Westinghouse Electric Corporation *and* Federation of Westinghouse Independent Salaried Unions. Case 13–CA–7968

June 12, 1968

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING, BROWN, AND ZAGORIA

Upon a charge filed by Federation of Westinghouse Independent Salaried Unions, herein called the Union, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 13, issued a complaint and notice of hearing dated August 31, 1967, against Westinghouse Electric Corporation, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on June 13, 1967, the Union was duly certified by the National Labor Relations Board as the exclusive bargaining representative of the Respondent's employees in the unit found appropriate by the Board[1] and that on or about June 19, 1967, and thereafter, the Respondent has refused and is refusing to recognize and/or bargain with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 11, 1967, the Respondent filed its answer, admitting the allegations with respect to the filing and receipt of the charge, jurisdiction, commerce, and status of the Union as a labor organization but denying all other allegations of the complaint.

On November 30, 1967, the General Counsel filed with the Board a Motion to Transfer Proceedings to the National Labor Relations Board and Motion for Summary Judgment, asserting that there were no material issues of fact or law to be resolved by a Trial Examiner, and requesting an appropriate Decision and Order. Thereafter, on December 5, 1967, the Board issued an order transferring proceeding to the Board and a notice to show cause on or before December 20, 1967, why the motion for summary judgment should not be granted. The date for filing answers to the notice to show cause was thereafter extended to January 8, 1968. The Respondent thereafter filed an answer to notice to show cause and a memorandum in support of answer to notice to show cause.

Upon the entire record in this case, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

The record before us shows that on February 12, 1965, the Regional Director for Region 13 issued a Decision and Direction of Election in Case 13–RC–10446 in which he found appropriate for bargaining the following unit of employees:

> All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, district offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees.

Pursuant to the Respondent's timely request for review and following the reopening of the hearing for the taking of additional evidence, the Board, on March 31, 1967, issued its Decision on Review, Direction, and Order[2] in which it remanded the case to the Regional Director for purposes of holding an election pursuant to his Decision and Direction of Election, as amended by the Board's decision. In its decision the Board found that only lead engineers (but not assistant engineers) on so-called "labor contracts" jobs were supervisors, and that lead engineers and assistant engineers on "technical supervision" jobs were not supervisors. Accordingly, the Board found eligible to vote, and included within the unit, engineers who in the 12 months preceding the decision spent more than 50 percent of working time in nonsupervisory duties, and further specified that the bargaining representative could not represent any engineer with respect to his supervisory duties.

Thereafter, a secret ballot election was conducted on May 26, 1967, with a majority of the valid ballots cast for the Union and with one challenged ballot which was sufficient to affect the results of the election. No objections were filed and on June 13, 1967, the Regional Director issued his Supplemental Decision on Challenges and Certification of Representative, in which the challenge was sustained and the Union certified as the exclusive bargaining representative of the employees in the unit. No request was made for review of the Supplemental Decision. By letter of June 15, 1967, the Union requested the Respondent to include the certified unit in the collective-bargaining agreement

[1] 163 NLRB 723.
[2] Fn. 1, *supra*.

which the parties had negotiated to cover other units at other locations. The Respondent, by letter of June 19, 1967, refused such coverage, challenged the appropriateness of the unit and the eligibility requirements established by the Board, and set forth its intention to deny recognition of the Union and the request for inclusion under the agreement unless directed to do so by a reviewing court.

In its answer to the notice to show cause the Respondent said, in substance, that: (1) the underlying certification is invalid in holding that steam service engineers were neither supervisors nor managerial employees; (2) the motion for summary judgment is improper since the Respondent is prepared to produce new and previously unavailable evidence concerning the supervisory and/or managerial status of the steam service engineers; and (3) collective bargaining under the circumstances specified in the Board's Decision and Order would be impracticable and also inconsistent with concepts of collective bargaining.

In connection with its first contention, *supra*, the Respondent relies on material contained in the representation hearing, and which was fully considered by the Board in its Decision on Review, Direction and Order, footnote 1, *supra*. As it is well settled that the Respondent may not relitigate in a Section 8(a)(5) proceeding matters which were or could have been raised in the related representation proceeding,[3] the Respondent's contention presents no issue warranting a hearing.

For similar reasons the other contentions of the Respondent do not warrant a hearing before a Trial Examiner. The allegedly new and previously unavailable evidence upon which the Respondent would rely is set out in an affidavit of Robert T. Barnum, midwest area manager of the Respondent's steam service department. This affidavit, in the main, purports to show an increase in the work and number of hours in which engineers act as lead engineers on labor contracts. However, the formula for representation set out in our unit decision clearly recognized the possibility of such changes in the number of hours served as lead engineers, and any change in the ratio of time spent as lead engineers on labor contracts would affect only the proportion of the duties as to which they are entitled to representation, for they are not to be represented for their supervisory work. Consequently, there is no warrant for a hearing as such matter is unrelated to the current refusal to bargain charges. As for the "current" job descriptions for steam service engineers "A," "B," and "C," only part of which are set out in the affidavit, we note that they provide that the particular engineer group "may involve direction," "may assume lead responsibility," or "occasionally directs," but there is no assertion that this is a principal or other than infrequent responsibility or that in fact the actual responsibilities of these engineers differ from those we considered earlier. Moreover, there is no indication that the "changed" job descriptions were not in effect while we were considering our earlier opinion or could not have been brought to our attention by appeal or motion for reconsideration, before the election and certification. No such course was pursued by the Respondent, and we cannot presume this is a new change made subsequent to the certification. The same defects hold with respect to the claim in Barnum's affidavit that since the close of the hearing certain bladers and generator mechanics have been assigned work on both labor contracts and technical supervision jobs under the "supervision" of engineers. Again the exact date of such assignment is not indicated nor is there any showing that the issue could not have been presented during our consideration of the initial hearing or by appeal therefrom. Unit determinations based upon fully litigated representation proceedings are entitled to some degree of finality in subsequent related unfair labor practice cases. Accordingly, we conclude, there is no presentation of "new" material warranting a further hearing on this matter.

