

In the Matter of TRANSFORMER CORPORATION OF AMERICA<sup>1</sup> and LOCAL 430 OF THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, C. I. O.

Case No. R-1942.—Decided August 10, 1940

**Jurisdiction:** amplifying equipment manufacturing industry.

**Investigation and Certification of Representatives:** existence of question, conflicting claims of rival representatives; contract about to expire, no bar to; election necessary.

Suit in State courts between union parties to proceeding *held* no bar to existence of question concerning representation.

Old employees reemployed in place of new employees who had displaced them following stoppage of work *held* eligible to vote.

**Unit Appropriate for Collective Bargaining:** production employees, including testers, special department and repair employees, inspectors, wire men, assemblers, packers, and shippers, but excluding all executives, foremen, office and clerical employees, and stock and shipping employees engaged in clerical work or work not directly applicable to production.

*Mr. Shad Polier* for the Board.

*Carb, Reichman & Luria* by *Mr. Edward E. Reichman*, of New York City, for the Company.

*Mr. Frank Scheiner*, of New York City, for the United.

*Mr. William Karlins*, of New York City, for I. B. E. W.

*Mr. D. M. Byrd, Jr.*, of counsel to the Board.

## DECISION

AND

## DIRECTION OF ELECTION

### STATEMENT OF THE CASE

On May 15, 1940, Local 430 of the United Electrical, Radio & Machine Workers of America, C. I. O., herein called the United, 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 Transformer Corporation of America, New York City, herein called the Company, and requesting an investigation and certification of representatives pursuant to

<sup>1</sup> Erroneously designated in the petition and formal papers as Transformer Corp of America.

Section 9 (c) of the National Labor Relations Act, 49 Stat. 449; herein called the Act.

On June 19, 1940, 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 2, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice.

On June 27, 1940, the Regional Director issued a notice of hearing, copies of which were served upon the Company, the United, and the International Brotherhood of Electrical Workers, Local B-1010, herein called the I. B. E. W., a labor organization claiming to represent employees directly affected by the investigation. Pursuant to notice a hearing was held on July 8, 1940, at New York City before James C. Paradise, the Trial Examiner duly designated by the Board. The Company, the United, and the I. B. E. W. were represented by counsel and participated in the hearing. Full opportunity to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded all parties. During the course of the hearing the Trial Examiner made several rulings on motions and objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. In addition the I. B. E. W. made a motion to dismiss the petition upon the basis of evidence adduced. The Trial Examiner reserved decision upon this motion. The motion to dismiss the petition is hereby denied for reasons appearing below:

Pursuant to leave, the United filed a brief which the Board has considered.

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

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE COMPANY

Transformer Corporation of America is a New York corporation, having its office and principal place of business located at 69 Worcester Street, New York City. The Company is engaged in the manufacture, sale, and distribution of amplifying equipment. Raw materials, consisting of sockets, transformers, tubes, chassis, wire and miscellaneous fabricated parts purchased by the Company outside the State of New York during the period from November 1, 1939 to April 3, 1940, amounted to \$50,000 in value and approximately 50 per cent in value of the Company's total purchases of raw materials. During the same period the gross volume of the Company's finished products shipped to places outside of the State of New York amounted in value to approximately \$160,000 and constituted approximately 70 per cent of the Company's sales during the same period.

The Company admits that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

## II. THE ORGANIZATIONS INVOLVED

Local 430 of the United Electrical, Radio & Machine Workers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company and other employees similarly engaged in New York City.

International Brotherhood of Electrical Workers B-1010, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company and other employees similarly engaged in New York City.

## III. THE QUESTION CONCERNING REPRESENTATION

On August 29, 1939, the Company and the I. B. E. W. executed a written contract, herein called the I. B. E. W. contract, providing for wages, hours of employment, and other working conditions of the Company's employees within an appropriate bargaining unit and by its terms to remain in force until August 24, 1940. The contract further specified that there would be no sympathetic strikes, stoppages, strikes, or lock-outs and that:

The employer agrees to call upon the Union for any production employees it may require and the Union agrees to supply the workers required within 24 hours after request is made for them. If they are not so supplied by the Union the Employer may obtain such Workers elsewhere, in which event such new workers shall be given a working card by the Union. Such new employees shall be on a trial period of two weeks, and after satisfactorily serving their trial period shall become members of the Union and continue to be members of the Union in good standing.

Some time prior to May 7, 1940, the membership of Local B-1010 of the I. B. E. W. voted to disaffiliate from the I. B. E. W. and to affiliate with the United. On May 7 the Company was by letter advised that the United claimed to be exclusive representative of the employees.

