In the Matter of DOSSIN'S FOOD PRODUCTS *and* DAIRY, BAKERY, CEREAL AND FOOD WORKERS DIVISION OF UNITED RETAIL, WHOLESALE AND DEPARTMENT STORE EMPLOYEES OF AMERICA, C. I. O.

Case No. 7–R–1699.—Decided May 20, 1944

Mr. Fred A. Schopp, of Detroit, Mich., for the Company.

Messrs. Nicholas J. Rothe and *George Worrall*, of Detroit, Mich., for the C. I. O.

Padway and Goldberg, by *Mr. I. E. Goldberg*, of Milwaukee, Wis., and *Messrs. Bert Brennan* and *James Hoffa*, of Detroit, Mich., for the Teamsters.

Mr. William R. Cameron, of counsel to the Board.

DECISION
AND
DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon petition duly filed by Dairy, Bakery, Cereal and Food Workers Division of United Retail, Wholesale and Department Store Employees of America, C. I. O., herein called the C. I. O., alleging that a question affecting commerce had arisen concerning the representation of employees of Dossin's Food Products, Detroit, Michigan, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Robert J. Wiener, Trial Examiner. Said hearing was held at Detroit, Michigan, on March 21, 1944. On April 17, 1944, the Board directed that the record be reopened for the purpose of adducing additional evidence relating to the present showing of interest of the petitioning union, and the nature and currency of the labor dispute. In accordance with such order, a further hearing upon due notice was held at Detroit, Michigan, on April 25, 1944, before said Trial Examiner. At each of said hearings the Company, the C. I. O., and Local Union No. 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., herein called the Teamsters, appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the hearing the Teamsters moved to dismiss the pe-

tition on the ground that a contract between the Teamsters and the Company constitutes a bar to a present determination of representatives. The Trial Examiner reserved ruling for the Board. For reasons hereinafter appearing this motion is hereby denied. The Trial Examiner's rulings made at the hearings herein 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, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Dossin's Food Products is a Michigan corporation having its principal office and place of business at Detroit, Michigan, where it is engaged in the business of manufacturing carbonated beverages. The Company also has plants located at Grand Rapids, Michigan, and Toledo, Ohio. A considerable portion of the soft drinks manufactured by the Company are made by it under franchises from companies located in the States of Georgia and New York. During 1943 the Company purchased raw materials, consisting of sugar, flavor, syrup, carbonic gas, and water, amounting in value to approximately $3,000,000, of which more than 50 percent was obtained from points outside the State of Michigan. Approximately 73 percent of the raw materials purchased was for use at the Detroit plant. During 1943 the Company sold finished products amounting in value to approximately $5,500,000. None of the Company's products was delivered from the Company's Detroit, Michigan, plant to points outside the State of Michigan. The Company maintains a sales office in its plant located in Toledo, Ohio. We find that the Company is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

Dairy, Bakery, Cereal and Food Workers Division of United Retail, Wholesale and Department Store Employees of America is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership employees of the Company.

Local Union No. 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

On February 11, 1941, the Company and the Teamsters entered into a written closed-shop contract, effective until March 1, 1944, with pro-

vision for automatic renewal for 1 year in the absence of written notice to terminate given by either party not less than 30 days prior to its expiration date.[1] By letter dated February 1, 1944, and received by the Company on February 3, 1944, the C. I. O. notified the Company of its claim to represent the Company's employees and requested recognition as their exclusive bargaining agent. The Company refused to grant such recognition, stating that it was precluded from doing so by its existing contract with the Teamsters. The Teamsters, as stated above, contends that such contract is a bar to a determination of representatives in this proceeding.

