

In the Matter of U. S. TESTING CO., INC. and FEDERATION OF ARCHITECTS, ENGINEERS, CHEMISTS & TECHNICIANS, C. I. O.

Case No. R-578.—Decided February 28, 1938

*Commercial Testing Laboratory—Investigation of Representatives:* controversy concerning representation of employees: refusal by employer to recognize petitioning union as exclusive representative—*Unit Appropriate for Collective Bargaining:* dissimilarity of interests; skill; history of collective bargaining relations; eligibility for membership in only organization among employees; occupational differences—*Employee Status:* where employer reimbursed for salary by research association—*Representatives:* proof of choice: membership applications in union—*Certification of Representatives:* upon proof of majority representation.

*Mr. John T. McCann,* for the Board.

*McClanahan, Merritt & Ingraham,* by *Henry Clifton, Jr.,* of New York City, for the Company.

*Isserman, Isserman, Rothbard & Kapelsohn,* by *Abraham J. Isserman,* of Newark, N. J., for the Federation.

*Mr. Sylvester Garrett,* of counsel to the Board.

DECISION

AND

CERTIFICATION OF REPRESENTATIVES

STATEMENT OF THE CASE

On November 22, 1937, Federation of Architects, Engineers, Chemists and Technicians, herein called the Federation, filed with the Regional Director for the Second Region (New York City) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of U. S. Testing Co., Inc., Hoboken, New Jersey, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On December 7, 1937, the National Labor Relations Board, herein called the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice.

On January 4, 1938, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company, and upon the Federation. Pursuant to the notice, a hearing was held on January 12, 13, 14, and 15, at New York City, before H. R. Korey, the Trial Examiner duly designated by the Board. The Board, the Company, and the Federation were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. Thereafter, the Company filed a brief for the consideration of the Board. During the course of the hearing the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

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

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE COMPANY

The Company, a New York corporation, has its office and principal place of business in Hoboken, New Jersey. It is engaged in the business of furnishing laboratory service, largely consisting of chemical and physical analysis of industrial commodities. Such commodities include a wide variety of textiles, asbestos, glass, dyes, fuels, paper, furs, leather, soaps, waxes, and paints. According to a stipulation entered into by the Company and the Board, 90 per cent of the materials tested in the Hoboken plant of the Company are shipped to that plant from sources outside of the State of New Jersey. Likewise it is stipulated that 90 per cent of the materials tested thereafter are shipped outside of the State of New Jersey. The Company's principal source of income consists of the fees charged for such laboratory services.

#### II. THE ORGANIZATION INVOLVED

Federation of Architects, Engineers, Chemists & Technicians, is a labor organization affiliated with the Committee for Industrial Organization, admitting to its membership employees of the Company qualified by training or experience in a professional capacity in engineering, chemistry, and other scientific or technical work.

#### III. THE QUESTION CONCERNING REPRESENTATION

The Federation claims to represent the majority of the employees of the Company in its miscellaneous testing laboratory, exclusive of maintenance and clerical employees and those having power to hire

and discharge employees. The Company, while not denying the Federation's claim to represent certain of its employees, nonetheless contends that since the miscellaneous testing laboratory is but one part of a larger laboratory unit maintained by the Company, it does not constitute an appropriate unit for collective bargaining.

We find that a question has arisen concerning representation of employees of the Company.

#### IV. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE APPROPRIATE UNIT

In its petition, as amended, the Federation alleges that the employees in the miscellaneous testing laboratory, exclusive of maintenance and clerical employees and of persons having the right to hire and fire employees, constitute the appropriate unit. The miscellaneous testing laboratory is the laboratory located on the fourth floor of the Company's five-floor building in Hoboken. On the fifth floor of the building the Company maintains another laboratory, likewise devoted to commercial testing. Both of these laboratories are under the general supervision of a single individual. Moreover, they constitute the only laboratories maintained by the Company at Hoboken. Thus the Company deems them to constitute a single laboratory unit, and contends that the fourth-floor laboratory cannot be separated from the fifth-floor laboratory for purposes of collective bargaining.

