In the Matter of THE AMERICAN BRASS COMPANY AND THE KENOSHA BRASS COMPANY *and* INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS, C. I. O.

Case No. 13–R–2410.—Decided June 23, 1944

Shaw, Muskat & Paulsen, by *F. H. Prosser*, of Milwaukee, Wis., for the Company.

Mr. Patrick J. O'Neill, of Waterbury, Conn., for the CIO.

Messrs. Alfred G. Goldberg and *David Sigman*, both of Milwaukee, Wis., for the AFL.

Mr. Glenn L. Moller, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon a petition duly filed by International Union of Mine, Mill & Smelter Workers, C. I. O., herein called the CIO, alleging that a question affecting commerce had arisen concerning the representation of employees of The American Brass Company, Kenosha, Wisconsin, herein called American,[1] the National Labor Relations Board provided for an appropriate hearing upon due notice before Robert T. Drake, Trial Examiner. Said hearing was held at Kenosha, Wisconsin, on May 25, 1944. The Companies, the CIO, and Brass and Copper Workers Federal Labor Union Local #19322, herein called the AFL, 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. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Both the AFL and the Companies moved to dismiss the petition. For the reasons appearing hereinafter, the motions are denied. All parties were afforded an opportunity to file briefs with the Board.

[1] At the hearing the CIO amended its petition so as to include, as an employer, Kenosha Brass Company, herein called Kenosha. Both concerns will hereinafter jointly be referred to as the Companies.

On May 11, 1944, pursuant to the provisions of Section 8 (a) of the War Labor Disputes Act,[2] the A. F. L. gave notice of a labor dispute involving the Company and its employees. On June 12, 1944, acting pursuant to Section 8 (a), subsection 3, of the War Labor Disputes Act, this Board conducted a vote by secret ballot among the Company's employees. The issue specified on the ballot was the "Demand of (the A. F. L.) that the National Labor Relations Board dismiss the petition for certification as the exclusive bargaining representative for certain employees of" the Companies, filed by the C. I. O. The ballot also set forth the status of the instant proceeding before this Board. The results of such balloting, as certified by an order of the Board, showed that, of 2,156 eligible voters, 1,508 cast valid ballots, of which 1,219 were in favor of permitting an interruption of war production and 289 opposed to such interruption.

Since the aforesaid proceedings the Board has received from the AFL several communications in the nature of motions, demanding that the Board dismiss the petition herein in order to avert the threatened strike. We are constrained to deny these motions. As we pointed out in the *Allis Chalmers* case,[3] where a similar issue was presented, the Board's exercise of its discretion, conferred upon it in the National Labor Relations Act, to determine whether and when it will proceed with an investigation and certification of representatives, is not controlled by the outcome of strike ballots conducted under the provisions of the War Labor Disputes Act. We find in Section III, *infra*, that a question concerning the representation of the Companies' employees has arisen, and we conceive it to be our statutory duty to direct that that question be resolved by an election by secret ballot. The Board cannot permit itself to be influenced in the performance of its duty under the Act by strikes, threats of strikes, or other forms of pressure. The AFL's motion to dismiss the petition on this ground are hereby denied.

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

Findings of Fact

I. THE BUSINESS OF THE COMPANY

American Brass Company is a Connecticut corporation, a subsidiary of Anaconda Copper Mining Company. American Brass Company operates a plant at Kenosha, Wisconsin. Immediately across the street from American's plant is the plant of Kenosha Brass Company, a wholly owned subsidiary of American Brass Company. These two plants are operated as a single unit, having the same central supervision and frequently interchanging employees. Copper, zinc, tin,

[2] Public Law 89, 78th Congress, Chapter 144, 1st Session.
[3] *Matter of Allis-Chalmers Manufacturing Company*, 52 N. L. R. B. 100.

manganese, lead, and other materials are used at both plants. During the year 1943 American Brass Company produced 227 million pounds of products, valued at $48,000,000. Kenosha Brass Company produces wholly for the United States Army, and did a substantial business in the year 1943. Almost all of the latter's products are shipped from the Company's Kenosha plant to points outside the State of Wisconsin. Thirty percent of American's finished products is shipped from its Kenosha plant to points outside the State of Wisconsin.

We find that the Companies are engaged in commerce and that they jointly constitute an employer within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

International Union of Mine, Mill and Smelter Workers, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

Brass and Copper Workers Federal Labor Union #19322, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

On or about March 30, 1944, the CIO wrote to American requesting recognition. On May 12, 1944, that company replied, refusing such recognition. No mention was made in this correspondence of the existence of Kenosha. At the hearing the Companies contended that the CIO's notice was defective because it had failed to mention Kenosha; that the AFL's contract with the Companies renewed itself on April 11, 1944; and that the contract is therefore a bar to a present determination of representatives.[4] We find no merit in this contention. The officials of the two Companies are the same persons, and the main office of American services both Companies. Since 1940 the employees of both have been treated as a single unit for bargaining purposes. Furthermore, by the time of American's reply to the

[4] The contract relied upon by the AFL was dated May 11, 1942, and by its terms was to be for a period of 1 year, with an automatic yearly renewal clause. In addition, however, the contract provided that if either party, at least 30 days prior to the expiration of any yearly period, gave notice of desire to amend or terminate the contract, the parties were to negotiate a new contract, and that if no agreement was reached before the end of the contract period, then the "entire agreement shall terminate and come to an end as of that date." In 1943, the parties were unable to reach an agreement on proposed changes and were forced to submit their disagreement to the War Labor Board. It is clear, therefore, that the contract actually terminated in 1943, as no agreement was reached before the end of the contract period. Since the parties have not executed a new contract since the expiration of the afore-mentioned one, it is apparent that the parties have been operating ever since under a mere oral arrangement. Furthermore, since the CIO's notice was sent to the Companies 10 days before the automatic renewal date, even if the contract had continued to remain in force, it would still be no bar to this proceeding.

