

In the Matter of THE MIDLAND STEEL PRODUCTS COMPANY and FOREMAN'S ASSOCIATION OF AMERICA, MIDLAND STEEL CHAPTER #105

*Case No. 8-C-1963.—Decided January 9, 1947*

*Mr. Thomas E. Shroyer*, for the Board.

*Messrs. Walter T. Kinder and Frank C. Heath*, of Cleveland, Ohio, for the respondent.

*Mr. Lorin F. Hibbard*, of Cuyahoga Falls, Ohio, for the Union.

*Mr. Bernard Golberg*, of counsel to the Board.

DECISION

AND

ORDER

On September 9, 1946, Trial Examiner R. N. Denham 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 at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. 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, The Midland Steel Products Company, Cleveland, Ohio, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and to bargain collectively with Foreman's Association of America, Midland Steel Chapter #105, as the exclusive representative of all departmental superintendents, assistant foremen and foremen of The Midland Steel Products Company, Parish and Bingham Division, Cleveland, Ohio, including the traffic manager, assistant traffic manager, safety engineer, and chief of plant

protection, but excluding the night superintendent, purchasing agent, assistant purchasing agent, production manager and assistant production manager;

(b) Engaging in any other acts in any manner interfering with the efforts of Foreman's Association of America, Midland Steel Chapter #105, to negotiate for or represent the employees in the aforesaid unit, as their exclusive bargaining agent.

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

(a) Upon request, bargain collectively with Foreman's Association of America, Midland Steel Chapter #105, as the exclusive representative of the employees described in paragraph 1 (a) of this Order, in respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant in Cleveland, Ohio, copies of the notice attached to the Intermediate Report herein marked "Appendix A."<sup>1</sup> Copies of said notice, to be furnished by the Regional Director for the Eighth 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 Eighth Region (Cleveland, Ohio), in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

MR. JAMES J. REYNOLDS, JR., took no part in the consideration of the above Decision and Order.

#### INTERMEDIATE REPORT

*Thomas E. Shroyer, Esq.*, of Cleveland, Ohio, for the Board.

*Lorn F. Hubbard*, Regional Director, Cuyahoga Falls, Ohio, for the Union.

*Walter T. Kinder, Esq.*, and *Frank C. Heath, Esq.*, of Cleveland, Ohio, for the Respondent.

#### STATEMENT OF THE CASE

Upon a charge duly filed on April 23, 1946, by Foreman's Association of America, Chapter 105, herein called the Union, the National Labor Relations Board, herein

<sup>1</sup> This notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words:

"The recommendations of a Trial Examiner" and substituting in lieu thereof the words:

"A Decision and Order"

In the event that this order is enforced by decree of a Circuit Court of Appeals, there shall be inserted, before the words "A Decision and Order," the words

"A Decree of the United States Circuit Court of Appealing Enforcing"

called the Board, by its Regional Director for the Eighth Region (Cleveland, Ohio), issued its complaint dated July 2, 1946, against The Midland Steel Products Company, of Cleveland, Ohio, herein called Respondent, alleging that Respondent has engaged in and is engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint together with copies of the charge and notices of hearing were duly served upon Respondent and the Union.

With respect to unfair labor practices, the complaint alleges in substance, that the Union, having been duly chosen on March 7, 1946, by a majority of the employees in a unit of the employees of Respondent defined therein and alleged to be appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act, as their representative for purposes of collective bargaining, by virtue of Section 9 (a) of the Act has been and is now the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to wages, hours of employment, rates of pay, and other conditions of employment; that on or about April 5, 1946, the Union requested the Respondent to bargain collectively with it in respect to wages, hours of employment, rates of pay, and other conditions of employment as the exclusive representative of the employees in the unit; and that on April 11, 1946, Respondent refused and ever since has continued to refuse to bargain collectively with the Union as such representative, and by such action has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act.

In its answer duly filed herein, Respondent admits its corporate existence; that it is engaged in the manufacture, sale and distribution of heavy stampings; that it engages in interstate commerce; that on or about March 7, 1946, a majority of the persons voting in an election conducted by the Board had designated the Union as their representative for the purposes of collective bargaining; that the Union has requested the Respondent to bargain collectively with it and that Respondent has and does refuse to bargain collectively with the Union. The answer further alleges that the persons participating in the elections above-referred to are not employees within the meaning of the Act and that the Board is without jurisdiction herein; that these persons constitute a part of management personnel and that the organization and unionization of such personnel would not effectuate the policies of the Act and would be contrary to public interest; and that in any event, the Board improperly permitted management representatives of different levels of responsibility to vote for representation in the same unit for purposes of collective bargaining.

