

WAGNER ELECTRIC CORPORATION *and* LOCAL 23, AMERICAN FEDERATION OF TECHNICAL ENGINEERS, AFL.
Case No. 14-CA-873. May 26, 1953

DECISION AND ORDER

On March 4, 1953, Trial Examiner Horace A. Ruckel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not violated Section 8 (a) (1) or (3) of the Act, as alleged in the complaint, and recommended that the complaint be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and the charging Union filed exceptions to the Intermediate Report and all parties filed briefs.

The Board has reviewed the rulings made by 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 exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except as modified below.

We agree with the Trial Examiner that the Respondent did not violate Section 8 (a) (1) or (3) of the Act by paying employees not represented by any union for time not worked during a strike and picketing by employees represented by IUE-CIO, and denying similar payment for time not worked during the strike and picketing to employees in a separate unit represented by the AFL charging union. However, in reaching this conclusion, we, unlike the Trial Examiner, rely solely on the fact, disclosed by the record, that the employees represented by the AFL, unlike the unorganized employees, were absent from work in breach of a no-strike clause in the AFL's contract¹ with the Respondent, and that the Respondent relied on this contract in determining not to pay those in the AFL unit. Accordingly, we find that there was no unlawful disparate treatment and we shall dismiss the complaint.

[The Board dismissed the complaint.]

Chairman Herzog and Member Murdock took no part in the consideration of the above Decision and Order.

¹ Paragraph 1 of article 12 of the contract reads as follows:

1. The Union agrees that during the term of this agreement, there shall be no strikes, slow-ups, sit-downs, sympathy strikes, stoppages of work, or any other form of interference with production or other operations. Any individual or group violating the above may be discharged or suspended, but shall have the right to avail himself of the grievance procedure provided in this Agreement.

Intermediate Report

STATEMENT OF THE CASE

Pursuant to a charge filed by Local 23, American Federation of Technical Engineers, AFL, herein called Local 23, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel and the Board, by the Regional Director for the Fourteenth Region (St. Louis, Missouri), issued his complaint dated November 19, 1952, against the Wagner Electric Corporation, herein called Respondent, alleging that Respondent had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charge, the complaint, and the notice of hearing were duly served upon Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that Respondent, following a 1-day strike by members of a labor organization¹ other than Local 23, paid its unorganized employees who did not report for work on the day of the strike but refused to pay the employee members of Local 23 who did not report, and that this difference in treatment was motivated by the union membership of the one group and the nonunion membership of the other. Therefore, it is said, Respondent discriminated with respect to the hire and tenure of its employees in violation of the Act.

Respondent filed an answer dated December 1, 1952, admitting the allegations of the complaint with respect to the nature of its business but denying that it had engaged in any unfair labor practices. Pursuant to notice a hearing was held at St. Louis, Missouri, on December 15 and 16, 1952, before me, the undersigned Trial Examiner. The General Counsel, Respondent, and Local 23 were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the conclusion of the General Counsel's case both parties rested. The parties waived oral argument and were advised that they might file briefs with me by January 5, 1953. Subsequently the Chief Trial Examiner extended this time to February 12. Briefs were duly filed by all parties.

Upon the entire record in the case and from my observation of the witnesses I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is a Delaware corporation with its principal office and manufacturing plants located at St. Louis, Missouri, where it is engaged in the manufacture, sale, and distribution of electric motors, electric transformers, hydraulic and air brakes, and related products. In addition to its St. Louis plants Respondent operates manufacturing plants in Mt. Vernon and Edwardsville, Illinois. The plant here involved is the Plymouth Avenue plant in St. Louis, where Respondent employs approximately 6,500 employees.

During the 12 months immediately preceding the issuance of the complaint Respondent received at its Plymouth Avenue plant raw materials valued in excess of \$500,000, of which more than 50 percent was shipped directly to the plant from points outside the State of Missouri. During the same period Respondent shipped directly from this plant finished products valued in excess of \$500,000, of which more than 20 percent was shipped directly to points located outside the State of Missouri.

II. THE LABOR ORGANIZATIONS INVOLVED

Local Union No. 1104, International Union of Electrical, Radio and Machine Workers, represents about 5,500 employees in the production and maintenance unit, and about 500 office and factory clerical workers in 2 other units. During the events hereinafter related Local 23, American Federation of Technical Engineers, affiliated with the American Federation of Labor, represented about 80 employees, mostly tool designers and draftsmen.

¹ The striking union was Local No. 1104, International Union of Electrical, Radio and Machine Workers, affiliated with the C.I.O., herein called the IUE.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The strike of the IUE

As a result of a dispute between Respondent and the IUE the production and maintenance employees on June 2, 1952, went on strike and a picket line was thrown around the plant. Employees represented by Local 23 and the unorganized employees remained in the plant as did the supervisory and professional employees. The unorganized nonsupervisory group consisted of about 150 employees, mostly office payroll clerks, secretaries, job-analysis people, etc. These are generally referred to in the record as the "excluded" group. The members of this group are paid on a weekly salary basis, as are the supervisory and professional employees, about 350 in number, but are not exempt from the Federal wage and hour provision as are those in the latter group.

