

In the Matter of AIR REDUCTION SALES COMPANY and ALLIED VICTORY
WORKERS COMMERCIAL TRANSPORTATION ASSOCIATION

Case No. 3-R-844.—Decided September 23, 1944

Mr. Thomas C. Clark, of New York City, for the Company.
Mr. James B. McKenna, of Buffalo, N. Y., for the Association.
Mr. Daniel R. Shortal, of Buffalo, N. Y., for the Teamsters.
Mr. Ben Grodsky, of counsel to the Board.

DECISION
AND
DIRECTION OF ELECTIONS

STATEMENT OF THE CASE

Upon an amended petition duly filed by Allied Victory Workers Commercial Transportation Association, herein called the Association, alleging that a question affecting commerce had arisen concerning the representation of employees of Air Reduction Sales Company, Buffalo, New York, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Peter J. Crotty, Trial Examiner. Said hearing was held at Buffalo, New York, on August 18, 1944. The Company, the Association, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 449, affiliated with the American Federation of Labor, herein called the Teamsters, 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 hearing the Teamsters moved to dismiss the petition on the ground that the Association is not a labor organization within the meaning of the Act and on the further ground that the Teamsters had a contract with the Company which constitutes a bar to the present proceeding. For reasons hereinafter appearing, these motions are 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. In its brief filed with the Board the Teamsters moves for leave to reopen the record for the purpose of introducing newly dis-

covered evidence. The Association has filed a brief in opposition to the Teamsters' application. The Teamsters' motion is denied.¹

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company is engaged in the manufacture of acetylene, oxygen, nitrogen, carbon dioxide, and other industrial gases at its Buffalo, New York, plants. During 1943 the Company used in excess of \$100,000 worth of raw materials at its Buffalo, New York, plants, of which in excess of 90 percent was shipped to it from points outside the State of New York. During the same period the Company manufactured at its Buffalo, New York, plants finished products valued at in excess of \$1,800,000, of which over 90 percent was shipped to points outside the State of New York.

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

II. THE ORGANIZATIONS INVOLVED

Allied Victory Workers Commercial Transportation Association, unaffiliated, is a labor organization admitting to membership employees of the Company.²

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 449, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

¹ In its brief the Teamsters sets forth the text of a letter purportedly written by John McCullough, temporary president of the Association, addressed to Daniel J. Tobin, president of the Teamsters' International, suggesting the issuance of a charter covering employees in the "pick up and delivery" divisions and stating that the writer is "not in favor of affiliation with any one but A F of L." It is argued that the letter is evidence that the Association, composed largely of employees who were and apparently still are members of the Teamsters, is not a bona fide labor organization, but is primarily a dissident group interested in securing an election of officers among the Teamsters' members and an accounting from that organization. We do not agree. Moreover, it does not appear that McCullough expressed more than his personal opinion and desires.

² The Teamsters contends that the Association is not a labor organization within the meaning of Section 2, (5) of the National Labor Relations Act. In its brief it alleges that the reason for the filing of the petition herein is dissatisfaction with the administration of the Teamsters. The Teamsters further states that "It is unquestionably a fact that the workmen [with] whom the organizers for the association talked, in reality, were duped or unaware of the purpose of the authorization cards signed by them. In reality, their complaint was directed against the conduct of the officers of Local 449."

The Association is a group of employees which has retained an attorney, organized themselves into a body for the purpose of collective bargaining, adopted a name, elected a slate of temporary officers, held weekly meetings, and is in the process of considering the adoption of bylaws and a constitution. We have held that such a group is a labor organization, within the meaning of the Act. *Matter of George W. Borg Corporation*, 25 N. L. R. B. 481. Furthermore, the authorization cards submitted by the Association clearly designate the Association as the collective bargaining representative of the signers.

III. THE QUESTION CONCERNING REPRESENTATION

The Company has indicated that it will bargain with the Association after the Association has been certified by the Board within an appropriate unit.

Pursuant to the provisions of collective bargaining agreements covering the distribution employees of its Buffalo plants, the Company dealt with the Teamsters from 1937 to 1943. These parties executed a new agreement for a term of 1 year, effective June 17, 1943, embracing the distribution division employees and providing that it was to "continue from year to year thereafter unless terminated by written notice from either party to the other, given not less than 90 days prior to the annual expiration date." The agreement also provided for a closed shop.

In 1941 the Company entered into an agreement with the Teamsters for a term of 2 years, effective July 1, 1941, covering the acetylene division employees of its Buffalo plants and providing for automatic renewal from year to year under the same conditions as the 1943 agreement between them embracing the employees of the distribution division. This agreement also provided for a closed shop. It was automatically renewed in 1943.