Pursuant to due notice a hearing was held in Cleveland, Ohio, on August 19, 1946, before the undersigned, R. N. Denham, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the Respondent were represented by counsel and the Union by its Regional Director. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. At the close of all the testimony, the motion of counsel for the Board to conform the pleadings to the proof as to the correction of names, dates, and other matters not going to the issues was granted without objection. There were no oral arguments.

On motion of counsel for the Board joined in by the other parties, the transcript of evidence, exhibits, and the entire record, including decisions, orders, directives, and certifications of the Board in Case No 8-R-1865<sup>1</sup> was incor-

<sup>1</sup> In the Matter of The Midland Steel Products Company, Parish & Bingham Division and Foreman's Association of America, Midland Steel Chapter #105, 65 N. L. R. B. 997.

porated into and made a part of the record in this proceeding for whatever consideration it may be entitled to receive under the practices of the Board and the requirements of the Act. At the request of counsel for Respondent, its brief heretofore filed in Case No. 8-R-1805 has been considered as if originally filed in this proceeding. Although counsel for Respondent announced an intention to also file a supplemental brief, none has been received.

On the basis of the foregoing and on the entire record, after having heard and observed all the proceedings and considered all the evidence offered and received, the undersigned makes the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

The Midland Steel Products Company, an Ohio corporation, is engaged in heavy stamping operations at a plant at Cleveland, Ohio, known as the Parish and Bingham Division. During the past year, Respondent had gross sales exceeding \$17,000,000 in value, of which about 50 percent was shipped to points outside the State of Ohio. During the same period, Respondent purchased raw material for use at the Cleveland plant valued at in excess of \$1,000,000, of which approximately 30 percent was shipped to its Cleveland plant from outside the State of Ohio. On the basis of the foregoing, it is found that the Respondent is engaged in commerce within the meaning of the Act.

##### II THE ORGANIZATION INVOLVED

Foreman's Association of America, Midland Steel Chapter #105, unaffiliated, is a labor organization admitting supervisory employees of Respondent into membership.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

In the course of proceedings on a petition theretofore duly filed with it by the Union, and after a hearing held as prescribed by the Act, the Board, on February 12, 1946, entered its Decision and Direction of Elections in which it found that "all assistant foremen and foremen, including assistant traffic manager, safety engineer, and chief of plant protection, but excluding night superintendent, purchasing agent, assistant purchasing agent, production manager, and assistant production manager," constitute a voting group representative of a unit of the employees of Respondent appropriate for purposes of collective bargaining; and that "all departmental superintendents, including traffic manager, but excluding assistant foremen, foremen, assistant traffic manager, safety engineer, chief of plant protection, night superintendent, purchasing agent, assistant purchasing agent, production manager and assistant production manager," constitute a separate voting group which may or may not, according to the wishes of a majority of them, also constitute a part of the appropriate unit first above described, and directed that separate elections by secret ballot be held among the two voting groups to determine whether they desire to be represented by the Union as a single unit, for purposes of collective bargaining within the meaning of the Act.

On March 7, 1946, pursuant to the foregoing Direction, elections were held among the employees in the two voting groups above described. Of the approximately 60 eligible voters in the first voting group above described, 52 cast votes for the Union; and in the second voting group, of the 12 eligible voters, 9 cast ballots for the Union and 3 against the Union. The results of these elections

were duly certified to the Board, which, on March 26, 1946, entered its Supplemental Decision finding that the following constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (c) of the Act:

All departmental superintendents, assistant foremen and foremen of the Midland Steel Products Company, Parish and Bingham Division, Cleveland, Ohio, including the traffic manager, assistant traffic manager, safety engineer and chief of plant protection but excluding the night superintendent, purchasing agent, assistant purchasing agent, production manager and assistant production manager,

and issued its Certification of Representatives, certifying that Foreman's Association of America, Midland Steel Chapter #105, is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment. Copies of this Supplemental Decision and Certification of Representatives were received by all parties in due course shortly after the issuance thereof.

On April 5, 1946, the Union wrote Respondent, addressing its letter to E. Almdale, Division Manager, as follows:

Under the date of the 26th of March 1946, the National Labor Relations Board issued its certification designating the Foreman's Association of America Chapter No. 105 as the duly elected collective bargaining representative of the departmental superintendents, assistant foremen and foremen, traffic manager, assistant traffic manager, safety engineer and chief of plant protection, employed by the Midland Steel Products Company, Parish & Bingham Division, Cleveland, Ohio, and a true copy of this certification has been received by us and doubtless by your Company.

