

doing work for the Employer. He is now paid by the contractor, who directs his work. The Employer carries him on its payroll and pays his hospitalization insurance and social security. The parties would include the laborer in the field unit. On the basis that he will return to work for the Employer, we deem him included in the field unit and will permit him to vote in the election.

[Text of Direction of Elections omitted from publication in this volume.]

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BIG RUN COAL & CLAY COMPANY *and* JOHN SHELTON, WILLARD NOLEN, ARTHUR BAYES, PETITIONERS *and* UNITED BRICK AND CLAY WORKERS OF AMERICA, A. F. L. *Case No. 9-RD-78. April 13, 1951*

### Decision and Direction of Election

Upon a petition for decertification duly filed, a hearing was held before Alan A. Bruckner, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Houston, Reynolds, and Styles].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The Petitioners assert that the Union is no longer the bargaining representative of the employees of the Employer as defined in Section 9 (a) of the Act.

3. The Union was certified on August 22, 1949,<sup>1</sup> as the bargaining representative of the production and maintenance employees at the Employer's Princess, Kentucky, plant, where the Employer is engaged in the manufacture of brick and tile, and the mining of coal and clay. We find that a question affecting commerce exists concerning the representation of employees of the Employer, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

4. The parties agree, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

All production and maintenance employees at the Employer's Princess, Kentucky, plant, excluding clerical employees, guards, professional employees, and supervisors as defined in the Act.

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<sup>1</sup> Case No. 9-RC-570. Unpublished. On August 24, 1950, the Employer and the Union entered into a contract, which was terminated by the Employer by timely notice given on October 28, 1950.

5. A dispute exists as to the eligibility of about 41 employees, who participated in a strike against the Employer from May 9 to June 19, 1950, but who have not been reemployed because they have been permanently replaced or their jobs have been abolished for economic reasons.<sup>2</sup>

The Petitioners and the Employer contend that the strike was an economic strike, and that the employees participating in the strike who have not yet been reinstated are, therefore, not eligible to vote. The Union contends that the strikers are eligible to vote because (1) the strike was caused by the unfair labor practices of the Employer, and the strikers are, therefore, entitled to reinstatement, and (2) in any event, the Employer has placed the strikers not yet rehired on a preferential hiring list, thereby recognizing them as still his employees. We shall consider these contentions in order.

(1) On August 26, 1949, the Union filed charges alleging that the Employer had discriminated against certain employees for union membership by terminating their employment, thereby violating Section 8 (a) (3) and (1) of the Act.<sup>3</sup> On November 16, 1949, this charge was amended by adding an allegation that the Employer, in violation of Section 8 (a) (4) and (3) of the Act, had refused to reemploy one Dexter Sergent because he had filed charges of unfair labor practices against the Employer. On March 6, 1950, the charge was further amended by adding an allegation that the Employer had violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the Union with respect to wages and other conditions of employment. As already stated, the strike began on May 9 and ended on June 19, 1950.

On June 12, during the course of the strike, the Union filed new charges against the Employer, alleging that it had individually solicited striking employees to return to work without consulting their certified bargaining representative, and by this conduct had violated Section 8 (a) (5) and (1) of the Act.<sup>4</sup>

On October 30, 1950, a settlement agreement was entered into with respect to Case No. 9-CA-189 between the Regional Director and the Employer, which found violations of Section 8 (a) (1), (4), and (5) of the Act, provided for the reinstatement of Sergent and the payment of back pay to him, and the posting of appropriate notices.

The charges in Case No. 9-CA-301 were dismissed by the Regional Director. The Union appealed to the General Counsel from the dismissal of these charges, and from the execution by the Regional Director and the Employer of the settlement agreement in Case No. 9-CA-189. On January 24, 1951, the General Counsel affirmed the dismissal

<sup>2</sup> Some of the strikers were rehired at the conclusion of the strike. As to the rest, the record is clear, and we find, that during the strike their jobs were either abolished or filled by permanent replacements.

<sup>3</sup> Case No. 9-CA-189.

<sup>4</sup> Case No. 9-CA-301.

of the charges in Case No. 9-CA-301 and rejected the appeal from the settlement agreement.

The Union now contends for the first time that the strike of May 9 was caused by the unfair labor practices remedied by the settlement agreement.

An initial finding that a strike is caused by unfair labor practices may be made only in unfair labor practice proceedings.<sup>5</sup> No such proceedings are now before us; nor have any findings been made in any other proceedings on the facts here involved that the instant strike was due to, or prolonged by, unfair labor practices of the Employer.<sup>6</sup> We therefore have no choice but to find, without further examination of the facts, that the strike was an economic strike, and that the employees who participated therein are economic strikers. As they were permanently replaced or their jobs abolished<sup>7</sup> they are not entitled to reinstatement.

(2) Although, as asserted by the Union, the strikers have been placed on a preferential hiring list, the record discloses that the Employer is currently operating with a normal employee complement, and that the probability of reemployment of the former strikers is remote. The Board has heretofore held that former employees are not eligible to vote, even though on preferential hiring lists, where it does not appear that they have a reasonable expectation of reemployment in the near future.<sup>8</sup>

In view of the foregoing, we find that the former strikers who have not yet been reemployed are ineligible to vote in the election directed herein.

[Text of Direction of Election omitted from publication in this volume.]

<sup>5</sup> *Times Square Stores Corporation*, 79 NLRB 361.

<sup>6</sup> On the contrary, in affirming the dismissal of the charges in Case No. 9-CA-301, the General Counsel expressed the view that the May 9, 1950, strike was an economic strike, and that there was no causal relation between the antecedent unfair labor practices and the strike.

<sup>7</sup> See footnote 2, above.

<sup>8</sup> *The Taylor-Winfield Corporation*, 90 NLRB 1011; *General Motors Corporation*, 92 NLRB 1752

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INDEPENDENCE LUMBER & MANUFACTURING COMPANY, INC.<sup>1</sup> and MILLMEN'S LOCAL UNION No. 1141, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL, PETITIONER. *Case No. 36-RC-580.*  
*April 13, 1951*

### Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Robert J. Wiener, hearing

<sup>1</sup> The name of Employer appears as amended at the hearing.