

In the Matter of JEFFERY-DE WITT INSULATOR COMPANY and LOCAL
No. 455, UNITED BRICK AND CLAY WORKERS OF AMERICA

Case No. C-21.—Decided April 24, 1936

Electric Equipment Industry—Unit Appropriate for Collective Bargaining: eligibility for membership in only organization making bona fide effort at collective bargaining; production employees; employees on hourly wage basis—*Representatives:* proof of choice: membership in union—*Collective Bargaining:* refusal to meet representatives; employer's duty as affected by strike—*Employee Status:* during strike—*Reinstatement Ordered, Strikers:* discrimination in reinstatement; displacement of employees hired during strike.

Mr. Melvin C. Smith for the Board.

Mr. F. M. Livezey, of Huntington, W. Va., for respondent.

Mary Lemon Schleifer, of counsel to the Board.

DECISION

STATEMENT OF CASE

On October 4, 1935, Local No. 455, United Brick and Clay Workers of America, hereinafter referred to as Local No. 455, filed a charge with the Regional Director for the Ninth Region charging the Jeffery-De Witt Insulator Company, Kenova, West Virginia, hereinafter referred to as the respondent, with having committed unfair labor practices prohibited by the National Labor Relations Act, approved July 5, 1935, hereinafter referred to as the Act. A complaint charging the respondent with violations of Section 8, subdivisions (1), (3) and (5) of the Act, and accompanying notice of hearing, were issued on November 25, 1935, by the Regional Director for the Ninth Region, copies of which were duly served on the respondent and Local No. 455. On November 29, 1935, the respondent filed an answer and a motion to dismiss the complaint on the grounds that the Act as applied to the respondent's business is unconstitutional in that it violates the Fifth and Tenth Amendments to the Constitution of the United States, and in that it constitutes an unlawful delegation of legislative power in violation of Article I, Section 1, of the Constitution of the United States; that the complaint as issued varies from the charges filed and is otherwise insufficient; and that the acts alleged in the complaint occurred prior to the effective date of the Act. At the conclusion of the hearing, counsel for the respondent renewed the motion to dismiss on the same grounds

and for the further reasons that the evidence adduced at the hearing did not show that the manufacture of insulators is a matter of interstate commerce nor that the respondent has been guilty of unfair labor practices as defined by the Act. The Trial Examiner made no rulings on these motions. The Board now denies the motions to dismiss.

Pursuant to a notice of postponement issued on December 5, 1935, a hearing was held at Huntington, West Virginia, on December 18 and 19, 1935, before Daniel M. Lyons, duly designated to act as Trial Examiner, at which hearing full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded both parties. Much testimony and several exhibits were received in evidence over the objections of counsel for the respondent. The rulings of the Trial Examiner in respect to the admission of this evidence are hereby affirmed.

By order of December 27, 1935, and pursuant to Article II, Section 35, of National Labor Relations Board Rules and Regulations—Series 1, the proceeding was transferred to and continued before the Board.

Upon the evidence adduced at the hearing and from the entire record now before it, including the transcript of the hearing, exhibits introduced and pleadings filed, the Board makes the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

1. The respondent, a corporation organized under and existing by virtue of the laws of the State of West Virginia, is engaged in the manufacture and sale of insulators at a plant in Kenova, Wayne County, West Virginia. The respondent in the year 1935 employed at various times between 82 and 166 persons, depending upon the extent of production. On November 26, 1935, 84 persons were employed in the respondent's plant.

2. Raw materials used by the respondent in the manufacture of insulators include clay, flint, kaolin, bitstone, feldspar, plaster, oxides, stains, mixed dust and hardware. Clay is secured from England, and from Kentucky, New York, Michigan and Tennessee; flint from West Virginia; kaolin from Florida; bitstone from West Virginia; feldspar from Tennessee; plaster from Ohio; hardware from Ohio, Indiana, New York and Pennsylvania. The record does not show where oxides, stains and mixed dust are obtained. For the eleven months period ending November 30, 1935, raw materials costing \$61,236.75 were purchased by the respondent. The cost of the materials which were purchased within the State of West Virginia was \$9,259.92, being approximately 15 per cent of the total purchased;

the balance of the materials, at a cost of \$51,977.73, or 85 per cent, was purchased in other states of the United States and from foreign countries. During the same period, the respondent also purchased crating, for use in the shipment of finished products, at a cost of \$7,390.27 in the State of West Virginia, and at a cost of \$197.93 in other states.