CIO's request, that company had in its possession a copy of the CIO's petition, filed April 11, which indicated that the appropriate unit contained approximately 2,500 employees, slightly more than the total personnel of both plants. It is clear, therefore, that the Companies knew at the time American refused to recognize the CIO that the CIO was claiming to represent the employees of both Companies. At the hearing, it was admitted that Kenosha, as well as American, would have refused to recognize the CIO if its request had been directed to both Companies.

The Companies and the AFL also urge that the petition should be dismissed on the ground that there is presently pending before the National War Labor Board a dispute with reference to certain working conditions and that this Board should therefore refuse to take jurisdiction in this proceeding. The theory of the Companies and the AFL appears to be that the situation should be governed by this Board's decision in the *Allis-Chalmers* case.[5] In that case we held that a newly certified representative was entitled to a reasonable opportunity to obtain the benefits of certification and that where reasonable efforts were made to procure a collective bargaining contract immediately after certification but resulted in a deadlock and the dispute was then referred to the War Labor Board, with the result that a formal contract was not entered into until after the claim of the rival union, the contract should be treated as a bar to a new determination of representatives. Such, however, is not the situation in the instant case, for the AFL has been the exclusive bargaining representative of the employees for 10 years and has, therefore, had ample opportunity to obtain the benefits of collective bargaining for the employees. We have already held that such circumstances clearly present a different situation from that presented by the *Allis-Chalmers* case.[6] We reaffirm our decisions in those cases and find that they are controlling in the instant proceeding. The motions of the Company and the AFL to dismiss on this ground are denied.

A statement by 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.

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[5] *Matter of Allis-Chalmers Manufacturing Company*, 50 N. L. R B 306

[6] See *Matter of Foster-Grant Co , Inc ,* 54 N L R. B. 802; *Matter of International Harvester Company,* 55 N L. R B. 497, and cases therein cited.

[7] The Board agent reported that the CIO submitted 752 application-for-membership cards, bearing apparently genuine original signatures, and that there are approximately 2100 employees in the appropriate unit.

IV. THE APPROPRIATE UNIT

The parties are agreed that the appropriate unit should conform to the unit covered by the past contracts between the AFL and the Companies, and should include all hourly-paid employees of both Companies, excluding watchmen,[8] armed guards, salaried employees, main office employees, members of the machinists' craft, foremen, assistant foremen, 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. They are further agreed that there should be included in the unit thus described shift foremen, subforemen, working foremen, weighers, and shop or department clerks.

Except as to the shift foremen, subforemen and working foremen, we see no reason to depart from the unit proposed by the parties, which is, essentially, a unit of production and maintenance workers. The weighers and department clerks are all hourly paid, have the same working hours as production employees, receive the same vacations as production employees, work in small department offices located adjacent to the departments, and are under the supervision of the department heads.[9] All of the salaried non-supervisory employees have different working hours, receive longer vacations, and are located in the main office, where they seldom come in contact with the production employees. The AFL has represented all hourly paid employees, including weighers and the shop or department clerks, during its entire 10-year bargaining history.

Subforemen, shift foremen, and working foremen are hourly paid employees. According to the testimony of the superintendent and assistant superintendent of the plants, these employees have authority effectively to recommend transfer, discharge, or discipline of employees. On the other hand, the record reveals that these employees have nearly all been members of the AFL, some of them being stewards actively participating in the presentation of grievances on behalf of employees, and that some of them have authority effectively to recommend disciplinary action while others do not. We shall therefore make no finding with respect to these employees as separate employment categories.[10]

The machinists in the Companies' employ are represented by the International Association of Machinists and all parties are agreed

[8] There are only three watchmen. They are superannuated employees who are paid for past services rather than for work done at the present time, and are regarded as pensioners

[9] The weighers and department clerks include promise clerks, promise clerk-time checkers, outside scalemen-clerks, mill clerks, clerk-time checkers, inside weighers, outside weigher-clerks, weighers

[10] See *Matter of Victor Chemical Works*, 52 N. L. R. B. 194.

that they should be excluded from the appropriate unit. We shall exclude them.

We find that all hourly paid employees of the Companies at their plants in Kenosha, Wisconsin, including all weighers, and all clerks employed in the department offices, but excluding watchmen, guards, salaried employees, members of the machinists' craft, main office employees, foremen, assistant foremen, 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 the Direction of Election herein, subject to the limitations and additions set forth in the Direction.

The Company urges that the CIO local, rather than the International, be designated on the ballot. The International, however, is the petitioner in the proceeding and wishes to be so designated on the ballot. We shall place the International on the ballot.

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 The American Brass Company and Kenosha Brass Company, Kenosha, Wisconsin, 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 Thirteenth 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 International Union of Mine, Mill and Smelter Workers, affiliated with the Congress of Industrial Organizations, or by Brass and Copper Workers, Federal Labor Union #19322, affiliated with the American Federation of Labor, for the purposes of collective bargaining, or by neither.