When employees arrived at the plant on the morning of Tuesday, June 3, revolving picket lines consisting of from 8 to 15 pickets paraded before each of the 4 usual entrances. During Tuesday, however, particularly Tuesday afternoon, a substantial number of employees showed up in the plant for work, and many more appeared at the regular starting time on the morning of June 4 when the picket line was reduced to a token line. Picketing ceased altogether at 9:40 a.m. on that day. On June 5 the strike of the IUE was settled.

Exhibits offered by the General Counsel show that 106 of the 150 excluded employees reported for and performed work on June 3. No Local 23 employees reported for work in the morning and only 7 came during the noon hour when the pickets were absent from the plant entrances. On June 4 all employees in the excluded group, excepting 2 who were docked, clocked in or were absent on scheduled vacations. But even on that day 10 employees represented by Local 23 were absent and 45 came in after 9 a.m., of which number 20 came in after 9:40 a.m. after picketing had ceased. In the excluded group only 7 were more than 20 minutes late, excepting 2 who were docked.

B. Respondent's policy of payment for time not worked

The issue in this case pertains to the method of payment or nonpayment of employees who did not show up for work in the plant on June 3, or who were late reporting for work on June 4. None of the production and maintenance employees who were on strike and represented by the IUE were, of course, paid. Similarly, none of those affiliated with Local 23 were paid for time not worked. On the other hand, all but 4 of the 106 of the total of approximately 150 excluded employees were paid for the whole day, whether or not they worked, as were supervisors, executives, and professional employees. Under the Fair Labor Standards Act, Respondent, in order to maintain the overtime exemption of employees in the supervisory and professional group, was required to pay their regular weekly salaries without deduction for time off. Unlike the employees in this group the excluded employees were not exempt under the Fair Labor Standards Act, although they were salaried employees. Ralph Boeringer, Respondent's industrial relations director, called as a witness by the General Counsel, testified that in deciding whether to pay employees in the excluded group along with the supervisory and professional employees covered by the Fair Labor Standards Act, or to equate them with the striking industrial and maintenance workers and not pay them, Respondent decided upon the former course. Accordingly, Respondent instructed its supervisors to review the cases of the excluded employees under their jurisdiction and to advise the payroll department in those instances where the supervisors felt that the absence of any particular worker was not justified for any of the usual reasons.²

Boeringer admitted while testifying that it was hardly practical to interview each and every employee in this group and that it was largely left to the discretion of each foreman. It is obvious, of course, as Respondent recognized, that the employees in the excluded group who did not report to work on June 3, as well as members of Local 23, were influenced primarily by the presence of the picket line which they had to cross to get into the plant. The question was who stayed away because of the physical difficulty involved, and who voluntarily because of trade union respect for the picket line. Boeringer stated that Respondent was influenced to some extent in distinguishing between those who might not have been able to cross the picket

²There were, of course, normally a number of absences from this as well as any other group in the plant due to sickness, vacation, and other standard reasons.

line and those who might not have wanted to do so, by the fact that Respondent knew the "attitude" of the different groups of employees. He considered the failure to appear for work of those represented by Local 23 as a voluntary absence occasioned by their respect for the picket line of another union. He concluded, on the other hand, from the fact that the excluded workers were not represented by any labor organization, that the failure of many of them to return to work was involuntary.

Contentions and Conclusions

The sum and substance of the General Counsel's contention is that Respondent's decision to indulge, in effect, the presumption that members of Local 23 who did not report to work on June 3 voluntarily stayed out because of their trade union respect for a picket line, and the opposite presumption that employees in the excluded group who did not come to work stayed out involuntarily, and its policy of paying the members of Local 23 only for time actually worked but of paying the excluded employees for the full day whether or not they performed services, constituted a disparate treatment of its union and nonunion employees, to the advantage of the latter, and was motivated by an antiunion purpose and hence discriminatory under the Act.

The General Counsel's brief characterizes Respondent's policy determination as "inconsistent." Consistency may sometimes be a virtue but its opposite has never been deemed an unfair labor practice. Moreover, in view of the fact that the employees in one group were organized in Local 23 and the employees in the other group were not organized, it was not inconsistent, or indeed unrealistic, in my opinion, for Respondent to assume that Local 23 employees entertained a modicum of traditional trade union respect for a picket line, and to conclude that they voluntarily refrained from crossing it. There is no direct evidence in the record to show why individual employees in the excluded group did not report for work.

