

In the Matter of FISCHER LUMBER Co. and WILLIAMETTE VALLEY DISTRICT COUNCIL, CHARTERED BY UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, A. F. L.

Case No. 19-R-1499.—Decided June 19, 1945

Mr. Dale Fischer, of Marcola, Oreg., for the Company.

Messrs. Reese Wingard and *C. P. Richards*, of Eugene, Oreg., for the
A F L

Messrs. Harry George and *Geo. Brown*, of Portland, Oreg., and
Messrs. Max Gardner and *J. R. Davidson*, of Eugene, Oreg., for the
C. I. O.

Mr. Joseph D. Manders, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTIONS

STATEMENT OF THE CASE

Upon a petition duly filed on February 9, 1945, by Williamette Valley District Council chartered by United Brotherhood of Carpenters & Joiners of America, A. F. L., herein called the A. F. L., alleging that a question affecting commerce had arisen concerning the representation of employees of Fischer Lumber Co., herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before John E. Hedrick, Trial Examiner. Said hearing was held at Eugene, Oregon, on March 21, 1945. The Company, the A. F. L., and International Woodworkers of America, Local No. 5-246, C. I. O.,¹ herein called the C I O., 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. 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 motion of the C I O to intervene was granted at the commencement of the hearing

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Fischer Lumber Co., an Oregon corporation, is engaged in the business of logging and milling lumber. The principal offices, woods, and mills, involved in the instant proceeding, are located near Marcola, Oregon. The Company cuts approximately 30,000,000 board feet of lumber annually. The Company's woods supply approximately 60 percent of the necessary logs and rough lumber required, and approximately 40 percent is obtained from the open market. During the year 1944, practically the Company's entire output of finished lumber products, valued at approximately \$800,000, was shipped to points outside the State of Oregon.

The Company admits that its operations affect commerce within the meaning of the National Labor Relations Act, and we so find.

II. THE ORGANIZATIONS INVOLVED

Willamette Valley District Council, chartered by United Brotherhood of Carpenters & Joiners of America, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

International Woodworkers of America, Local No. 5-246, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

On May 1, 1943, the Company and the C. I. O. entered into a collective bargaining agreement. Said agreement provides that it shall be in effect until April 1, 1944, and from year to year thereafter unless either party "terminated" the agreement by notice at least 65 days prior to the expiration date. The agreement further provides that the parties may "change the terms" by notice at least 60 days prior to the expiration date; and that in the event negotiations, initiated as a result of a party's desire to "modify" continue beyond the anniversary date, the agreement shall remain in effect until a "new" agreement is reached, but shall terminate if negotiations are discontinued by either party. The agreement was automatically renewed on April 1, 1944. In a letter received by the Company on January 30, 1945, the A. F. L. notified the Company of its desire to be recognized as the exclusive bargaining representative of the Company's employees. The Company refused to grant such recognition. At the hearing the Company and the C. I. O. contended that the A. F. L.'s notice, received by the Company less than 65 days, but more than 60 days, prior to the anniversary of the agreement, was not timely, and that the agree-

ment, allegedly renewed on January 27, 1945, is a bar to a direction of election at this time. However, such contentions omit consideration of the 60-day "modification" provisions, which clearly empower either contracting party unilaterally to terminate the agreement after instituting negotiations for changes therein.² Since the agreement was still terminable by either party, pursuant to these provisions, when the A. F. L. notified the Company of its claim to represent the employees, the contract does not operate to bar a determination of representatives.³

A statement of a Board agent, introduced into evidence at the hearing, indicates that A. F. L. 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 the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT; THE DETERMINATION OF REPRESENTATIVES

The A. F. L. and the C. I. O. contend that all production, maintenance, transportation, and construction employees of Fischer Lumber Co., located at or near Marcola, Oregon, including the filer, bull buck, hook-tender,⁵ and all truck drivers who are employees of the Company, but excluding the shipping clerk and all other clerical employees, the road engineer, the woods superintendent, general superintendent of the sawmill, sawmill foreman, and all other employees with supervisory authority, constitute the appropriate unit for bargaining purposes. Since 1941 the Company and the C. I. O. have bargained on the basis of an agreed unit substantially the same as the proposed unit, but such unit excluded "independent contractors" and their employees.⁶ The Company now opposes the inclusion within the proposed unit of the filer and bull buck, who it contends are supervisory employees, and further contends that the truck drivers are not employees of the Company.

