

In the Matter of HALE BROTHERS STORES, INC. and RETAIL CLERKS
ASSOCIATION, LOCAL 428, A. F. OF L.

Case No. 20-R-1285.—Decided June 13, 1945

Bohnett, Hill & Cottrell, by *Mr. C. C. Cottrell*, of San Jose, Calif., for the Company and the Association.

Mr. Joseph Abihider, of San Francisco, Calif., and *Mr. James P. McLoughlin*, of San Jose, Calif., for the Union.

Mr. Angelo J. Fiumara, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon a petition duly filed by Retail Clerks Association, Local 428, A. F. of L., herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of Hale Brothers Stores, Inc.,¹ San Jose, California, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before John Paul Jennings, Trial Examiner. Said hearing was held at San Jose, California, on April 6, 1945. The Company, the Union, and the Retailers Association of San Jose, herein called the Association, 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, a motion was made to dismiss the proceeding on the ground of lack of jurisdiction and an alleged failure of proof that the Company was engaged in interstate commerce. Ruling on the motion was reserved for the Board. For reasons appearing hereinafter the motion is 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.

¹ The parties stipulated that all formal papers in this case be amended to show the name of the Company as indicated herein.

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

FINDINGS OF FACT

I THE BUSINESS OF THE COMPANY

Hale Brothers Stores, Inc., is a Delaware corporation operating five retail department stores in California. We are here concerned solely with the Company's operations at its store in San Jose, California. The Company operates purchasing offices in New York City and in St. Louis, and coordinates purchases for all its stores through a central merchandiser in San Francisco who receives and fills requests for merchandise from the officials of the Company's stores. During the year 1944, the purchases of the Company for its San Jose store amounted to between \$1,750,000 and \$2,000,000, about 70 percent of which came from sources outside the State. Of its total sales at San Jose during 1944, amounting to between \$2,500,000 and \$3,000,000, only a fraction of 1 percent involved interstate sales.

The Company contends (1) that the Board lacks jurisdiction since the Company is engaged solely in intrastate commerce, and (2) that, in any event, there has been a failure of proof of jurisdiction. However, we find, on the basis of facts previously indicated, that the Company's contentions are without merit. The record shows that a large amount of the Company's purchases for its San Jose store is shipped to it from points outside the State of California through interstate commerce, and that the Company sells through this store and ships through interstate commerce a relatively small amount of merchandise to its out-of-State customers. Although it is apparent that most of the sales at the Company's San Jose store are local in character, we have heretofore held that the test of the Board's jurisdiction is not the percentage of either purchases or sales made outside the State but the effect thereof on commerce. Applying that test, we find that the Company's business and operations affect commerce within the meaning of the National Labor Relations Act.²

II. THE ORGANIZATION INVOLVED

Retail Clerks Association, Local 428, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

By letter dated November 20, 1944, the Union requested recognition from the Company as the exclusive collective bargaining representative of certain of its employees at its San Jose store. The Company refused such

² See *N. L. R. B. v. Fainblatt*, 306 U. S. 601; *J. L. Brandeis & Sons v. N. L. R. B.*, 142 F. (2d) 977 (C. C. A. 8), cert. den. 323 U. S. 751; *N. L. R. B. v. The J. L. Hudson Company*, 135 F. (2d) 380 (C. C. A. 6), cert. den. 320 U. S. 740.

request, asserting that the unit claimed by the Union is inappropriate for the purposes of collective bargaining.

A statement of a Board agent, introduced into evidence at the hearing, indicates that the Union represents a substantial number of employees in the unit hereinafter found appropriate.³

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 UNIT

Scope of the unit

The Union seeks a unit composed of all permanent selling and non-selling employees of the Company's San Jose store with certain specified inclusions and exclusions. The Company and the Association contest the scope of the unit, maintaining that the unit should include all employees of all retail stores in San Jose which are members of the Association.⁴

While it appears that the Company is a member of the Association, and the latter is authorized by its membership to bargain collectively in behalf of its employer-members, there is no evidence in the record that the Association, which admits to membership employers operating stores other than department stores, has ever bargained collectively with labor organizations representing the specific employees whom the Union seeks to represent. In fact, the record shows that, to date, the only collective bargaining that the Association has done has been limited to its representation of some but not all of its members and solely with respect to the tailors in their employ.⁵ Moreover, the record shows that another company operating a similar type business in San Jose withdrew from the Association upon entering into a contract with the Union for its employees and that one non-member company operating a department store in San Jose has entered into a separate agreement with the Union covering its employees. In addition, the Union does not claim, nor does it appear, that it has organized the employees of all members of the Association. Accordingly, under all the circumstances,

³ The Regional Director reported that the Union submitted 131 authorization cards; that, of these cards, 119 were dated between October and December, 1944, 10 were dated during January and February 1945, and 2 were undated; and that there are approximately 190 employees in the unit claimed by the Union to be appropriate. The Regional Director further reported that the cards were not checked against a company pay roll due to the refusal of the Company to furnish one.

