

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

Employees may communicate with the Board's Regional Office, 849 South Broadway, Los Angeles, California, Telephone No. 688-5204, if they have any question concerning this notice or compliance with its provisions.

Jas. H. Matthews Co., Industrial Marking Products Division and Local 605 of the International Union of Electrical, Radio & Machine Workers, AFL-CIO. Case No. 6-CA-2824. February 11, 1964

DECISION AND ORDER

On October 24, 1963, Trial Examiner Owsley Vose issued his Decision 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 attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision, and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Brown].

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 Decision, the exceptions and the brief, and the entire record, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER¹

The Board adopts as its Order the Recommended Order of the Trial Examiner.

¹ The Recommended Order is hereby amended by substituting for the first paragraph therein the following paragraph:

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, Jas. H. Matthews Co., Industrial Marking Products Division, its officers, agents, successors, and assigns, shall:

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge filed on August 9, 1963, by the Charging Party, the General Counsel of the National Labor Relations Board, by the Regional Director for the Sixth Region, issued a complaint on August 28, 1963, alleging that the Respondent had refused to bargain collectively with Local 605 of the International Union of Electrical, Radio & Machine Workers, AFL-CIO, herein called IUE, the certified majority representative of Respondent's employees in an appropriate bargaining unit. The

Respondent admits that it has refused to bargain with the IUE and challenges only the Regional Director's action in the representation proceeding, Case No. 6-RC-3262, in overruling the Respondent's objections to conduct affecting the results of the election.

Pursuant to due notice, a hearing was held before Trial Examiner Owsley Vose in Pittsburgh, Pennsylvania, on September 12, 1963. All parties were afforded full opportunity to be heard and to introduce relevant evidence. Counsel for the General Counsel presented oral argument at the close of the hearing and the counsel for the Respondent submitted a brief.

Upon the entire record in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Respondent is a Pennsylvania corporation having places of business and plants in various States. The Industrial Marking Products Division, which is here involved, operates two plants in Pittsburgh, Pennsylvania, where it is engaged in the manufacture of marking devices. During the year preceding the filing of the complaint the Respondent caused to be shipped to its Pittsburgh plants from out-of-State sources in excess of \$50,000 worth of goods and materials. During this same period the Respondent shipped more than \$50,000 worth of goods and materials from its Pittsburgh plants to out-of-State destinations. I find, as the Respondent admits, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 605 of the International Union of Electrical, Radio & Machine Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The representation proceeding*

On February 5, 1963, the Respondent and the IUE entered into an agreement for consent election for the conduct of a Board election. Under this agreement, which was approved by the Regional Director, the parties stipulated as to the appropriate collective-bargaining unit described in the Recommended Order below, the eligible voters, the date and place of the election, the selection of observers, the manner of counting ballots, and other matters pertaining to the conduct of the election. The parties specifically agreed that:

Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election, and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.

In addition, the agreement provided that either party may file objections to the conduct of the election or conduct affecting the results of the election; and if objections were filed, that the Regional Director would conduct an "investigation" and report thereon. The agreement then stated:

The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding

Pursuant to the agreement, the election was held on February 21, 1963. The IUE received 72 votes and 67 votes were cast against it. There were no challenged ballots.

Hereafter the Respondent filed with the Regional Director timely objections to conduct affecting the results of the election. The conduct to which the Respondent primarily objected was the IUE's distribution to the employees on February 19, 1963, just 2 days before the election, of a leaflet which in its view contained serious misrepresentations concerning the terms of the Respondent's pension and insurance

plans, false accusations of fraud and dishonesty on the part of the Respondent, and misrepresentations as to the insurance and other benefits which the IUE had negotiated with other employers.¹ The Respondent urged in its objections, that the Regional Director should take into consideration the fact that the employees would be likely to give undue weight to the IUE's representations regarding the terms of pension and insurance plans because they were advanced as the opinions of the IUE's pension and insurance experts. The Respondent also argued before the Regional Director that it did not have sufficient time before the election to make an effective reply to the IUE's misrepresentations.

Upon receipt of the Respondent's objections the Regional Director conducted an investigation into the matters raised by the objections. In the course of the investigation, which lasted over 3 months, representatives of the Regional Director conferred with representatives of the Respondent, requested and received numerous documents offered in support of the Respondent's position, including an affidavit of the Respondent's personnel director. Upon consideration of all the material submitted by the Respondent, the Regional Director concluded that, while the leaflet did contain some misrepresentations of fact, the Respondent had a sufficient opportunity to correct any misrepresentations before the election, and that any exaggerations contained in the leaflet were not such as to warrant setting aside the election. Accordingly, on June 26, 1963, the Regional Director overruled the Respondent's objections and certified the IUE as the exclusive bargaining representative of the employees in the appropriate unit described in the Recommended Order below.