Also in 1941 the Company and the Teamsters entered into an agreement covering the oxygen division employees of the Company's Buffalo plants. This agreement was for a term of 1 year ending July 1, 1942. In 1942 they entered into another 1-year agreement effective July 1, 1942, covering the oxygen division employees and containing a similar automatic renewal clause to that provided for in the 1943 contract covering the distribution division employees. This contract also contained a closed-shop provision. In 1943 it was automatically renewed.

On March 14 and 15, 1944, the Teamsters sent letters to the Company with respect to each of the existing agreements which read as follows:

Our agreement which expires ----- provides for a notification 90 days prior to expiration date if any change is desired. Therefore, we are taking this opportunity to notify you that we desire a change in our contract upon its expiration.

These letters were served in timely fashion, and, in our opinion, stayed the operation of the automatic renewal clauses contained in the existing agreements. The letters, we find, effectively terminated the distribution division contract as of June 17, 1944, and the acetylene division and oxygen division contracts as of July 1, 1944. Thus, contrary to the Teamsters' contention, none of these agreements constitutes a bar to a current determination of representatives.

While the Teamsters also contends that the Company considers itself bound by the contracts in that it is still operating under their provisions, in the absence of written and signed contracts extending the terms of the expired agreements, we do not consider that this arrangement bars the instant proceeding.³

A statement of a Board agent, introduced into evidence at the hearing, indicates that the Association represents a substantial number of employees in the unit alleged to be appropriate.⁴

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 UNITS

The Association requests a single unit covering all production and maintenance employees in the acetylene, oxygen, and distribution divisions of the Company's Buffalo plants, but excluding office, clerical, and supervisory employees. The Teamsters and the Company contend that there should be separate units for each of these three divisions.

The Association urges that a single unit is appropriate because the three divisions are coordinated in management and maintain a common pay roll, and because there has been only one bargaining agent for the three divisions.

On the other hand, the Teamsters and the Company point to the fact that the oxygen division and the transportation division are at one location and the acetylene division is located 3 miles away, that each division has its own superintendent, and that there are, and have always been, three separate contracts, one applicable to each division. As noted in Section III, above, the Company has dealt with the Teamsters as the bargaining representative of its distribution division employees since 1937, and as the representative of its acetylene and oxygen division employees since 1941. As the basis for this relationship three separate contractual units were established and have been maintained by these parties.

³ *Matter of Eivor, Inc*, 46 N L R B 1035

⁴ The Field Examiner reported that the Association submitted 49 cards, 48 of which bore the names of persons listed on the Company's pay roll of July 27, 1944, which contained the names of 69 employees in the alleged appropriate unit. According to the uncontradicted testimony of counsel for the Association, the cards were signed after the middle of July 1944.

The Field Examiner further reported that, of the 33 employees in the distribution division listed on the aforesaid pay roll, the Association submitted cards bearing the names of 21; that, of the 12 employees in the acetylene division, listed on the aforesaid pay roll, the Association submitted cards bearing the names of all, and that, of the 24 employees in the oxygen division listed on the aforesaid pay roll, the Association submitted cards bearing the names of 13. The Teamsters relies on its contracts with the Company as evidence of its interest in this proceeding.

On the entire record, and particularly because of the history of collective bargaining upon the basis of a separate unit for each of the three divisions, we are of the opinion that the employees of each division constitute a separate bargaining unit.

We find that all production and maintenance employees in the acetylene division of the Company's Buffalo, New York, plants, but excluding office and clerical 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.

We also find that all production and maintenance employees in the oxygen division of the Company's Buffalo, New York, plants, but excluding office and clerical 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.

We further find that all production and maintenance employees in the distribution division of the Company's Buffalo, New York, plants, but excluding office and clerical 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 shall direct that the question concerning representation which has arisen be resolved by separate elections by secret ballot among the employees in the appropriate units who were employed during the pay-roll period immediately preceding the date of the Direction of Election, subject to the limitations and additions set forth in the Direction.

DIRECTION OF ELECTIONS

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, as amended, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Air Reduction Sales Company, Buffalo, New York, separate elections 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 super-

vision of the Regional Director for the Third 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 units 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 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 any who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the elections, to determine whether they desire to be represented by Allied Victory Workers Commercial Transportation Association, or by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 449, affiliated with the American Federation of Labor, for the purposes of collective bargaining, or by neither.