There is some testimony to show why employee members of Local 23 did not show up. For example, Albert Schuster, chief steward of Local 23, the only member of the group called as a witness, was present in front of the plant in such a relationship to the strikers that Respondent might reasonably have believed that he was lending moral support to the strike. Moreover, Schuster admitted while testifying that he was a representative of Local 23 during contract negotiations in August 1951, and that one of the provisions of the contract which that organization proposed was that "nothing in [the] agreement [should] be construed as in any manner restricting the right of any employee covered by [the] agreement to respect picket lines formed against the Company by any bona fide union in accordance with its regular rules and regulations."

The above provision was not adopted, but it is reasonable to suppose that this attitude toward picket lines in general was applicable to the picket line around Respondent's plant on June 3, and that Respondent's officials had this in mind in considering why nearly all of the employee members of Local 23 failed to come to work.

It has been found that most of the excluded employees did manage to get into the plant and go to work on the day in question, and all of them except 2 were present on June 4, almost all of them on time, whereas few Local 23 members reported on June 3, 10 did not come in on June 4, many of those who did waited until after 9:40 when the picket line was withdrawn, and many others came in around 9 a.m. when, it is probable, it became known that it was about to be withdrawn.

In support of the asserted unreasonableness of Respondent's policy there is some evidence adduced by the General Counsel to show the manner of picketing, the density of the picket lines, the unavailability of other entrances, etc., and a showing by Respondent on cross-examination that Schuster, at least, was able to get into the plant anytime he desired to do so. I do not find it necessary to discuss this evidence in detail. In my opinion it is not determinative of the issue here. The question is not whether the Respondent's idea of the difficulty attached to getting through the picket line, or the lack of it, was reasonable or the situation in front of the plant correctly appraised. The question is whether Respondent, in determining its policy, was motivated by a desire to discriminate against union members in favor of its unorganized employees. There is no such showing.³ Respondent has been in contractual relations with Local

³ The General Counsel in his brief cites the testimony of Mamet, counsel for Local 23, as to a conversation with Boeringer in July 1952, when Mamet first asked that absence from work on June 3 should be credited against the employees' annual vacation and later that Local 23 employees should be given a day's wages, that: "Its just impossible to pay because whether or not you were involved in the strike, you're still a union. Unions can strike, unorganized people can't. And even though this wasn't your strike, you are a union." The General Counsel would

23 as well as with the striking union for a number of years. There is no suggestion in the record, much less any evidence, of hostility on the part of Respondent toward union organization in general or toward Local 23 in particular. Disparity of treatment there was; but disparity of treatment is not the equivalent of discrimination, as the Board and the courts have held in cases too numerous for citation. Neither the brief of the General Counsel nor that of Local 23 cites any cases to the contrary. There is nothing here to show that this disparate treatment was caused by anything else than Respondent's own conception of sound business policy.

In my opinion the General Counsel has not met the burden upon him of establishing his case by a preponderance of the credible testimony, viewing the record as a whole. It must be concluded, and I find, that Respondent, by paying its unorganized employees for June 3 whether or not they worked, and failing to pay members of Local 23 unless they worked, and then only for the time they performed services, did not commit an unfair labor practice.

CONCLUSIONS OF LAW

1. Wagner Electric Corporation is and at all times relevant herein was engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
2. American Federation of Technical Engineers, Local 23, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.
3. Respondent has not engaged in any unfair labor practices within the meaning of the Act.

[Recommendations omitted from publication.]

read into this statement the meaning that members of Local 23 were being treated unequally simply because they were union adherents. I do not so interpret it. In my opinion Boeringer's remarks, taken in their context, were merely a paraphrase of Respondent's statement of policy based on its belief that Local 23 members voluntarily absented themselves from work because, as a union, they respected the picket line of the striking union.

COCHRAN CO., INC. *and* UNITED FRESH FRUIT AND VEGETABLE WORKERS, LOCAL INDUSTRIAL UNION NO. 78, CIO, Petitioner

THE GARIN CO. *and* UNITED FRESH FRUIT AND VEGETABLE WORKERS, LOCAL INDUSTRIAL UNION NO. 78, CIO, Petitioner. Cases Nos. 20-RC-2048, 20-RC-2049, and 20-RC-2054. May 26, 1953

DECISION AND DIRECTION OF ELECTIONS

Upon separate petitions duly filed under Section 9 (c) of the National Labor Relations Act, a hearing in the above-consolidated cases¹ was held before LaFayette D. Mathews, Jr., hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

1. The Employers are engaged in commerce within the meaning of the Act.
2. The labor organization involved claims to represent employees of the Employers.
3. The Employers contend that the employees sought by the Petitioner are "agricultural laborers" and not "employees"

¹On November 24, 1952, the Regional Director consolidated the proceedings in the above cases.