Inasmuch as the Midland Steel Products Company Chapter No. 105 of the Foreman's Association of America has long since demanded recognition and collective bargaining with your company on issues affecting the seven classes of foremen above specified, and it is now the legally constituted agency for such bargaining, demand is hereby made that a time and place be specified at an early date for the commencement of collective bargaining in the premises within reasonable limits.

We are agreeable to a time and place that meets your convenience, but we feel that your reply in writing to this demand should be made within one week from the date of this letter.

On April 11, 1946, Respondent, by its president E. J. Kulas, responded to the Union's letter of April 5 as follows:

I acknowledge receipt of your letter of April 5th.

You are of course quite aware of the Company's position in regard to the question raised by your letter. On May 5, 1945, we wrote you that the position of the Company was that it considered its "supervisory employees a part of its management and is not prepared to bargain collectively with its own representatives," and also that the Company did not feel that such a thing would be sound or required by law.

While it is true that since the above date a hearing has been held before the National Labor Relations Board, as a result of which an election has been held and certification made, it is likewise the fact that the questions raised in this proceeding are now in the process of being reviewed by the courts. For example, my information is that there is now pending a case of this nature in the United States Circuit Court of Appeals at Cincinnati.

You can doubtless confirm this information through your counsel, Mr. Bernard Konopka, 1437 Dime Building, Detroit.

I must advise you that until these questions, including the question arising in our proceeding before the National Labor Relations Board, have received an authoritative answer by the courts the Company is not prepared to meet with representatives of your Chapter of the Foreman's Association of America for the purpose of collective bargaining.

The foregoing constitutes all the evidence offered and received in this proceeding, with the exception of the transcript of testimony, exhibits, orders, decisions and certifications making up the record in Case No. 8-R-1865, incorporated in this record by reference as heretofore noted.

On the basis of the foregoing, it is found that on April 11, 1946, Respondent refused to bargain with Foreman's Association of America, Midland Steel Chapter #105, as the certified exclusive bargaining representative of its employees within a unit described as above set forth, and has at all times since that date continued so to refuse, and thereby has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations as 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 thereof.

#### V. THE REMEDY

Counsel for the Respondent have urged that the Trial Examiner review *de novo* all the evidence, exhibits, pleadings, orders, and decisions making up the record in the original representation case, herein identified as Case No. 8-R-1865. It is conceded by counsel for Respondent that no events have occurred since the hearing in the representation case or the decision of the Board therein, which have effected any change in the circumstances or conditions surrounding the questions raised by Respondent originally. In the absence of any showing of such a change of circumstances or conditions, the questions as to the status of the employees embraced within the unit found to be appropriate, or the propriety of extending the rights guaranteed by the Act to the employees in such unit, are not open to consideration by this Trial Examiner. Those are matters which have already been fully considered and disposed of by the Board in arriving at the conclusions expressed by it in the Decision and Supplemental Decision rendered in the representation case. Such matters are *res adjudicata* insofar as this Trial Examiner is concerned.

The questions raised herein have recently been considered and disposed of in the decision of the United States Circuit Court of Appeals for the Sixth Circuit, in *N. L. R. B. v. Packard Motor Company* (August 12, 1946).<sup>2</sup>

In the original brief herein, counsel for Respondent have pointed out what they maintain are differences in the circumstances reflected by the record here and those disclosed by the record of the *Packard* case. Those differences, however, if they exist, are based on Respondent's evaluation of the evidence in the original hearing herein, and not on the findings made by the Board, based on the same evidence. At this stage, those findings are not reviewable. They discuss

<sup>2</sup> 157 F (2d) 80 (C. C. A. 6).

the facts in detail and find that they parallel the subjects covered in the *Packard* case, both in material substance and in appropriate disposition. To now give weight to the renewed contentions of counsel, it would be necessary for me to disregard the findings heretofore made by the Board, which have statutory finality if supported by substantial evidence, and examine the original record with a view to fitting new and different findings to the arguments advanced by counsel. This is not within the province of the Trial Examiner but rests solely with the Board to whom Respondent may address its argument at the proper time if it desires so to do.

Concerning the applicability of the decision in the *Packard* case, there appears to be no substantial distinction between the facts found by the Board to exist here and those upon which it bottomed its decisions in those cases,<sup>3</sup> that foremen are "employees" entitled, as such, to all the benefits of the Act; that various levels of authority may properly be included within a single appropriate unit; and that the Foreman's Association of America, being an independent organization, unaffiliated with any organization of the "rank and file" employees, is qualified to represent them. This paralleling of the facts is not my independent finding. The similarity of many of the basic facts here with those in the *Packard* case is specifically pointed out by the Board in its Decision and Direction of Election in Case No. 8-R-1865, the representation case herein.

