In the Matter of General Motors Corporation (Eastern Aircraft Division) and M & M Restaurant Operating Company, Inc., *and* United Retail, Wholesale & Department Stores Employees, Local #327 (C. I. O.)

Case No. 5-R-1669.—Decided January 16, 1945

Mr. James D. Sahlloo, for the Board.

Mr. John Thomas Smith, by *Mr. Kevin McInerney*, of New York City, for Eastern.

Weinberg & Green, by *Messrs. Everett L. Buckmaster* and *Charles Mindel*, of Baltimore, Md., for M & M.

Mr. Maurice J. Neistadt, of Baltimore, Md., and *Mr. Harvey Rosen*, of New York City, for the C. I. O.

Mr. Anthony Glorioso, of Baltimore, Md., for the A. F. L.

Miss Melvern R. Krelow, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

Statement of the Case

Upon a petition duly filed by United Retail, Wholesale & Department Stores Employees, Local #327 (C. I. O.), herein called the C. I. O., alleging that a question affecting commerce had arisen concerning the representation of employees of General Motors Corporation (Eastern Aircraft Division) and M & M Restaurant Operating Company, Inc., Baltimore, Maryland, herein called Eastern and M & M, respectively, the National Labor Relations Board provided for an appropriate hearing upon due notice before Earle K. Shawe, Trial Examiner. Said hearing was held at Baltimore, Maryland, on November 20, 1944. The Board, Eastern and M & M appearing specially, the C. I. O., and Local Joint Executive Board, Hotel & Restaurant Employees' International Alliance and Bartenders' International League of America, affiliated with the American Federation of Labor, herein called 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 commencement

of the hearing, Eastern made a motion to dismiss the petition on the ground that Eastern is not an employer of the employees herein involved within the meaning of the National Labor Relations Act. M & M moved that the petition be dismissed on the grounds that M & M is not engaged in business affecting commerce and is therefore not subject to the jurisdiction of the Board, and that the unit sought is inappropriate. The Trial Examiner reserved rulings on the motions for the Board. For reasons hereinafter set forth the motions are hereby 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.

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

Findings of Fact

I. THE BUSINESS OF THE COMPANIES

General Motors Corporation (Eastern Aircraft Division), a corporation organized and existing under and by virtue of the laws of the State of Delaware, operates a plant in Baltimore, Maryland, where it is engaged in the manufacture of airplane subassemblies. Eastern purchases raw materials consisting of aluminum and steel castings for use at the Baltimore plant, valued in excess of $1,000,000 annually of which approximately 90 percent is shipped from points outside the State of Maryland. Eastern manufactures finished products valued in excess of $2,000,000 annually, all of which are shipped to points outside the State of Maryland.

Eastern admits, for the purpose of this proceeding, that it is engaged in commerce within the meaning of the Act.

M & M Restaurant Operating Company, Inc., a Maryland corporation, is engaged in the operation of cafeteries in defense and other plants located in and around Baltimore, Maryland, where it prepares and serves food. Under the terms of a contract hereinafter discussed, M & M operates a cafeteria at Eastern's Baltimore plant. Foodstuffs and related products in the sum of approximately $440,000 are purchased annually by M & M for use in the various cafeterias operated by M & M, and are obtained by M & M from the warehouses of distributors located within the State of Maryland; approximately 30 percent of such foodstuffs and related products is shipped from points outside the State of Maryland. The gross volume of sales by all cafeterias operated by M & M is approximately $800,000 per year.[1] Approximately 45 percent of the persons employed by Eastern in the Baltimore plant patronize and eat in the cafeteria.

[1] M & M also operates cafeterias at plants in Baltimore operated by other companies under separate contracts for each.

On June 30, 1943, Eastern and M & M entered into a contract in which M & M received the right and privilege to sell food in a cafeteria [2] provided by Eastern. M & M has at all times exclusively sold food in the cafeteria. Eastern agreed to furnish, without cost to M & M, all necessary heat, hot and cold water, light, gas, and electric current; to furnish and maintain all necessary equipment including, but not limited to, cash registers, dishes, silverware, tables, refrigerators, ranges, heaters, and dish washers. Eastern agreed to reimburse M & M for bus-boy labor. M & M agreed to furnish at all times good wholesome food at reasonable prices, under clean and sanitary conditions; to furnish efficient service and to arrange a schedule of operation for the service of food to correspond with the working hours and schedules of Eastern, and upon demand, supply food and service at other hours and in other than the cafeteria when requested to do so by Eastern. M & M agreed to pay monthly to Eastern, in lieu of rent, the sum equal to 2 percent of the gross receipts which are in excess of $150 per day. M & M agreed to maintain accurate books of account and records which would at all times be subject to inspection by Eastern. M & M agreed that all its employees "shall be subject to inspection, investigation, and approval of the Manufacturer [Eastern] and the Navy Department, and that they will at all times obey and cooperate with all the rules and regulations established by the Manufacturer." M & M agreed "to accept from the Manufacturer recommendations concerning the discharge for cause of any employee of the Caterer [M & M] who may be engaged directly or indirectly in the performance of the terms of this agreement, but any or all such discharges for cause shall be made in the name of, and shall be the responsibility of the Caterer." M & M agreed to cooperate in every way with the management of Eastern in respect to M & M's menu, price and quality of foods and service.

