

E. I. DU PONT DE NEMOURS AND COMPANY *and* BUFFALO RAYON WORKERS INDEPENDENT UNION. *Case No. 3-CA-436. May 29, 1952*

Decision and Order

On December 11, 1951, Trial Examiner C. M. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had unlawfully refused to bargain collectively and was refusing to bargain collectively in violation of Section 8 (a) (5) and (1) of the Act, 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 Board¹ has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case,² and finds merit in the Respondent's exceptions. Because of our complete disagreement with the Trial Examiner, as hereinafter set forth, we make our own findings of fact, conclusions of law, and order.

The facts giving rise to this proceeding are substantially as follows:

Within a fenced-in area in Tonawanda, New York, the Respondent operates under separate managers, 3 plants which may be designated as the Rayon Division, the Cellophane Division, and the Sponge Division. In general, each plant manufactures the type of product indicated by its name. The Respondent has separate contracts with 3 independent unions, which may be designated as the Rayon Union, the Cellophane Union, and the Sponge Union, covering each of these 3 plants, respectively. It is the Rayon Union which has filed the charges in this case, claiming that the Respondent has refused to bargain with the Rayon Union with respect to certain maintenance workers in the Rayon Division unit.

On June 10, 1944, the Board's Regional Director for the Third Region, pursuant to the terms of an agreement for consent election, found and determined that the Rayon Union "is the exclusive representative of all the employees" in the following unit: "All hourly paid employees of the Rayon Division . . ." with certain specified exclusions.³

¹ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Styles and Peterson].

² The Respondent's request for oral argument is hereby denied, as the record, including the exceptions and brief, adequately present the issues and the positions of the parties.

³ The Trial Examiner found that this unit was limited to the employees on the Rayon

Since this certification, the Respondent has entered into a series of contracts with the Rayon Union covering the Rayon Division, the most recent being dated February 14, 1951, and running for at least 2 years. This contract covers the following described unit: ". . . all hourly wage roll employees of the Rayon Division . . ." with specified exclusions.

The charges in this case were occasioned by the transfer of 57 maintenance workers from the payroll of the Rayon Division to the payrolls of the Cellophane Division and Sponge Division, respectively, in May and June 1951. Before May and June 1951, the maintenance work for the Cellophane Division and for the Sponge Division, as well as that for the Rayon Division, was performed by maintenance employees all carried on the payroll of the Rayon Division. By book-keeping entries, the Cellophane Division and the Sponge Division purchased this service, as well as others, from the Rayon Division. Before the transfers, referred to above, in May and June 1951, the Respondent and the Rayon Union treated all these maintenance workers, including those physically working in the Cellophane Division and in the Sponge Division, as being within the Rayon Division unit, and the Respondent bargained with the Rayon Union for all these maintenance workers.

In April 1950 the Respondent reorganized its administrative and supervisory structure. Under that which existed before April 1950 the Rayon Division, the Cellophane Division, and the Sponge Division were a part of the Respondent's Rayon department. In April 1950 a new department, the film department, was created and the Cellophane Division and the Sponge Division were made part of the film department. Thereafter, in 1950, the Respondent notified the Rayon Union that the Respondent planned to transfer maintenance workers from the Rayon Division payroll to the payrolls of the Cellophane Division and the Sponge Division and that the Respondent would not, after the transfers, recognize the Rayon Union as the representative of such transferred employees. The Rayon Union protested, but the Respondent rejected the protest.

Effective on May 21, 1951, the Respondent transferred 21 maintenance employees from the payroll of the Rayon Division to the payroll of the Sponge Division; and, effective on June 18, 1951, the Respondent transferred 36 maintenance employees from the payroll of the Rayon Division to the payroll of the Cellophane Division. In addition to these transfers, the Respondent transferred the immediate supervisors of the transferred maintenance workers to the payrolls of the Sponge Division and Cellophane Division, respectively. There-

Division payroll for the period ending April 2, 1944. In this, he was in error, as we hereinafter point out.

after, the transferred maintenance workers continued to do the same work as theretofore and had the same immediate supervision. However, as indicated, the transfers resulted in a change in payroll status, and there was a change with respect to top-level supervision. In other words, the transferred employees ceased to be on the payroll of the Rayon Division; they assumed status as payroll employees of the Sponge Division or of the Cellophane Division, depending on where they physically worked, and became subject to the exclusive managerial control of the Sponge Division or of the Cellophane Division, as the case may be.