3. Insulators sold by the respondent from January 1 to November 30, 1935, at a gross sale price of \$230,854.75, were distributed in 45 states of the United States, the Panama Canal Zone, Brazil, Canada, India, Mexico, Newfoundland, New Zealand, Peru, and Venezuela. Sales within the State of West Virginia were at a gross price of \$2,555.26, representing approximately 1 per cent of the total sales.

4. The respondent maintains sales offices in Kenova, West Virginia, New York City, New York, and Chicago, Illinois. It also makes sales through approximately twenty regularly employed sales agents located throughout the United States who are paid on a commission basis. It also employs a foreign sales agent in New York City, who in turn appoints foreign subagents.

5. All of the aforesaid constitutes a continuous flow of trade, traffic and commerce between the States and with foreign countries.

II. THE APPROPRIATE UNIT AND MAJORITY

6. The complaint alleges that the production employees of the respondent constitute a unit appropriate for the purposes of collective bargaining. The record contains no denial of this allegation, nor does the respondent assert that any other unit is the proper one. The membership of Local No. 455, the only labor organization in the respondent's plant, is limited to production workers employed by the respondent. Furthermore, the respondent has recognized production workers as a logical classification in that the respondent, in submitting for the record statistics on payrolls and employment in its plant, grouped its payroll into the headings "Factory" and "Others", and its employment record into "Wage Earners", "Salary Plant" and "Salary Other". We find that the production employees of the respondent constitute a unit appropriate for the purposes of collective bargaining.

7. Local No. 455 is a labor organization which was organized among the production employees of the respondent in September, 1933. It is a local of United Brick & Clay Workers of America, affiliated with the American Federation of Labor. The Secretary of Local No. 455 testified that approximately 75 members of Local No. 455 were working in the respondent's plant on June 15, 1935, at the time a strike, discussed hereafter, was called. The employment record of the respondent shows that on June 14, 89 persons were

employed by the respondent, 63 classified as wage earners, 13 as salary employees at the plant and 13 as salary employees elsewhere. As previously stated the number of employees actually working for the respondent at different periods during 1935 varied from 82 to 166; those not actually at work were still considered as employees. At the hearing a list of 129 persons was submitted on behalf of Local No. 455, as members of Local No. 455 in good standing on December 17, 1935. There is no evidence in the record to show that the membership of Local No. 455 varied between June 15 and December 17, 1935. Whether we use the maximum number of 166 employees and the total membership of Local No. 455 as 129, or the number of production workers employed by the respondent on June 14 as 63, and the number of members of Local No. 455 working on June 15 as approximately 75, it is apparent that at all times since June 15, and more particularly on July 16, 17, 18, and about August 1, the dates on which the evidence shows the respondent refused to bargain collectively, a majority of the employees of the respondent engaged in production were and have been members of Local No. 455.

III. THE UNFAIR LABOR PRACTICES

8. At the time of the organization of Local No. 455 in September 1933, a committee was elected to deal with the respondent in collective bargaining. Upon the refusal of the respondent to meet the committee and bargain collectively, a strike was called on October 13, 1933. The strike lasted three days and was settled with the aid of a Conciliator from the United States Department of Labor. The testimony of a member of Local No. 455 is to the effect that the strike was settled by the respondent's agreement to recognize Local No. 455 and to reemploy two union members to each non-union member in starting up the plant after the strike. It is not apparent from the record just what form this agreement took. The evidence does show that at all times subsequent to this, Local No. 455 had a committee which met with the management for the purposes of collective bargaining. The testimony on behalf of Local No. 455 was that the respondent did not, however, live up to its agreement in the rehiring of men.

In March, 1934, Local No. 455 again solicited the aid of a Conciliator from the Department of Labor, for the purpose of attempting to secure an agreement with the respondent concerning seniority, wages, closed shop and the staggering of work. The respondent agreed to cease staggering work, and to grant a wage increase, a portion of which was to become effective immediately, the balance at a later designated time. The immediate increase was received but the balance was never given. Again the record does not show what form this agreement took.

