Westinghouse Electric Corporation *and* Sunnyvale Westinghouse Salaried Employees Association. *Case No. 20-CA-1919. July 21, 1961*

DECISION AND ORDER

On February 13, 1961, Trial Examiner William E. Spencer 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 Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report, together with a supporting brief.

The Board 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 and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as his recommended Order has been modified herein.

1. We agree with the Trial Examiner that the Respondent violated Section 8(a)(5) by the restrictions it imposed on meeting with Ray Babcock, the president of the Union and *ex officio* chairman of its negotiating committee. Babcock, an employee of the Respondent, had been a member of the professional unit which the Union had represented until it was voted out by the professional employees in August 1960. Babcock then offered to resign his post as president of the Union but was induced to retain that office after a vote of the members at a regular meeting of the Union had made it possible for him to do so.[1] After the August 1960 elections, the Union retained its status as the exclusive bargaining representative for a unit of technical-clerical employees at the Sunnyvale plant.

Thereafter, Respondent was willing to meet with the Union and those of its negotiators who were themselves members of the technical-clerical unit. It refused though, to grant Babcock leave in order to participate in negotiations during working hours, while also refusing to negotiate with the Union after working hours, when Babcock would be available. Respondent did offer to grant Babcock a transfer from his position as a professional engineer to a job in the technical-clerical unit and indicated that if he accepted the transfer it would have no

[1] The membership voted to interpret the Union's constitution to mean that employees eligible for certification (such as the professionals) are eligible for membership in the Union. Babcock was thereby made eligible to retain his office since the constitution provided that officers of the Union must be members. We consider the action of the membership to be at least a *de facto* ratification of Babcock's status as an officer. It is for the Union, and not for the Board or the Respondent, to decide how and when its constitution is to be interpreted or amended.

objection to negotiating with him during working hours as a member of the certified unit.

The alternative offered Babcock, of sacrificing his professional career in order to continue serving his Union, appears drastic when contrasted with the limited inconvenience which Respondent and its negotiators would have suffered in allowing Babcock to participate in the negotiations during or after working hours. These restrictions on Babcock's availability during the times that Respondent was willing to negotiate effectively deprived the Union of his services in dealing with the Respondent. Although each of these restrictions may by itself have been reasonable, Respondent's refusal to waive or vary any one of its requirements constituted in substance a barrier to the Union's right to freely select its own negotiators. We find that Respondent thereby unlawfully interfered with the Union's right to bargain with it, in violation of Section 8(a)(5).[2]

2. Unable to use Babcock as a negotiator, the Union agreed to meet and bargain without him, and by the date of the hearing, an agreement had been negotiated and signed. Babcock's signature on the agreement was recogized as valid by Respondent, as it had no objection to his serving as president of the Union. The Trial Examiner recommended that Respondent cease and desist from refusing to bargain collectively with the Union. This, however, seems to us broader than is necessary to effectively remedy the violation alleged and proved. We shall, therefore, limit our order to the specific requirement that the Respondent meet with the Union at reasonable and mutually convenient times without regard to whether the Union's representatives are employees in the certified unit.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Westinghouse Electric Corporation, Sunnyvale, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Sunnyvale Westinghouse Salaried Employees Association as the exclusive bargaining representative of its employees in the certified technical-clerical unit by refusing to meet at reasonable and mutually convenient times with

[2] Cf. *Converse Bridge and Steel Company*, 49 NLRB 370, which held that there was no Section 8(5) violation in refusing to grant employees time off during working hours in order to negotiate, and *Tennessee Chair Company, Inc.*, 126 NLRB 1357, finding no Section 8(a)(5) violation in an employer's reasonable limitations on bargaining during regular working hours. The purport of both cases is that an employer may consider its own convenience in setting limitations on bargaining meetings. In doing so, however, it may not disregard the right of the bargaining representative to meet and negotiate with it at reasonable times, through its chosen negotiators

Ray Babcock or any other duly authorized representative of the Union.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Union or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively at reasonable and mutually convenient times with the duly authorized representatives of Sunnyvale Westinghouse Salaried Employees Association, without regard to whether such representatives are employed in the certified technical-clerical unit.

(b) Post at its place of business in Sunnyvale, California, copies of the notice attached hereto marked "Appendix."[3] Copies of the notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of 60 days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twentieth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply therewith.

MEMBERS RODGERS and BROWN took no part in the consideration of the above Decision and Order.

[3] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order 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 meet and bargain collectively with Sunnyvale Westinghouse Salaried Employees Association through its duly authorized representatives at reasonable and mutually convenient times, without regard to whether the Union's representatives are employed in the unit for which the Union has been certified.