Much evidence bearing upon this issue was adduced at the hearing. Although both laboratories are under the general supervision of one man, it also appears that there are separate supervisors directly in charge of each one. On the other hand, many of the products tested are handled in both laboratories in a single series of tests. Some degree of homogeneity of the two laboratories is indicated, moreover, by the fact that certain of the employees are interchangeable.

The bulk of the testing done on the fifth floor, however, relates to the physical qualities of raw silk and yarns. This testing requires mere visual or mechanical skill. It is to be contrasted with the general chemical testing of a wide variety of products carried on

in the fourth-floor laboratory. It can be no mere chance that most of the fourth-floor employees have academic training while those on the fifth floor have not. Indeed, the fifth-floor supervisor is shown to have no academic training along technical lines. In a list of fifth-floor employees submitted by the Company there are included five "textile engineers", three "test samplers", 19 laboratory aids", and one "technical clerk." It is strenuously urged by the Company that these persons fall within the ambit of the Federation's constitution, which admits to membership all persons "qualified by training and/or experience in any professional capacity in Architecture, Engineering, Chemistry or any other scientific or technical work." No serious attempt was at any time made to define a laboratory aid. One of the persons so described in a pay roll submitted in evidence by the Company, however, was shown to be a shipping clerk and general handyman. The evidence discloses that the status of textile engineer may be acquired merely through experience in purely visual inspection of yarns and threads. Some idea of the technical qualifications of a test sampler may be gleaned from the uncontradicted evidence that one person so designated by the Company was unable either to read or write. In the absence of any more cogent evidence than the foregoing to sustain the Company's contention that the fifth-floor laboratory is staffed by persons of professional standing, we must conclude that the Federation members are correct in their belief that the fifth-floor employees in general are not entitled to membership in their organization.

It is uncontradicted that the Federation at no time attempted to organize the fifth-floor employees. Such an attempt on the part of the Federation, moreover, would have been in direct contravention of a jurisdictional agreement entered into with the Textile Workers Organizing Committee, also affiliated with the Committee for Industrial Organization. Indeed, pursuant to that agreement the Textile Workers Organizing Committee is shown to have made serious, although unsuccessful, efforts to organize the fifth-floor employees during the summer of 1937.

In view of all of the evidence, therefore, the miscellaneous testing laboratory properly may be deemed to constitute an appropriate unit, without the inclusion of the fifth-floor laboratory.

There yet remains some doubt, however, as to the propriety of including certain specific individuals within the unit. In its pay roll for January 11, 1938, the Company lists as fourth-floor laboratory employees the following persons: Bertrand, Block, Brathwaite, Brede, Coradi, Davieau, Donohoe, Grilli, Holgate, Irmer, Kellner, Kennedy, Kirby, Krumholz, McAndrew, Mennerich, Peschel, Salines, Schroeder, Smith, Tiews, Tiffany, Turner, Walker, and Witten. Of

these, it is urged by the Federation that Block, Brathwaite, Brede, Coradi, Davieau, Turner, and Walker should be excluded from the unit. In addition, the Federation seeks to have Morgan and Ingram included within the unit.

As to Brathwaite, the evidence is clear that his duties are primarily those of a shipping clerk and general handyman. Similarly, there is no dispute that Brede's duties are largely clerical. It is not denied that Davieau is the supervisor in charge of the fourth-floor laboratory. The nature of their work requires that these persons be excluded from the bargaining unit. Owing to an eye injury incapacitating him for his customary work as silk inspector on the fifth floor, Coradi has been temporarily employed on the fourth floor and is about to return to his old job. As to Morgan, on the other hand, the evidence discloses that although he is regularly a fourth-floor laboratory employee, he has been used on the fifth floor as a silk inspector since Coradi suffered his eye injury. Morgan, therefore, is to be regarded as a fourth-floor employee, while Coradi is not.

