

In the Matter of FOSTER-GRANT CO., INC. and PLASTIC, CORK AND LINO-
LEUM DEPARTMENT OF THE UPHOLSTERERS' INTERNATIONAL UNION
OF N. A. (A. F. OF L.)

Case No. 1-R-1659.—Decided January 22, 1944

Messrs. Jacob Chatkis and Paul Byrne, of Leominster, Mass., for the Company.

Mr. Haskell Golder, of Cambridge, Mass., and Mr. Howard Litchfield, of Arlington, Mass., for the A. F. L.

Mr. Sam Sandberg, of Leominster, Mass., for the C. I. O.

Mr. Robert E. Tillman, of counsel to the Board.

DECISION
AND
DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon petition duly filed by Plastic, Cork and Linoleum Department of the Upholsterers' International Union of N. A. (A. F. of L.), herein called the A. F. L., alleging that a question affecting commerce had arisen concerning the representation of employees of Foster-Grant Co., Inc., Leominster, Massachusetts, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Robert E. Greene, Trial Examiner. Said hearing was held at Leominster, Massachusetts, on December 15, 1943. The Company, the A. F. L., and United Paper, Novelty & Toy Workers International Union (C. I. O.), herein called the C. I. O., appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The rulings of the Trial Examiner made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded opportunity to file briefs with the Board.

Upon the entire record in the case,¹ the Board makes the following:

¹ Subsequent to the hearing the Company filed a motion with the Board to correct certain errors in the record. The other parties were duly notified and made no objections to the motion. The motion is hereby granted, and the corrections are approved and made part of the record in this proceeding.

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Foster-Grant Co., Inc., a Massachusetts corporation, operates a plant in Leominster, Massachusetts, where it is normally engaged in the manufacture, sale, and distribution of plastic specialties, including jewelry, combs, sun goggles, and hair ornaments. The principal raw materials used by the Company consist of glass, cellulose, acetate, and other synthetic resins. Normally, the raw materials purchased annually by the Company have a value in excess of \$325,000, of which over 90 percent represents the value of raw materials shipped to the plant from points outside the Commonwealth of Massachusetts. Normally, the Company's production is valued in excess of \$1,000,000 annually, of which 90 percent represents the value of its products shipped to points outside the Commonwealth of Massachusetts. At the present time, the Company is engaged in war production for the United States Government. It admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

Plastic, Cork and Linoleum Department of the Upholsterers' International Union of N. A. is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.

United Paper, Novelty & Toy Workers International Union is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

On October 4, 1943, the A. F. L. sent a letter to the Company in which it set forth its claims to represent the Company's employees. No reply was received, but within a week or two thereafter, the Company informed the A. F. L. that the latter would not be recognized unless and until the Board so determined.

The Company and the C. I. O. now contend that no question concerning representation has arisen in the present proceeding because the Company's employees are presently represented under a contract with the C. I. O.

To determine this issue, a brief resume of the bargaining relations between the Company and the C. I. O. is necessary. The history of bargaining dates back to August 8, 1941, when the C. I. O. was victorious in a consent election conducted among the Company's production and maintenance employees. As the result of this election,

the C. I. O. was certified as the collective bargaining representative of the above employees. On September 22, 1941, it entered into a contract with the Company, which provided for a 1-year term ending November 1, 1942, but subject to automatic renewal in the absence of written notice to the contrary by either party not later than 60 days before the termination date. On October 26, 1942, the C. I. O. and the Company negotiated a second contract to terminate on November 1, 1943, subject to an automatic renewal clause identical to the above. In August 1943, the C. I. O. orally informed the Company of a desire to make certain changes in the second contract, and accordingly, on September 13, 1943, submitted a written proposal of changes attached to a letter which read in part: "Enclosed you will find a copy of the proposals for the new contract to replace the Agreement now in effect which expires November 1, 1943." Thereafter, the C. I. O. and the Company entered into negotiations, which culminated on September 27, 1943, in an oral understanding to the effect that the provisions of the second contract would be retained as supplemented by the award of the National War Labor Board, herein called the W. L. B., on four issues in dispute which were to be submitted to that agency. On September 28, 1943, this oral understanding was embodied in a written "Interim Agreement," which stated that the entire contract had been mutually agreed to, that the question of wage rates would be held in abeyance, and that the following four provisions would be submitted to the W. L. B. (the parties agreeing to abide by the award): check-off, length of probationary period, lay-off period, and piece-work transfer. On October 5, 1943, the Company received the afore-mentioned notice of representation claims from the A. F. L. Thereafter the Company agreed with the C. I. O. to permit the W. L. B. to arbitrate the wage rates, which would then be included in the contract. Finally, between October 25 and November 1, 1943, the C. I. O., and later the Company, signed a formal contract terminating on November 1, 1944, which contains various provisions calculated to incorporate the awards to be made by the W. L. B.

In its brief, the C. I. O. contends that the Interim Agreement, which was entered into before notice of the A. F. L.'s claims to representation, continued the 1942 contract with minor revisions, thus constituting a bar to the present proceeding, and that the submission of several issues to the W. L. B. did not serve to remove the bar. The Company contends somewhat similarly that the Interim Agreement was an agreement to continue the 1942 contract and to submit proposed changes to the W. L. B.; that this agreement was reached before knowledge of the A. F. L.'s claims; and that it constitutes evidence in writing that the parties had reached a meeting of the minds, even though a more formal document was contemplated.