Filer and bull buck. The filer and bull buck are jointly in charge of approximately 30 fallers and buckers.⁷ They mark the logs for the fallers

² See *Matter of Dedman Foundry & Machine Company*, 50 N. L. R. B. 1019, *Matter of Nestle Milk Products*, 56 N. L. R. B. 1160.

³ See *Matter of Mall B, Incorporated*, 40 N. L. R. B. 346.

⁴ The Field Examiner reported that the A. F. L. submitted 38 cards, which bear apparently genuine original signatures, corresponding with the names on the Company's pay roll of February 12, 1945, which contained the names of 94 employees in the alleged appropriate unit. All of the cards were dated either in January or February 1945. At the hearing, representatives of the A. F. L. presented to the Trial Examiner five certificates of designation, each bearing apparently original and genuine signatures, all of which were dated in March 1945.

The agreement between the C. I. O. and the Company was submitted by the C. I. O. as evidence of its representation.

⁵ All the parties are in agreement that the hooktender does not exercise supervisory authority within the meaning of our customary definition.

⁶ See *Matter of Fischer Lumber Company, Inc.*, 31 N. L. R. B. 828.

⁷ Neither the filer nor the bull buck has authority to supervise the other.

and buckers, and are responsible for the scaling of these two types of employees.⁸ The filer and bull buck earn less than the employees under their supervision. The Company states that these employees have authority to hire and discharge, but have in fact exercised such authority to a minimum extent during the past 3 years.⁹ The employees in question fall within the class of minor supervisory employees with which we were concerned in *Matter of Coos Bay Lumber Company*.¹⁰ In view of the custom in the Northwest logging industry discussed in that decision, we find it unnecessary to decide whether or not the filer and bull buck involved herein are supervisory employees within the meaning of our usual definition, and we shall include them in the unit. We shall exclude therefrom all supervisory employees in the woods with the rank of camp foreman or above, as well as all supervisory employees in the sawmill and planing mill who come within our customary definition.

Truck drivers. The Company purchases logs from K. C. Johnson, who uses approximately three trucks to haul said logs from his woods to the mill of the Company. It appears that K. C. Johnson has an established place of business, and hold himself out to the public generally as a distributor of logs.¹¹ We find the said Johnson to be an independent contractor. The evidence does not indicate that the Company is an employer or co-employer of Johnson's employees. We shall, therefore, exclude such employees from the unit.

The legal title to the trucks which transport logs from the Company's woods to the mill is vested in persons other than the Company. Dale Fischer, vice president and stockholder of the Company, owns approximately three trucks; L. G. Cornwall, the Company's logging superintendent, owns approximately three trucks. The Company contends that Fischer and Cornwall are independent contractors; and that the drivers of their trucks are employees of these contractors, over which the Company allegedly exercises no control. On the above basis, the Company urges exclusion of such truck drivers from the appropriate unit. The said Fischer and Cornwall allegedly hire and discharge the truck drivers.¹² The Company, however, services the above trucks in its machine and repair shops. The truck drivers are directed by the Company in the performance of their work. Fischer and Cornwall do not have an established place of business, nor do they perform trucking operations for customers other than

⁸ The filer devotes approximately 50 percent of his time to the manual function of filing saws, but his remaining functions place him within the category of a "bull buck."

⁹ The record is not definitive of the quantum of supervisory authority delegated to or exercised by the filer and the bull buck.