On May 8, 1940, the I. B. E. W. wrote the Company and requested that Sam Lippman and John Granelli, two employees, be discharged in "accordance with the contractual agreements entered into between Local B-1010 and the Company . . . as they are no longer members of Local B-1010 IBEW." On May 15 the Company replied that in compliance with the I. B. E. W. request of May 8 it had dismissed Lippman and Granelli "on the basis that they were no longer members

of B-1010 of the IBEW with whom we now have a contractual arrangement.”

It appears that the discharge of Lippman and Granelli precipitated a stoppage of work by all of the employees. Thus the Company also wrote the I. B. E. W. on May 15 that at the close of the morning session of work on May 14 a number of “your members failed to return to work,” and advising the I. B. E. W. further that in accordance with the second paragraph of the I. B. E. W. contract the Company proposed to seek satisfactory workers elsewhere unless the I. B. E. W. took immediate action to comply with the terms of the agreement. Because of the work stoppage the Company’s production suffered a complete cessation at that time, and none of the employees taking part in the stoppage was again employed by the Company until May 27, 1940.

On May 16, 1940, the Company resumed production with an entire new force of 28 employees, herein called the new employees, consisting in part of persons supplied by the I. B. E. W. and in part of persons secured by the Company and given working cards by the I. B. E. W. These persons continued in the employ of the Company until May 24, 1940. On that date the Company and the United entered into a written agreement in which the United warranted, and the Company accepted, that it represented a majority of the Company’s employees within the same bargaining unit described in the I. B. E. W. contract. Although this contract provided that it was not to be construed as one granting the United exclusive recognition it specified that pending the ordering of an election by the Board pursuant to the petition previously filed by the United and pending certification of the United as the exclusive collective bargaining agency of the employees, the United agreed to withdraw, with prejudice, charges which it theretofore had filed with the Board and to withdraw all pickets from before the Company’s plant. In return the Company agreed to reemploy all employees who were employed on March 6, binding itself further not to discriminate against its employees. In addition the contract provided that in the event the United should be certified as the collective bargaining agency for the Company’s employees, the I. B. E. W. contract should be deemed to be an agreement between the Company and the United from the date of such certification until December 3, 1940. Finally, it was specified that in the event the United should not be certified by the Board as the collective bargaining agency the United agreement should terminate.

On the morning of May 25 the Company notified the new employees that they were “unconditionally discharged” and on May 27 it resumed normal production, with the employees who failed to return to work after the morning session of May 14.

A statement of the Regional Director, introduced into evidence, states that the United presented 27 application cards bearing dates between May 5 and May 15; that all of the 27 signatures affixed to the cards appear to be genuine original signatures of the persons whose names appear on the Company's pay roll of May 8, 1940. The Regional Director further stated that the pay roll of May 8 showed a total of 27 production employees.

On May 27, 1940, the I. B. E. W. filed in the Supreme Court of the State of New York for New York County an action of the nature of a suit in equity to enjoin the Company from violating in any manner the I. B. E. W. contract.<sup>2</sup> On June 10 by motion of the United,<sup>3</sup> after the Company had filed its answer on May 28, Frank Sullivan, as president of Local 430 of the United, was joined as a party defendant in the action. On June 5, 1940, Justice Lloyd Church denied the motion of the I. B. E. W. for an injunction *pendente lite* "solely on the ground that an injunction *pendente lite* cannot issue except after a hearing (sec. 876-8 Civil Practices Act). This denial is in no way a determination of the merits of the controversy which must await the hearing, the time of which is hereby set for the tenth day of June, 1940 . . ."

At the hearing the I. B. E. W. took the position that the existence of a question concerning representation was precluded by the I. B. E. W. contract and by the pendency of its suit in the Supreme Court of the State of New York. The United and the Company took the opposite view:

It is not necessary to pass upon the status of the I. B. E. W. contract, since, in any event, that contract is about to expire. We have frequently held that, under such circumstances, the Board, in furtherance of the purposes of the Act to afford employees the opportunity to select new representatives, is not precluded from an investigation and determination of representatives.<sup>4</sup> In addition, the Board is of the opinion that the pendency of the action in the Supreme Court of the State of New York is not sufficient to constitute a bar to the existence of a question concerning representation. That action is a suit between private parties in which the question concerning representation under Section 9 (c) of the Act cannot be decided by the Court.

For these reasons, the Board finds that a question has arisen concerning the representation of the Company's employees within an appropriate bargaining unit.

<sup>2</sup> The action is entitled "Alexander Gerál, as president of Radio Local Union B-1010, International Brotherhood of Electrical Workers, Plaintiff, against—Transformer Corporation of America, Defendant."

<sup>3</sup> Section 93 (b) of the Civil Practice Act of New York State.

