

In the Matter of B. F. GILMOUR Co., INC. and PLUMBING, HARDWARE, PAINT, ELECTRICAL SUPPLIES & AUTOMOBILE ACCESSORIES EMPLOYEES UNION LOCAL #1146 OF THE RETAIL CLERKS INTERNATIONAL PROTECTIVE ASSOCIATION, AFL and UNITED ASSOCIATION, AFL, BRANCH #2, STEAMFITTERS AUXILIARY LOCAL UNION #638-C

*Case No. 2-RE-59.—Decided March 25, 1944*

*Mr. Bryan F. Gilmour*, of Brooklyn, N. Y., for the Company.  
*Liebowitz & Schuman*, by *Mr. Henry Schuman*, of New York City, for Local 1146.

*Mr. Henry W. Hanick*, of New York City, for Local 638.

*Mr. David V. Easton*, of counsel to the Board.

## DECISION

AND

## DIRECTION OF ELECTION

### STATEMENT OF THE CASE

Upon a petition duly filed by B. F. Gilmour Co. Inc., Brooklyn, New York, herein called the Company, alleging that a question affecting commerce had arisen concerning the representation of its employees, the National Labor Relations Board provided for an appropriate hearing upon due notice before Jack Davis, Trial Examiner. Said hearing was held at New York City on February 2 and 9, 1944. The Company, Plumbing, Hardware, Paint, Electrical Supplies & Automobile Accessories Employees Union, Local #1146 of the Retail Clerks International Protective Association, AFL, herein called Local 1146, and United Association, AFL, Branch #2, Steamfitters Auxiliary Local Union #638-C, herein called Local 638, appeared, participated and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. During the hearing, Local 1146 made a motion to dismiss the petition herein, which the Trial Examiner referred to the Board. For reasons appearing below, the motion is hereby 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:

55 N. L. R. B No. 138.

## FINDINGS OF FACT

## I. THE BUSINESS OF THE COMPANY

B. F. Gilmour Co. Inc., a New York corporation with its principal office and place of business located in Brooklyn, New York, is engaged in the wholesale distribution of pipe fittings, valves, heating equipment, and industrial supplies. During the past year, the Company purchased products for sale at its Brooklyn plant valued in excess of \$1,000,000, 90 percent of which was obtained from points located outside the State of New York. Sales of the Company during this period exceeded \$1,000,000 in value, 15 percent of which necessitated the shipping of merchandise by the Company to points located outside the State of New York.

The Company admits that it is engaged in commerce within the meaning of the National Labor Relations Act, and we find that we have jurisdiction in this proceeding, despite the contention of Local 1146 to the contrary.<sup>1</sup>

## II. THE ORGANIZATIONS INVOLVED

Plumbing, Hardware, Paint, Electrical Supplies & Automobile Accessories Employees Union, Local #1146 of the Retail Clerks International Protective Association and United Association, Branch #2, Steamfitters Auxiliary Local Union #638-C, each is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.

## III. THE QUESTION CONCERNING REPRESENTATION

On May 27, 1937, Local 1146 and Plumbing & Heating Wholesalers' Employers Association, herein called the Association, executed a closed-shop contract covering employees of members of the Association, among whom was the Company. This contract was succeeded by another between the same parties dated February 17, 1939, and by supplemental agreements dated March 7, 1941, and May 15, 1942, each of which extended, with modifications, the 1939 agreement to December 31, 1942. Prior to this last date, Local 1146 presented to the Association certain demands with respect to conditions of employment of the employees of the Association's members, and requested a new contract. These demands were refused by the Association, but it agreed verbally with Local 1146 to an extension of the terms of the existing contract until such time as they could reach a

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<sup>1</sup> Local 1146 contended at the hearing that the Board has no jurisdiction since the Company had had recourse to the processes of the New York State Labor Relations Board which had issued a formal ruling. We find this contention to be without merit.

new agreement. No new agreement had been executed by these parties at the time of the hearing in this proceeding.

Having failed to procure a new written contract from the Association, Local 1146 undertook negotiations with the Company regarding the latter's employees. On or about March 20, 1943, the Company submitted a proposed contract to Local 1146. This contract was discussed at a meeting of the Company's employees held under the auspices of Local 1146, at which time the employees rejected it, and so notified the Company. Thereafter, in May 1943, Local 638 sought recognition from the Company as the bargaining representative of its employees. The Company refused such recognition. Thereupon, Local 638 filed a petition with the New York State Labor Relations Board, herein called the New York Board.<sup>2</sup> On September 15, 1943, the New York Board dismissed the petition of Local 638 on the ground that it presented "a controversy between two labor organizations affiliated with the same parent body." On October 29, 1943, the Company filed the petition in the present proceeding.<sup>3</sup>

On November 10, 1943, the Association and Local 1146 executed an agreement providing for the submission to arbitration of all disputed matters, among which was the controversy between Local 1146 and Local 638 over the representation of employees of members of the Association. On November 23, 1943, a further arbitration agreement was executed by the parties respecting these matters.<sup>4</sup> On December 29, 1943, the arbitrator issued his award, made retroactive to January 1, 1943, stating, *inter alia*, that "the jurisdictional dispute has been withdrawn from the consideration of the arbitrator by agreement of the parties."<sup>5</sup>