At the hearing, the General Counsel conceded that the Respondent was motivated by economic considerations in making the transfers, and that the transfers in themselves were not proscribed by the Act.

After the transfers, the Respondent bargained with the Sponge Union and the Cellophane Union for the respective transferees and declined to continue bargaining with the Rayon Union with respect to these 57 transferred maintenance employees.

Conclusions

On the basis of substantially the foregoing facts, the Trial Examiner found that the Respondent unlawfully refused to bargain with the Rayon Union.

The Trial Examiner found, albeit erroneously as set forth below, that the Rayon Division unit, as determined by the Regional Director in June 1944, was limited to the employees on the payroll of the Rayon Division for the period ending on April 2, 1944. The Trial Examiner reasoned that, just as in the case of that determination, the Respondent and the Rayon Union in their series of contracts, although not so expressly stated therein, intended to establish a unit of those employees who were on the payroll of the Rayon Division *at the time each contract was executed*; that the parties intended that the current contract, dated February 14, 1951, at the time of its execution covered, and during its term, would continue to cover, all production and maintenance hourly paid employees on the payroll of the Rayon Division on February 14, 1951; and that the 57 employees involved here, who were on that payroll, were not transferred outside this unit because, as the Trial Examiner stated, "Their jobs changed in no single respect; their names were simply shifted from one account book to another of the same employer." The Trial Examiner concluded that, by the transfers, the Respondent deprived the 57 employees of their rights under the current contract of the Rayon Union and of their right of free choice of their own bargaining representative.

We do not agree. Contrary to the Trial Examiner's finding, the unit certified by the Regional Director was not limited to those employees who were on the payroll of the Rayon Division for the period ending on April 2, 1944. The April 2 date was the date specified in the agreement for consent election governing the eligibility of employees to vote in the election. Nothing in the agreement for consent election or the Regional Director's determination limited the scope of the unit to employees on the payroll for the period ending on April 2, 1944, or any other payroll period. Moreover, there is no evidence that the Respondent or the Rayon Union intended by their series of contracts to describe therein a unit limited to those employees who were on the payroll at the time of execution of each contract, or to freeze the unit described therein so as to preclude, during their respective terms, the transfer of employees in the unit at the time of execution of each contract to jobs outside the unit. As the Respondent urges, so to construe the Regional Director's determination or the unit description in the series of contracts would lead to artificial results. Indeed, the current contract between the Respondent and the Rayon Union expressly contemplates the transfer of employees within the unit to jobs outside the unit.⁴ Thus, we conclude that the current contract between the parties did not preclude the transfer of those within the unit at the time of execution of the contract to jobs outside the unit.

The crucial question here is whether the Respondent effectively transferred the 57 maintenance workers to jobs outside the Rayon Division bargaining unit. We disagree with the Trial Examiner's conclusion that there was no transfer in any "actual or real sense" or that the transfers represented no more than a paper transaction. While it is true that the work of the 57 maintenance employees remained the same and that they were still employees of the same employer, working under the same immediate supervisors after the transfer, these employees have ceased to be on the payroll of the Rayon Division and are no longer subject to the supervision or control of the Rayon Division managerial hierarchy. Thus we conclude that these 57 maintenance workers were not, after the transfer, employees of the Rayon Division. As they were no longer employees of the Rayon Division, they ceased to be within the Rayon Division bargaining unit, and the Respondent was under no duty to bargain with the Rayon Union with respect to the transferred 57 employees. The al-

⁴ Sec. 5 of Art. VI of that contract provides :

Individuals who may be or have been transferred or promoted from jobs within the scope of this bargaining unit to jobs outside the scope of this bargaining unit may be returned to or placed in the bargaining unit with full seniority credit for time spent outside this bargaining unit.

leged loss of contract rights and the alleged loss of the right to a free choice of bargaining representatives, relied on by the Trial Examiner as grounds for his ultimate determination, are normal concomitants of a *legitimate* transfer of employees from a bargaining unit to jobs outside the unit, as was the case here. Accordingly, we shall dismiss the complaint.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein against the Respondent, E. I. du Pont de Nemours and Company, Buffalo, New York, be, and it hereby is, dismissed.

