In the Matter of SIMMONS ENGINEERING CO. *and* UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, C. I. O.

Case No. 18–C–1154.—Decided February 26, 1946

DECISION
AND
ORDER

On December 7, 1945, the Trial Examiner 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. No request for oral argument before the Board at Washington, D. C. was made by any of the parties, and none was held.

The Board has reviewed the Trial Examiner's rulings 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 respondent's brief and exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

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, Simmons Engineering Co., Minneapolis, Minnesota, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Electrical, Radio and Machine Workers of America, C. I. O., as the exclusive representative of all its non-salaried production and maintenance employees excluding supervisors, clerical workers, instructors, and part-time cleaning woman.

(b) In any manner interfering with the efforts of United Electrical, Radio and Machine Workers of America, C. I. O., to bargain collectively with it.

[1] See *N. L. R. B. v. Blair Quarries, Inc.*, 152 F. (2d) 25 (C. C. A. 4)

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

(a) Upon request, bargain collectively with United Electrical, Radio and Machine Workers of America, C. I. O., as the exclusive representative of all its employees in the aforesaid appropriate unit, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post at its plant at Minneapolis, Minnesota, copies of the notice to the Intermediate Report, marked "Appendix A."[2] Copies of said notice to be furnished by the Regional Director for the Eighteenth Region, shall, after being duly signed by the respondent or its 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 respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director of the Eighteenth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

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

INTERMEDIATE REPORT

Mr. Stephen M. Reynolds, for the Board

Mr. George D. McClinstock, of *Faegre & Benson*, of Minneapolis, Minn., for the respondent.

Mr. C. M Peters, of Minneapolis, Minn., for the Union.

STATEMENT OF THE CASE

Upon an amended charge duly filed by United Electrical, Radio and Machine Workers of America, C. I. O., herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Eighteenth Region (Minneapolis, Minnesota), issued its complaint dated October 23, 1945, against Simmons Engineering Co.,[1] 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 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, together with notice of hearing, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleges in substance that on or about May 24 and August 6, 1945, respondent refused and continues

[2] Said notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words "Recommendations of a Trial Examiner" and substituting in lieu thereof the words "A Decision and Order."

[1] In the formal papers herein, respondent was originally referred to as "Simmons Engineering Company." At the commencement of the hearing counsel for the Board made a motion to correct the name of respondent to "Simmons Engineering Co." This motion, in which counsel for respondent joined, was granted

to refuse to bargain collectively with the Union which was then and still is the exclusive representative of respondent's employees in an appropriate unit, and that by such conduct the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. Respondent, in its answer filed November 3, 1945, denies the commission of any unfair labor practices.

Pursuant to notice, a hearing was held on November 5, 1945, at Minneapolis, Minnesota, before the undersigned Sidney L Feiler, the Trial Examiner duly designated by the Chief Trial Examiner The Board and the respondent were represented by counsel and the Union by an official representative Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the Board's case, the undersigned granted a motion of counsel for the Board to conform the pleadings to the proof as to formal matters. At the close of the Board's case, the undersigned denied a motion of counsel for the respondent to dismiss the complaint. This motion was renewed at the close of the entire case and decision was reserved thereon. The motion is hereby denied. At the conclusion of the evidence, counsel for the Board and counsel for the respondent presented oral argument. Subsequent to the hearing, counsel for the Board and counsel for the respondent filed briefs with the undersigned.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is a Minnesota corporation, maintaining its principal office and place of business at Minneapolis, Minnesota, where it is engaged in the manufacture of bakery and cutlery blades. At the time of the hearing, the respondent was purchasing raw materials at a rate in excess of $10,000 per annum. All the materials purchased were being transported to the respondent's plant at Minneapolis, Minnesota, from States other than the State of Minnesota. The respondent's sales were being made at a rate in excess of $50,000 per annum, of which approximately 80 percent was being transported into and through States other than the State of Minnesota.

The respondent admits that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

United Electrical, Radio and Machine Workers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. Chronology of events[2]

Prior to April 17, 1945, the plant now used by the respondent, Simmons Engineering Co., was occupied by the Simmons Engineering Company, a partnership. The partnership was engaged in the business of manufacturing cutting blades for use in the bakery trade.