WE WILL NOT refuse to meet with the Union and its representatives at reasonable and mutually convenient times or in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

All our employees are free to become, remain, or refrain from becoming members of the above-named Union or any other labor organization except to the extent this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act.

WESTINGHOUSE ELECTRIC CORPORATION,
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.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

In this proceeding, heard before Trial Examiner William E. Spencer of the National Labor Relations Board, herein the Board, at Sunnyvale, California, November 30, December 1, 1960, Westinghouse Electric Corporation, the Respondent herein, was charged with a refusal to bargain with Sunnyvale Westinghouse Salaried Employees Association, herein the Union, the duly designated representative of its employees in an appropriate unit, in violation of Section 8(a)(5) and, derivatively, of Section 8(a)(1) of the National Labor Relations Act, as amended, herein the Act. The Respondent in its answer to the General Counsel's complaint admitted the Union's representative capacity in an appropriate unit, as alleged, but denied the commission of the alleged unfair labor practices. All parties participated in the hearing and were afforded full opportunity to examine and cross-examine witnesses and to introduce evidence relevant and material to the issues. After the evidence had been taken, the General Counsel's representative at the hearing argued his position orally; subsequent to the hearing, the Respondent filed a brief.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a Pennsylvania corporation with its principal executive offices at Pittsburgh in that State. It has plants and other offices located in various States other than Pennsylvania. Its manufacturing plant located at Sunnyvale, California, is the only plant involved in this proceeding.

The annual value of its products manufactured, sold, and distributed at its Sunnyvale plant, is in excess of $1,000,000, and of this amount products of a value in excess of $50,000 are shipped annually from its Sunnyvale plant to destinations outside the State of California.

Jurisdiction is admitted and found.

II. THE LABOR ORGANIZATION INVOLVED

The Union is an unaffiliated labor organization admitting to membership certain classifications of employees at the Respondent's Sunnyvale, California, plant.

III. THE UNFAIR LABOR PRACTICES

A. Background Facts

Prior to May 31, 1960, the Union, then an affiliate of the Federation of Westinghouse Independent Salaried Unions, herein the Federation, represented among Respondent's employees a bargaining unit composed of clerical and technical employees, and a second unit composed of professional employees. On May 31, 1960, the Union's president, Ray Babcock, notified the Respondent that the Union had terminated its affiliation with the Federation. On June 1, considering that the disaffiliation created conflicting claims of representation, the Respondent filed representation petitions covering the professional and clerical units, respectively. Pursuant to these petitions, a Board-conducted election was held on August 10, and on August 18 the Board's Regional Director certified the Union as bargaining representative of Respondent's employees in the clerical-technical unit, and further certified that "no union" had won in the professional unit. Babcock was and is a professional employee, a member of the professional unit which voted "no union" on August 10.

B. *Bargaining with respect to the clerical-technical unit*

Babcock as the Union's president was also, by virtue of that fact, chairman of its negotiating committee. His term as president expires in May 1961. However, inasmuch as the professional unit of which he was a member voted against union representation, he submitted his resignation as president to a regular membership meeting held on August 23. The membership attendant at this meeting voted overwhelmingly to continue Babcock and other officers in their posts for the remainder of their unexpired terms.

On September 6, pursuant to Babcock's request, the Respondent met with Babcock and William Cole, the Union's first vice president. Babcock informed the Respondent that the Union had voted to continue him and other officers in their official capacities for the balance of their unexpired terms and that he was ready to begin negotiations on an agreement. He asked if the Respondent would allow professional employees such as himself time off from their jobs to negotiate on behalf of the clerical-technical unit. Respondent's Lawrence D. Gibson, its manager of industrial relations, replied that he did not think company policy would permit unrepresented employees time off to negotiate for employees in the bargaining unit, but would reserve a final answer on the point until he could study the problem. Babcock then said that as an alternative the Union was prepared to negotiate at nights or on weekends. Gibson answered, quasi-humorously, that he was "not about to start a second shift . . . for industrial relations . . . ."

A second meeting between Babcock and Cole, representing the Union, and officers of the Respondent, was held on September 12. The discussion centered on Babcock's alternate proposals for negotiations; i.e., time off for himself during work to enable him to negotiate in his capacity as chairman of the Union's negotiating committee, or negotiations outside regular working hours. Gibson, Respondent's spokesman, replied:

1. The Respondent would not grant time off during working hours to professionals for purposes of negotiating on behalf of the clerical-technical unit;
2. The Respondent would not negotiate with the Union at night or on weekends; i.e., outside regular working hours;

3. If Babcock wished to participate in negotiations, a transfer to the represented unit might be arranged; with any resultant difference in pay to be made up by the Union;

4. The Respondent had no intention of influencing the Union's choice of bargaining representatives, but drew the line at giving professional employees time off to negotiate for a unit to which they did not belong.