In connection with the third contention set out in the Respondent's answer to the notice to show cause, the Respondent also relies on the record of the representation proceeding and the affidavit of Barnum. For the reasons previously set forth none of this material warrants a further hearing in this proceeding or a reconsideration of our earlier decision in the representation proceeding. In addition, the Respondent attached to its answer a letter purported to be from the Union's president to all units of the Union which the Respondent claims came to its attention after the close of the hearing. The letter discusses alleged efforts of the Respondent to place supervisory responsibilities on engineers and advises the engineers to refuse to perform such duties, or if the Respondent insisted, to do so only on the basis of employee willingness to accept removal from the unit. However, this letter in no way affects our previous decision which was based on the record of work performed by engineers, and responsibilities vested in them, in the particular unit

[3] *Pittsburgh Plate Glass Company* v *N L R B*, 313 U S 146, *Red-More Corporation d/b/a Disco Fair, et al*, 164 NLRB 638.

under consideration. Therefore, nothing contained in this letter warrants a hearing before a Trial Examiner or a reconsideration of our earlier decision.

Accordingly, as we conclude there are no issues requiring a hearing before a Trial Examiner, the General Counsel's motion for summary judgment is granted.

On the basis of the record before it, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Pennsylvania with plants and operations in all States of the United States engaged in the manufacture and service of electrical appliances and in providing technical services relating thereto. During the past year the Respondent has, in the course and conduct of its business operation, processed, sold, and shipped directly from the State of Illinois to points outside the State of Illinois goods and services valued in excess of $100,000 and has, in the course and conduct of its business operation, received in the State of Illinois from points outside the State, goods and services valued in excess of $100,000.

The Respondent admits, and we find, that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Federation of Westinghouse Independent Salaried Unions is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees at the Respondent's Chicago, Illinois, district office constitute a unit appropriate for collective bargaining within the meaning of the Act.

> All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, district offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees.

2. The certification

On May 26, 1967, a majority of the employees of the Respondent in said unit, in a secret election conducted under the supervision of the Regional Director for Region 13, designated the Union as their representative for the purpose of collective bargaining with the Respondent, and on June 13, 1967, the Board certified the Union as the exclusive collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. *The Request To Bargain and the Respondent's Refusal*

On or about June 15, 1967, the Union by letter requested the Respondent to include the certified unit in the collective-bargaining agreement which the parties had negotiated to cover other units at other locations. In a letter dated June 19, 1967, the Respondent refused such coverage, challenged the appropriateness of the unit certified by the Board, and stated its intention to deny recognition unless otherwise directed by a reviewing court.[4]

Accordingly, we find that the Union was duly certified by the Board as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above in the Board's certification and that the Union at all times since June 13, 1967, has been and now is the exclusive bargaining representative of all employees in the aforesaid unit, within the meaning of Section 9(a) of the Act. We further find that the Respondent has, since June 19, 1967, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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[4] Even if the Union's letter of June 15 is viewed as an imperfect bargaining demand, the Respondent's answer of June 19 clearly indicated the Respondent recognized it as a request to bargain, and the Respondent's unequivocal refusal to recognize the Union made evident the futility of any further effort by the Union to seek bargaining with the Respondent. A union is not required to engage in futile gestures in the face of an employer's unequivocal refusal to bargain See *American Compressed Steel Corporation*, 146 NLRB 1463, 1470–71 Moreover, we note that in its answer to the notice to show cause, the Respondent makes no assertion or claim of imperfection with respect to the Union's bargaining demand.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The acts of the Respondent set forth in section III, 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.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

1. Westinghouse Electric Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Federation of Westinghouse Independent Salaried Unions is a labor organization within the meaning of Section 2(5) of the Act.
3. All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, district offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since June 13, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about June 19, 1967, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of the Respondent in the 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.
6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to 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.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

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, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with Federation of Westinghouse Independent Salaried Unions, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, district offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

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

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Chicago, Illinois, district offices copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 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.

[5] 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 "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

(c) Notify the Regional Director for Region 13, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

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, as amended, we hereby notify you that:

WE WILL NOT refuse to bargain collectively with Federation of Westinghouse Independent Salaried Unions, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All professional Steam Service field engineers employed at the Employer's Chicago, Illinois, district offices; excluding all service assistants, office clerical employees, guards, supervisors as defined in the Act, and all other employees.

WESTINGHOUSE ELECTRIC CORPORATION
(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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 881 U.S. Courthouse and Federal Office Building, 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 353–7572.