It is clear that M & M is the employer of the employees involved herein; they are paid and supervised by M & M, which also pays social security taxes, unemployment compensation taxes, and workmen's compensation insurance premiums for such employees. There remains the question, however, as to whether Eastern is also the employer of such employees. There is testimony in the record that M & M's operation and supervision of the cafeteria and the persons employed therein are, in practice, not controlled or supervised by Eastern, in that M & M has not consulted Eastern with reference to payment of wages and to the hire, discharge, or transfer of such employees, in that Eastern has not exercised its right to "recommend" the discharge of employees, and in that the prices of meals have not been

[2] Although the contract also provides for M & M to operate a dining room in addition to the cafeteria, no dining room has ever been established on the premises.

set by Eastern. As we stated in the *Bethlehem-Fairfield* case,[3] we do not believe that such testimony, accepted as true, materially alters the situation. We are of the opinion, and find, that the provisions of the contract, hereinabove referred to, give Eastern such power of control over the operations and personnel of M & M that Eastern is thereby constituted also the employer of the employees involved herein within the meaning of Section 2 (2) of the Act.

II. THE ORGANIZATIONS INVOLVED

United Retail, Wholesale & Department Stores Employees, Local #327, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of Eastern and M & M.

Local Joint Executive Board, Hotel & Restaurant Employees' International Alliance and Bartenders' International League of America, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of Eastern and M & M.

III. THE QUESTION CONCERNING REPRESENTATION

On or about August 4, 1944, the C. I. O. notified M & M that it represented a majority of the employees of M & M and requested recognition as the exclusive bargaining representative of such employees. Prior to the hearing, the A. F. L. also requested recognition as the exclusive bargaining representative of M & M's employees. M & M has refused such requests until either organization has been certified by the Board in an appropriate unit. At the hearing, counsel for Eastern stated that Eastern likewise would not recognize either organization on the ground stated hereinabove.

A statement of a Board agent, introduced into evidence at the hearing, indicates that the C. I. O. represents a substantial number of employees in the unit hereinafter found appropriate.[4]

We find that a question affecting commerce has arisen concerning the representation of employees of Eastern and M & M, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The C. I. O., the A. F. L., and M & M are in general agreement that all employees in the cafeteria in the Baltimore plant of Eastern who

[3] 53 N L. R B 1428.

[4] The Field Examiner reported that the C I. O submitted 48 application cards, that the cards were dated as follows 3 in June and 1 in July 1944, 44 were undated There are approximately 52 employees in the unit

At the hearing, the A F L. submitted 29 application for membership pledge-cards which bore apparently genuine signatures of persons purportedly employed by M & M. The cards were dated in November 1943.

are engaged in preparing, handling and serving food, including cooks, chefs, dishwashers, bus boys, and kitchen help, but excluding head chefs, managers, and all other supervisory employees, constitute an appropriate unit. The only dispute arises with respect to cashiers; the C. I. O. and the A. F. L. desire their inclusion, whereas M & M contends that they should be excluded. Eastern takes no position with respect to the appropriate unit.

There are approximately six cashiers employed in the cafeteria. Their duties are to take cash and to keep a record of sales. Since their duties are largely clerical and not directly connected with the preparation and serving of food, we shall exclude them from the unit.[5]

We find that all employees of Eastern and M & M in the cafeteria located in the Baltimore plant of Eastern who are engaged in the preparation, handling and serving of food, including cooks, chefs, dishwashers, bus boys, and kitchen help, but excluding cashiers, clerical employees, head chefs, managers, 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.

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, as amended, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with General Motors Corporation (Eastern Aircraft Division) and M & M Restaurant Operating Company, Inc., Baltimore, 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

[5] See *Matter of Bethlehem-Fairfield Shipyard, Incorporated and M & M Restaurant Operating Company, Inc*, 53 N L R B 1428. *Matter of S & W Cafeteria of Washington, Incorporated*, 20 N L. R B 259, *Matter of The Welfare Association*, 45 N L R. B 285.

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 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 United Retail, Wholesale & Department Stores Employees, Local #327 (C. I. O.), or by Hotel, Restaurant and Cafeteria Employees, Local 695, AFL,[6] for the purposes of collective bargaining, or by neither.

[6] The A F. L. requested to appear on the ballot in the manner set forth above