⁴ The Retailers Association of San Jose is a group composed of 27 merchants located in San Jose. One of its stated purposes is "to study, make recommendations on, and represent the membership in, labor relations incident to the operations of the retail business of the city of San Jose, to the end that fair and satisfactory employer and employee relations may be developed and maintained." According to the bylaws of the Association, no member may bargain individually with any labor organization.

⁵ In this connection, the Association has, since 1940, entered into written contracts with the Amalgamated Clothing Workers Union, C. I. O. We note, however, that in its most recent contract with that union, the Association has excluded from its provisions one of the employer-members for the reason that the latter had in his employ a tailoress who was unwilling to become a member of that union.

including the present extent of union organization and the absence of a collective bargaining history on a multiple-employer basis, we find that an association-wide unit is inappropriate at this time for the purposes of collective bargaining.⁶ We further find that the rights of the employees herein to bargain collectively through representatives of their own choosing will be effectively preserved through a unit comprising solely the employees at the San Jose store.

Composition of the bargaining unit

The Union contends that all selling and non-selling employees of the Company's San Jose store, including employees in the millinery department and lending library, and the artists, but excluding the shopper, the porter, engineer, display employees, card writer, soda fountain employees, watchmen, bushelmen, barbers, beauticians, the optometrist, and those department managers and assistant department managers who qualify as executives within a definition proposed by it, and certain enumerated executives, constitute an appropriate bargaining unit. Subject to its contention relative to the scope of the unit, the Company agrees generally as to the composition of the unit. However, among the specified inclusions and exclusions there is agreement among the parties only as to the artists, watchmen, bushelmen, executives, barbers, beauticians, and the optometrist. There remains, therefore, for consideration the disputed categories of employees:

Employees in the millinery and lending library departments: The Company would exclude these employees on the ground that they are not its employees within the meaning of the Act, whereas the Union would include them. The specific departments in which these employees work are leased to outside concerns.⁷ The Company exercises some control and supervision over them as well as over the services they render in order to insure that the Company's policies are observed. Thus, employees of leased departments are hired through the Company's personnel department, are paid by company check by the Company's paymaster, and are required to conform in all respects to company rules. Their wages, hours, and working conditions do not vary in any respect from those of other employees of the Company, and they also have the same vacation privileges. Indeed, it was testified that the employees of the leased departments are unaware, when hired, of the arrangement between the Company and the lessees and consider themselves employees of the Company. Moreover, the general manager testified that the Company intends that the public should not know of the leasing arrangement. In this connection, it appears that the

⁶ See *Matter of Lamson Brothers Company*, 59 N. L. R. B. 1561; *Matter of Bull-Insular Line, Inc.*, 56 N. L. R. B. 189; *Matter of Chapman Dehydrator Company, Inc.*, 51 N. L. R. B. 664.

⁷ Although the Company also leases space for the beauty salon, barber shop and optometry departments, these departments are not involved herein since the parties agree to exclude the employees therein.

Company extends credit to the customers who purchase in the leased departments and, in case of loss, the Company assumes the risk where it extended the credit; in addition, payments are made by customers to the Company which, in turn, makes the necessary adjustment with the lessee.⁸ It is significant, too, that the single employee in the lending library department is relieved when necessary by employees who are concededly employees of the Company. We are aware, on the other hand, that the Company has independent contracts with the lessees which provide that these employees are employees of the lessee concerned and not of the Company,⁹ that the employees in these departments work directly under the supervision of department managers who represent the lessee, and that the lessees have title to, and control the sale of, the merchandise in the leased departments. We are, nevertheless, satisfied, from all the circumstances before us, that these departments are held out by the Company as departments of the store, and that the foregoing elements in the relationship between the Company and the individuals working in these departments establish an employer-employee relationship. We note also that the Union has agreed to the exclusion from the unit of employees in other leased departments, *viz.*, beauty salon, barber shop, and optometry. However, its position in the premises is not rendered inconsistent thereby, since such exclusions were for reasons of desiring to avoid jurisdictional disputes¹⁰ with other similarly affiliated labor organizations which accept those employees for membership, whereas it does not appear that the employees in the millinery and lending library departments are eligible for membership in any similarly affiliated labor organizations. Accordingly, upon the basis of the record, we find that the employees in the millinery and the lending library departments are employees of the Company within the meaning of the Act.¹¹ We shall include them in the unit.

