

In the Matter of O. E. FELTON, D/B/A FELTON OIL COMPANY, EMPLOYER
AND PETITIONER and PETROLEUM DRIVERS & HELPERS, LOCAL No.
248, A. F. OF L.

Case No. 21-RM-4.—Decided August 17, 1948

DECISION
AND
DIRECTION OF ELECTION

Upon a petition duly filed, hearing in this case was held at Los Angeles, California, on February 26, 1948, before Ben Grodsky, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the case, the National Labor Relations Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

O. E. Felton, d/b/a Felton Oil Company, is engaged in the distribution of petroleum products within the State of California. The Employer is under contract to buy and sell only petroleum products manufactured by General Petroleum Corporation of California, hereinafter called the Corporation, which the Board has in the past determined to be subject to the jurisdiction of the National Labor Relations Act.¹

The Corporation refines gasoline from crude oil, part of which is produced in California and part of which is received by it from points outside the State. The Employer picks up all his petroleum products at the warehouses of the Corporation in California and makes all his deliveries within the State, either to his own accounts or to accounts of the Corporation, for which the Employer is the exclusive distributor in a specified area in Southern California. These accounts include a number of concerns over which the Board has in the past assumed jurisdiction, including Consolidated Vultee Aircraft Corporation,

¹ *Matter of General Petroleum Corporation of California*, 56 N. L. R. B. 1366.
78 N. L. R. B., No. 141.

Douglas Aircraft Corporation, B. F. Goodrich Rubber Company, and North American Aircraft Company. The Employer's sales for the first 11 months of 1947 included 6,500,000 gallons of gasoline, 132,000 gallons of oil, 110,000 pounds of grease, and 135,000 gallons of "white products." About 11 percent of the gasoline, 20 percent of the oil, and 23 percent of the grease were sold to accounts of the Corporation.

We find that the Employer's operations affect commerce within the meaning of the Act.²

II. THE ORGANIZATION INVOLVED

Petroleum Drivers & Helpers, Local No. 248, herein called the Union, is a labor organization affiliated with the American Federation of Labor, claiming to represent employees of the Employer.

III. THE QUESTION CONCERNING REPRESENTATION

On September 17, 1946, the Employer and the Union entered into a contract, which expired on September 30, 1947. Shortly before the latter date, the Union sought to negotiate a new contract, claiming that it still represented a majority of the employees. The Employer disputed this, and on September 23, 1947, filed the instant petition. Although duly served with a copy of the Notice of Hearing on the instant petition, the Union failed to appear. However, we do not construe the Union's absence from the hearing as a withdrawal of its claim to represent employees of the Employer.³ Such absence may denote, not indifference, as our dissenting colleague suggests, but merely acquiescence in the proceedings before the Board.⁴ Moreover, we do not think that it comports with orderly procedure to set a case for hearing and to presume from the Union's failure to appear that it no longer claims exclusive recognition.

Our dissenting colleague believes that the instant petition should be dismissed because the Board has not been furnished with any data concerning the number of employees in the unit who have designated the Union as their bargaining representative. Such a showing is required by the Board with respect to a petition for certification filed under Section 9 (c) (1) (A) of the Act to enable the Board to determine administratively whether further proceedings on the petition are warranted. Our colleague would have us extend this require-

² *Consolidated Edison Co v N L R B.* 305 U. S. 197. *Matter of McCarty Manufacturing Company*, 59 N. L. R. B. 1244; *Matter of Santa Fe Springs Waste Water Disposal Company*, 68 N. L. R. B. 403; *Butler Bros. v N. L. R. B.*, 134 F. (2d) 981 983 (C. C. A. 7), cert. den. 320 U. S. 789

³ Cf. *Matter of Ny-Lint Tool and Manufacturing Company*, 77 N. L. R. B. 642; *Matter of Terrytoons, Inc.*, 77 N. L. R. B. 471; *Matter of Federal Shipbuilding and Drydock Company*, 77 N. L. R. B. 463.

⁴ See *Matter of California Knitting Mills*, 77 N. L. R. B. 574.

ment of a showing of interest to a petition filed, as in the instant case, by an employer under Section 9 (c) (1) (B).

Section 202.17 (a) of the Board's Rules and Regulations—Series 5, effective August 22, 1947, provides that in the case of a petition by an employer no proof of representation on the part of the labor organization claiming a majority is required. We are aware of nothing in the legislative history or provisions of the amended Act which precludes the Board from adhering to this rule.⁵ Moreover, for reasons set forth below, we believe that the application of this rule will best effectuate the intent of Congress in enacting the provision for employer petitions in Section 9 (c) (1) (B).

At the outset it is to be noted that, unlike Section 9 (c) (1) (A) of the Act, Section 9 (c) (1) (B), under which the instant petition was filed, does not require any allegation by the Petitioner that a substantial number of employees wish, or do not wish, to be represented by a union.