B. The unfair labor practice proceeding

On June 27, 1963, the IUE by letter requested that the Respondent meet with it on July 2, 1963, for the purpose of opening collective-bargaining negotiations. By letter dated July 3, 1963, the Respondent declined to meet with the IUE and explained that, in its opinion, "the Regional Director's Report was not based on substantial evidence considered as a whole, was unreasonable, arbitrary, constituted an abuse of discretion, and was not in conformity with NLRB policies or the provisions of the Act."

Thereafter the instant proceeding was initiated with the filing of the charge and the issuance of the complaint, as stated above. In its answer to the complaint, the Respondent admitted its refusal to bargain collectively with the IUE and, in explanation thereof, quoted the position stated in its letter to the IUE dated July 3, 1963.

At the hearing in this case all of the evidence sought to be adduced by the Respondent related to the alleged misrepresentations and false accusations contained in the IUE's pre-election leaflet distributed on February 19, 1963, and the Respondent's inability to refute such misrepresentations in the short period remaining before the election. All of the exhibits offered by the Respondent in this proceeding had previously been submitted to and considered by the Regional Director in the representation proceeding. None of the testimony sought to be adduced was shown to be unavailable at the time the Regional Director's investigation of the Respondent's objections to the election was pending.

Counsel for the General Counsel objected to the receipt in evidence of the proffered testimony and exhibits upon the ground that the Respondent was merely seeking to relitigate matters decided by the Regional Director in his investigation of the Respondent's objections.

The Trial Examiner sustained counsel for the General Counsel's objection in this regard but permitted counsel for the Respondent to state for the record the matters which he proposed to prove in this proceeding if allowed to do so. An expert on pensions and insurance matters was called and examined by counsel for the Respondent as part of the offer of proof. The purpose of allowing the Respondent to make this offer of proof and to make the proffer of documentary evidence which it did, as stated by the Examiner, was to enable the Trial Examiner to determine whether the proffered evidence, if adduced, tended to establish that the Regional Director was arbitrary and capricious in rejecting the Respondent's objections to the election. Concluding at the hearing that the evidence proffered by the Respondent did not tend to establish arbitrary and capricious action on the part of the Regional Director, the Trial Examiner in effect reaffirmed his prior ruling excluding substantially all of the evidence offered by the Respondent at the hearing.

¹ In its objections, the Respondent presented two other grounds for setting aside the election. However, the Respondent no longer advances these objections and consequently they need not be discussed at this stage of the proceedings.

Since receiving the Respondent's brief, the Trial Examiner has reconsidered the Respondent's offer of proof, including all of the testimonial and documentary evidence proffered, with a view to determining whether under applicable Board law the Respondent, if allowed to go to proof on the proffered matters, could make out a case for reversing the Regional Director's ruling rejecting the Respondent's objections to the election. For the reasons set forth below, I conclude that the Respondent could not make out such a case and, accordingly, adhere to my ruling at the hearing excluding the Respondent's proffered evidence.

Under the terms of the consent election agreement, Respondent specifically agreed that the Regional Director's determination "shall be final and binding" as to "any" election question and as to the method of investigation of any question. Thus, Respondent in effect agreed to make the Regional Director "the final arbiter of any questions relating to the election." (*Buffalo Arms, Inc. v. N.L.R.B.*, 224 F. 2d 105, 109 (C.A. 2).) In such cases, as the Board has stated, "we will deem the Regional Director's determination . . . to be final in the absence of fraud, misconduct, or such gross mistakes as imply bad faith on the part of the Regional Director, even though we might reach a different result." *Sumner Sand & Gravel Company*, 128 NLRB 1368, 1371, enfd. 297 F. 2d 754 (C.A. 9); *Pacific Multiforms Company*, 138 NLRB 796, 798-799. As held by the Court of Appeals for the Third Circuit, "It is clear that nothing short of capricious and arbitrary action by the Regional Director would invalidate this decision which the parties had agreed to accept as final." *N.L.R.B. v. General Armature & Mfg. Co.*, 192 F. 2d 316, 317 footnote 1. As the Board explained in the *Pacific Multiforms* case, "To hold otherwise would permit the parties deliberately to ignore binding commitments embodied in a consent agreement, would open the door to subterfuges for hampering and delaying a final determination of a bargaining representative; and would tend to defeat, rather than to effectuate, the policies of the Act."

In this case, as in the *General Armature* case, the Respondent's proffered evidence falls "far short of proving capricious or arbitrary decision." The Respondent's evidence, at most, raises the question whether the Regional Director made an error of judgment in passing upon the Respondent's objections to the election. Such a question, however, is not cognizable before me, under the authorities cited above. Here, as in the *Pacific Multiforms* case, the Respondent is in effect merely "seeking to relitigate in a complaint proceeding matters foreclosed by the Regional Director's final determination," which is impermissible upon the proffered facts of the case in view of the Respondent's commitment to be bound by the Regional Director's decision regarding any and all election questions.