Department managers and assistant department managers: The Company would exclude these employees while the Union would exclude only those department managers and assistant department managers who qualify as executives within a definition proposed¹² by it.¹² The Company employs 12 department managers. Each one is in complete charge of a de-

⁸ Adjustments, including that for rent and services rendered, are made from time to time between the Company and the individual lessees. All extensions of credit to the customers of the leased departments must clear the Company's credit manager.

⁹ The lessees make Federal Old Age and Social Security payments with respect to these employees on the basis of information furnished by the Company.

¹⁰ The Company's asserted reason for agreeing to such exclusions is that the individuals concerned are not its employees under the Act.

¹¹ See *Matter of Famous-Barr Company*, 59 N. L. R. B. 976.

¹² The Union's proposed definition generally is that an executive should be an employee having the duty and responsibility of directing the operation of the employer's business and receiving not less than \$20 per week in excess of that paid employees supervised. It is apparent that the proposed definition seeks to supersede the test for supervisory authority as established by the Board and is not consistent therewith.

partment or group of departments having from 5 to 12 employees under his supervision. It is their duty to purchase merchandise to be sold in their respective departments and to see that it is properly displayed and in condition to be sold. Each has authority to recommend the hire, discharge, and transfer to another department of employees under his supervision and such recommendations are given considerable weight. We find, therefore, that department managers are supervisory employees within the meaning of our customary definition and, as such, shall exclude them.

There are 5 assistant department managers in training for jobs as department managers. They are employed in those departments having a complement of from 10 to 15 employees and perform in the store substantially the same duties as their particular department manager, although under the latter's supervision. No instructions have ever been given to them as to their duty to make recommendations concerning the employees in their department and further, no authority has been bestowed upon them to purchase merchandise. In any event, any recommendation that they may have regarding personnel is made only to the department manager, who then exercises his own independent judgment as to any action to be taken. Accordingly, we are of the opinion that the assistant department managers do not possess the indicia of authority necessary to bring them within our customary definition of supervisory employees; we shall therefore include the assistant department managers.

Porter, engineer, display employees, card writer, and soda fountain employees. The Union desires the exclusion of these employees while the Company would include them. The Union, in order to avoid any jurisdictional dispute with other similarly affiliated labor organizations which accept these employees for membership, has refrained from extending its organizational activity to them. Under the circumstances and, in view of the eligibility of these employees for membership in other labor organizations affiliated with the American Federation of Labor, we shall grant the Union's request and exclude them.¹³

The shopper: The Union would exclude and the Company include this employee. Her duties consist, in the main, of checking the quality and prices of merchandise in competitive stores and of approximating the number of customers at such stores on particular days. Although she shops in the Company's San Jose store, it is not her duty to check on the performances of duties by the other employees. Nor does it appear, as urged by the Union, that she enjoys such confidential relationship to management as would warrant her exclusion, since whatever confidential information she may obtain relates to business and not to labor relation matters. Under all the circumstances we are satisfied that she has interests

¹³ See *Matter of Monsanto Chemical Company*, 53 N. L. R. B. 784, *Matter of Simpson Electric Company*, 54 N. L. R. B. 1479.

allied with those in the unit sought by the Union; we shall include her.

Conclusion

We find that all selling and non-selling employees of the Company at its San Jose, California, store, including employees of the millinery department, the lending library, assistant department managers, the artists, and the shopper, but excluding watchmen, the optometrist, barbers, beauticians, the porter, the engineer, display employees, the card writer, the tailor, soda fountain employees, executives,¹⁴ department 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.

The Company requires all employees at its San Jose store to punch a time card when reporting for work; regular employees punch a white card, casual or temporary employees, a blue card. A casual employee, who has satisfactorily worked on separate days totaling, as a rule, 2 weeks, and who desires to remain with the Company, is generally permitted to become a regular employee and is thereafter required to punch a white card; a casual employee who has worked for this stated period may, however, continue using a blue card for reasons of uncertainty either on the part of the Company as to whether it wishes to retain that employee, or on the part of the employee as to whether he wishes regular employment. The parties appear to agree in the premises that temporary or casual employees be not permitted to vote but that regular part-time employees be considered eligible to vote, regardless of the type of time card used. However, the parties have not defined the term "regular part-time employee" as it relates to those holding blue cards. Under the circumstances, we shall declare eligible to vote not only employees holding white cards whether working full time or part time, but also those employees holding blue cards who have worked for the Company on 26 separate days within the 6-month period immediately preceding the date of the Direction of Election herein.

¹⁴ The parties agree that this includes the general manager, merchandise manager, comptroller, advertising manager, display manager, credit manager, assistant personnel manager, and assistant comptroller.

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 Hale Brothers Stores, Inc., San Jose, 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 Twentieth 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, and also the determinations in Section V. *supra*, 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 any 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 or not they desire to be represented by Retail Clerks Association, Local 428, affiliated with the American Federation of Labor, for the purposes of collective bargaining