The question presented in the cases of Block, Turner, and Walker differs somewhat. These men, known as "service men", are primarily concerned with the selling of the Company's services to various business concerns throughout all of the United States lying east of the Mississippi River. Since their work necessitates a high degree of technical knowledge, the Company customarily chooses its service men from among the best of its laboratory workers. By training, therefore, these men clearly are eligible for membership in the Federation. At the same time, however, it is apparent that the interests of these men are widely dissimilar from those of the regular fourth-floor laboratory employees. They spend an average of less than three-quarters of an hour per day in the laboratory, and not more than half of their time is spent at the Hoboken office of the Company. Their brief visits to the laboratory, moreover, are almost entirely for the purpose of explaining specific tests to those regular laboratory workers who are to conduct them. Primarily salesmen, they are not to be regarded as regular employees of the miscellaneous testing laboratory and must be excluded from the unit.

In the case of Ingram, the contention is that the Company actually does not employ him although he works in the fourth-floor laboratory and enjoys the use of all the Company's facilities. The Company pays Ingram's salary by its own check, but is reimbursed therefor by the Textile Foundation, of Washington, D. C. The latter institution, established for the purpose of stimulating research in the textile field, is interested in the research work being done by Ingram. His reports, made initially to the Company, generally are forwarded to the Foundation. It appears, however, that the discretion as to

the hiring of Ingram was exercised by a Company official, and that the same official advised him not to sign an employment contract with the Foundation. His hours, vacations, and conditions of employment are determined in the same manner as those of other persons working in the fourth-floor laboratory. Upon all of the evidence, we are convinced Ingram's inclusion within the unit is proper.

We find, therefore, that the employees in the miscellaneous testing laboratory of the Company, exclusive of maintenance and clerical employees and of persons having the power to hire and discharge employees, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

#### VI. THE DETERMINATION OF REPRESENTATIVES

There was introduced in evidence at the hearing the Company's pay roll of January 11, 1938, showing the names of 20 employees within the appropriate unit. The Federation submitted in evidence signed membership applications of thirteen of such 20 employees, and also an authorization signed by the same 13. The Company claimed that one of the employees, Bertrand, did not in fact desire representation by the Federation. A company official testified that Bertrand had so stated to him. We feel, however, that this testimony does not sufficiently rebut the showing made as to Bertrand's desire that the Federation represent him, particularly since there was no attempt to resort to readily available evidence of a more direct nature.

At the hearing, the Company stated that Irmer, one of the 13 employees, had given notice that she was leaving the Company's employ. By letter to the Board dated February 11, 1938, counsel for the Company stated that Irmer actually had left her job. In addition, there was enclosed a photostatic copy of a letter written by another of the 13 employees, Mennerich, in which he tendered to the Federation his resignation from membership in it. The date of Mennerich's letter is January 24, 1938. The Company claims that Irmer should not be considered as within the unit and that Mennerich does not desire representation by the Federation. If we held in accordance with this claim, the evidence would show 19 employees within the appropriate unit, of whom 11 desire representation by the Federation. The Federation, therefore, clearly represents a majority of the employees within the appropriate unit. Accordingly, it is not necessary to pass upon the merits of the Company's claim.

We find that the Federation has been designated and selected by a majority of the employees in the appropriate unit as their repre-

sentative for the purposes of collective bargaining. It is, therefore, the exclusive representative of all the employees in such unit for the purposes of collective bargaining, and we will so certify.

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

#### CONCLUSIONS OF LAW

1. A question affecting commerce has arisen concerning the representation of employees of U. S. Testing Co., Inc., Hoboken, New Jersey, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. The employees of the miscellaneous testing laboratory of the Company, excluding maintenance and clerical employees and persons having the power to hire and discharge employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

3. Federation of Architects, Engineers, Chemists and Technicians, C. I. O., is the exclusive representative of all the employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the National Labor Relations Act.

#### CERTIFICATION OF REPRESENTATIVES

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended,

IT IS HEREBY CERTIFIED that Federation of Architects, Engineers, Chemists and Technicians, affiliated with the Committee for Industrial Organization, has been designated and selected by a majority of the employees of the miscellaneous testing laboratory of U. S. Testing Co., Inc., Hoboken, New Jersey, excluding maintenance and clerical employees and persons having the power to hire and discharge employees, as their representative for the purposes of collective bargaining and that, pursuant to the provisions of Section 9 (a) of the Act, Federation of Architects, Engineers, Chemists and Technicians, C. I. O., is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.