

cated their desire to be represented by such Unions, and if a majority in group (d) likewise vote for such Unions, the Regional Director is instructed to issue a certification of representatives to the Joint Petitioners for a plantwide production and maintenance unit, including therein the employees in any one or more of groups (a) to (c) in which a majority has voted for such Union, which unit the Board, under such circumstances, finds to be appropriate for purposes of collective bargaining.

ORDER

IT IS HEREBY ORDERED that the petitions in Cases Nos. 10-RC-2207, 10-RC-2208, 10-RC-2209, and 10-RC-2210 be, and they hereby are, dismissed.

[Text of Direction of Elections omitted from publication.]

NATIONAL CARBON DIVISION, UNION CARBIDE AND CARBON CORPORATION AND NATIONAL CARBON COMPANY, INC. *and* LOCAL 85, UNITED GAS, COKE AND CHEMICAL WORKERS, CIO. Case No. 3-CA-177.

NOTICE TO SHOW CAUSE

On August 22, 1952, the Board issued its Decision and Order in the above-entitled case.¹ Upon reconsideration on its own motion, it appears to the Board that said Decision and Order should be amended in the manner set forth in the proposed Amendment to Decision and Order, attached hereto.

Please take notice that unless on or before May 11, 1953, proper cause to the contrary is shown, the National Labor Relations Board will issue as an Amendment to Decision and Order, the proposed amendment attached hereto.

¹ 100 NLRB 689.

PROPOSED AMENDMENT TO DECISION AND ORDER

The second paragraph of the Decision and Order herein (100 NLRB 689), is hereby deleted.

In place thereof the following is hereby substituted:

The Board has reviewed the rulings for the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.¹

¹ As noted in the Intermediate Report, the Respondent moved, at the outset of the hearing, that the complaint be dismissed. This motion, which the Trial Examiner denied, was predicated upon the fact that the initial charges were filed by the Union at a time when its parent organization, the CIO, was not in compliance with the provisions of Section 9 (f), (g), and (h) of the Act. However, the CIO was in compliance at the time the complaint issued. See *Dant & Russell, Ltd.*, 73 S. Ct. 375.

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 only to the extent that they are consistent with our dismissal herein of the complaint in its entirety.

The entire balance of the Decision and Order herein commencing with the subsection captioned "Refusal to bargain after August 25, 1949," appearing on page 698 and ending with "Appendix A," inclusive, is hereby deleted.

In place thereof the following is hereby substituted:

(4) Refusal to bargain after August 25, 1949

The Trial Examiner found that at various times after August 25, 1949, the Respondent violated Section 8 (a) (5) and (1) of the Act, by refusing to resume negotiations with the Union and by unilaterally increasing wages and employee benefit plans. We do not agree.

On August 25, the Respondent informed the Union that it had just received a representation claim from the Independent Union and that it had not had time to determine what its "proper position" should be, but that until the situation could be "clarified" it nevertheless intended to continue to bargain with the Union. On September 12, the Independent filed a representation petition with the Board, whereupon the Respondent refused, on request, to continue negotiations with the Union. On March 30, 1950, the Regional Director dismissed the petition because of the pending unfair labor practice charges.¹⁶ On April 21, this dismissal was sustained by the Board. Thereafter, the Respondent again refused upon request to resume bargaining with the Union and unilaterally made certain changes as to wages and employee benefit plans.

We agree with the Respondent that the filing of the petition raised a prima facie question concerning representation which, under the "Midwest Piping" doctrine,¹⁷ precluded it from bargaining further with the incumbent union during the pendency of the petition. The Board has held that the mere filing of a petition by a rival union seeking to dislodge an incumbent union, such as that here, does not itself require an employer to refrain from continuing to recognize the incumbent statutory representative.¹⁸ But we also pointed out that, in continuing the established relationship with an incumbent union, an employer runs the risk of an unfair labor practice finding if the Board later determines that the petition raised a "real question

¹⁶ These charges were litigated in the instant proceeding and, as herein found, were without merit.

¹⁷ The doctrine derived its name from the case entitled *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060.

¹⁸ *William Penn Broadcasting Company*, 93 NLRB 1104.

concerning representation.' It would therefore be manifestly unfair to require an employer who has engaged in no antecedent unfair labor practice to bargain at his peril during the pendency of a timely petition.

Nor do we believe, as does our dissenting colleague, Member Houston, that Respondent unlawfully refused to bargain after the Board had affirmed the dismissal of the petition. True, after such dismissal, the Respondent was no longer under possible legal jeopardy within the meaning of the Midwest Piping doctrine. However, that fact is not necessarily dispositive of another aspect of the Respondent's defense involving application of the Board's settled rule that after the end of the certification year, an employer may with impunity refuse to continue recognition of a certified union where there exists a good-faith doubt as to its continued majority status.¹⁹

We are convinced by the record as a whole that during the pendency of the petition and after its dismissal by the Board there was a reasonable basis for the Respondent to have believed that the Union no longer represented a majority of the employees. Thus, the Union's certification was about 5 years old. It had just terminated an unsuccessful strike which resulted in the replacement of a large number of union adherents. The Independent had made a rival claim of representation upon the Respondent, and implemented it by filing a representation petition. As stated above, the Independent's petition was administratively dismissed by the Board, not because its claim was unfounded, but because of the pendency of certain charges filed by the Union which have been found herein to be without merit. We are convinced that the dismissal of the petition in these circumstances did not alleviate the Respondent's otherwise reasonable and preexisting doubt as to the Union's majority status but only delayed its resolution.