Intermediate Report

STATEMENT OF THE CASE

Upon a charge duly filed by Buffalo Rayon Workers Independent Union, herein called the Rayon Union, the General Counsel of the National Labor Relations Board, by the Regional Director of the Third Region, (Buffalo, New York) issued his complaint dated October 9, 1951, against E. I. du Pont de Nemours 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 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. A copy of the charge was duly served upon the Respondent; copies of the complaint and notice of hearing thereon were served upon the Respondent, the Rayon Union, Buffalo Yerkes Cellophane Union, herein called Cellophane Union, and du Pont Cel-O-Seal and Sponge Workers Independent Union, herein called Sponge Union.

As to unfair labor practices the complaint alleges, in substance, that since May 1951, the Respondent has refused to bargain collectively with the Rayon Union as the exclusive bargaining representative of its employees in an appropriate unit, and thereby has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act.

Thereafter the Respondent filed an answer in which it denied having engaged in unfair labor practices and set forth certain affirmative allegations.

Pursuant to notice a hearing was held in Buffalo, New York, on November 6 and 7, 1951, before the undersigned Trial Examiner. Upon motion, counsel for the Cellophane and Sponge Unions was permitted to intervene. All parties were represented at and participated in the hearing where full opportunity was afforded them to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. Motions made at the conclusion of the hearing to dismiss the complaint, upon which ruling was then reserved, are disposed of by the findings, conclusions, and recommendations below. Opportunity for oral argument was afforded but waived by all parties. Briefs have been received from General Counsel and the Respondent.

Upon the entire record in the case, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

E. I. du Pont de Nemours and Company is a Delaware corporation, having its principal office in Wilmington, Delaware. This proceeding involves only its three plants located in Tonawanda, New York. During 1950 each of these plants purchased raw materials valued at more than \$1,000,000, of which 75 percent was shipped to Tonawanda from points outside the State of New York. During the same year finished products from each plant, valued at more than \$750,000, were shipped from Tonawanda to points outside the State of New York.

II. THE LABOR ORGANIZATIONS INVOLVED

Buffalo Rayon Workers Independent Union, Buffalo Yerkes Cellophane Union, and du Pont Cel-O-Seal and Sponge Workers Independent Union are labor organizations admitting to membership employees of the Respondent at its Tonawanda plants.

III. THE UNFAIR LABOR PRACTICES

A. *The events and issues*

Most facts of the case are not in dispute.

In brief, within a single, enclosed area at Tonawanda, New York, known as the Yerkes Works or Yerkes Location, the Respondent operates plants producing, in separate buildings: (1) rayon, (2) cellophane and polythene, and (3) "Cel-O-Seal" and sponge products. Although all are owned and operated by the same Respondent Company, for business purposes different payrolls are maintained for the different production groups or divisions, and for collective bargaining purposes production employees in the three groups have been and are represented by three different independent labor organizations. Until May 1951, however, maintenance employees generally and for all three divisions were carried on the Rayon payroll and over a long period of years had been represented by the Rayon Union.

That is to say, although before May 1951, maintenance employees had been regularly engaged in maintenance work in both the cellophane and the "Cel-O-Seal" or sponge buildings, as well as at the rayon works, for many years all such workers had been carried on the rayon payroll. For bookkeeping purposes (since ownership was the same) it appears that the Rayon Division charged the other divisions for maintenance work performed in their respective buildings.

Sometime before May the company rearranged its departmental organization setup with a consequence that certain divisional changes at top levels were made at the Tonawanda plants. Insofar as such rearrangement is material to these proceedings, the effect at the Yerkes Works was to give top management at the cellophane and sponge plants supervision and responsibility over the maintenance workers in their respective divisions. Following this reorganization, on May 21, 21 maintenance workers who until then had been on the Rayon payroll were placed upon the Sponge payroll; and on June 18, 36 maintenance workers until then on the Rayon payroll were placed on the Cellophane payroll.

The Respondent concedes that the so-called "transfers" were actually only a "bookkeeping" transaction, in that neither the work of the individuals nor their immediate supervision was altered. General Counsel concedes that the transaction was occasioned by perfectly legitimate reasons.

