

In the Matter of FRANK L. THIENONGE, DOING BUSINESS AS BIRMINGHAM GRAIN COMPANY and UNITED WHOLESALE & WAREHOUSE EMPLOYEES UNION LOCAL #261, C. I. O.

Case No. 10-R-1094.—Decided March 14, 1944

Mr. Kenneth Perrine, of Birmingham, Ala., for the Company.

Mr. Frank I. Parker, of Birmingham, Ala., for the CIO.

Mr. J. L. Busby, of Birmingham, Ala., for the A. F. of L.

Mr. Irving Rogosin, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon a petition duly filed by United Wholesale & Warehouse Employees Union Local #261, C. I. O., herein called the CIO, alleging that a question affecting commerce had arisen concerning the representation of employees of Frank L. Thienonge, doing business as Birmingham Grain Company,¹ Birmingham, Alabama, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before T. Lowry Whittaker, Trial Examiner. Said hearing was held at Birmingham, Alabama, on January 25, 1944. At the commencement of the hearing, the Trial Examiner granted a motion of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 612, A. F. of L., herein called the A. F. of L., to intervene. The Company, the CIO, and the A. F. of L. appeared and participated.² All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. During the course of the hearing, the Company and the A. F. of L.

¹ The name of the Company was stated in the petition as Birmingham Grain Company. It is stated here as corrected to conform to a motion to amend made during the course of the hearing

² Counsel for the Company appeared specially, without waiving the right to raise the question of the Board's jurisdiction

moved to dismiss the petition, alleging that the Board was without jurisdiction.³ For reasons hereinafter stated, the motion is denied. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded an opportunity to file briefs with the Board.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Frank L. Thiemonge is an individual, doing business as Birmingham Grain Company since May 1930, and having a principal office and place of business in Birmingham, Alabama. The Company is engaged in the general grain and feed business. Its purchases consist of hay, corn, mixed feed, oats, hominy feed, and flour. It sells, at wholesale and retail, flour, oats, corn, and hay, and processes, sells, and distributes, under the trade name of Tango, mixed cow feed, dairy feed, laying mash, growing mash, pig and hog feed, horse and mule feed, and chicken feed. During the last 12-month period, the Company purchased raw materials of the value of \$300,000, of which approximately 40 to 60 percent originated from points outside the State of Alabama. During the same period, the value of sales was approximately \$350,000, all of which were within the State of Alabama. The Company employs a total of approximately 25 employees.⁴

The Company and the A. F. of L. deny that the Board has jurisdiction, on the ground that the Company has not been shown to be engaged in interstate commerce. We have, heretofore, frequently held that such facts as are above set forth are sufficient to confer jurisdiction upon the Board, and we find that the operations of the Company affect commerce within the meaning of the National Labor Relations Act.⁵

II. THE ORGANIZATIONS INVOLVED

United Wholesale & Warehouse Employees Union Local #261, C. I. O. is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership employees of the Company.

³ As an additional ground for its motion to dismiss, the A. F. of L. alleged that there was no evidence that any of the employees of the Company were members of the CIO. In view of the statement of the Field Examiner hereinabove referred to, this contention is manifestly without foundation. See Section III, *infra*.

⁴ The facts above recited are substantially in accordance with a stipulation of the parties.

⁵ *Matter of Poultrymen's Service Corporation*, 41 N. L. R. B. 444, enfd 138 F. (2d) 204 (C. C. A. 3), *Matter of Rudolph and Charles Kudile, Co-partners, doing business under the name of Kudile Bros.*, 28 N. L. R. B. 116, enfd 130 F. (2d) 615 (C. C. A. 3). See also, *Matter of Coca-Cola Bottling Works*, 46 N. L. R. B. 180, *Matter of Durham Pepsi-Cola Bottling Company*, 40 N. L. R. B. 753, *N. L. R. B. v. Suburban Lumber Co.*, 121 F. (2d) 829 (C. C. A. 3) cert den. 314 U. S. 693.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Local 612, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

Several days prior to December 18, 1943, the CIO telephoned the Company advising that it represented a majority of its employees and requested a conference for the purposes of collective bargaining. Thereafter, by letter of December 18, it confirmed this request. The Company, through its attorney, by letter dated December 31, 1943, acknowledged receipt of this letter, advised the CIO of the existence of an outstanding contract with the A. F. of L. and refused to recognize the CIO until the actual bargaining representative has been determined.

The Company and the A. F. of L. entered into a contract to run for a period of 1 year from February 17, 1943, to and including February 17, 1944, with a provision for automatic renewal from year to year thereafter, unless written notice was given by either party 60 days prior to the annual expiration date.

By letter dated December 15, 1943, the A. F. of L. notified the Company of its desire to discuss an increase in wage rates and vacation provisions in accordance with the terms of the contract. Inasmuch as the CIO orally demanded recognition of the Company several days prior to the written request of December 18, 1943, which, itself was presumably received by the Company 61 days prior to the expiration of the February 17 contract, it is apparent that reasonable notice of the claim of representation by the CIO was received by the Company. Furthermore, the request by the A. F. of L. in its letter of December 15, 1943, for a conference for the purpose of discussing wages and vacations, would in any event have the effect of preventing the automatic renewal clause from becoming operative.⁶ We find, therefore, that the contract is no bar to this proceeding.

A statement of a Board agent, introduced into evidence at the hearing, indicates that the CIO represents a substantial number of employees in the unit hereinafter found appropriate.⁷

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.

⁶ *Matter of Anaconda Wire & Cable Company*, 52 N. L. R. B., 1028

⁷ The Field Examiner reported that the CIO submitted 19 authorization cards which bore apparently genuine original signatures. The names of 13 persons appearing on the cards were listed on the Company's pay roll for the period ending December 22, 1943, which contained the names of 19 employees in the appropriate unit. Of the 13 cards, 1 was dated November 1943, 11 were dated December 1943, and 1, January 1944.

IV. THE APPROPRIATE UNIT

It was stipulated by all parties that all production, maintenance, shipping, cleaning, and delivery employees, including truck drivers and helpers in the Birmingham plant of the Company, excluding foremen and supervisors with authority to hire and discharge, and office and clerical workers, constitute an appropriate unit. This unit is substantially the same as that covered by the contract between the Company and the A. F. of L. There are no shipping employees within the conventional meaning of that term, the employees herein involved consisting of truck drivers and helpers employed in the warehouse who load and unload trucks, drive and make deliveries and whose jobs are generally interchangeable.⁸ The one employee designated by the Company as a "shipping clerk" has supervision over these employees, including authority to hire and discharge. He is apparently the sole supervisory employee of the Company.

We find, substantially in accordance with the stipulation of the parties, that all production and maintenance employees, excluding foremen, office and clerical employees, and any 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 means of an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of the Direction of Election herein, subject to the limitations and additions set forth in the Direction.

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 purpose of collective bargaining with Frank L. Thie-monge, doing business as Birmingham Grain Company, Birmingham, Alabama, an election by secret ballot shall be conducted as early as

⁸ The record does not disclose the presence of any employees specifically designated as "cleaning and delivery employees" at the Company's plant, except as stated above.

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 Tenth 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 United Wholesale & Warehouse Employees Union Local #261, C. I. O., or by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 612, A. F. of L., for the purposes of collective bargaining, or by neither.