If, as our colleague maintains, the Board must nevertheless determine, as a condition of processing an employer petition, that the union or individual claiming exclusive recognition has sufficient support for such claim to warrant the holding of an election, there would be serious practical difficulties in the way of compliance with such a requirement in the normal case. If a union desires an election, it will normally file its own petition. Where it fails to do so, the union presumably does not desire an election, and so would not be likely to cooperate in fur-

⁵The excerpt from the Senate Committee Report quoted by our dissenting colleague states merely that the provisions for employer petitions do not affect the Board's rules with respect to dismissal of petitions by reason of an inadequate showing of representation. Prior to the amendments, the Board had no rule requiring a showing of interest in cases of employer petitions involving, as in the instant case, only one union, as the Board did not entertain such petitions at all until the enactment of Section 9 (c) (1) (B). And in the case of conflicting claims by rival unions, where the Board's procedures did permit the filing of employer petitions, the Board, in fact, did not require a showing of substantial interest as a condition of entertaining such a petition. See Sections 203.47 (b) and 203.49 of the Board's Rules and Regulations—Series 4. In the *Sprague* case, cited by our dissenting colleague, the Board, in stating the reasons for the dismissal of the Employer's petition, significantly did not refer to the absence of any showing as to the union's representative status, but relied rather on the union's nonappearance at the hearing, coupled with its indication of lack of interest in the proceeding we find no such indication in the instant case.

The dissent herein relies also on the first clause of Section 9 (c) (2) of the amended Act as manifesting the desire of Congress that the Board apply the same procedures to employer petitions as to other petitions. However, it is clear from the legislative history of this clause, as well as its context, that it was designed only to preclude the Board from according more favorable treatment to affiliated than to independent unions. MHouse Conference Report No 510, 80th Cong., 1st Sess., p 48, Senate Report No 105, 80th Cong., 1st Sess., p 25. Moreover, if Section 9 (c) (2) is to be applied as our dissenting colleague asserts, it would require that employer-petitioners obtain and submit evidence of a union's representative interest in the same manner as other petitioners—namely, by ascertaining what employees had designated the union as their representative. Patently, at the very least, this would require the employer to engage in unfair labor practice in procuring such data. We cannot believe that Congress intended such a result.

nishing information to the Board as to its representative status in order to assist the employer in obtaining an election. Accordingly, if we required employer petitions to be supported by a showing of the union's interest, we would for all practical purposes defeat the will of Congress as expressed in Section 9 (c) (1) (B), that employers confronted with a union's claim for recognition be afforded an opportunity to ascertain through a Board election the representative status of the union.

We find, therefore, that a question affecting commerce exists concerning the representation of employees of the Employer, within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The Employer contends without contradiction, and we find, that all truck drivers at the Employer's Downey, California, plant, excluding supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.⁶

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with O. E. Felton, doing business as Felton Oil Company, Downey, California, 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 Twenty-first Region, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations—Series 5, 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, 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, and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented by Petroleum Drivers & Helpers, Local No. 248, A. F. of L., for the purposes of collective bargaining.

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

⁶ The record does not disclose to what extent, if any, the unit sought by the Employer differs from the unit established in the 1946 contract, which was comprised of "all drivers, warehousemen, plantmen, and yardmen."

MEMBER MURDOCK, dissenting:

I disagree with the assumption of jurisdiction in this case because the Employer's business is essentially local. It neither sells nor purchases any product outside the State of California. The majority asserts jurisdiction over it merely because it purchases within the State of California certain petroleum products from a corporation which has been held to be within the jurisdiction of the National Labor Relations Board; sells petroleum products to other persons wholly within the State of California who come within the jurisdiction of the Board; and makes some deliveries within the State of California for the account of the General Petroleum Corporation. I find it difficult to think of any business or industry, however local its character may be, that could not be brought within the jurisdiction of the Board by the standards which the Board has used in this case. Although there is a remote possibility that labor trouble in the employer's business might to a very small degree affect commerce, I cannot believe that Congress intended that the Board should take jurisdiction of such local enterprises. Accordingly, I would dismiss the petition on jurisdictional grounds.

I also believe that the petition should be dismissed for the further reason that it has not been shown that the Union actually has a substantial interest among the employees so as to warrant the conclusion that a question concerning representation exists to justify an election. The Board is considering here an employer's petition filed under Section 9 (c) (1) (B) of the National Labor Relations Act, as distinguished from an employee's or labor organization's petition filed under Section 9 (c) (1) (A) of the Act. Under the Wagner Act, there was no specific statutory provision for the filing of a representation petition by an employer. The Board, however, prior to the 1947 amendments, in the light of its experience, provided by rule for the filing of an employer petition in situations where two or more labor unions claimed to represent employees of an employer. It was obviously the intent of Congress, by the enactment of Section 9 (c) (1) (B), to perfect by statutory provision the right of employers to file representation petitions, not only where two unions made claims of representation, but also where only one union claimed bargaining rights.