On September 13, the Union made a written demand that the Respondent meet with the Union's bargaining representatives at 7:30 p.m., on September 21, 1960. Gibson in his reply refused the demand, reiterating the Respondent's position as stated above. On September 20, Babcock inquired, by phone call, if the Respondent's position had changed, and received the reply, "No." Later that same day he inquired if the Respondent would negotiate with the Union's executive committee if he, Babcock, was not present, and the answer was in the affirmative.

On October 21, the Union's negotiator, Cole, called Samuel O. Lemon, Jr., Respondent's local supervisor of industrial relations, and questioned Lemon about an agreement the Respondent had reached with another labor organization. Lemon advised Cole that the Respondent was ready to make a similar offer to the Union, if the Union would appoint a negotiating committee for meeting with the Respondent during working hours. Lemon cautioned Cole that the controversy revolving around Babcock could go on for as long as a year, and that it seemed unnecessary to defer negotiations until that issue could be disposed of. Cole demurred, but the Union did in fact appoint a committee composed of nonprofessional employees to meet with the Respondent, and a meeting occurred on October 25. On October 28 a memorandum agreement was prepared and after a noon recess the Union's representatives attending the meeting returned with copies of the agreement signed by Babcock. Cole asked if the Respondent objected to having Babcock's signature on the document, and Lemon replied ". . . we [have] no objection to Mr. Babcock signing the document—we [have] never questioned his right to be President of the organization. It [is] perfectly all right with us if his name remain[s] just as is."

C. *Concluding Findings*

The parties agree and it is found that all salaried clerical and technical employees at Respondent's Sunnyvale, California, plant, including clerical employees of its accounting department, and excluding confidential secretaries, confidential salaried payroll clerks, industrial relations department personnel, buyers, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of the Act, and that the Union at all times since August 18, 1960, has been and now is the exclusive representative for purposes of collective bargaining of employees in the aforesaid appropriate unit. The sole issue is whether the Respondent has refused to meet with the Union for purposes of bargaining at "reasonable times," as required by the Act or, in the alternative, has unlawfully interfered with the Union's choice of its negotiators.

Nothing is more firmly established in the decisions than that neither bargaining principal can lawfully dictate his opposite's choice of negotiators, nor force a change in the personnel of his opposite's negotiators. The Board, generally with court approval, has been most zealous in protecting the free choice of any duly constituted bargaining authority's choice of its negotiators.[1]

The Respondent, however, contends that its refusal to allow Babcock time off during regular working hours to negotiate on behalf of the Union, coupled with its refusal to negotiate with the Union outside regular working hours, was not predicated in any degree on desire or intent to dictate the Union's choice of negotiators, or to influence that choice. Its reasoning, as I understand it, is that it has fulfilled the requirement to meet with the Union's negotiators "at reasonable times"; that reasonable times, properly construed, does not impose a legal obligation on the Respondent to allow employees outside the bargaining unit time off for acting as the Union's negotiators, or to meet outside working hours. This last, according to the

[1] See, for instance, *Deeco, Inc.*, 127 NLRB 666, in which the Board held that an employer was not justified in refusing to meet with a union's negotiator though the latter had twice called the employer's president a habitual liar, and had in effect challenged him to make good on his declaration that he would inform the union that he would no longer bargain with this negotiator The Board found that under the circumstances of the case, the union's negotiator was not shown to have been "hostile" to the employer in question and therefore the employer was not justified in refusing to meet with him as the union's negotiator

Respondent, would impose an undue hardship on its negotiators because it would interfere with their performance of their personal and civic duties.

