obstacles of one's own creation. Here real bargaining became impossible with the Corporation's refusal to divulge data which, it insisted, precluded monetary changes in the employees' working conditions. Applying here a holding of the Court in *Truitt*: "And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim . . . without making the slightest effort to substantiate" it, that the operation in which the employees are engaged is too unprofitable to warrant improved wage or other monetary working conditions.

For the reasons stated, I find that the Company refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with 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 certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall recommend that, upon request by the Union, negotiations between it and the Respondent be renewed and that the Respondent furnish to the Union such record information and other probative material as will substantiate the Respondent's claim that the zinc mine has been operated at a loss and likely would be closed if the employees were granted improved monetary working conditions.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. All the production and maintenance employees of the Respondent's Zinc Mine Works at or near Jefferson City, Tennessee, excluding office clerical and office janitorial employees, watchmen and/or guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
3. The Union, on January 1, 1958, was, and at all times thereafter has been, the exclusive representative of all employees in such unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
4. By refusing to bargain collectively with the Union as the exclusive representative of its employees in an 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 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(a)(1) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

The Mastic Tile Corporation of America, Petitioner *and* International Chemical Workers Union Local No. 1, AFL-CIO.

Case No. 21-RM-522. February 18, 1959

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Norman H. Greer,

hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

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

1. The Employer is engaged in commerce within the meaning of the Act.

2. International Chemical Workers Union, Local No. 1, AFL–CIO, referred to herein as Chemical Workers, claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[2]

4. We find that all production and maintenance employees of the Employer at its Long Beach, California, factory, excluding administrative, office and clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Employer contends that 239 economic strikers have been permanently replaced and are, therefore, ineligible to vote in any election which the Board may direct. The Chemical Workers maintains that the striking employees have not been permanently replaced, but that, in any event, the replacements and the strikers should vote under challenge, and their status determined on the basis of an investigation after the election.

The Employer manufactures floor tile at its plant in Long Beach, California. Chemical Workers has been the certified representative of the production and maintenance employees for about 10 years.

The last contract between the Employer and the Union expired on September 1, 1958. Negotiations for a new agreement were unsuccessful and on September 21, Chemical Workers called a strike. All the production and maintenance employees, 281 in number, left their jobs. The Employer sent a letter to the strikers on October 2, informing them that if they did not return to their jobs by October 7, they would be permanently replaced. Approximately 40 strikers returned around the deadline date. Newspaper advertisements were placed by the Employer stating that a labor dispute was in progress at the plant, and that applications for employment would be accepted. In response to the advertisements, the Employer received 1,200 applications from which 239 new employees were initially hired. The Employer stated that it would give the same consideration to applications from strikers after the deadline date as to those of the new employees.

[1] The hearing officer properly denied the motion of Local 1's parent international to intervene, since it had no interest, contractual or otherwise, separate from that of Local 1.

[2] The Union's request for a new contract is the equivalent of a new demand for recognition, and raises a question concerning representation which the Employer is entitled to have resolved by an election. *Jewett & Sherman Co.*, 110 NLRB 806.

No settlement was reached at the last meeting between the parties, held on October 8. On November 3, the Employer notified Chemical Workers that it had filed the instant petition, that because of its new hirings it was now operating at capacity, and that it doubted whether the Union any longer represented a majority of the production and maintenance workers. The strike was still in progress as of the date of the last hearing, November 26, 1958.

Although there has been a turnover of approximately 100 of the newly hired employees, none of them were discharged to make room for a returning striker. An examination of the production job classifications indicates that they do not require any skills which cannot be quickly acquired. The Employer's plant manager testified that on several occasions he told new employees that they were permanent replacements. The wages and conditions of employment are unchanged. Although newly hired employees are subject to a 30-day probationary period, each replacement was hired to fill a specific position left vacant by a striker.

The Employer has been able to resume regular production with the replacements, and has taken no action inconsistent with his expressed purpose of replacing his striking personnel permanently. Under these circumstances, it would needlessly delay a final determination of the pending question concerning representation to permit the replacements and the strikers to vote under challenge.[3] We therefore find that the strikers who have not returned have been permanently replaced, that they are not entitled to be reinstated to their former positions, and are, pursuant to Section 9(c)(3) of the Act, ineligible to vote in the election directed herein.[4]

[Text of Direction of Election omitted from publication.]

[3] Chemical Workers cite such cases as *The Pipe Machinery Company*, 76 NLRB 247, *Dura Steel Products Company*, 109 NLRB 179, and *The Hertner Electric Company*, 115 NLRB 820, for the proposition that the question of strikers' eligibility to vote should be resolved upon an investigation of challenged ballots after the election. However, in these cases, contrary to the situation presented here, the facts relating to the permanent replacement of the strikers was not fully developed at the representation hearing.

[4] *Belmont Smelting & Refining Works, Inc.*, 115 NLRB 495. Turnover of replacement does not necessarily negate the permanency of their employment, *John W. Thomas Co.*, 111 NLRB 226; nor does the serving of a probationary period detract from a replacement's permanent status, *Hertner Electric Company*, 116 NLRB 979.

Convair (Pomona), a Division of Convair, a Division of General Dynamics *and* Associated Tool and Die Makers of America, Petitioner. *Case No. 21-RC-5174. February 18, 1959*

SUPPLEMENTAL DECISION AND ORDER AMENDING DIRECTION OF ELECTION

On November 7, 1958, the Board issued a Decision and Direction of Election in the above-entitled proceeding,[1] in which it directed

[1] 122 NLRB 41.