

IN the Matter of BERNARD SHAPIRO AND MONROE SHAPIRO, PARTNERS,
d/B/A RELIABLE NUT COMPANY and FOOD, TOBACCO, AGRICULTURAL
AND ALLIED WORKERS UNION OF AMERICA, C. I. O.

Case No. 21-R-2837.—Decided August 14, 1945

Latham and Watkins, by *Mr. Richard W. Lund*, of Los Angeles,
Calif., for the Company.

Miss Luisa Moreno and *Messrs. O. H. Johnston* and *Dixie Tiller*, of
Los Angeles, Calif., for the Union.

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

DECISION
AND
DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon a petition duly filed by Food, Tobacco, Agricultural and Allied Workers Union of America, C. I. O., herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of Bernard Shapiro and Monroe Shapiro, partners, d/b/a Reliable Nut Company, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Maurice J. Nicoson, Trial Examiner. Said hearing was held at Los Angeles, California, on May 25, 1945. The Company and the Union 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. The Company, in its brief, moved for dismissal of the instant petition. For reasons stated in Section V, the motion is hereby denied.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Bernard Shapiro and Monroe Shapiro, partners, d/b/a Reliable Nut Company, are engaged in the manufacture of edible nut products at
63 N. L. R. B., No. 52.

their sole plant located in Los Angeles, California. The chief products purchased and used by the Company in its manufacturing processes include peanuts and other edible nuts, oils, sugar, salt, and packing materials. The Company's finished products primarily consist of peanut butter, salted nuts, peanut candy, and edible nuts. During the current fiscal year, it is estimated that the Company purchased raw materials valued in excess of \$1,000,000, approximately 70 percent of which was shipped to it from points outside the State of California. During the same period, the Company sold finished products valued in excess of \$1,400,000, approximately 15 percent of which was shipped to points outside the State of California.

We find that the Company's operations affect commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATION INVOLVED

Food, Tobacco, Agricultural and Allied Workers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

On or about April 14, 1945, the Union advised the Company that it represented a majority of the Company's employees and was desirous of negotiating a collective bargaining agreement. Shortly thereafter, the Company indicated that it would not extend recognition until the Union has been certified by the Board in an appropriate unit.

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.¹

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 parties are in substantial agreement that the appropriate unit should consist of all production and maintenance employees of the Company, including working foremen and working foreladies,² but

¹ The Field Examiner reported that the Union submitted 68 application-for-membership cards, 53 of which bore apparently genuine original signatures of persons appearing on the Company's pay roll of April 28, 1945, which contained the names of 91 employees in the appropriate unit, and that the cards were dated in March and April 1945.

Candy Workers Union, Local 417, Los Angeles Central Labor Council, and Los Angeles Industrial Union Council were invited to submit representation evidence, but they failed to do so.

² The parties are in agreement that such employees do not exercise supervisory authority within the meaning of our customary definition.

excluding temporary employees, office and clerical employees, superintendents, and supervisory employees. The parties disagree, however, as to the following employees:

Truck driver and swamper. At the present time, the Company employs one truck driver who is engaged in the hauling of sundry items to and from the plant. On occasion the truck driver performs work in the plant, but it is merely incidental to the loading and unloading of the truck. The swamper acts as his helper in the performance of all of the above tasks. The Union urges the exclusion of the truck driver and the swamper on the ground that their inclusion in the unit may raise jurisdictional problems in the future;³ the Company desires their inclusion. In view of the fact that the truck driver and swamper are employees whose interests and working conditions are substantially dissimilar to those of the production and maintenance employees, and since the parties differ as to their disposition, we shall exclude them from the unit.⁴

We find that all production and maintenance employees of the Company, including working foremen and working foreladies, but excluding the truck driver and swamper, temporary employees, office and clerical employees, superintendents and all or any 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

The Union urges that the date of April 28, 1945, should determine eligibility to vote in any election herein directed, in view of the termination of employment of approximately nine persons on the "graveyard shift" subsequent to that date, allegedly in order to discourage union activity.⁵ Unless a union chooses to pursue its remedy under Section 10 of the Act by filing a charge with respect to such a matter, we do not treat it as a reason for departing from the customary practice in a representation proceeding. The mere fact that employees of the Company have been laid off or discharged since April 28 does not, *per se*, afford any basis for altering the usual eligibility date.