The sincerity of the respondent in any later negotiations with Local No. 455 is subject to question in the light of the fact that Local No. 455 had to secure the aid of Conciliators before any concessions were made by the respondent, and that in neither case did the respondent live up to the agreements in their entirety.

9. From the time of the strike in October, 1933, until June, 1935, the respondent had been meeting at least once a month with representatives of Local No. 455. As early as March, 1934, Local No. 455 sought to secure an agreement respecting seniority. In response to the demands of Local No. 455, a schedule of seniority by which the respondent's workers were divided into ten departments was prepared on April 3, 1935.

The respondent contends that no agreement was ever made that seniority according to this schedule should be effective, and that it merely stated it would try to operate under this seniority schedule as an experiment. Whether the respondent did or did not agree to put seniority into effect need not be decided for the purposes of this decision. The important fact is, that for many months the question of seniority was a major issue between the parties.

10. J. C. Cassels, auditor, and W. L. Stinson, vice-president and general manager, who on behalf of the respondent met Local No. 455 for the purposes of collective bargaining, testified that on April 23, 1935, Local No. 455 submitted a proposed agreement to the respondent. This proposed agreement contained as its two principal features a provision for seniority in the same manner as provided by the schedule of April 3, and a provision for a union shop. (The term "union shop" was defined as a plant where a non-union person might secure employment, but would have to become a union member within a stated period of time, to continue his employment.) On behalf of the Board there was no testimony as to whether or not such a proposed agreement had been submitted on April 23, but there was testimony that another proposed agreement offered in evidence had been submitted to the respondent by Local No. 455 on or about May 15, 1935. The respondent denies that this proposal was submitted to it on May 15 or at any time. However, the proposal, which Local No. 455 claims to have submitted on May 15, is substantially the same as the proposal which the respondent claims was submitted April 23. In both, seniority and union shop are the principal features. It is apparent that at least from May 15, 1935, the issue of union shop had also become, as seniority had for some time been, an issue between the parties.

11. On or about June 1, 1935, the respondent submitted a counter-proposal to Local No. 455. This counter-proposal contained practically verbatim some of the less important features of the earlier pro-

posal of Local No. 455. As to the two main issues, the respondent's counter-proposal ignored the issue of union shop; as to seniority, it provided: "It shall be the policy of the Company to give employment to the employees having the longest service record, other qualifications being equal for the particular work to be performed." The evidence submitted by the respondent was to the effect that it would not accept the seniority rule proposed by Local No. 455 and which, by the admission of both parties, had been adhered to for some time after the preparation of the schedule of April 3, 1935, because it could not successfully be used in the respondent's plant in that too many types of work, each requiring specialized skill, are done in each department. Some evidence was introduced on behalf of the respondent to show that because of the operation of the seniority rule materials had been destroyed by putting men on operations with which they were not familiar.

12. Local No. 455 refused to accept the counter-proposal of the respondent and on June 12 or 13, 1935, submitted a second proposal. With respect to seniority and union shop, this proposal was practically identical with the earlier proposal of Local No. 455. However, it added a provision for check-off by the respondent of initiation fees and dues of Local No. 455, a provision which had not previously been submitted to the respondent.

13. On June 13, 1935, a special meeting between the respondent and the Committee of Local No. 455 was held to discuss this second proposal. The proposal was considered paragraph by paragraph. An impasse was reached, neither side being willing to retreat from its position in regard to seniority, union shop and check-off.

In accordance with a strike vote taken on June 14, 1935, practically all workers in the respondent's plant ceased work at noon of June 15. Again on June 16, the respondent met with the Committee. This meeting lasted about five hours, the discussion centering around the issues of seniority, union shop and check-off. No agreement was reached, but W. L. Stinson, vice-president and general manager of the respondent, promised to contact the directors of the respondent to try to secure their consent to the union demands. On June 20 Stinson reported that the directors would not consent to entering into an agreement with Local No. 455 embodying seniority, union shop and check-off in the manner desired by Local No. 455.

