In the Matter of M. P. MOLLER, INC. *and* CONGRESS OF INDUSTRIAL ORGANIZATIONS

Case No. 5–R–1490.—Decided April 25, 1944

Mr. Sidney J. Barban, for the Board.

Mr. John Wagaman, of Hagerstown, Md., for the Company.

Mr. Ernest Marsh, of New York City, and *Messrs. Abe Klein, Guy Johnson*, and *Robert J. Brylke*, of Hagerstown, Md., for the CIO.

Joseph A. Padway, by *Mr. James A. Glenn*, of Washington, D. C., and *Mr. John Myers*, of Hagerstown, Md., for the AFL.

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

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE.

Upon petition duly filed by Congress of Industrial Organizations, herein called the CIO, alleging that a question affecting commerce had arisen concerning the representation of employees of M. P. Moller, Inc., Hagerstown, Maryland, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Earle K. Shawe, Trial Examiner. Said hearing was held at Hagerstown, Maryland, on March 2 and 3, 1944. The Company, the CIO,[1] and Federal Labor Union No. 21108, affiliated with the American Federation of Labor, herein called the AFL, 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.

During the hearing the AFL moved to dismiss the petition of the CIO on the ground that no question concerning representation had arisen because (1) the CIO had not made a substantial showing of

[1] The CIO signed a waiver of its charges of unfair labor practices filed against the Company in Case No. 5–C–1735, insofar as they might constitute a basis for objecting to the instant proceeding.

representation, and (2) the AFL was party to contracts with the Company which barred a present determination of representatives. Ruling on this motion was reserved for the Board. For the reasons stated in Section III, *infra*, the motion is hereby denied.

The AFL also moved to continue the hearing until such time as the uncertainty surrounding the Company's immediate prospects for giving employment to its full wartime complement of employees was resolved. Ruling on this motion was reserved for the Board. For the reasons set forth in Section V, *infra*, this motion is hereby denied.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

M. P. Moller, Inc., a Maryland corporation, has its principal place of business and only plant in Hagerstown, Maryland, where in normal times it manufactures pipe organs. Since February 1942, the Company has been engaged in the manufacture of airplane wings for the Fairchild Aircraft Corporation, and ground training equipment for the Navy Department. Practically all the raw materials used by the Company are furnished by the Fairchild Aircraft Corporation or are purchased by the Company. During the year 1943, the Company purchased raw materials from outside the State of Maryland of a value of approximately $25,000. During the same period, the value of the Company's finished products was in excess of $2,000,000. Substantially all this production went to the Fairchild Aircraft Corporation or to the Navy Department.

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

II. THE ORGANIZATIONS INVOLVED

Congress of Industrial Organizations is a labor organization admitting to membership employees of the Company.

Federal Labor Union No. 21108, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

By a letter dated January 8, 1944, the CIO advised the Company that it represented a substantial number of the latter's hourly-paid production and maintenance employees and requested a conference for collective bargaining purposes. The Company refused to hold a conference.

The AFL contends that it has contractual relations with the Company which preclude a present investigation and determination of representatives. The record indicates that on October 23, 1937, a consent election was conducted under the auspices of the Board's Regional Director among the Company's production and maintenance employees, in which the AFL was victorious. The AFL and the Company entered into their first collective bargaining agreement on June 25, 1938. Subsequent contracts were signed on November 7, 1939, April 18, 1940, May 3, 1941, March 6, 1942, and March 6, 1943. This last contract provides that it is to be effective for a term of 1 year, and thereafter until changed upon 30 days' written notice by either party. Article VII thereof further provides that terms relating to wages, hours, holidays, vacations, and overtime pay are to be contained in a separate agreement. Immediately after signing the March 6, 1943, contract, the AFL petitioned the National War Labor Board, hereinafter called the W. L. B., on the matter of wages, overtime pay, holidays, and vacations. On November 13, 1943, the W. L. B. issued a directive order which, *inter alia*, granted certain wage increases to the Company's employees retroactive to March 6, 1943. The provisions of the directive were incorporated in an agreement signed by the Company and the AFL on January 3, 1944. This agreement provides that it is to continue for a term of 1 year from the date of its execution, and thereafter until replaced or amended, for which 30 days' written notice is required to be given by one party to the other.

