In the Matter of EMPIRE WORSTED MILLS, INC. *and* TEXTILE WORKERS UNION OF AMERICA, C. I. O.

Case No. 3–R–1007.—Decided October 4, 1945

Messrs. J. Russell Rogerson and *Marvin R. Klarquist*, of Jamestown, N. Y., for the Company.

Isadore Katz, Esq., of New York City, by *Mr. Benjamin Wyle; Mr. Charles Sobol*, of Buffalo, N. Y., and *Mr. Vincent Tortolano*, of Jamestown, N. Y., for the C. I. O.

Mr. Charles Connors, of Hudson, N. Y., and *Mr. William A. Hartley*, of Jamestown, N. Y., for the A. F. of L.

Mr. A. Sumner Lawrence, of counsel to the Board.

DECISION
AND
DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon a petition duly filed by Textile Workers Union of America, C. I. O., herein called the C. I. O. alleging that a question affecting commerce had arisen concerning the representation of employees of Empire Worsted Mills, Inc., Jamestown, New York, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Eugene von Wellsheim, Trial Examiner. The hearing was held at Jamestown, New York, on July 10, 1945. The Company, the C. I. O., and Department of Woolen and Worsted Workers of the United Textile Workers of America, A. F. L., herein called the A. F. L., appeared and participated. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to file briefs with the Board. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The A. F. L.'s request for leave to present oral argument and the motions of the Company and the A. F. L. to dismiss the proceeding, are hereby severally denied.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Empire Worsted Mills, Inc., a New York corporation, operates a plant at Jamestown, New York, where it is engaged in the manufacture of army serge and shirting under direct contract with the United States Government. During the period from January 1, 1944, to December 31, 1944, the Company used at its Jamestown plant raw materials valued in excess of $500,000, of which 95 percent was obtained from points outside the State of New York. During the same period, the Company manufactured at its Jamestown plant finished products valued in excess of $1,500,000, of which more than 75 percent was shipped to points outside the State of New York.

The Company admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

Textile Workers Union of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

Department of Woolen and Worsted Workers of the United Textile Workers of America, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

On or about March 9, 1945, the C. I. O. addressed a letter to the Company claiming majority representation and requesting recognition as the bargaining agent for certain of its employees. The Company received the letter but did not reply, admitting at the hearing that it thereby intended to refuse recognition pending certification of the C. I. O. as bargaining representative of such employees.

The Company and the A. F. L. contend that the present proceeding is barred by one or more contracts allegedly entered into between the Company and the A. F. L. prior to the C. I. O.'s notice of its claim to representation. In short, the Company, whose position is shared by the A. F. L., contends that either the last of a series of formal agreements between the Company and the A. F. L. was automatically renewed under the provision contained therein for automatic renewal, or that such agreement was expressly renewed by act of the parties, prior to the receipt by the Company of the C. I. O.'s claim to majority representation.

With respect to the contention that the last formal agreement between the Company and the A. F. L. was automatically renewed, it appears that during the year 1944 the Company and the A. F. L. executed a 1-year formal collective bargaining agreement, the effective date of which is uncertain; and that this agreement was subject to automatic renewal in the absence of written notice of a desire to revise or terminate the agreement given by either party 30 days prior to the expiration date.[1] On January 23, 1945, the A. F. L. formally notified the Company under the terms of the automatic renewal provision, of its desire to renegotiate wages and other substantive terms of the then existing agreement. Thereafter, in February 1945, the Company and the A. F. L. entered into negotiations for substantial modifications of the agreement as sought by the A. F. L. Pursuant to such negotiations, the parties executed a memorandum expressly renewing the formal agreement subject to the determination of issues then in the process of negotiation.

