In the Matter of WHITNEY'S, EMPLOYER AND PETITIONER *and* RETAIL CLERKS' UNION LOCAL #1222–A, AFL, UNION

Case No. 21–RM–76.—Decided January 10, 1949

DECISION

AND

DIRECTION OF ELECTION

Upon a petition duly filed, a hearing in this case was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. At the hearing, the Retail Clerks' Union Local #1222–A moved on various grounds [1] to dismiss the petition. For the reasons stated below, the motions to dismiss are hereby denied.

Upon the basis of the entire record in this case, the Board [2] finds:

1. The business of the Employer:

Whitney's, a San Diego department store, is a successor to Whitney's Department Store, the subject of an earlier Board proceeding.[3] On January 1, 1948, Whitney's purchased the business, which hitherto had been a unit in a national chain, and became a one-unit enterprise. During 1947, Whitney's Department Store made purchases totalling $2,258,434.61 of which $1,303,118.11 or 57 percent was directly from sellers outside the State of California. During the period January 1, 1948, to July 31, 1948, Whitney's purchases totalled $1,319,053.75, of

[1] The Union moved to dismiss the petition on the ground *inter alia* that the petition had been investigated by a representative of the General Counsel rather than by a representative of the Board as allegedly required by Section 9 (c). This contention is without merit. The preliminary determination of whether "reasonable cause that a question concerning representation exists" in the processing of representation petitions is an investigative phase of the Board's work which the Board may properly vest in the General Counsel. *Matter of The Procter & Gamble Mfg. Co.*, 78 N. L. R. B. 1043; see *Evans* v. *International Typographical Union*, 76 F. Supp. 881, at 887.

[2] Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-man panel consisting of the undersigned Board Members [Chairman Herzog and Members Houston and Murdock].

[3] 73 N. L. R. B. 1245. During the year ending December 31, 1946, the Employer in that case purchased materials exceeding $2,500,000 in value, of which approximately 40 percent was obtained outside the State of California. During the same period, the Employer's sales were in excess of $3,705,000, of which less than one-half of 1 percent was to out-of-State customers. The Board found the Employer, contrary to its contentions, engaged in commerce, relying on *Matter of J. L. Brandeis & Sons*, 50 N. L. R. B. 325, 47 N. L. R. B. 614, 53 N. L. R. B. 352, enforced 142 F. (2d) 977 (C. C. A. 8), cert. denied 323 U. S. 751; *Matter of M. E. Blatt Co.*, 38 N. L. R. B. 1210, enforced 143 F. (2d) 268 (C. C. A. 3); *Matter of Loveman, Joseph & Loeb*, 56 N. L. R. B. 752, enforced 146 F. (2d) 769 (C. C. A. 5).

which $797,745.54 or 60.5 percent was directly from sellers outside California. In addition the Employer estimated that about 20 percent of its own total purchases were from sellers outside the State who had goods within the State for delivery therein, and that about 10 percent of its total purchases were from sellers who maintained offices within the State but whose goods were delivered from outside the State. In 1947, Whitney's Department Store's sales amounted to $4,260,000. From January 1 to July 31, 1948, Whitney's sales amounted to $2,160,000. These sales include sales to concessionaires. Less than one-half of 1 percent of these sales were to known out-of-State customers.

The Union moved to dismiss the petition on the ground that the Employer is a local retail establishment not engaged in a business affecting commerce, contending that the finding in *Matter of Whitney's Department Store*,[4] is irrelevant because Whitney Department Store was a member of a national chain whereas Whitney's is a single unit. The contention is without merit. In that case we found the department store in question to be *individually* engaged in commerce within the meaning of the Act.[5]

We find, contrary to the Union's contentions, that the Employer's operations affect commerce within the meaning of the Act.[6]

2. The labor organization named below claims to represent employees of the Employer.

3. The question concerning representation:

The Union was certified as the exclusive bargaining representative for all retail sales personnel of Whitney's Department Store on June 27, 1947. A collective bargaining agreement which *inter alia* recognized the Union as the exclusive bargaining representative of certain of the Employer's employees was made on October 15, 1947. More than 60 days before the anniversary date of the agreement, the Union notified the Employer of its desire to negotiate a renewal of the 1947–48 agreement. The Employer refused to negotiate with the Union on the ground that he questioned its majority status, and immediately thereafter, on August 18, 1948, filed the instant petition.

At the hearing, the Union moved to dismiss the petition on the ground that there was no reasonable cause to believe that a question of representation affecting commerce exists. The Union does not question *Matter of Felton Oil Company*,[7] in which we held that in

[4] *Ibid*

[5] See *Matter of Raleigh Coca-Cola Bottling Works*, 80 N L. R. B 768.

[6] *Matter of Milliron's*, 72 N. L. R B 69; *Matter of Parks-Belk Co. of Elizabethton*, 77 N L. R B. 429; *Matter of Sams, Inc*, 78 N. L R B. 826.

[7] 78 N. L. R. B. 1033, Mr. Murdock dissenting. In that case, an uncertified but recognized union sought to negotiate a new contract, claiming that it still represented a majority of the employees. The Employer disputed this, and filed an "RM" petition.

employer petition cases the Board will not require evidence of a claiming union's representation interest either from the Employer or the claiming union. The Union contends that the Employer should not be permitted to file a bare petition under Section 9 (c) (1) (B) and obtain a hearing thereon except "where one or more *hitherto unrecognized* labor organizations have presented to him a claim to be recognized." This contention also lacks merit. Section 9 (c) (1) (B) provides for petitions "by an employer, alleging that one or more individuals or labor organizations have presented him with a claim to be recognized." Under the circumstances here present the request for renewal of the contract constituted a claim to be recognized. Nothing in the legislative history of this provision supports the qualifications we are here asked to make.[8]

We find 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.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:[9]

> All retail sales personnel, including stockroom employees, cashiers, and package wrappers, but excluding buyers, assistant buyers, window trimmers, display workers, and display manager, floor supervisors and department heads or heads of stock, and guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations—Series 5, as amended, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the pay-roll period immediately preceding the date of this Direction of Election, 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

[8] See S Rept No 105 on S 1126, 80th Cong , 1st Sess , p. 10.

[9] This unit agreed upon by the parties is identical to the unit approved in 73 N. L R B. 1245, except for the exclusion of window trimmers and display workers whom the Union does not now seek or claim to represent.

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, for purposes of collective bargaining, by Retail Clerks' Union Local #1222–A, AFL.