Those facts, accepted by the Circuit Court of Appeals in its decision in the *Packard* case, and present here, have formed the basis for the judicial support of the principles originally enunciated by the Board in the Decision and Direction of Election in the *Packard* case and repeated in its Decision and Direction of Elections out of which this controversy has arisen. Since the pattern is almost identical in both cases and has heretofore been adjudicated by the Board and the United States Circuit Court of Appeals, I can find no basis for departing from those adjudications.

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist from so doing and take affirmative action which will effectuate the policies of the Act; that is to say: it will be recommended that Respondent, upon demand, bargain with the Foreman's Association of America, Midland Steel Chapter #105 as the representative of all the employees within the unit heretofore found to be appropriate, in regard to wages, hours, rates of pay and other conditions of employment, and, if an agreement is reached in such negotiations, reduce the terms so agreed upon to a signed written agreement. It will also be recommended that Respondent post appropriate notices in its plant where notices to employees usually are posted and maintain the same for sixty (60) days, in order to advise its employees that it will comply or is complying with such recommendations.

On the basis of the foregoing findings of fact and upon the entire record, the undersigned arrives at the following:

#### CONCLUSIONS OF LAW

1. Foreman's Association of America, Midland Steel Chapter #105, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All departmental superintendents, assistant foremen and foremen of the Midland Steel Products Company, Parish and Bingham Division, Cleveland, Ohio, including the traffic manager, assistant traffic manager, safety engineer and chief of plant protection, but excluding the night superintendent, purchasing agent, assistant purchasing agent, production manager and assistant production man-

<sup>3</sup> N. L. R. B. 4 and 64 N. L. R. B. 1212

ager, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Foreman's Association of America, Midland Steel Chapter #105, was on April 11, 1946, and at all times thereafter has been the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain with Foreman's Association of America, Midland Steel Chapter #105, as the exclusive and certified representative of all the employees in a unit of the employees of the Respondent heretofore found by the Board to be appropriate for the purposes of collective bargaining, 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, Respondent has engaged in and is engaging in an unfair labor practice 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 foregoing findings of fact and conclusions of law, the undersigned recommends that the Respondent, The Midland Steel Products Company, of Cleveland, Ohio, its officers, agents, representatives, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Foreman's Association of America, Midland Steel Chapter #105, as the exclusive representative of all departmental superintendents, assistant foremen and foremen of the Midland Steel Products Company, Parish and Bingham Division, Cleveland, Ohio, including the traffic manager, assistant traffic manager, safety engineer, and chief of plant protection, but excluding the night superintendent, purchasing agent, assistant purchasing agent, production manager and assistant production manager;

(b) Engaging in any other acts in any manner interfering with the efforts of Foreman's Association of America, Midland Steel Chapter #105, to negotiate for or represent its supervisory employees as the exclusive bargaining agent for the aforesaid unit.

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

(a) Upon request, bargain collectively with Foreman's Association of America, Midland Steel Chapter #105, as the exclusive representative of the employees described in paragraph 1 (a) of these recommendations, in respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant in Cleveland, Ohio, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Eighth Region, shall, after being duly signed by Respondent's representative, be posted by 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 Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Eighth Region (Cleveland, Ohio), in writing, within (10) days from the receipt of this Intermediate Report, what steps Respondent has taken to comply therewith.

It is further recommended that unless on or before ten (10) days from the date of the receipt of this Intermediate Report, the Respondent notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring 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 November 27, 1945, 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 25, 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 to the Board within ten (10) days from the date of the order transferring the case to the Board. Any party desiring to submit a brief in support of the Intermediate Report shall do so within fifteen (15) days from the date of the entry of the order transferring the case to the Board, by filing with the Board an original and four copies thereof, and by immediately serving a copy thereof upon each of the other parties and the Regional Director.

Dated September 9, 1946

R. N. DENHAM,  
*Trial Examiner.*

#### APPENDIX A

##### 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 refuse to bargain with Foreman's Association of America, Midland Steel Chapter #105, as the exclusive representative of our supervisory employees in the bargaining unit described herein.

We will bargain collectively upon request with the above-named union as the exclusive representative of all supervisory employees in such bargaining unit, with respect to wages, 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 departmental superintendents, assistant foremen, and foremen of the Midland Steel Products Company, Parish and Bingham Division, Cleveland, Ohio, including the traffic manager, assistant traffic manager, safety engineers, and chief of plant protection, but excluding the night superintendent, purchasing agent, assistant purchasing agent, production manager, and assistant production manager.

We will not engage in any other acts in any manner interfering with the efforts of Foreman's Association of America, Midland Steel Chapter #105, to negotiate for or represent the supervisory employees in said bargaining unit.

By THE MIDLAND STEEL PRODUCTS COMPANY,  
-----  
(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.