Section 9 (c) (1) provides that whenever a petition has been filed either under Section 9 (c) (1) (A) or Section 9 (c) (1) (B) :

The Board shall investigate such petition and, if it has reasonable cause to believe that a question of representation affecting commerce exists, shall provide for an appropriate hearing upon

due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

This clearly expresses Congress' intent that the Board's determination that a question of representation exists shall not be made until it has first administratively investigated such petition and, on such investigation, has reasonable cause to believe that a question of representation affecting commerce exists. After having established such reasonable cause, the Board is then directed to provide a hearing upon due notice. At such hearing it must be established upon the record that a question of representation actually exists before the Board may direct an election to determine the question of representation. Section 9 (c) (2) provides that "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply *irrespective of the identity of the persons filing the petition or the kind of relief sought.* . . ." [Emphasis supplied.]

It is apparent from the foregoing quotations from the Act that Congress was keenly aware of the possibility that frivolous petitions might be presented to the Board either by employees, labor organizations, or employers. To guard against such frivolous petitions and the futile expenditure of Government funds in conducting unwarranted elections, Congress adopted the formula of an administrative investigation followed by a hearing with a finding that a question of representation exists as a condition precedent to the direction of an election in all cases.⁷

The Board has not in the past recognized a naked claim of representation as sufficient to raise a question concerning representation so as to warrant directing an election, either in the case of petitions by labor organizations or by employers.⁸ I find nothing in the amended Act to warrant a conclusion that Congress intended the Board to do so in

⁷ In the *Locwenstein case* (75 N L R B 377), the Board specifically held that, regardless of the fact that an employer files the petition under Section 9 (c) (1) (B), the question of representation is initially raised by claimants, whether individuals or labor organizations. Thus, whether a petition is filed under Section 9 (c) (1) (A) or (B), the question of representation is raised by the employees or an individual or a labor organization claiming to act in their behalf and cannot be raised by the employer's act of filing a petition.

⁸ See e g *Matter of C H Sprague & Son Company*, 72 N. L. R. B 1401, where the Board dismissed an employer petition after finding no question concerning representation existed. The rival labor organization which requested recognition of the employer admitted prior the hearing that it had no proof of representation beyond the fact that one employee had once been a member. The Board found that the rival organization, "has not appeared at the hearing, although apprised thereof, and has, in fact, indicated a lack of interest in this proceeding, thereby defaulting on its purported claim."

the case of employer petitions under the new Act. The majority attempts to support its position by calling attention to Section 202.17 (a) of the Board's Rules and Regulations effective August 22, 1947, which provides that in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required. Certainly a rule promulgated by the Board, which is in conflict with the provisions of the Act itself, affords no support for the majority decision. The statement of the majority that "We are aware of nothing in the legislative history or provisions of the amended Act which precludes the Board from adhering to this rule," fails to give effect to the plain language of Section 9 (c) (2) which provides that the *same* rules of decision shall be applied in determining the existence of a question concerning representation "*irrespective of the identity of the persons filing the petition or the kind of relief sought.*" [Emphasis supplied.] The general rule laid down in Section 9 (c) (2) so clearly and explicitly demands that a showing of substantial interest should be required in connection with *all* petitions if required in connection with any, that resort to legislative history for its meaning is unnecessary. Nevertheless, the majority turns to the legislative history and seizes on a statement therein as to what *motivated* the insertion of Section 9 (c) (2) in the Act as a peg upon which to hang the sweeping pronouncement that Congress intended its application *only* to that limited situation despite the all-inclusive generality of the rule laid down in plain language in the provision. In resorting to the legislative history to vary and constrict the unambiguous language of Section 9 (c) (2), the majority flies in the face of the elementary rule of statutory construction which the Supreme Court stated in the following words in *Caminetti v. U. S.*, 242 U. S. 470, 485, 490:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation But, as we have already said, it has been so often affirmed as to become a recognized rule, *when words are free from doubt they must be taken as the final expression of the legislative intent*, and are not to be added to or subtracted from

by considerations drawn from titles or designating names or reports accompanying their introduction or from any extraneous source. *In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.* [Emphasis supplied.]