In its brief the Respondent cites *N.L.R.B. v. Trancoa Chemical Corp.*, 303 F. 2d 456 (C.A. 1); *N.L.R.B. v. Houston Chronicle Publishing Co.*, 300 F. 2d 273 (C.A. 5); *Cross Company v. N.L.R.B.*, 286 F. 2d 799 (C.A. 6); and *Celanese Corporation of America v. N.L.R.B.*, 291 F. 2d 224 (C.A. 7). Respondent's reliance on these cases here is misplaced in view of the fact that none of these cases concerned an agreement for a consent election of the type here involved, i.e., including the commitment by the employer to be bound by whatever decision the Regional Director might make on any question arising in the election proceeding. It is possible, had not the Respondent waived its right to have the Board itself pass upon its objections to the election, that the Board would have reached a different conclusion from the Regional Director upon the facts of the case. However, since the Respondent did bind itself to accept the Regional Director's determination, the Respondent must be held to its commitment in this regard in the absence of fraud or arbitrary, or capricious action on the part of the Regional Director. As found above, the Respondent's proffered evidence, at most, raises the question whether the Regional Director made an error of judgment in passing upon the Respondent's objections to the election.

For the reasons stated above, I conclude that the Respondent's admitted refusal to bargain collectively with the IUE constitutes a violation of Section 8(a)(5) of the Act.

CONCLUSION OF LAW

1. By refusing to bargain collectively on July 3, 1963, and thereafter with Local 605 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the duly certified exclusive bargaining representative of its employees in an appropriate bargaining unit the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, the Trial Examiner, pursuant to Section 10(c) of the Act, recommends that the Respondent Jas. H. Matthews Co., Industrial Marking Products Division, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 605 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

All production and maintenance employees, stockroom and shipping and receiving employees, and working foremen in the Industrial Marking Products Division at the above-named Employer's plants located at 6515 Penn Avenue and 916 Forbes Avenue, Pittsburgh, Pennsylvania, excluding all office clerical employees, plant clerical employees, technical employees and guards, professional employees, and supervisors as defined in the Act, as amended.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 605 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit described in paragraph 1(a) above, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Pittsburgh, Pennsylvania, plant, copies of the attached notice marked "Appendix."² Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive 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 Sixth Region, in writing, within 20 days from the receipt of this Recommended Order, what steps it has taken to comply herewith.³

²In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "A Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

³In the event that this Recommended Order be adopted by the Board this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL bargain collectively with Local 605 of the International Union of Electrical, Radio & Machine Workers, AFL-CIO, as exclusive bargaining representative of our employees in the appropriate unit described below:

All production and maintenance employees, stockroom and shipping and receiving employees, and working foremen in the Industrial Marking Products Division at the above-named Employer's plants located at 6515 Penn Avenue and 916 Forbes Avenue, Pittsburgh, Pennsylvania, excluding all office clerical employees, plant clerical employees, technical employees and guards, professional employees, and supervisors as defined in the Act, as amended.

JAS. H. MATTHEWS CO., INDUSTRIAL MARKING PRODUCTS DIVISION, Employer.

Dated _____ By _____ (Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 2107 Clark Building, 701-17 Liberty Avenue, Pittsburgh, Pennsylvania, Telephone No. 471-2977, if they have any question concerning this notice or compliance with its provisions.

Big Three Welding Equipment Company and Johnnie Cecil Gripon, Ruble C. Gentry, Jr., Guy W. East. *Cases Nos. 23-CA-1575-1, 23-CA-1575-2, and 23-CA-1585. February 12, 1964*

DECISION AND ORDER

On August 2, 1963, Trial Examiner Leo F. Lightner issued his Intermediate Report in the above-entitled proceeding, finding that 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 attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report with a supporting argument, and a request for oral argument.¹ The General Counsel filed limited exceptions to the Trial Examiner's Intermediate Report together with a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Brown].

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as noted below :

The complaint alleges, *inter alia*, that Oliver Stansbury, Respondent's plant superintendent, told an employee, R. C. Gentry, that the latter's discharge was occasioned by Gentry's organizational activities. The Trial Examiner recommended dismissal of this allegation because he found no evidence upon which any such statement could reasonably be inferred. He acknowledged, however, that the intended import of what Stansbury actually said to Gentry at the time of the latter's discharge "may have been" as alleged in the complaint.

According to Gentry's credited testimony, he was told by Stansbury that he was being fired because he was dissatisfied. Gentry replied, "That is not the reason you are firing me and you know it." Stans-

¹ Respondent's request for oral argument is hereby denied, as in our opinion, the record and briefs adequately present the issues and positions of the parties.