Although for management the "transfers" were merely a bookkeeping convenience for the employees concerned, a material change was effected in their collective bargaining relationship with the Employer. For collective bargaining purposes the Employer in effect and unilaterally transferred these employees out of the rayon unit and into either the cellophane or sponge units. These employees ceased to be represented, on the dates of the bookkeeping transactions, by the collective bargaining agent of their own choosing—a choice recognized by the Respondent in the contract of February 14, and were effectively placed by the Employer under a representation agent they had not selected. Moreover, not only the 57 employees whose names were transferred to other payrolls, but *all* maintenance workers at the Yerkes plant lost certain real and material rights which theretofore had been theirs under the contract. In bidding for vacancies, for example, maintenance employees may now bid only for jobs in one, instead of in all three plants.

From this situation the single major issue stems: whether the employer was legally privileged to deprive these 57 maintenance workers of their rights under the contract during its existence, a period of 2 years from February 14, 1951.

B. Contentions and conclusions

The current agreement between the Respondent and the Rayon Union defines the unit to be recognized as follows:

The unit of employees represented by the Union shall be all hourly wage roll employes of the Rayon Division at the Plant, excluding lead-burners, all salary roll employes, office and clerical employes, guards, nurses, telephone operators, and all employes working under the direction of the Technical Superintendent, and further excluding all supervisory employes with authority to hire, discharge, promote, transfer or otherwise effect changes in the status of employes or effectively recommend such action.

General Counsel claims that the unit described in the complaint is precisely the same as that set forth in the contract and quoted above. General Counsel, however, used several hundred words to describe that unit, setting out each classification of employees which was on the February 14 payroll. It appears to be unnecessary to quote here General Counsel's allegation as to the unit, since he avers that he intended to describe the same unit but in different words.

As not infrequently happens, it seems that here the use of words has hindered, and not helped, the meeting of minds of opposing counsel.

Contractual relations between the Respondent and the Rayon Union first began after, and as a result of, a Board-conducted election in 1944 (Case No. 3-R-764), at which time the appropriate unit was found to be, insofar as relevant here:

All hourly paid employees of the Rayon Division of the Company's Rayon Department at Buffalo, New York . . . who appeared on the Employer's pay roll for the period ending April 2, 1944. . . .

The first agreement between the Rayon Union and the Respondent, in its recognition clause, refers to and cites the Board's certification and the unit there set forth, except that it does not include the date "April 2, 1944." The reasonable construction of that first contract, and of subsequent contracts, both as to intent and practice, is that the parties considered them to cover employees on the payroll *at the time each was executed*, just as the Board election covered the employees on the payroll as of a specific date shortly before the election. It is therefore reasonable to believe that both parties considered that the current agreement, at the time of its execution covered and, during its existence would

continue to cover, the production and maintenance hourly paid employees on the Rayon payroll of February 14, 1951. In fact, the printed agreement itself states on its cover: "Production and Maintenance Units."

The Trial Examiner therefore concludes and finds, in the interest of brevity and clarity, without altering the substantive terms either of the complaint or the contract, that the appropriate unit consists of:

All hourly paid production and maintenance employees of the Rayon Division at the Yerkes Plant, as of February 14, 1951, excluding lead-burners, all salary roll employees, office and clerical employees, guards, nurses, telephone operators, and all employees working under the direction of the Technical Superintendent, and further excluding all supervisory employees within the meaning of the Act.

From the evidence the Trial Examiner further finds that on February 14, 1951, the Rayon Union represented a majority of the employees in the above-described unit, and that at all times since that date the Rayon Union has been and is now the exclusive representative of all employees in said unit for the purposes of collective bargaining in respect to wages, hours of employment, or other conditions of employment.

At the hearing and in its brief the Respondent contended that the contract itself permits *transfer* of employees from this unit to another. The Trial Examiner considers that such provisions are immaterial. Employees here were *not transferred* "to other jobs outside the bargaining unit" in any actual or real sense. Their jobs changed in no single respect; their names were simply shifted from one account book to another of the same Employer.