³ At the hearing the Union agreed to include the truck driver and swamper in the appropriate unit, if they devoted approximately 25 percent of their time to production work. The record affords insufficient evidence upon which to base a finding as to the amount of time the truck driver and swamper devote to production work, we are, therefore, constrained to disregard this offer of inclusion.

⁴ See *Matter of Wilson & Company, Inc.*, 62 N. L. R. B. 895; *Matter of Kingan & Co., Incorporated*, 61 N. L. R. B. 1222.

⁵ It appears that these employees may have been discharged because the Company was unable to obtain sufficient quantities of corn syrup. Some of the discharges were offered reemployment.

The Company urges, in its brief, the dismissal of the instant petition, or, in the alternative, the selection of an eligibility date which will take into consideration the Company's contemplated change in its manufacturing site and reduction of personnel.⁶ The Company requests an eligibility date "not earlier than 10 days after [it] begins operations at the new location."⁷ The Company's lease covering the building in which it operated at the time of the hearing was due to expire on June 25, 1945. A company witness testified that efforts to renew this lease or to lease other industrial property have been futile. However, on April 11, 1945, the Company entered into a contract calling for the construction of a plant, 10,000 to 12,000 square feet in size, to be completed on or about August 1, 1945.⁸ The priority for the construction of the plant was acquired through the assistance of the Army, with which the Company is presently under contract. The size of the plant was limited by the War Production Board to meet the operational requirements for the completion of an Army contract, whereby the Company has undertaken to supply the Army with peanut butter for the first 9 months of 1945. At the hearing, the Company indicated that the lessor of the "old" plant would extend its lease "until the new structure is ready for occupancy." The Company asserts that it intends to transfer to the "new" plant all persons who are presently employed in the peanut butter department of the "old" plant.⁹ However, the candy and salted nuts departments are either to be sold as a "going business" or completely disbanded.¹⁰

It is evident from these facts that the prospective change in the Company's operations involves no material change in the appropriate unit, but only a reduction in its size. This is not a case where the employees retained by the Company will be absorbed into an existing, larger unit;¹¹ nor will they be engaged in new or materially different operations or processes.¹² The operation is contracting, not expanding.¹³

Since the time of the anticipated reduction of the Company's working force has now arrived, we find it unnecessary to consider Com-

⁶ At the hearing the Company merely stated its request as to the eligibility date, without moving for dismissal.

⁷ The Company anticipates that operations will begin on or about August 1, 1945.

⁸ The "new" plant will be approximately 7 miles from the "old" plant, a distance which, in a city the size of Los Angeles, will evidently not result in any significant alteration of working conditions. Indeed, the record shows that some employees now travel a distance of approximately 40 miles to reach the Company's plant.

⁹ The Company states that this will involve the retention of approximately 15 employees out of the 91 presently employed in the entire plant.

¹⁰ In the latter case, all equipment and material will be disposed of by public or private sale.

¹¹ Cf. *Matter of Armour & Company*, 62 N. L. R. B. 1194.

¹² All the operations in the Company's present plant appear to require substantially the same skills, and this fact will also be true as to operations in the "new" plant. Cf. *Matter of M. P. Moller, Inc.*, 56 N. L. R. B. 16.

¹³ Cf. *Matter of Aluminum Company of America*, 52 N. L. R. B. 1040.

pany's request with respect to the eligibility date. We hereby deny its motion to dismiss the petition; for the mere reduction of the Company's working force, now, presumably, in progress or already accomplished, does not militate against a determination of representatives within the next 30 days. Our usual eligibility requirements will ensure that the election hereinafter directed will reflect the desires of the persons in the Company's employ at the time of the election.

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 Bernard Shapiro and Monroe Shapiro, partners, d/b/a Reliable Nut Company, Los Angeles, 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, 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 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, 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 or not they desire to be represented by Food, Tobacco, Agricultural and Allied Workers Union of America, C. I. O., for the purposes of collective bargaining.

MR. GERARD D. REILLY took no part in the consideration of the above Decision and Direction of Election.