On the same day, Stinson addressed employees who had returned to the plant for their checks and asked them to return to work, stating that he wanted them to return as "J-D employees".

14. During the period from June 20 to July 15, 1935, the plant of the respondent operated far below normal or seasonal capacity. There evidently were no meetings during that time between Local No.

455 and the respondent. It was not until July 15 that a Conciliator from the Department of Labor again came into the breach. Mr. Edward McDonald from the United States Department of Labor and Mr. J. F. Woods, an inspector from the West Virginia Department of Labor, met with Mr. Stinson and his counsel on July 16, 17, 18, and about August 1.

According to the testimony of J. F. Woods, the Conciliators at all of these meetings requested that the respondent meet with the Committee of Local No. 455, which request the respondent consistently refused. Other requests were also made by the Conciliators at these conferences. At the meeting of July 16, they suggested that the respondent submit a counter-proposal to the last proposal submitted by Local 455. Stinson, in reply to this suggestion, stated he would like to have time to consider it. At the meeting of July 17, Stinson stated the respondent had no counter-proposal to offer. At this meeting the Conciliators also requested the respondent to accept a proposal prepared by the Conciliators by which the strikers would be returned to work immediately and the matters in issue be submitted to arbitration. Stinson stated that he would not accept this proposal because there were several men among the strikers the respondent could not afford to reemploy because they were troublemakers. At the meetings of July 18 and about August 1, the Conciliators again sought to secure the consent of the respondent to meet with the Committee but were again unsuccessful.

15. The question for determination is whether or not the respondent was under a duty to meet with the Committee when requested to do so by the Conciliators on July 16, 17, 18 and about August 1.

It seems apparent from the record that the respondent did engage in collective bargaining with Local No. 455 on and prior to June 20, 1935, even though no agreement had been reached by the parties. Despite the fact mentioned previously that the respondent's good faith in some of its earlier dealings with Local No. 455 is questionable, the fact that the respondent offered to enter into an agreement with Local No. 455 on June 1, accepting some of its demands, and met frequently with Local No. 455 in the period from June 1 to 20, 1935, to discuss the proposals and counter-proposals, leads us to believe that the bargaining by the respondent at that time was done in good faith. It is undoubtedly true that an impasse had been reached by the parties on June 20, 1935, on the three substantive issues of seniority, union shop and check-off, Local No. 455 being unyielding in its demands concerning these issues, the respondent equally firm in its refusal to recede from its position. As long as this impasse continued the respondent might have been justified in refusing to meet with the Committee on the basis that no agreement was possible.

However, the situation existing on July 16, 17, 18 and about August 1, had changed materially. A strike had been in progress for more than a month. Because of this situation, disinterested third persons, representatives of Federal and State agencies, had offered their services to secure, if possible, some break in the deadlock. They offered employer and employees alike an opportunity to reexplore the situation and to determine the possibility of an agreement which would be acceptable to both parties in the light of the then existing circumstances. If the respondent had been sincerely interested in using the procedure of collective bargaining as a means of promoting industrial peace it would have seized this as a most auspicious time to have met with Local No. 455.

Stinson told the Conciliators that he would not meet the Committee because so many meetings had been held that further meetings would be useless. This reason is not convincing. A strike had been in progress for more than a month. The presence of the Conciliators was indicative of the desire of the strikers to compose their differences with their employers.

The record convinces us that after the strike began, the respondent did not desire to reach an agreement with its striking employees. In addition to telling the Conciliators that he would not meet the Committee because further meetings would be useless, Stinson told them that he would not meet the Committee because the situation was working itself out nicely, and because the respondent had no further duty to meet the strikers inasmuch as, by striking, they had ceased to be employees of the respondent. The record shows clearly that a current labor dispute existed on July 16, 17, 18 and about August 1; thus, at all such times, the strikers were still employees within the meaning of the Act.¹ These statements of Stinson's clearly show that the respondent no longer regarded itself as an employer whose relations with its employees were governed by the orderly procedure required by the Act.

At the hearing, Stinson admitted that his statement to the strikers on June 20, that he wished to deal with them as "J-D employees", meant that he did not wish to deal with them through a union. This merely reinforces our conviction that, regardless of what the result of a meeting with the Committee might have been, the respondent no longer desired, or considered itself required, to use the procedure of collective bargaining as a means of reaching an agreement; and that the respondent had finally determined to seize the strike as a means of eliminating Local No. 455 as the bargaining agent of its employees.

