

In the Matter of PUREPAC CORPORATION & KLINZMOTH CHEMICAL CORPORATION and WHOLESALE & WAREHOUSE WORKERS UNION, LOCAL 65, C. I. O.

*Case No. 2-R-4241.—Decided April 17, 1944*

*Mr. Simeon F. Gross*, of New York City, for the Company.

*Messrs. Leonard H. Wacker, Al Bernknopf and Mac Mattis*, all of New York City, for the C. I. O.

*Messrs. Jacques Buitenkant and Arnold Cohen*, of New York City, for the A. F. L.

*Mrs. Platonía P. Kaldes*, of counsel to the Board.

DECISION  
AND  
DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon a petition duly filed by Wholesale & Warehouse Workers Union, Local 65, C. I. O., herein called the C. I. O., alleging that a question affecting commerce had arisen concerning the representation of employees of Purepac Corporation and Klinzmoth Chemical Corporation, New York City, herein referred to collectively as the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Robert F. Koretz, Trial Examiner. Said hearing was held at New York City, on February 28 and 29, 1944. During the course of the hearing, Federal Labor Union, Local #20734, A. F. L., herein called the A. F. L. moved to intervene in the proceedings. The Trial Examiner granted the motion. The Company, the C. I. O., and the A. F. L. appeared and participated. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the hearing the A. F. L. moved to dismiss the petition.<sup>1</sup>

<sup>1</sup> The motion to dismiss was based on three separate grounds: (1) that since there is an existing contract between the A. F. L. and the Company, the Board is deprived of jurisdiction in this proceeding by virtue of the limitation placed upon the expenditure of Board funds in the rider attached to the Appropriation Act of 1944; (2) that the said contract is a bar to a present determination of representatives; and (3) that the unit requested in the petition is not appropriate for the purposes of collective bargaining. The latter two contentions are discussed below. We do not consider the first contention to be of any

The motion was referred to the Board. For the 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. Inasmuch as the A. F. L. and the C. I. O. have filed briefs which adequately discuss the issues, the A. F. L.'s request for oral argument is hereby denied.

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

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE COMPANY

Purepac Corporation is engaged in the manufacture, sale, and distribution of drugs and pharmaceuticals. Klinzmoth Chemical Corporation, a wholly owned and controlled subsidiary of Purepac, is engaged in the sale and distribution of insecticides which are processed by Purepac. The two corporations, a majority of whose officers and directors are the same, are operated as an integrated enterprise. There are some 377 persons employed by them.

During 1943, in the course of its manufacturing operations, Purepac Corporation used chemicals valued in excess of \$100,000, about 90 percent of which was shipped to it from points outside the State of New York. During the same period, Purepac Corporation sold finished products valued in excess of \$100,000, about 80 percent of which was shipped by it to points outside the State of New York, and Klinzmoth Corporation sold insecticides valued at more than \$50,000, about 5 percent of which was shipped to points outside the State of New York.

The Company admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

#### II. THE ORGANIZATIONS INVOLVED

Wholesale & Warehouse Workers Union, Local 65, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

Federal Labor Union, Local #20734, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

#### III. THE QUESTION CONCERNING REPRESENTATION

The Company has had collective bargaining contracts with the A. F. L. for 6 or 7 years. The last of such contracts was executed on

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merit, since the limitation imposed by the rider to the Appropriation Act of 1944 refers specifically to "a complaint case" and not to a representation proceeding. See *Matter of California Door Company*, 52 N. L. R. B. 68.

or about October 1, 1942. This contract, according to its terms, covered all persons employed at the Company's plant, excluding heads of departments, office employees, salesmen, and chauffeurs. By a supplemental agreement between the parties dated March 12, 1943, the contract was expanded to include office employees and salesmen, excluding salesmen employed outside the Metropolitan Area, supervisors, executives and sales managers, and provision was made for a closed shop. The October 1, 1942, contract contains the following provision which the supplemental agreement of March 12, 1943, did not alter:

This agreement . . . shall be in effect from the 1st day of October, 1942, until the 1st day of October, 1943, and shall continue automatically from year to year until either party shall notify the other in writing by registered mail, at least 45 days before the expiration of the then current term that the notifying party elects to terminate the contract at the expiration of the then current term; that if neither party so elects, thirty (30) days prior to the expiration hereof, both parties hereto shall convene to alter, modify, change, extend or renew any or all terms of this agreement.