Since the agreement of March 6, 1943, has been in effect for over a year, and is now terminable upon 30 days' notice by either party, it clearly is no bar to a present determination of representatives.[2] Nor can the agreement of January 3, 1944, be regarded as precluding a present determination of representatives despite the fact that it was executed prior to notice of the CIO's claim to representation. As noted heretofore, Article VII of the March 6, 1943, contract specifically provides for a "separate and supplemental" wage agreement such as was signed on January 3, 1944. Likewise, the latter agreement in its preamble states that it was entered into in accordance with Article VII of the March 6, 1943, contract and shall be construed as a wage agreement. The president of the Company testified that the January agreement did not replace the March contract. Moreover, it has been the practice of the Company and the AFL to enter into supplemental wage agreements, as is indicated by separate agreements negotiated on March 6, 1942, and September 5, 1942, for 6-month periods. Finally, as noted above, the W. L. B. directive which was incorporated in the January agreement was made retroactive to March 6, 1943, the

[2] See *Matter of Phelps-Dodge Refining Corporation*, 40 N. L. R. B. 1159, 1161, and cases cited therein.

date of the basic contract. The January 3, 1944, agreement, therefore, must be treated as supplemental to the March 6, 1943, basic contract, and, for the purposes of this representation proceeding, as subject to its termination provisions. Were we to hold the January 3, 1944, agreement, which deals primarily with wages, to be a bar to this proceeding, it is conceivable that the subject matter which may appropriately be dealt with in collective bargaining agreements would be divided among several separate contracts, each of which might have a different termination date, so that the occasion would never arise when there would be no contract in operation to be urged as a bar to the petition of a rival organization. Under such circumstances, the rights of employees to choose new bargaining representatives at reasonable intervals would be defeated.

A statement of a Field Examiner of the Board, introduced into evidence at the hearing, as supplemented by a statement of the Trial Examiner made at the hearing, indicates that the CIO represents a substantial number of employees in the unit hereinafter found to be appropriate.[3] The AFL contends that the CIO has not made a sufficient showing in view of the evidence indicating that the number of employees who would be included in the unit is steadily decreasing. It urges that the CIO does not represent a substantial number of the Company's pre-war employees who will finally constitute the unit if lay-offs continue as company officials predict. It is true that prior to the hearing the Company released many of its employees. However, at the present time, the extent to which the Company's total personnel will be further decreased cannot be foretold with any degree of accuracy. We shall, therefore, rely upon the showing which the CIO made in its proposed unit at the time its designation cards were received and checked by the Board's Field Examiner and the Trial Examiner.

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 parties are in agreement that the appropriate unit should comprise all production and maintenance employees of the Company, including inspectors, truck drivers, watchmen, and leadmen, but excluding executives, office and clerical employees (including those who spend part of their time handling forms in connection with shipments), employees in the retail music store, out-of-town employees who install,

[3] According to the statements, the CIO submitted 381 application for membership cards. Of these cards, 271 bore signatures which were the names of persons whose names appeared on the Company's pay roll of January 29, 1944, which listed 721 employees in the unit alleged to be appropriate. The AFL relies upon its contracts to show its interest.

tune, and service organs, the engineering staff, draftsmen, nurses, guards, managers, superintendents, assistant superintendents, and the chief inspector. The Company and the CIO would also exclude foremen, assistant foremen, and assistant chief inspectors, whereas the AFL would include them in the unit.