<sup>4</sup> In the Matter of *Oppenheimer Casing Company and United Packinghouse Workers of America, Local No. 75*, 15 N. L. R. B. 70, In the Matter of *Chrysler Corporation and United Automobile Workers of America, Local 371*, 13 N. L. R. B. 121, In the Matter of *Atlantic Footwear Company, Inc and United Shoe Workers of America*, 5 N. L. R. B. 252, In the Matter of *Shipowners' Association of the Pacific Coast, et al and International Longshoremen's and Warehousemen's Union, District No. 1*, 7 N. L. R. B. 1002, In the Matter of *Sandusky Metal Products, Inc and American Federation of Labor*, 6 N. L. R. B. 12.

#### 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

The parties stipulated and the Board finds that "all production employees, including testers, special department and repair employees, inspectors, wire men, assemblers, packers, and shippers, but excluding all executives, foremen, office and clerical employees, and stock and shipping employees engaged in clerical work or work not directly applicable to production"<sup>5</sup> 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

At the hearing a controversy arose concerning the pay roll to be used in determining eligibility to vote in the event an election should be directed. The United requested that eligibility be determined as of the date of the filing of the petition, or in the alternative as of the date of the hearing on July 8. The I. B. E. W., on the other hand, expressed a desire for the use of the pay roll of May 24. Substantially the positions of the United and the I. B. E. W. present a question of the determination of the eligibility of the new employees.

As has been pointed out above, the employees who were employed by the company prior to the stoppage of work on May 14 were at the time of the hearing, with certain exceptions,<sup>6</sup> again employed by the company. These employees, in many instances, had been with the company for 5 or 6 years and represent the Company's entire personnel with a few exceptions added since June 24.<sup>7</sup> On the other hand, H. L. Shortt, president of the Company, testified that the new employees were unconditionally discharged on May 25, 1940, by telegraphic communication because of the "very nasty problem all the way around" and because, the "new employees not being able to

<sup>5</sup> "Work not directly applicable to production" was defined by the parties as that of an employee who handles a finished product subsequent to its having been placed in a primary carton immediately upon being completed

<sup>6</sup> The Company's pay roll lists Fred Auerback as resigning May 31, John J. Rash on May 13, George Buchanan on June 14, and Manfred Vitale as being discharged on June 13

<sup>7</sup> The exact number of such employees was not revealed

turn out the work," production had fallen off. Under the circumstances the Board is of the opinion and finds that the policies of the Act will be best effectuated by holding that the old employees, presently employed by the Company are eligible to participate in the selection of the bargaining representative of the employees in the appropriate unit.<sup>8</sup>

The record is not clear that the I. B. E. W. desires to appear on the ballot in the event an election is ordered on the foregoing terms. We shall direct that it be placed thereon and if, within 5 days from the date of our Direction, it notifies the Board that it does not desire to participate in the ballot, we shall amend our Direction accordingly.<sup>9</sup>

In accordance with our usual practice, we direct that the employees of the Company eligible to vote in the election shall be those employees in the appropriate unit who were employed during the pay-roll period last preceding the date of this Direction of Election, including employees who did not work during such pay-roll period because they were ill or on vacation, but excluding employees who have since quit or been discharged for cause.

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 Transformer Corporation of America, New York City, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. All production employees, including testers, special department and repair employees, inspectors, wire men, assemblers, packers and shippers, but excluding all executives, foremen, office and clerical employees, and stock and shipping employees engaged in clerical work or work not directly applicable to production, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

#### DIRECTION OF ELECTION

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 2, as amended, it is hereby

<sup>8</sup> Cf. *Matter of Easton Publishing Co and Eastern Typographical Union No 258*, 19 N L R B 389, *Matter of A. Sartorius & Co, Inc and United Mine Workers of America District 50, Local 12090*, 10 N L R. B. 493 See also *Matter of Johnson-Carper Furniture Co, Inc and Local 293, United Furniture Workers of America*, 14 N L. R. B 1030

<sup>9</sup> *Matter of Borg-Warner Corp and United Automobile Workers of America Local No 287*, affiliated with the C. I. O., 19 N L R B. 538

DIRECTED that, as part of the investigation authorized by the Board to ascertain representatives for the purposes of collective bargaining with Transformer Corporation of America, New York City, an election by secret ballot shall be conducted as early as possible but not later than thirty (30) days from the date of this Direction of Election under the direction and supervision of the Regional Director for the Second Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all production employees who were employed during the pay-roll period last preceding the date of this Direction of Election including testers, special department and repair employees, inspectors, wire men, assemblers, packers, shippers, employees who did not work during such pay-roll period because they were ill or on vacation, and employees who were then or have since been temporarily laid off, but excluding all executives, foremen, office and clerical employees, stock and shipping employees engaged in clerical work or work not directly applicable to production, and any employees who have since quit or been discharged for cause, to determine whether they desire to be represented by Local 430 of the United Electrical, Radio and Machine Workers of America, C. I. O., or by the International Brotherhood of Electrical Workers, Local B-1010, for the purposes of collective bargaining, or by neither.

MR. WILLIAM M. LEISELSON took no part in the consideration of the above Decision and Direction of Election.