In certain aspects, the instant case appears to present a problem similar to that which the Board resolved in *Matter of Allis-Chalmers Manufacturing Company*² by holding that the contractual relationship existing therein between the Company and an intervenor labor organization was a bar to a determination of representatives. However, as later decisions have emphasized,³ that case stands solely for the principle that a newly recognized or certified representative is entitled to a reasonable opportunity to obtain the benefits of exclusive representation as evidenced by a collective bargaining contract; and that, where all reasonable efforts have been made to procure such a contract immediately after recognition or certification, but a bargaining deadlock has ensued, and resort is then had to the processes of a governmental agency established for such purposes, with the result that a formal contract is not entered into until after knowledge is acquired of the conflicting claims of a second labor organization, nevertheless, the Board will treat the contract as a bar to any determination of representatives sought before the reasonable term of such contract is about to expire. In the present case, the C. I. O. is neither a newly recognized nor a newly certified labor organization. On the contrary, it has had exclusive bargaining relations with the Company for a period of over 2 years. Moreover, the Interim Agreement in the instant case, unlike the comparable agreement in the *Allis-Chalmers* case, was not in effect at the time the conflicting representation claim was presented; it was intended to cover a possible hiatus period commencing at the termination of the old contract, but at the time the A. F. L. served notice of its claim the term of the old contract had still 26 days to run. The *Allis-Chalmers* case is, therefore, not controlling.

Where a contract provides for its automatic renewal in the event neither party gives notice to the other more than a specified number of days prior to the termination date of a desire to change the contract, the Board has held that to prevent such automatic renewal from operating as a bar to a determination of representatives, the petitioning union must either serve notice of its claim on the Company or file its petition prior to the automatic renewal date. Where such a contract is not automatically renewed, as was the case herein, we are of the opinion that notice of conflicting claims to representation given either prior to the termination date of the old contract, or prior to the effective date of a succeeding contract, is sufficiently timely to prevent the succeeding contract from acting as a bar. Here, the A. F. L. gave notice before the termination date of the 1942 contract. We find,

² 50 N. L. R. B. 306.

³ See *Matter of MacClatchie Manufacturing Company*, 53 N. L. R. B. 1268. *Matter of Kennecott Copper Corporation, Nevada Mines Branch*, 51 N. L. R. B. 1140; *Matter of Aluminum Company of America, Vancouver, Washington*, 53 N. L. R. B. 593.

therefore, that neither the Interim Agreement nor the 1943 contract is a bar to a present determination of representatives.

A statement of the Regional Director, introduced into evidence at the hearing, indicates that the A. F. L. represents a substantial number of employees in the unit hereinafter found to be appropriate.⁴

We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The A. F. L. and the C. I. O. are agreed on the appropriate unit to the extent that it should include all employees of the Company, excepting executives, supervisory employees above the rank of working foreman, office, clerical, and sales employees, and truck drivers. The C. I. O., in opposition to the A. F. L. would also exclude shipping-room employees from the unit. The Company does not take any position as to the appropriate unit.

In the consent election conducted on August 8, 1941, shipping-room employees, by agreement of the Company and the C. I. O., were excluded from the voting unit. The shipping-room employees have not been covered by any contract since the consent election. In view of the dispute between the two participating labor organizations as to the present disposition of shipping-room employees, we are of the opinion that the history of collective bargaining should be determinative of the issue. This history indicates that the shipping-room employees have not been included in the production and maintenance unit. Under these circumstances, we shall exclude them from that unit in the present proceeding.

We find that all employees of the Company, excluding office, clerical, and sales employees, truck drivers, shipping-room employees, executives, supervisory employees above the rank of working foreman, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. THE DETERMINATION OF REPRESENTATIVES

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll

⁴The Regional Director stated that the A. F. L. submitted to him 181 authorization cards, of which 178 bore apparently genuine, original signatures; and that 161 of the latter 178 cards bore names of persons whose names appeared on the Company's October 28, 1943, pay roll, which listed 625 employees in the unit alleged to be appropriate.

period immediately preceding the date of our Direction of Election herein, subject to the limitations and additions set forth therein.⁵

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 9, of National Labor Relations Board Rules and Regulations—Series 3, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Foster-Grant Co., Inc., Leominster, Massachusetts, 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, under the direction and supervision of the Regional Director for the First Region acting in this matter as agent for the National Labor Relations Board and subject to Article III, Sections 10 and 11, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause, and have not been rehired or reinstated prior to the date of the election, to determine whether they desire to be represented by Plastic, Cork and Linoleum Department of the Upholsterers' International Union of N. A. (A. F. of L.), or by United Paper, Novelty & Toy Workers International Union (C. I. O.), for the purposes of collective bargaining, or by neither.

⁵ In its brief the A. F. L. urged that eligibility to vote be determined by the pay-roll period immediately preceding the election, in view of the closed-shop provisions of the C. I. O. contract. We do not consider that this reason necessitates a departure in the instant case from our customary practice in determining the eligibility date.