The record indicates that during the summer of 1943, there was considerable defection from the Teamsters among the employees, and during the month of July 1943, a meeting was held, attended by a majority of the Company's regular employees and by representatives of the Teamsters, at which time it was voted unanimously to withdraw from the Teamsters and to affiliate with the C. I. O. The employees were thereafter advised, however, by representatives of the C. I. O. that the C. I. O. would not accept them into membership during the remainder of the term of the Teamsters' contract. While the Company at the hearing disclaimed knowledge of this action on the part of a majority of its employees, we find, on the basis of the credible testimony of John Cook and James Kefgen, that Walter Dossin, the Company's president, in August or September 1943, stated at a meeting of employees that he was aware of the shift in their allegiance.

On January 11, 1944, a representative committee of the Teamsters, in conference with the Company's president, Walter Dossin, was told by him that he was through with the contract and that when it expired he wanted no further contract with any labor organization. This was reported to a regular meeting of the Teamsters, on the same date, and approximately a week later a special meeting, attended by only 11 employees, was held by the Teamsters at which the members present voted for continuation of the contract.[2] By letter dated January 25, 1944, the Teamsters notified the Company of the action taken at this meeting, and requested extension of the contract. The Company, by letter dated January 27, 1944, replied that after due consideration it had decided to accept the extension.

On January 28, 1944, John Cook and Peter Spickenagel, employees brought to the Company's office petitions bearing the signatures of approximately 71 of the Company's employees, in substance requesting the Company to terminate the contract with the Teamsters as of its

[1] This contract was amended on July 25, 1941, by a supplementary agreement in writing, amending the closed-shop provision and adding a check-off provision The amendment, however, did not alter either the term of the contract or its provision for automatic renewal.

[2] It appears that at the time a vote was taken on continuation of the contract only nine employees were in attendance.

expiration date, and to cease deducting monthly dues on behalf of the Teamsters, and notifying the Company that the employees would refuse to work under the contract after the month of February 1944. Accompanying the petitions was a letter which these employees requested the Company to send to the Teamsters to serve as written notice of termination of the contract according to its terms. Although neither the petitions nor the letter contained reference to employee affiliation with the C. I. O. or of claims to representation by that Organization, we find on the basis of the credible testimony of both Cook and Spickenagel, that Cook, in conversation with Roy Dossin, the Company's secretary-treasurer, informed him, at the time the petitions were presented, that the petitions were attributable to employee affiliation with the C. I. O.[3]

On February 28, 1944, a strike occurred in the Company's plant, caused by disaffection among the employees with the Teamsters' representation. The immediate cause of the strike was the prospective discharge, by virtue of the closed-shop contract, of four employees who had been active in behalf of the C. I. O.[4] At that time the great majority of the Company's employees went out on strike; although some have since returned to work, a majority of the strikers have remained on strike. Since the latter part of March 1944, employee picketing about the Company's plant has been continuous. On April 25, 1944, the strikers offered unconditionally to return to work; but this offer was rejected by the Company.

Upon the basis of the facts above set forth, the Teamsters contends that inasmuch as formal notification of the representation claims of the C. I. O. was not given the Company until after the operative date of the contract's automatic renewal provision and subsequent to the exchange of correspondence affirming such renewal, the contract constitutes a bar. With this contention we cannot agree. Only in the absence of other factors sufficient to place the parties upon notice that a question concerning representation exists, has the Board held untimely the representation claim of a labor organization made subsequent to the effective date of the automatic renewal provision of a contract.[5] Where, as here, the employees themselves, by timely action, disclose the loss of majority status by the contracting union, and a substantial number make plain their intention to be represented by

[3] At the hearing Roy Dossin denied that at the time of presentation of the petitions any mention was made by either Cook or Spickenagel of C. I. O affiliation. We do not credit this testimony.

[4] The record discloses that approximately 4 days prior to February 28, the Teamsters, by letter to the Company, requested the discharge of these four men. Walter Dossin, the Company's president, had left word for these four employees to wait in his office when they came to work on the morning of the 28th; when he arrived at his office on that day, the strike had commenced. Dossin read the Teamsters' letter to the four employees and thereupon discharged them.