In December 1944, the Union began its efforts to organize the employees of the partnership. On December 20, 1944, it filed with the Board a petition for inves-

[2] There was no substantial dispute concerning the factual background of this case. Unless otherwise indicated, the findings of fact are based upon admitted facts or uncontradicted evidence which the undersigned credits.

tigation and certification of representatives. On January 4, 1945, a consent election agreement was executed by the parties In the election, held on January 12, 1945, 16 ballots were cast for the Union, and 1 against. The Union was certified by the Board on January 22, 1945, as exclusive collective bargaining representative of employees in an appropriate unit.

Thereafter, the Union entered into negotiations with the partnership in an attempt to reach an agreement. Conferences were held on March 8 and March 27, at which little progress was made At these conferences the Union was represented by a committee of employees and Charles M Peters, business representative. The partners and George D McClintock, Esq , attended the meetings on behalf of management. Between March 27, and April 2, Peters had an additional meeting with McClintock concerning a contract. Again, not much progress was made.

On April 3, McClintock advised Peters that there would be a change in the management and requested a postponement in the negotiations until the sentiments of the new owners could be ascertained Peters agreed to this arrangement.

The respondent corporation was organized on March 28, 1945 On April 16, it purchased the assets of the partnership On April 17 it took charge of plant operations. Neither of the partners of Simmons Engineering Company had any interest in the respondent corporation. None of the shareholders of respondent had had any interest in the partnership.

Peters thereafter attempted to arrange for a conference with respondent. Such a meeting took place on May 18. Respondent was represented by McClintock, appearing as its attorney, A J Topp, general manager, and Harry M Gustafson, president Peters and a committee of employees appeared for the Union. McClintock presented a draft contract in the nature of a counterproposal to previous proposals by the Union. The various clauses were discussed During the discussion, McClintock several times raised the question as to whether the certification of the Union in January 1945 had any binding effect upon the respondent[3] However, the parties continued to discuss the proposed contract, but could not reach an agreement.

A final conference took place on May 24 At this meeting, McClintock stated that Topp had received some evidence that a number of employees wanted to be members of another labor organization, that respondent did not know whether the Union represented a majority of the employees, and would not continue bargaining negotiations, unless the Union obtained a new certification or presented new evidence of its majority representation

On April 26, 1945, a representation petition was filed with the Regional Director by a rival labor organization, the International Association of Machinists, A F. of L , herein called the Machinists. This petition was dismissed on June 14 No appeal was taken from this decision

Thereafter, respondent, by McClintock, engaged in correspondence with the Regional Director concerning the effect of the prior certification. The Regional Director took the position that the certification was binding upon the respondent In a letter, dated July 17, 1945, McClintock reiterated the respondent's stand that it would not bargain with the Union On August 6, 1945, when Peters at-

[3] McClintock testified that a few weeks after respondent took over operations at the plant he came to the conclusion that the certification of the Union had no effect upon respondent and that when he spoke to an employee of the Board, whom he could not identify, by telephone, he received support for his position It is clear from McClintock's testimony, which is credited, that the information McClintock received was not given to him as the official position of the Board nor did he receive it other than as an informal opinion, and the respondent is not relying upon this incident as a defense In any event, as appears hereinafter, the official position of the Regional Director, subsequently conveyed to the respondent, was that the certification was binding upon the respondent

tempted to renew bargaining negotiations McClintock refused to do so on the ground that respondent was not certain of the Union's majority status.

B. The refusal to bargain collectively

1. The Union's status as statutory representative

As heretofore stated, on January 22, 1945, the Union was certified by the Board as collective bargaining representative for employees of the partnership, Simmons Engineering Company, in an appropriate unit. Respondent contends that since the partners retained no interest in the respondent and the shareholders of respondent had had no interest in the partnership the certification was not applicable to the respondent and was of no effect as to it.[4]

This contention ignores the public purpose of the Act—the prevention of industrial strife. The orders of the Board are made to implement this policy, not to adjudicate private rights. A change in ownership cannot operate to defeat or impede the operation of the Act As the Court declared in the *Colten* case:[5]

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace . . . It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency.

The certification herein was an announcement of the designation of employees of their bargaining representative. It cannot be said that a change of management resulted in a change of their preference If every change in management would nullify a designation of representatives this would constitute an encouragement of litigation and industrial strife which the Act seeks to prevent. The certification raised a presumption of the Union's continuing majority representation in the appropriate collective bargaining unit therein set forth; and the presumption was valid as against the respondent, a *bona fide* transferee of the assets of the partnership.[6]

2 The appropriate unit

The Board, in January 1945, certified as appropriate a unit consisting of all non-salaried production and maintenance employees excluding supervisors, clerical workers, instructors, and part-time cleaning woman. It was on the basis of this finding that the partnership and the Union entered into collective bargaining negotiations.