In support of their contention that the 1944 agreement was automatically renewed, the Company and the A. F. L. maintain that the notice given by the A. F. L. for revision of the contract was untimely under the terms of the automatic renewal provision, inasmuch as it was tendered the Company less than 30 days prior to January 30, 1945. Assuming that the expiration date of the contract was January 30, 1945,[2] as the Company and the A. F. L. contend, it may be conceded that the A. F. L.'s notice was untimely and that the contract therefore would have been automatically renewed in the absence of any conduct by the parties subsequent to the automatic renewal date indicating that the automatic renewal provision was not intended to remain operative. Retroactive waiver of the automatic renewal provision, however, is clearly indicated by the entrance of the parties into negotiations for substantial modifications of the contract and by the execution of the express renewal agreement extending the terms of the 1944 contract subject to the adoption of any of the A. F. L.'s proposed changes. Accordingly, we find that the 1944 contract was not automatically renewed and, consequently, that it constitutes no bar to the instant proceeding.[3]

There remains for consideration, however, the question of the sufficiency of the express renewal agreement as a bar to the petition in the present instance. Although the Company and the A. F. L. contend

[1] The agreement opens with the statement that it was "entered into this 30th day of January 1944." However, the last paragraph, which provides for the automatic renewal thereof, indicates that the agreement was executed not on January 30, 1944, but on April 10, 1944

[2] If it is assumed that the expiration date of the 1944 agreement was April 10, 1945, it is clear that insofar as such agreement is concerned, the C. I. O. was timely in presenting its claim to representation to the Company on March 9, 1945

[3] See *Matter of Swift & Company*, 58 N. L. R. B. 1258; *Matter of Iroquois Gas Corporation*, 61 N. L. R. B 302.

that the renewal agreement was executed prior to the C. I. O.'s claim to representation, the evidence does not definitely establish the date upon which the renewal agreement was executed. The Company's general manager testified that he though that all the signatories to the agreement, other than the A. F. L. international representative, executed the agreement about 1 week after February 2, 1945, the date of the Company's reply to the A. F. L.'s notice requesting negotiations. The same witness further stated that the agreement was executed by all such signatories prior to April 12, 1945, when the parties met for a conference with a Field Examiner of the Board concerning the C. I. O.'s claim to representation.[4] The president of the A. F. L. local, however, testified that the renewal agreement was executed sometime during the latter part of March 1945. There is nothing in the record to indicate when the requisite signature of the A. F. L. international representative was added to the renewal agreement as previously signed by the Company and the representatives of the A. F. L. local.

Upon the record as a whole, we are not convinced that the parties raising the renewal agreement as a bar have established that such agreement was executed prior to the C. I. O.'s request for recognition as the bargaining representative. Accordingly, we find that the renewal agreement does not prevent a present determination of representatives.

The statement of a Board agent, introduced into evidence at the hearing, indicates that the C. I. O. represents a substantial number of employees in the unit hereinafter found appropriate.[5]

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.

V. THE APPROPRIATE UNIT

We find, in substantial accord with the agreement of the parties, that all production and maintenance employees of the Company, including the assistant in the Burling Department, but excluding office and

[4] The witness who attended the conference could not recall, however, that anyone had produced the agreement or raised it as an objection to the C. I. O 's claim to representation.

[5] The Board agent reported that the C. I. O. had submitted 155 authorization cards, of which 110 checked with the Company's pay roll of June 2, 1945, containing 442 names within the claimed appropriate unit. The 110 cards checked consisted of 12 cards dated 1944, 2 cards undated, and the remainder dated between January 1945, and May 1945. The A. F. L submitted no cards but relied upon its contracts with the Company as evidence of its interest in the proceeding.

The A F. L. contends that the showing made by the C. I. O. is insufficient to maintain the present petition While it appears that the C I O 's showing is only approximately 24 percent of the employees in the claimed appropriate unit, we are of the opinion that the showing of the C I O is sufficient since the last formal agreement between the Company and the A F L provides for maintenance of membership in the A F L as the basis of continued employment by the Company See *Matter of Aluminum Company of America, et al*, 61 N L R B 245

clerical employees, subforemen, 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.

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 Empire Worsted Mills, Inc., Jamestown, New York, 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 Third 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 appropriate unit 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 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 they desire to be represented by Textile Workers Union of America, C. I. O., or by Department of Woolen and Worsted Workers of the United Textile Workers of America, A. F. L., for the purposes of collective bargaining, or by neither.