[5] See *Matter of Mill B, Inc.*, 40 N. L R. B. 346.

another union, a present determination of representatives is not precluded merely because the union by which they seek to be represented fails to notify the company of its claim prior to the automatic renewal of the existing contract. As we recently pointed out, it is not only the contracting union that enjoys the prerogative of terminating a collective bargaining contract; the employees themselves can achieve the same result by evincing an intent to choose a new bargaining representative.[6] In the instant case, the desire of a majority of the employees to transfer their affiliation from the Teamsters to the C. I. O. was clearly evidenced to the Company by the disaffiliation vote taken at the employees' meeting in July of 1943, referred to above. While it is true that the petitions presented to the Company on January 28 bore the signatures of slightly less than a majority of the Company's employees within the appropriate unit,[7] such presentation was accompanied by a request that the Company transmit to the Teamsters a prepared letter stating that "Upon the request of the employees of the Dossin's Food Products Company," the Company did not desire or intend to continue the existing contract, and by oral notice that the employees desired to be represented by the C. I. O.

We believe the inference to be drawn from the foregoing events to be plain: that the Company was apprised by knowledge of the vote taken in July 1943, and by the petitions, the letter, and the statements made by the employee delegates who presented them on January 28, 1944, that a claimed majority of its employees desired to terminate the Teamsters' representative status and to designate the C. I. O. as their bargaining agent. Had a claim to majority representation been made by the C. I. O. on January 28, supported by a representation showing of considerably less than a majority, such a claim, particularly in view of the closed-shop provision of the contract, clearly would have been sufficient to render the renewal clause of the contract ineffective as a bar. We perceive no reason for reaching a different result where a claimed majority of the employees on their own behalf place the employer on notice, prior to the renewal date, of their desire to discharge the contracting union and select a new representative, where that representative promptly thereafter initiates proceedings before the Board. Although it may be conceded that the controversy here presented would in large part have been avoided had the C. I. O. made its formal claim to representation in advance of the renewal date of the contract, we cannot permit this technical oversight to deprive the employees of the right to express their desires as to representation in an

[6] See *Matter of The Van Iderstine Company*, 55 N L R B. 1339.

[7] It was testified by Walter Dossin that during January 1944 the Company had on its pay roll of regular employees 157 drivers, production employees, and warehousemen. In the light of this figure, it appears that the number of signatures to the petitions constituted approximately 45 percent of the employees within the unit

election. As we have frequently stated, the Board in exercising its discretion as to the effect to be given to a collective bargaining agreement in a representation case, must balance the interest in the stability essential to encourage the practice and procedure of collective bargaining and the sometimes conflicting interest in the freedom of employees to select and change their representatives.[8] In the instant case, we think it plain that the latter interest is the more important and that no stable and peaceful relations would be achieved by dismissing the petition. Accordingly, we find that the contract does not constitute a bar to a present determination of representatives.

A statement of the Field Examiner introduced in evidence at the hearing, indicates that the C. I. O. represents a substantial number of employees in the unit hereinafter found appropriate.[9]

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 agree that the appropriate unit should comprise all driver-salesmen, delivery men helpers for driver-salesmen, helpers for delivery drivers, inside production shop help, warehouse and dock employees, and maintenance employees, employed by the Company at its Detroit, Michigan, plant, including regular part-time employees, but excluding casual employees, and employees having supervisory status within the Board's customary definition. The parties disagree, however, with respect to plant-protection employees, whom the C. I. O. seeks to include.

The record discloses that there are two plant-protection employees, one of whom serves as watchman in the Company's office during the daytime, occasionally drives a company car on errands, and performs other services for company officials; he is uniformed and at times armed. The other plant-protection employee patrols the plant and company garage at night, and also serves as a cashier who receives the money brought in by drivers upon completion of their routes after 6 o'clock in the evening. In view of the nature of their duties, it appears that they do not possess sufficient interests in common with the drivers, warehousemen, and production employees to warrant their inclusion

[8] *Matter of The Trailer Company of America*, 51 N L R B 1106

[9] The Field Examiner reported that the C I O submitted 133 application cards, 63 being undated and the balance dated from January through March 1944, of which 104 bore the names of persons whose names appeared on the Company's pay roll of February 9, 1944, containing 178 names within the unit claimed to be appropriate by the C. I. O.