When respondent took over operations at the plant on April 17, 1945, it did not make any substantial changes in production methods and organizations.[7]

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[4] Respondent's good faith as to this contention is questionable. On May 18, 1945, officials of the respondent who, by their own testimony, knew of the certification and McClintock, who was familiar with all prior proceedings, met with the Union They submitted a counterproposal to the Union in the form of a draft contract. If this contract had been accepted and signed by the Union, the Union would have received full recognition However, a decision on the question of respondent's good faith is not essential to a decision herein

[5] *N L R B* v *Colton*, 105 F (2d) 179, 183 (C C A. 6) See also *N. L. R. B.* v *Adel Clay Products Company*, 134 F (2d) 342, 346 (C C A. 8).

[6] *Matter of Syncro Machine Company, Inc*, 62 N. L. R B. 985, decided June 29, 1945. *Matter of South Carolina Granite Company*, 58 N. L R. B. 1448.

[7] The findings as to the business of respondent and the work of its employees are based chiefly on the testimony of President Gustafson and General Manager Topp

Corporate officers and directors took the place of the partners. Other minor changes in the supervisory organization did not change the essential character of the business. As for the production and maintenance workers themselves, they were called together by General Manager Topp on April 17 and all rehired as employees of respondent. Thereafter, respondent continued to manufacture bakery blades just as its predecessor had. After a few weeks, it began to experiment with the production of cutlery blades At the present time respondent is manufacturing both bakery and cutlery blades, but the major share of respondent's revenue comes from the sale of the bakery blades.

It is clear and it is hereby found that since the respondent commenced operations no substantial change has occurred in the character of the business such as to affect the appropriateness of the unit heretofore found appropriate by the Board.

The undersigned finds that on the dates of the requests to bargain as hereinafter set forth, and at all times thereafter, the unit as set forth in the aforementioned certification constituted a unit appropriate for the purposes of collective bargaining.

3. Representation by the Union of a majority in the appropriate unit

In the afore-mentioned election conducted in January 1945, the Union received 16 votes and 1 vote was cast against it. For proof of the majority status of the Union on the dates relevant herein the Board and the Union rely on the results of the election, the subsequent certification of the Union, and the presumption of the continuation of that majority status for a reasonable period.

Respondent contends that the certification was not proof of majority as to its employees, a contention which has previously been considered and rejected. It also contends, in effect, that the presumption of continuance of majority status has been rebutted herein.

In this connection, General Manager Topp testified that sometime between the first and second meetings with the Union, that is, between May 18 and May 24, he found on his desk some membership cards for the Machinists which had been signed by more than a majority of the employees in the unit. Employee Alexander Thompson testified that he obtained the signatures to those cards and gave them to the business agent of the Machinists. Neither he nor Topp knew how the cards had reached Topp's desk. Topp further testified that after examining the cards he returned them to Thompson. The testimony of Topp and Thompson is credited.

At the time the cards were received by Topp the certification was 4 months old. It is well settled that a designation once made by secret ballot under Board auspices must continue in effect for a reasonable period. The undersigned finds that, under the circumstances of this case, assuming that there was an attempted repudiation of the Union, it was ineffective to destroy the majority status of the Union.[8]

The undersigned finds and concludes that on May 24, 1945, and on August 6, 1945, the Union represented a majority of the employees in the appropriate unit.

4. The refusal to bargain

Respondent concedes that on and after May 24, 1945, it refused to bargain collectively with the Union as the representative of its employees in the afore-de-

[8] *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S 702; *N. L. R. B.* v. *Grieder Machine Tool & Die Co*. 142 F (2d) 163 (C. C A. 6); *N. L. R. B.* v. *Century Oxford Mfg. Corp.*, 140 F. (2d) 541 (C. C. A. 2), cert. den 323 U S. 714; *N. L. R. B.* v. *Appalachian Electric Power Co.*, 140 F. (2d) 217 (C. C. A. 4); *Valley Mould & Iron Corp.* v. *N L. R. B.*, 116 F. (2d) 760 (C. C. A 7).

scribed appropriate unit. Its reasons for doing so have been considered and rejected. Respondent further urges that the usual relief for its unlawful refusal to bargain should not issue herein. It maintains that because of labor turnover only 9 or 10 of the voters in the election are still employed, that the unit has increased from approximately 17 employees to 28, and that of the original group of voters remaining in respondent's employ, 5 signed membership cards in the Machinists in May 1945. If this contention were to be accepted the respondent, in effect, would reap the fruits of its unlawful conduct. It would be enabled to take advantage of any dissatisfaction which has occurred among its employees by its continued refusal to recognize the Union as a bargaining agent.