Beginning with the 1942 contract, the AFL has bargained collectively for foremen, assistant foremen, and assistant chief inspectors. This date coincides with the expansion in the Company's personnel which resulted from the change-over from peacetime to wartime production. Prior thereto, the Company had no assistant foremen or assistant chief inspectors. The president of the Company stated that while the Company originally was willing that the AFL bargain for the above employees, it is now of the opinion that the results of such bargaining warrant their exclusion.

The record is clear that the employees in question exercise supervisory powers which affect the status of other employees. Thus, the foremen are immediately under plant superintendents, and have the power to discipline and effectively to recommend hiring and discharging. In addition, they fill out efficiency forms and other employee records. The assistant foremen act as foremen in the absence of the latter. They also effectively recommend hiring and discharging. They are engaged in production work from 15 to 75 percent of their time as daily circumstances vary. The assistant chief inspectors report to the chief inspector, and in his absence they are directly responsible for the work of inspectors. They have authority effectively to recommend discipline, promotion, hiring, and discharging of inspectors. On the average, one-half of their time is devoted to supervision and one-half to inspection activities.

In *Matter of The Maryland Drydock Company*,[4] the Board held that supervisors could not constitute an appropriate unit within the scope of the Act, except in crafts having a history of such bargaining. While it can be said that the Company has a history of collective bargaining as respects certain of its supervisory employees, nevertheless, it was not the intent of our decision in the *Maryland Drydock* case to provide that isolated short-term instances of collective bargaining history on behalf of supervisory employees could serve to remove the affected employees from the application of the doctrine enunciated therein. Here, the record does not indicate that bargaining for foremen, assistant foremen, and assistant chief inspectors is typical of the unions interested in organizing the organ industry or the airplane parts industry. We shall, therefore, exclude foremen, assistant foremen, and assistant chief inspectors from the

[4] 49 N. L. R. B 733.

unit as supervisory employees, within the meaning of the *Maryland Drydock* decision.

We find that all production and maintenance employees of the Company, including inspectors, truck drivers, watchmen, and leadmen, but excluding executives, office and clerical employees (including those who spend part of their time handling forms in connection with shipments), employees in the retail music store, out-of-town employees who install, tune, and service organs, the engineering staff, draftsmen, nurses, guards, managers, superintendents, assistant superintendents, the chief inspector, foremen, assistant foremen, assistant chief inspectors, 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 period immediately preceding the date of our Direction of Election herein, subject to the limitations and additions set forth therein.[5]

As has been indicated heretofore, there is a possibility that the employment rolls of the Company will be cut drastically in the near future. If this event occurs it will be the result of reconversion from war activities to peacetime production, in which the 590 production and maintenance employees at the date of the hearing would be reduced in number to between 125 and 150. The AFL contends that since this possibility exists, no election should be held until it has materialized or has been eliminated.

Inasmuch as the record indicates that the future employment plans of the Company are by no means definitely established, we shall not postpone the election hereinafter directed and thereby deprive the employees of a present opportunity to choose a collective bargaining representative. However, when it is demonstrated that the Company's personnel has been cut to its pre-war size by reconversion from war to peacetime production, and that this, together with other appropriate circumstances, warrants a redetermination of representatives or of the appropriate bargaining unit, a new petition for the investigation and certification of a collective bargaining representative may be filed with the Board.

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[5] The CIO urges that eligibility to vote be determined by a pay-roll period nearest the date when its petition was filed, in view of the anticipated decrease in personnel. We find no merit to this request since our usual date for determining eligibility will more accurately provide for a reflection of the desires of the employees still retained by the Company at the time of the election

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 M. P. Moller, Inc., Hagerstown, Maryland, 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 Fifth 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 Congress of Industrial Organizations, or by Federal Labor Union, Local 21108, AFL, for the purposes of collective bargaining, or by neither.[6]

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

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[6] The CIO and the AFL expressed preferences at the hearing that their respective names appear on the ballot as set forth in the Direction of Election.