The Trial Examiner, at the reopened hearing, reported that the Company had furnished a list of persons employed by it within the appropriate unit as of April 24, 1944, consisting of 67 names, and that of authorization cards submitted by the C. I. O., 20 bore the names of persons whose names appeared on said list, 13 of the cards appearing on such list being undated, 2 dated in January, and 5 in February 1944

within the unit. We shall, therefore, exclude the plant-protection employees.

We find that all driver-salesmen, delivery men helpers for driver-salesmen, helpers for delivery drivers, inside production help, warehouse and dock employees, and maintenance employees, employed by the Company at its Detroit, Michigan, plant, including regular part-time employees, but excluding casual employees, plant-protection employees, and 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. The C. I. O. contends that eligibility to vote should be determined by reference to the pay roll for the period preceding February 28, 1944, the date the strike occurred, thus excluding persons hired to replace the striking employees. With regard to the eligibility of the strikers, it is clear, and we find, that their work ceased as a result of a labor dispute which is still current and that they are, therefore, employees of the Company within the meaning of Section 2 (3) of the Act. Under the Board's established policy, both strikers and replacement employees are eligible to vote.[10] However, we shall exclude from participation in the election those replacement employees hired after April 25, 1944, the date on which the strikers offered unconditionally to return to work. In refusing to reinstate the strikers, the Company made no contention that jobs were not available; the only explanation tendered for such refusal was that it would not do so without the approval of the Teamsters which, in turn, had conditioned its approval of the Company's reinstatement of the strikers upon the prior withdrawal of the C. I. O.'s petition herein. Upon making an unconditional offer to return to work, the striking employees thereby acquired a right to available jobs which, for the purposes of determining eligibility to vote, is superior to the right of employees first hired after the unconditional offer.[11] Accordingly, we shall, subject to the limitations and additions set forth in the Direction, direct that persons eligible to vote in the election hereinafter directed shall be all those employees who were in the employ of the Company during the pay-roll period immediately

[10] See *Matter of Rudolph Wurlitzer Company*, 32 N. L. R. B. 163; *Matter of Ideal Seating Company*, 36 N. L. R. B 166.

[11] See *Matter of Kellburn Manufacturing Company, Inc*, 45 N. L. R. B. 322.

preceding April 25, 1944, including employees who were on strike during said pay-roll period, and excluding persons hired thereafter.

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 Dossin's Food Products, Detroit, Michigan, 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 Seventh 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 April 25, 1944, including employees who went on strike and 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 employees hired since April 25, 1944, and those 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 or not they desire to be represented by Dairy, Bakery, Cereal and Food Workers Division of United Retail, Wholesale and Department Store Employees of America, affiliated with the Congress of Industrial Organizations, or by Local Union No. 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, affiliated with the American Federation of Labor, for the purposes of collective bargaining, or by neither.

MR. GERARD D. REILLY dissenting:

The old maxim that "hard cases make bad law" is well illustrated by the decision of the Board in the instant case. From the beginning of the administration of the Labor Relations Act it has been the practice of this Board to give full effect to all the provisions of contracts lawfully made between employers and the duly recognized bargaining representative. Although the Act provides that a majority of employees may select their own representative, it has never been thought that the right to change representatives could be exercised during a contract term unless a claim for other representation was made before

the effective date of the new contract. In the Mill B case,[12] decided more than 2 years ago, the Board reiterated this doctrine in a case in which the Board dismissed a petition based upon a competing claim of representation not made until after the beginning of the automatic renewal period, on the ground that failure to give notice of a desire to change representatives in advance made the existing contract a bar to a new election.[13] We have adhered rigidly to this rule, even where the claim of the petitioning union was only 24 hours late,[14] or where notice of a proposed amendment was made well in advance of the begining of the new contract term, but too late to comply with the strict provisions of the contract.[15] On the other hand, where the contract has not contained 30-day or 60-day notice clauses, we have given full effect to the legal right of the employees to give notice of change of representatives up until the very last date of the contract, even though new contracts had been negotiated in advance.[16]