Any other view would, in our opinion, permit an incumbent union to perpetuate its majority status by filing charges which after litigation were found to be groundless.

We accordingly find, contrary to the Trial Examiner, that after August 25, 1949, the Respondent was justified in refusing to resume negotiations with the Union as the exclusive bargaining agent and that its subsequent unilateral action with respect to insurance, pensions, and wage rates was not violative of section 8 (a) (5) and (1) of the Act.

As we have adopted that portion of the Intermediate Report dismissing certain allegations of the complaint and as we have reversed all unfair labor practice findings made by the Trial Examiner, we shall dismiss the complaint in its entirety.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the

¹⁹Celanese Corporation of America, 95 NLRB 664, 671-2.

National Labor Relations Board hereby orders that the complaint herein against the Respondent, National Carbon Division, Union Carbide and Carbon Corporation, and National Carbon Company, Inc., Niagara Falls, New York, be, and it hereby is, dismissed.

Member Houston, dissenting in part and concurring in part:

I agree with the opinion of Chairman Herzog and Member Murdock that there was no refusal to bargain before the representation petition was dismissed. But I cannot agree insofar as it fails to find that the Respondent did not unlawfully refuse to bargain after April 21, 1950, the date on which the Board dismissed the Independent's petition. In my opinion that dismissal was tantamount to a holding that there was then no question concerning the representation of the Respondent's employees. Consequently, the Respondent could not rely on any asserted doubt of the Union's majority so as to excuse its admitted refusal to resume bargaining. The Union's majority status, established by Board certification in 1945, must be presumed under these circumstances to have continued unaffected.

Member Peterson, concurring specially:

Although I agree with the dissenting view of Member Styles, that the Respondent unlawfully refused to bargain at the outset of negotiations, such view cannot here prevail, as a majority of the Board (Chairman Herzog and Members Houston and Murdock) hold to the contrary. Therefore, and in order to obtain a majority determination of all issues raised by the complaint, I shall regard the majority holding on the above point to be the law of the case. This leaves for my consideration the separate issue on which there is a divergence of opinion, i.e., whether there was an independent unlawful refusal to bargain after the dismissal of the petition. On that issue, I am in accord with the view of Chairman Herzog and Member Murdock that there was no such violation, and therefore join them in dismissing the complaint in its entirety.

Member Styles, dissenting:

For the reasons set forth by the Trial Examiner, I would find, contrary to the majority, that the Respondent failed and refused to bargain in good faith on the subject of pensions and employee benefits from the outset of the negotiations which began March 28, 1949. It follows therefore that the strike of May 8, 1949, was an unfair labor practice strike, and that, to the extent found by the Trial Examiner, the Respondent's refusal to reinstate the strikers upon request was discriminatory.

Because of the occurrence of these unfair labor practices, I would find, further, that the Respondent was not

privileged to refuse to bargain with the Union at any time following the strike despite the pendency of the rival union's petition. For, under well-established principles, no valid question concerning representation could exist while the Respondent's unfair labor practices remained unremedied,²⁰ and any loss of majority which might have occurred could be attributed to the Respondent's unlawful conduct. In the light of this holding as to the continuing duty of the Respondent to bargain, I would also find, in accord with the conclusion of the Trial Examiner, that the Respondent's unilateral increases in rates of pay and in employee benefits, constitute per se violations of Section 8 (a) (5) and (1) of the Act.

In view of the foregoing, I need not and do not pass upon the other unfair labor practice issues considered by my colleagues.

²⁰ See *N. L. R. B. v. Franks Bros.*, 321 U.S. 702; *John Deere Plow Company*, 82 NLRB 69; *Pacific-Gamble Robinson Co.*, 88 NLRB 482; *Metropolitan Life Insurance Co.*, 91 NLRB 473.

ARMSTRONG & HAND, INC. *and* DISTRICT LODGE 37,
INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL.
Case No. 39-CA-272. April 28, 1953

DECISION AND ORDER

On February 25, 1953, Trial Examiner James A. Shaw 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 Board¹ 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 Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following corrections, additions, and modifications.

1. We agree with the Trial Examiner's finding that the Respondent refused to bargain with the Union on December 19, 1951, and at all times thereafter, in violation of Section 8 (a) (5) and (1) of the Act. However, as the Intermediate Report omits some, and does not discuss fully other, factors we deem material to this finding, we set forth below some of the crucial facts and the basis for our concurrence.

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