Not only is the resort to legislative history unwarranted here, but the conclusion drawn from the legislative history relied upon by the majority is unwarranted. The mere fact that the original *motivation* for the insertion of Section 9 (c) (2) in the Act was to preclude the Board in representation cases from according more favorable treatment to affiliated unions than to independent unions does not prove that the section was "designed *only*" to apply to that narrow situation as the majority assert. Had Congress intended *only* to provide that the same rules of decision should be applied in determining the existence of a question concerning representation irrespective of whether petitioner was an affiliated or independent union, it could have simply said so, and undoubtedly would have said so. When it went further and used words laying down a broad general rule, are we to conclude as the majority implicitly does, that Congress was doing a useless thing and didn't intend that the words should mean what they say? Moreover, *if* legislative history is to be considered, in my opinion, the express reference to employer petitions in the Senate Labor Committee Report,⁹ when read together with Section 9 (c) (2), is affirmative indication that Section 9 (c) (2) was intended to be given its normal scope and meaning, and renders it impossible to conclude that Congress intended the Board to use a double standard for determining the existence of a question concerning representation—one standard for employer petitions and a different one for those filed by employees or labor organizations.

Without question, Congress intended to protect the employer against claimants purporting to represent his employees by affording him a method by which he might have such claims resolved. But it is inconceivable to me, in the light of the language of Section 9 (c) (1) and (2), that Congress intended that this Board should take the time and expend the money necessary to hold an election on the mere claim of representation of some individual or labor organization without the slightest requirement of a showing of substantial interest.

The existence of a recently expired contract might ordinarily be deemed a sufficient showing of substantial interest to justify a conclu-

⁹ "Neither of these amendments [for decertification and employer petitions] affects the present Board's rules of decision with respect to dismissal of petitions *by reason of an inadequate showing of representation* or the existence of an outstanding collective agreement as a bar to an election." [Emphasis supplied.] Senate Report No. 105, 80th Congress, 1st Session, page 25.

sion that a question concerning representation exists and proceeding to an election. But such a contract cannot be so treated where, as here, after receiving notice of the hearing, the Union fails to appear to support its prior claim of representative status. I would construe a failure or refusal of a union to appear and support a claim of representative status in a proceeding in which its status is questioned, as an abandonment of such claim. Such a finding is fully warranted and provides a complete answer to the question which is posed by an employer petition—what is the representative status of a union which has made a claim. The Board's finding and decision that the claimant is not the representative of the employees is adequate protection for the employer and is all that can be done, even after the holding of the election, if the vote is against the Union. The majority fail to point out wherem such a finding does not afford the employer all the protection he needs.

The majority's insistence that the Board should proceed to useless elections on employer petitions in situations where there is no showing that the union involved has any substantial interest, or where by reason of the union's failure to appear it is properly found to have abandoned a claim of representative status, will have serious consequences apart from wasting appropriations in running unnecessary elections. It must be remembered that when the Board has directed an election, Section 9 (e) (3) prohibits another election from being ordered within a 12-month period. Thus, whenever a union which represents only a mere handful of employees, or even none, makes a naked claim of representation on an employer, or whenever an employer collusively arranges for some individual or organization to make a claim, the Board's action in directing a needless election on the employer's petition will serve to deprive the employees of any opportunity to vote for a collective bargaining representative for a year. The decision of the majority in this case is thus an invitation to the unscrupulous employer to thwart collective bargaining. It encourages labor organizations which are prone to indulge in "dog-in-the-manger" tactics to make frivolous claims on an employer. It compels employees to make a nugatory choice between a union which has indicated its lack of interest in them by defaulting on its purported claim to represent them and no collective bargaining for a period of a year by a duly elected representative. It attributes to Congress an intent to frustrate collective bargaining rather than to encourage it, despite the fundamental policy expressed in the Act to encourage the practice and procedure of collective bargaining in order to safeguard and promote the flow of commerce.

By construing Section 9 (c) (1) and (2) as requiring the Board to insist on a substantial showing of interest before it finds the existence of a genuine question of representation in employer petition cases, as well as in others, we would adhere both to the language of the Act and Congressional intent, and avoid the pitfalls referred to. Such construction would discourage the filing of frivolous claims. It would encourage and facilitate collective bargaining, rather than thwart and impede it. Contrary to the conclusion of the majority, it would do no injustice to anyone. The employer's rights can be as effectively safeguarded by an order of this Board dismissing a petition based on a frivolous claim with the finding that the claimant does not represent the employees, as they could be by an election, and without the devastating results of forestalling collective bargaining for the long period of a year.

The assertion of the majority in footnote 5 that a construction of Section 9 (c) (2) to require a substantial showing of interest in employer petition cases as well as others would require the Employer "to obtain and submit evidence of a Union's representative interest" and thereby "to engage in an unfair labor practice," is completely without foundation. It would no more be the Employer's responsibility to make the showing than it is when a labor organization is petitioner. The responsibility as always lies with the labor organization making the claim of representation *administratively* to satisfy Board representatives that it has a substantial interest to support such a claim. Showing of substantial interest is never a matter for litigation. Where a union's claim of representation is frivolous and it fails to make any showing, or where it makes some effort to do so but its showing is insubstantial, we would simply find that the union is not the representative of the employees.