Sometime in July 1943, the A. F. L., by registered mail, wrote to the Company that it desired to start negotiations for a new contract and set forth demands for substantial changes from the terms of the old contract with respect to wages, hours, and working conditions.<sup>2</sup> The Company and the A. F. L. commenced negotiations pursuant to the above notice on or about August 1, 1943, and continued their dealings until September 17, 1943. Among other things, the A. F. L. requested wage increases for all employees, including the salesmen, and longer vacations with pay. On September 17, 1943, the Company and the A. F. L. executed a written agreement providing that the parties thereto agreed to "renew" the contract "presently existing" for another year, i. e., from October 1, 1943, to October 1, 1944, and that they would cooperate for the purpose of assisting each other in obtaining from the National War Labor Board approval of wage increases.

On September 8, 1943, while the above-mentioned negotiations were in progress, the C. I. O. wrote to the Company, claiming to represent a majority of the sales employees and requesting a bargaining conference. So far as the record shows, the Company did not reply. On September 11, 1943, the C. I. O. filed its original petition herein, and on January 15 and 18, 1944, respectively, it filed amended petitions.

The A. F. L. apparently contends that the contract originally en-

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<sup>2</sup> This letter was not introduced into evidence at the hearing. The president of the Company testified that it was no longer available.

tered into between it and the Company on October 1, 1942, was automatically renewed for another year commencing October 1, 1943, and thus operates as a bar to this proceeding.<sup>3</sup> If this contention is to stand, we must interpret the automatic renewal clause in the 1942 contract as having taken effect, and the September 17, 1943, agreement as a formalization of the terms of renewal. We cannot agree to such an interpretation. From the undisputed evidence that the A. F. L.'s letter to the Company of July 1943 was sent through registered mail, was delivered to the Company more than 45 days before the current term of the then existing contract was about to expire,<sup>4</sup> contained demands for changes from the terms of that contract substantial enough to require extended negotiations between the parties, and actually requested negotiations looking toward the execution of a "new" agreement, we are persuaded that the A. F. L. elected to terminate the 1942 contract in July 1943 and that a new agreement was executed on September 17, 1943, embodying by reference all the terms of the 1942 contract not inconsistent with the new terms reached by the parties.

Since the 1942 contract was terminated and the C. I. O. gave notice of its claim to representation prior to the execution of the new agreement, we find that neither contract constitutes a bar to a present determination of representatives.

A statement read into the record by the Trial Examiner indicates that the C. I. O. and the A. F. L. represent a substantial number of employees in the unit alleged to be appropriate.<sup>5</sup>

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 DETERMINATION OF REPRESENTATIVES

The C. I. O. contends that all salesmen classified on the Company's pay roll as "Metropolitan Salesmen,"<sup>6</sup> excluding supervisors, constitute an appropriate unit. The A. F. L. contends that these employees

<sup>3</sup> See *Matter of Mill B, Inc, et al*, 40 N L R B 836

<sup>4</sup> The timing of the letter and the manner in which it was delivered met the requirements for the 1942 contract's termination

<sup>5</sup> The Trial Examiner stated that the C I O submitted 6 membership application cards, all of which bore apparently genuine original signatures, and 1 membership book, which appeared to be a genuine record of dues payments, that the names of 7 persons appearing on the application cards and membership book were listed on the Company's pay roll of February 25, 1944, which contained the names of 14 employees in the alleged appropriate unit, and that the cards were dated as follows: 4 were dated in February 1943, 1 in March 1943, and 1 in July 1943. The membership book contained an entry dated February 26, 1944, showing payment of dues through that date. The A. F. L. relies on its contract with the Company as evidence of its interest.

<sup>6</sup> The Company also employs another group of salesmen referred to in the record as "country salesmen" who work under different conditions and supervision than the Metropolitan Salesmen. None of the parties contends that this group should be included in the unit.

should be part of a plant-wide unit also embracing the production and office employees. The Company takes a neutral position.

The Company employs 14 Metropolitan Salesmen who work under the immediate supervision of Bander, its vice president. These salesmen sell the Company's products in the Metropolitan New York area, in upper New York State, and in States near New York, such as New Jersey, Pennsylvania, Rhode Island, and Massachusetts. They work under supervision different from that of production and office employees and, unlike the latter groups, spend most of their working time outside the Company's plant. They are paid on a commission basis, whereas production employees are paid on an hourly basis and the office employees on a weekly salary basis. It is apparent that the Metropolitan Salesmen constitute a clearly identifiable, homogeneous group whose working conditions and interests differ substantially from those of the production and office employees.