The evidence most persuasively points to a contrary conclusion. The Union had been selected almost unanimously by employees of the partnership as their bargaining agent. All these employees had been retained on respondent's pay roll when it assumed control of the business on April 17, 1945. There had been no substantial change in the number of employees in the unit on May 24, 1945, when respondent refused to bargain with the Union. Its contentions concerning the majority status of the Union and the effect of the certification were invalid. When the Regional Director dismissed the petition of the Machinists in June 1945, respondent had further notice that its position was untenable. Yet it clung to its previous decision and continued to refuse to bargain with the Union. The Union has never fully enjoyed the rights to which it was entitled and the employees have not secured the representation to which they were entitled. The purposes of the Act will be effectuated by recommending the normal remedy for an 8 (5) violation of the Act.[9]

It is accordingly found that on May 24, 1945, and at all times thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

It is found that 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

Since it has been found that respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found

[9] *Franks Bros Co* v. *N L R. B.*, 321 U. S. 702. The case of *Matter of Klamath Pine Co.*, 56 N. L R. B 587, was cited by respondent in support of its position. In that case, the Board held that a certification of representatives of employees of a named employer did not bar consideration of a representation petition for employees of a successor concern and a direction of a new election. However, there are essential differences between that case and the present case. In the *Klamath* case a demand for collective bargaining was first made 9 months after the certification. In the instant case, only 4 months had elapsed before the demand and prior thereto there had been negotiations with the predecessor company, of which respondent was aware. In the *Klamath* case, there had been a substantial change in personnel at the time of the demand In the present case, there had been little change in personnel on May 24, 1945. In any event, the Regional Director had considered and rejected a representation petition herein in June 1945 Nevertheless respondent persisted in refusing to recognize the Union.

that respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that respondent upon request bargain collectively with the Union.

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

CONCLUSIONS OF LAW

1. United Electrical, Radio and Machine Workers of America, C. I. O., is a labor organization within the meaning of Section 2 (5) of the Act.

2. All non-salaried production and maintenance employees of the respondent, excluding supervisors, clerical workers, instructors, and part-time cleaning women, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. United Electrical, Radio and Machine Workers of America, C. I. O., was, on May 24 and August 6, 1945, and at all times thereafter has been, the exclusive representative of all of the employees in the above-described unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on May 24, 1945, and at all times thereafter to bargain collectively with United Electrical, Radio and Machine Workers of America, C. I. O., as the exclusive representative of all its employees in the aforesaid appropriate unit, 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, the respondent has engaged in and is engaging in unfair labor practices 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 above findings of fact and conclusions of law and upon the entire record in the case the undersigned recommends that the respondent, Simmons Engineering Co., Minneapolis, Minnesota, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Electrical, Radio and Machine Workers of America, C. I. O., as the exclusive representative of all its employees in the above-described appropriate unit;

(b) In any manner interfering with the efforts of United Electrical, Radio and Machine Workers of America, C. I. O., to bargain collectively with it.[10]

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

(a) Upon request, bargain collectively with the United Electrical, Radio and Machine Workers of America, C. I. O., as the exclusive representative of all its employees in the aforesaid appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant at Minneapolis, Minnesota, copies of the notice attached hereto, marked "Appendix A." Copies of said notice to be furnished by the Regional Director for the Eighteenth Region, shall, after being duly signed by the respondent or its 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

[10] *N. L. R. B. v. Express Publishing Company*, 312 U. S. 426.

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) File with the Regional Director for the Eighteenth Region within ten (10) days of the receipt of this Intermediate Report, a report in writing setting forth in detail the manner and form in which respondent has complied with the foregoing recommendations

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, respondent notifies 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 July 12, 1944, 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

SIDNEY L. FEILER,
Trial Examiner.

Dated December 7, 1945

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 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, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All non-salaried production and maintenance employees excluding supervisors, clerical workers, instructors and part-time cleaning woman.

WE WILL NOT in any manner interfere with the efforts of UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, C. I. O., representing our employees, to bargain collectively with us.

SIMMONS ENGINEERING CO.,
Employer.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material