Despite occasional protests in these close situations, these rules have worked well. They are understood by employer and labor groups and they are applied by regional offices in hundreds of cases which never reach the full Board. In the explosive field of labor relations, where a board of this character is continuously open to the charge of partisanship, it is especially important that the rules relating to representation are simple, easily understood, and administered uniformly in all cases, irrespective of sympathetic circumstances in a particular situation.

On the record before us, it may be conceded that on the facts a showing has been made that a substantial number and, possibly, a majority of the workers in this plant now desire the petitioning union as their bargaining representative. Nevertheless, the inexorable fact remains that it was not until February 3 that this company received from the petitioning union any notice of its assertion that it should be recognized by the company as the exclusive bargaining agent of its employees. Four days earlier the contract with the Teamsters had automatically renewed itself for another year beginning March 1, 1944. Consequently, under our well established rules of decision we have no other course open to us but to dismiss the petition. The opinion directing the election glosses the fact that this direction departs from

[12] 40 N L R B 346

[13] In the majority opinion in this case, the Board overruled one decision which was apparently an aberration from the normal rule The only limitations upon the *Mill B* doctrine are well recognized and have been confined to four types of cases: (1) Contracts for an indefinite term (*Trailer Company of America*, 51 N. L. R. B. 1106); (2) contracts for an unreasonable duration (*Inland Container Corp*, 47 N. L R B 952); (3) contracts with a labor organization which has disintegrated (*International Engineering Works, Inc!*, 49 N. L R. B. 1129); (4) contracts with respect to which a doubt has arisen as to the legal identity of the bargaining representative (*Brenizer Trucking Co.*, 44 N. L. R. B 810).

[14] *Cleveland Container*, 47 N L. R. B. 1309.

[15] *Matter of Borg-Warner*, 56 N. L. R B. 105.

[16] *Matter of Ercor, Inc.*, 46 N. L. R B. 1035; *Matter of Kimberley-Clark Corporation*, 55 N L R. B. 521; *Matter of Foster-Grant Co., Inc.*, 54 N. L. R. B. 802.

the *Mill B* rule by dwelling at some length upon the fact that a majority of the employees went on strike after the Teamsters' contract was renewed, and that there was evidence of employee dissatisfaction with the Teamsters' contract prior to the time of the renewal. I do not see how either circumstance should be given any weight. Certainly petitioning unions which declare strikes in wartime should not be accorded better treatment than unions which rely solely upon the orderly procedures of this Board. Moreover, evidence of dissatisfaction with a contracting union, unless a majority of the employees serve notice upon an employer that they no longer desire their present bargaining representative to continue, has never been deemed a revocation of the authority of the bargaining agent.[17] And even a petition by a majority group directed against a contracting union, but not designating any representative of their own, has been held not sufficient to raise a question of representation.[18] The *Van Iderstine* case,[19] cited in support of a contrary view, merely emphasizes the general rule. There, departmental representatives selected by the employees in the various departments informed the employer in advance of the automatic renewal date that the employees did not wish to be represented again by the contracting union and a petition had actually been signed by a majority of the employees to this effect. In the case at bar, the petition directed against the contracting union was signed by only a minority, and the spokesmen for the petitioners (even if we take their testimony at its face value) did not advance any claim of counter representation to their employer, but simply stated that "we had joined the CIO and they were our future representative."

I therefore must dissent to this decision, for I think it will introduce chaos into the law of representation.

[17] See *Medo-Photo Supply Corp.* v. *N. L R. B.*, 321 U. S. 678.
[18] *Tabardrey Manufacturing Company*, 51 N. L. R. B. 246.
[19] *Matter of The Van Iderstine Company*, 55 N. L. R. B. 1339.