The collective bargaining history at the Company's plant, so far as the record shows, dates from 1937 when the A. F. L. was recognized as the exclusive representative of all production employees. Although the Company and the A. F. L. have been in continuous contractual relations since that date, the Metropolitan Salesmen were not covered by any collective bargaining contract and were not otherwise the subject of collective bargaining until the spring of 1943.<sup>7</sup> On March 12, 1943, the Company and the A. F. L. executed a supplemental agreement extending the terms of the existing contract to include Metropolitan Salesmen and office employees and providing for a closed shop. On March 13, 1943, the C. I. O. wrote to the Company, claiming that it represented a majority of the salesmen employed in the Metropolitan Area and requesting a bargaining conference. On March 15, the Company replied stating that the Metropolitan Salesmen had already made application for membership in the A. F. L., that the State Mediation Board had ordered the Company to recognize the A. F. L., and that the Company had entered into a contract with the A. F. L. On March 18, the C. I. O. again wrote to the Company, stating that the employees in question had never applied for membership in any labor organization other than the C. I. O., and requesting a bargaining conference. On March 22, a representative of the C. I. O. and several of the Metropolitan Salesmen, conferred with the president of the Company, claimed that the C. I. O. represented a majority of the Metropolitan Salesmen and again re-

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<sup>7</sup> The C. I. O. began to organize the Metropolitan Salesmen in February 1943. On March 3, the A. F. L. wrote to the New York State Mediation Board stating that there was a dispute between it and the Company concerning the salesmen. On March 11, at the office of the State Mediation Board, the Company and the A. F. L. entered into a stipulation setting forth that the Company recognized the A. F. L. as the representative of the Metropolitan Salesmen and office employees; that there existed a contract covering production employees; and that the Company agreed to enter into a closed-shop contract with the A. F. L. covering office employees and Metropolitan Salesmen.

requested collective bargaining. The Company's president replied that he could not grant the request because of the agreement with the A. F. L., whereupon the C. I. O. representative stated that none of the Metropolitan Salesmen had joined the A. F. L.<sup>8</sup> The president of the Company then informed those present that the Metropolitan Salesmen would be discharged unless they joined the A. F. L. Subsequently, the C. I. O. representative advised the Metropolitan Salesmen to sign application cards for the A. F. L. under protest. Although the record does not clearly indicate whether or not these salesmen did in fact sign application cards, it is presumed that they did so.

On March 23, the C. I. O. filed a petition with the Board's Regional Office. On July 23, the Board's Regional Director wrote to the C. I. O. informing it that he refused to issue Notice of Hearing. Between March 23 and July 23, at a series of meetings held at the Board's Regional Offices, and attended by representatives of the A. F. L., the C. I. O., and the Company, the C. I. O. continued to claim representation of the Metropolitan Salesmen.

As was set forth under Section III, above, sometime during July the A. F. L. gave notice to the Company that it elected to terminate the existing contract, and during the ensuing negotiations for a new agreement between the parties, the C. I. O. reasserted its claim as the bargaining agent of the Company's Metropolitan Salesmen.

From the foregoing, it is clear that the inclusion of the Metropolitan Salesmen within the plant-wide contract was of recent date and has apparently been actively resisted both by the C. I. O. and the employees in question. In such circumstances, considering also their homogeneity, we shall permit the Metropolitan Salesmen to express their desires through the means of an election as to whether they shall bargain separately or as part of a plant-wide unit. Consequently, we shall make no final determination of the appropriate unit at this time, but shall direct that an election by secret ballot be held among all employees classified on the Company's pay roll as Metropolitan Salesmen, 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, who were employed by the Company 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, to determine whether they desire to be represented by Wholesale & Warehouse Workers Union, Local 65, affiliated with the Congress of Industrial Organizations, or by Federal Labor Union #20734, affiliated with the American Federation of Labor, for the purposes of collective bargaining, or by neither. Upon the result of this election will depend,

<sup>8</sup> The Metropolitan Salesmen present also asserted that they had not done so.

in part, our determination as to the appropriate unit. If a majority of these employees choose the C. I. O. as their bargaining representative, they will thereby have indicated their desire to constitute a separate appropriate unit. If, however, these employees choose the A. F. L. they will have thereby indicated their desire to be part of the plant-wide unit.

### 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 Purepac Corporation and Khinzmoth Chemical Corporation, 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, 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 all employees classified on the Company's pay roll as Metropolitan Salesmen, 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, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during the 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 Wholesale & Warehouse Workers Union, Local 65, affiliated with the Congress of Industrial Organizations, or by Federal Labor Union, Local #20734, affiliated with the American Federation of Labor, for the purposes of collective bargaining, or by neither.

CHAIRMAN MILLIS took no part in the consideration of the above Decision and Direction of Election.