior to any expiration date." Neither the Company nor the UCLGW gave written notice prior to this 30-day period. However, on or about March 1, 1945, an official of the UCLGW's international advised the local to notify the Company of the "matters the membership desires to become part of the 1945-46 agreement . . . in compliance with the terms of the present agreement." On March 28, 1945, a meeting was held in the offices of the Company between representatives of the UCLGW and the Company. At this meeting the parties negotiated with respect to a general wage increase, wage increments for shift differentials, Christmas bonuses, and vacation schedules; employee grievances were also discussed. Neither Christmas bonuses nor shift differentials were provided for in the 1944 contract; and it is evident that an agreement as to these subjects, as well as the wage issues discussed at the March 28 meeting, would have resulted in material additions and modifications of the contract. The plant manager, who was the sole signatory for the Company on the April 2, 1944, contract, attended the March 28 meeting, and at the hearing testified that he interpreted the meeting as the initial step toward the execution of a new contract. In the past, similar negotiations, commenced prior to the renewal date without formal notice of any type, have resulted in the execution of new contracts.

The CIO contends that the Company and the UCLGW, by commencing the negotiation of a new contract at their March 28 conference, in effect agreed to terminate the 1944 contract without the formality of written notice. We are persuaded that this contention is correct, considering all the circumstances: the past practice of the contracting parties, the Company's understanding that the old contract was to be permitted to expire, the fact that the UCLGW local had been advised by its international office to propose terms for the "1945-46 agreement," and, particularly, the fact that the negotiating conference was held 3 days prior to the date when the 1944 contract would have renewed in the absence of notice given by either of the contracting parties.¹ We note the UCLGW's contention that the meeting of March 28 did not serve as mutual notice to terminate the 1944 contract, in view of a clause in that contract which provides that the Company shall meet with the UCLGW at any time for the purpose of discussing wages, hours, and working conditions "with the object of reaching a satisfactory agreement."² We do not, however, regard

¹ Cf. *Matter of Marvel-Schebler Division, Borg Warner Corporation*, 56 N. L. R. B. 105, at p. 108.

² The clause referred to by the UCLGW reads as follows:

The company is at all times willing to meet with any of its employees or representatives of any of its employees not connected with competitive companies for the purpose of discussing wages, hours and working conditions, with the object of reaching a satisfactory agreement. . . .

this general provision as sufficient to negate the inference that the contracting parties, by discussing basic changes and additions to their agreement just prior to the date fixed for renewal or termination of that agreement, intended to make a new contract and thus bring the old one to an end.³

We find that the negotiations on March 28 were equivalent to reasonable, mutual notice of termination, and that the contract of April 2, 1944, is, therefore, no bar to a present determination of representatives.⁴

On April 11, 1945, the UCLGW local unanimously voted to disaffiliate from its international and to affiliate with the Congress of Industrial Organizations. Shortly thereafter, the members of the local requested and received a CIO charter. The CIO now contends that "Local Union 105" is a defunct labor organization, and, therefore, its collective bargaining agreement with the Company, allegedly renewed on April 1, 1945, cannot operate as a bar to an immediate determination of representatives under any circumstances. In view of our finding that the contract was terminated, we need not consider this contention.

A statement of a Board agent, introduced into evidence at the hearing, indicates that the CIO represents a substantial number of employees in the unit hereinafter found appropriate.⁵

We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The parties are in substantial agreement that the appropriate unit should consist of all production and maintenance employees of the Company at the Clarence Center plant, including watchmen, but excluding office and clerical employees and all supervisory employees. The parties disagree, however, as to the following category of employees:

Laboratory employees: The Company employs two laboratory workers. These two employees test various items which are ultimately distributed as samples to the Company's customers. The production

³ Cf. *Matter of Green Bay Drop Forge Company*, 57 N L R B 1417; *Matter of Story and Clark Piano Company*, 61 N L R B 614; *Matter of Douglas Public Service Corp.*, 62 N L R B 651.

⁴ See *Matter of Hudson Sharp Machine Co.*, 62 N L R B 799; *Matter of General Metals Corporation*, 59 N L R B 1252.

⁵ The Field Examiner reported that the CIO submitted 98 authorization cards, all of which bore apparently genuine original signatures of persons appearing on the Company's pay roll of April 22, 1945, which contained the names of 125 employees in the appropriate unit, and that the cards were dated in April 1945.

The UCLGW submitted its current contract as evidence of its representation in the alleged appropriate unit.

workers receive an hourly rate of pay, but the laboratory employees receive a salary. A company witness testified that laboratory employees have always been considered to be a part of the office force and have been excluded from previous bargaining units. The CIO and the AFL desire their inclusion in the proposed unit; the Company urges their exclusion. Since the testers in the laboratory have been excluded from previous bargaining units and do not have the identical interests and working conditions to those of the production workers, we shall exclude them from the unit hereinafter found appropriate.

We find that all production and maintenance employees of the Company at the Clarence Center plant, including watchmen, but excluding the testers in the laboratory, office and clerical employees, and all or any 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.

V. THE DETERMINATION OF REPRESENTATIVES

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of the Direction of Election herein, subject to the limitations and additions set forth in the Direction.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 3, as amended, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with National Gypsum Company, Clarence Center, New York, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Third Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United

States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause, and have not been rehired or reinstated prior to the date of the election, to determine whether they desire to be represented by United Gas, Coke and Chemical Workers of America, Local Union 247, CIO, or by United Cement, Lime and Gypsum Workers of America, Local Union 105, AFL, for the purposes of collective bargaining, or by neither.

MR. GERARD D. REILLY took no part in the consideration of the above Decision and Direction of Election.