In summary, it is found that to accommodate its own convenience the Respondent has actually deprived its maintenance employees of rights not only encompassed by the contract of February 14, 1951, but also of rights guaranteed them by Section 7 of the Act—choice of their own collective bargaining agent. By this action the Respondent has refused to bargain with the Rayon Union as the exclusive bargaining agent of its employees in the above-described appropriate unit. Specifically it is found that the Respondent refused to bargain on May 21 and June 18, and at all times thereafter.

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 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

Having found that the Respondent has engaged in unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It has been found that the Respondent has refused to bargain collectively with the Rayon Union as the exclusive representative of all employees in an appropriate unit. It will therefore be recommended that the Respondent cease and desist therefrom and, also, that it bargain collectively with the Rayon Union with respect to wages, hours, and other terms and conditions of employment, for all employees in the appropriate unit.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. Buffalo Rayon Workers Independent Union, Buffalo Yerkes Cellophane Union, and du Pont Cel-O-Seal and Sponge Workers Independent Union are labor organizations within the meaning of Section 2 (5) of the Act.

2. All hourly paid production and maintenance employees of the Respondent's Rayon Division at the Yerkes plant, as of February 14, 1951, excluding lead-burners, all salary roll employees, office and clerical employees, guards, nurses, telephone operators, and all employees working under the direction of the technical superintendent, and further excluding all supervisory employees within the meaning of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Buffalo Rayon Workers Independent Union was, on February 14, 1951, and at all times since has been the exclusive representative within the meaning of Section 9 (a) of the Act of all employees in the aforesaid unit for the purposes of collective bargaining.

4. By refusing to bargain collectively with Buffalo Rayon Workers Independent Union as the exclusive bargaining representative of the employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By said acts the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (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 omitted from publication in this volume.]

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 in any manner interfere with the efforts of BUFFALO RAYON WORKERS INDEPENDENT UNION to bargain collectively with us. 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. The bargaining unit is:

All hourly paid production and maintenance employees of the Rayon Division at the Yerkes plant, as of February 14, 1951, excluding lead-burners, all salary roll employees, office and clerical employees, guards, nurses, telephone operators, and all employees working under the direction of the technical superintendent, and further excluding all supervisory employees within the meaning of the Act.

E. I. DU PONT DE NEMOURS AND COMPANY,
Employer.

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.

ANTHONY C. MARKITELL AND JOHN H. DENT, PARTNERS, D/B/A
TRAFFORD COACH LINES, AND TRAFFORD COACH LINES *and* AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1214. *Case No. 6-CA-281.*
May 29, 1952

Supplemental Decision and Order

On January 3, 1952, the Board issued a Decision and Order in the above-entitled proceeding, finding, among other things, that the evidence was insufficient to support the complaint allegation that the discharge of employee DiRito constituted a violation of Section 8 (a) (3) of the Act.¹ On March 3, 1952, the General Counsel filed a motion for reconsideration, requesting the Board to reconsider its decision and to find a violation as to DiRito. None of the other parties filed any documents in response to the motion. The Board has considered the motion and, after reevaluating the entire record, makes the following finding and conclusion respecting DiRito.

The General Counsel's motion is based on the ground that the Board has accorded insufficient weight to the evidence pointing to illegal motivation in the discharge of this employee. The General Counsel argues particularly the persuasiveness of an affidavit, received in evidence, given by Markitell to the Board agent who investigated the charge before issuance of the complaint. When all four of the employees involved in this case—Cole, Taylor, Hopkins, and DiRito—were discharged, Markitell was the owner of the bus company for which they worked, and was himself named as a party Respondent.²

In our original decision we found that Cole, Taylor, and Hopkins were discharged because of their persistent activities on behalf of the Union generally. As it was clear that their grievance committee protest on behalf of William Miller on September 27 was the provocative incident giving rise to Markitell's ire, we did not adopt the Trial Examiner's specific finding that they were discharged for the additional reason that they had engaged in a short-lived strike 3 weeks earlier. Our doubt as to the sufficiency of the evidence supporting the complaint allegation respecting DiRito stemmed from the fact that he was in the hospital, and therefore did not participate in the grievance protest when the group was discharged. We were hesitant to

¹ 97 NLRB 938.

² As set forth in detail in the Intermediate Report, in the affidavit in question Markitell stated that all four employees were discharged because they were responsible for a strike on September 5 and 6, 1949.