¹Section 2, subdivision (3) of the Act defines an employee as: ". . . any individual whose work has ceased as a consequence of, or in connection with any current labor dispute. . ."

Consequently, the respondent's refusal to negotiate with the strikers through the Conciliators was merely the final expression of its determination not to bargain collectively.

We find that the respondent refused to bargain collectively with Local No. 455 in respect to conditions of employment on July 16, 17, 18 and about August 1, 1935.

16. The statement of Stinson to the Conciliators that there were several strikers the respondent would not take back because they were troublemakers is alleged in the complaint to constitute a violation of Section 8, subdivision (3), of the Act, in that it constituted discrimination in regard to hire and tenure of employment, and thereby discouraged membership in a labor organization. The evidence shows that Stinson did not state who the persons were that the respondent would not reemploy. There is testimony that McReynolds, a foreman, named several persons to a striking employee whom he alleged the respondent would not reemploy. The record does not show that the intent was to discriminate because of union activities and affiliations or that the persons named, or any other striker, sought reemployment and were discriminated against for this reason. We conclude that the evidence is insufficient to justify a finding that the respondent has been guilty of discrimination in regard to hire and tenure of employment.

17. The respondent by refusing to bargain collectively with Local No. 455 in respect to conditions of employment has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

18. The effect of the strike was to burden and obstruct commerce. The respondent by its refusal to bargain collectively with Local No. 455 placed obstacles in the way of settling the strike and as a consequence was responsible for the continuance of the burden and obstruction to the free flow of commerce. We find, therefore, that these acts of the respondent have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

The record shows that on November 26, 1935, the respondent was employing 58 wage earners, only 23 of whom had been employed prior to June 15, 1935. The record does not show how many of the new employees were hired on and after July 16, 1935, when the respondent refused to bargain collectively.

Under these circumstances no effective relief would be granted by merely ordering the respondent to bargain collectively. Since the respondent in refusing to bargain collectively on July 16, 1935, and thereafter, precluded the possibility of the strikers returning to work

under an agreement which might have been reached at that time, we will also order the respondent to offer employment to its employees who were on strike on July 16 and who have not received substantially equivalent employment elsewhere, replacing, if necessary, the persons who were hired by the respondent for the first time on and subsequent to July 16, 1935.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact and upon the entire record in the proceedings the Board finds and concludes as matters of law:

1. Local No. 455 is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.

2. The employees of the respondent engaged in production constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. By virtue of Section 9 (a) of the Act, Local No. 455, having been designated as their representative by a majority of the employees in an appropriate unit, was on July 5, 1935, and at all times thereafter has been, the exclusive representative of all employees in such unit for the purposes of collective bargaining.

4. The respondent, by refusing to bargain collectively with Local No. 455 in respect to conditions of employment on July 16, 17, 18 and about August 1, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (5) of the Act.

5. The respondent, by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (1) of the Act.

6. The unfair labor practices in which the respondent has engaged and is engaging constitute unfair labor practices affecting commerce, within the meaning of Section 2, subdivisions (6) and (7) of the Act.

ORDER

On the basis of the findings of fact and conclusions of law and pursuant to Section 10, subdivision (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Jeffery-De Witt Insulator Company, and its officers and agents, shall:

1. Cease and desist from refusing to bargain collectively with Local No. 455 as the exclusive representative of its employees engaged in production in respect to rates of pay, wages, hours of employment and other conditions of employment.

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

(a) Upon request, bargain collectively with Local No. 455 as the exclusive representative of its employees engaged in production in respect to rates of pay, wages, hours of employment and other conditions of employment.

(b) Offer employment to its employees who were on strike on July 16, 1935, and who have not received substantially equivalent employment elsewhere, where the positions held by such persons on June 15, 1935, are now filled by persons who were first employed by the respondent on and after July 16, 1935, and place all other employees who were on strike on July 16, 1935, and have not since received substantially equivalent employment elsewhere on a preferential list to be offered employment as and when additional labor is needed.