In 1937, Local 638 had unsuccessfully attempted to organize the employees of the Company. The record discloses that a dispute existed between Local 638 and Local 1146 with respect to jurisdiction to represent employees in classifications covered by the contract between the Association and Local 1146, each labor organization claiming the right to represent such employees. Between 1938 and 1943 several attempts were made by the labor organizations to settle this dispute, without success. In 1943, at the annual conference of the American Federation of Labor, the parent organization, representatives of the Internationals of the two labor organizations met for the

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<sup>2</sup> Case No. SE-9768 The record does not disclose whether or not both labor organizations appeared in this proceeding although the title of the action includes both their names

<sup>3</sup> Pursuant to an understanding between the Company and the Association, the latter was at all times fully apprised of these matters

<sup>4</sup> Local 638 was not a party to either of these agreements

<sup>5</sup> This award was made subject to the approval of the National War Labor Board, and such approval had not been received as of the date of the hearing herein

purpose of discussing the dispute, but failed to make any arrangements to submit the controversy to the executive council of the parent organization, having decided that the dispute should be settled locally. However, despite subsequent efforts of the labor organizations themselves to adjust their dispute, and the attempts of third parties to do likewise, no settlement was reached. The jurisdictional dispute is still in existence.

Local 1146 contends, in effect, that the combination of the verbal extension of the written agreement which expired December 31, 1942, the written arbitration agreements of November 1943, and the award of December 29, 1943, which was retroactive to January 1, 1943, clearly manifests a contractual relationship between itself and the Association (and the Company as a member thereof), which constitutes a bar to this proceeding. We do not agree. Local 638 asserted its claims of representation and the Company filed its petition with us at a time when no written agreement existed either between Local 1146 and the Association or between Local 1146 and the Company. Under such circumstances, we find that no bar exists to a present determination of representatives.<sup>6</sup>

Nor, under the circumstances here presented, does the fact that a jurisdictional dispute exists between two unions affiliated with the same parent organization warrant a dismissal of this proceeding. The dispute between Local 1146 and Local 638 is one of long duration, and all attempts to settle it by the labor organizations themselves have been unsuccessful. Although the disputants could have presented the controversy to their parent organization for settlement, they failed to do so. In view of these circumstances, the substantial representation shown by both labor organizations among the employees in the unit hereinafter found appropriate,<sup>7</sup> and the fact that the Company filed the petition herein, alleging that a question affecting commerce had arisen concerning the representation of its employees, we are of the opinion that this proceeding is properly before us.

Accordingly, 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.

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<sup>6</sup> *Matter of Gulf Oil Corporation*, 36 N. L. R. B. 1003; *Matter of Ecor, Inc.*, 46 N. L. R. B. 1035. We also note that the representation claims of Local 638 and the petition herein filed by the Company both preceded the arbitration agreements between the Association and Local 1146 and the arbitrator's award which ensued.

<sup>7</sup> A statement of the Board's Field Examiner, introduced into evidence at the hearing, with respect to designations submitted by the labor organization herein, bearing apparently original signatures of persons appearing upon the Company's pay roll of November 18, 1943, indicates that Local 1146 submitted 10 such designations, Local 638 submitted 17 such designations, and that the unit hereinafter found appropriate was then comprised of 20 employees.

#### IV. THE APPROPRIATE UNIT

The parties agree that all manual employees of the Company, including receiving clerks, shipping clerks, counter men, warehouse clerks, pipe cutters, stockmen, packers, and shopmen, properly constitute an appropriate unit.<sup>8</sup> However, the record shows that the Company employs a working foreman in the shop and another in its receiving department, and while it appears that one of these, at least, has authority to make recommendations with respect to hiring and discharging employees under his supervision, it does not clearly appear whether or not his recommendations are accorded effective weight. It further appears, however, that both of these employees had previously been represented with other employees of the Company for the purposes of collective bargaining. In view of the state of the record, the exclusion or inclusion of these two employees will depend upon whether or not they fall within our customary definition of supervisory employees.

We find that all manual employees of the Company, including receiving clerks, shipping clerks, counter men, warehouse clerks, pipe cutters, stockmen, packers, and shopmen, but excluding all 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 find that the question concerning representation which has arisen can best be resolved by an election by secret ballot. At the hearing, Local 1146 contended that eligibility to vote in the election be determined as of June 7, 1943. However, in the absence of any persuasive reason for departing therefrom, we shall adhere to our customary practice, and shall direct that the employees of the Company eligible to vote in the election shall be those 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,

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<sup>8</sup> These classifications are the same as those covered by the contracts between the Association and Local 1146

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 B. F. Gilmour Co. Inc., Brooklyn, New York, 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 Second 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 any 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 Plumbing, Hardware, Paint, Electrical Supplies & Automobile Accessories Employees Union, Local #1146, of the Retail Clerks International Protective Association, affiliated with the American Federation of Labor, or by United Association, Branch #2, Steamfitters Auxiliary Local Union #638-C, affiliated with the American Federation of Labor, for the purposes of collective bargaining, or by neither.