¹⁰ 62 N L R B 93

¹¹ Cf. *Matter of Murphy Timber Company*, 37 N L R B 487

¹² Fischer and Cornwall are both agents of the Company and alleged independent contractors. Their dual personality renders it difficult to determine in what capacity their official acts are performed.

the Company. The Company permits some of its personnel to perform bookkeeping operations for Fischer and Cornwall, whose books of account are kept in the Company's offices.¹³ Fischer and Cornwall are paid by the Company on the basis of the number of thousand of board feet of lumber hauled. In some instances the drivers of Fischer's and Cornwall's trucks are paid with Company checks.¹⁴ A Company witness testified that company checks were issued to these truck drivers "as a matter of convenience." The record further reveals that the Company employed one of these truck drivers as a choke setter, and issued one check in payment for such services and truck driving. These drivers haul practically the Company's entire output of logs from the woods to the mill. The trucking operations are clearly integrated with the other functions of the Company. Under these circumstances, we are of the opinion that the Company exercises such dominion and control over the industrial life of the truck drivers that it is, in fact, an employer of said drivers within the meaning of the Act.¹⁵ For the foregoing reasons we conclude that the drivers of trucks owned by Fischer and Cornwall may properly be included in the bargaining unit. However, in view of the fact that said employees were not included in the prior bargaining unit, we shall conduct a separate election among them to determine their desires in respect to the matter. We shall also conduct an election among the other production, maintenance, transportation, and construction employees of the Company. If the truck drivers select the same union as selected by the production and maintenance group, they will have thereby indicated their desire to be included in a unit with the general production and maintenance group, and will become a part of such unit.¹⁶ We shall make no finding with respect to the appropriate unit pending the outcome of the elections.

We shall accordingly direct that separate elections be held among the employees in the separate voting groups described below who were employed during the pay-roll period immediately preceding the date of the Direction of Elections herein, subject to the limitations and additions set forth in the Direction:

1. All truck drivers employed by the Company, excluding the truck drivers employed by K. C. Johnson.
2. All other production, maintenance, transportation, and construction employees of the Company, located at or near Marcola, Oregon, including

¹³ It appears that Fischer and Cornwall pay such individuals for services rendered.

¹⁴ In other instances the Company reimburses them for services rendered in the following manner:

(a) A portion of the total indebtedness is paid into a checking account (the pool) against which Fischer and Cornwall may issue checks.

(b) Another portion is paid directly to Fischer and Cornwall.

¹⁵ See *Matter of Seattle Post-Intelligencer Department of Hearst Publications, Inc.*, 9 N. L. R. B. 1262; *Matter of John Yasek*, 37 N. L. R. B. 156, *Matter of The Kelly Company*, 34 N. L. R. B. 325, *Matter of Murphy Lumber Company, supra*, cf. *Matter of Hearst Publications, Incorporated*, 25 N. L. R. B. 619.

¹⁶ See *Matter of Pittsburgh Equitable Meter Company*, 61 N. L. R. B. 880

the filer, bull buck, and hook tender, but excluding all office and clerical employees, shipping clerk, the road engineer, the woods superintendent and all other supervisory employees in the woods having the rank of camp foremen or above, and the sawmill foreman and all other supervisory employees in the sawmill and planing mill having the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

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 Fischer Lumber Co., Marcola, Oregon, 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 supervision of the Regional Director for the Nineteenth 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 each of the voting groups described in Section IV, *supra*, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees 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 Willamette Valley District Council, chartered by the United Brotherhood of Carpenters & Joiners of America, A. F. L., or by International Woodworkers of America, Local No. 5-246, C. I. O., for the purposes of collective bargaining, or by neither.

MR. GERARD D. REILLY, concurring:

Although I concur in the conclusions reached in the majority opinion, I disagree with the basis assigned therein for the inclusion of the filer and bull buck in the appropriate unit, for the reasons stated in my dissenting opinions in *Matter of Packard Motor Car Company*,¹⁷ and *Matter of Coos Bay Lumber Company*.¹⁸ I would include the filer and bull buck on the ground that they do not in fact exercise supervisory authority within the meaning of our customary definition.

¹⁷ 61 N. L. R. B. 4

¹⁸ *Supra*