I do not agree with the Respondent's position. If the Union chose to designate Babcock as one of its negotiators, it had that right, regardless of where or by whom Babcock was employed. I understand that the Respondent does not question that right. But the Respondent, regardless of its motivation,[2] made it impossible for Babcock to act in his designated capacity, unless he wished to accept demotion in order to bring himself within the bargaining unit. I think the Respondent had no right to impose such a condition on his exercise of his functions as a negotiator, and that its attempt to do so, from whatever angle it is approached, was a refusal to bargain within the meaning of the Act. The Respondent, in my opinion, has misconstrued the requirement that bargaining principals meet at "reasonable times." Apparently, the Respondent has construed this to mean at such times as may appear to the Respondent to be reasonable in the light of its own convenience and the discharge by its officials of their private and civic duties, exclusive of its duty to bargain. Actually, the rule of reasonableness applies to the entire bargaining situation and neither principal has the right unilaterally to impose such restrictions and limitations on bargaining sessions as would effectively exclude participation therein by person or persons chosen by his opposite to bargain on the latter's behalf. Doubtless Babcock would have preferred to perform his functions as chairman of the Union's negotiating committee during working hours, as he had prior to the Union's disaffiliation with the Federation, but he offered to negotiate either during or outside working hours, pursuant to the Respondent's choice in the matter, and this was of the essence of reasonableness. Respondent could have allowed Babcock time off during working hours to perform his duties as negotiator. This, I think, it was not required to do. Babcock as a professional employee held something of a key post, and it may well be that his absence from his post during working hours would have caused the Respondent some economic loss. The fact that in the past he had been allowed time off for negotiations and the performance of other union duties, appears to have flowed from a negotiated agreement which had expired, or was at the sufference of his employer. In short, the refusal of the Respondent to permit him time off for negotiations was not, in my opinion, *ipso facto* a refusal to bargain. It was this refusal, *coupled* with the refusal to bargain *outside* working hours, effectively foreclosing the Union's chief negotiator from the performance of his bargaining functions, which constituted a violation of Section 8(a)(5) and, derivatively, 8(a)(1) of the Act, and it is so found.

The fact that in order to obtain certain benefits granted under an agreement between the Respondent and another labor organization, the Union designated a committee which met with the Respondent's requirements and executed the memorandum agreement of October 28, clearly does not constitute a waiver by the Union of its right to name its own negotiators and was without effect on the posture of the issues herein. I do not understand that the Respondent makes any contrary contention.[3]

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[2] There is conflict in the testimony on this point but I have not resolved it as I do not believe that such resolution is required for a decision here.

[3] The Respondent's contention that the General Counsel failed to prove that Babcock was a duly designated representative of the Union for bargaining purposes, requires but brief comment. The refusal to bargain was not based on this ground The Respondent at no time challenged or in any way questioned Babcock's *capacity* to act as the Union's president and chief negotiator Respondent Lemon stated unequivocally that Respondent accepted Babcock's signature to the memorandum agreement of October 28 and "never questioned his [Babcock's] right to be president of the Union." I do not propose to construe the Union's constitution and bylaws to determine whether the overwhelming vote to continue in his office as president accorded Babcock at the meeting of August 23, was in strict conformity with the aforesaid constitution and bylaws. This, in my opinion, is a matter for the membership of the Union to determine. It is enough for our purposes here that, by a vote taken at a regular membership meeting of the Union, Babcock was continued in office for his unexpired term; that he presented himself to the Respondent as the Union's president and chief negotiator and was recognized by the Respondent as such; and there is no evidence in this record that his status as such has been changed or in any way affected by action taken by the Union's membership Assuming, *arguendo,* that Babcock was not "duly designated" as the Union's negotiator, the Respondent's violation would nevertheless be clear, for the position assumed by the Respondent with respect to the Union's negotiators was in no way limited to Babcock; it applied to *any* employee whom the Union might designate negotiator who was not employed in the appropriate unit

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

It having been found that the Respondent engaged in unfair labor practices by refusing on and after September 12, 1960,[4] to bargain with the Union, the statutory bargaining representatives of its employees in an appropriate unit, it will be recommended that on request the Respondent bargain with the Union on all proposals which raise bargainable issues, and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the basis of the foregoing 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 salaried clerical and technical employees at Respondent's Sunnyvale, California, plant, including clerical employees of its accounting department, and excluding confidential secretaries, confidential salaried payroll clerks, industrial relations department personnel, buyers, professional employees, and supervisors as defined in the Act, constituted at all times material herein, and now constitute, a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.
3. The Union was on August 18, 1960, and at all times since has been the exclusive representative of all employees of the Respondent at its Sunnyvale, California, operation, in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
4. By refusing on and after September 12, 1960, to bargain collectively with the Union as exclusive representative in the aforesaid 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 the said refusal to bargain, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them in Section 7 of the Act, and thereby 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 are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

[4] The date on which Respondent's position found herein to constitute a refusal to bargain was defined and announced to the Union's negotiators.

Pontiac Motors Division, General Motors Corporation *and* Wallace R. O'Neil. *Case No. 7-CA-2363. July 25, 1961*

DECISION AND ORDER

On June 27, 1960, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Inter-