In the Matter of WORCESTER WOOLEN MILLS CORPORATION *and* TEXTILE WORKERS UNION OF AMERICA, C. I. O.

*Case No. 1-R-2932.—Decided July 11, 1946*

*Mr. Simon G. Friedman*, of Worcester, Mass., and *Mr. Myer G. Jasper*, of Cherry Valley, Mass., for the Company.

*Messrs. Felix P. Damore* and *Manel Travers*, both of Worcester, Mass., for the Union.

*Mr. Jerome J. Dick*, of counsel to the Board.

## DIRECTION

AND

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### STATEMENT OF THE CASE

Upon a petition duly filed by Textile 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 Worcester Woolen Mills Corporation, Cherry Valley, Massachusetts, herein called the Company, the National Labor Relations Board on March 22, 1946, conducted a prehearing election pursuant to Article III, Section 3, of the Board's Rules and Regulations,[1] among employees of the Company in the alleged appropriate unit, to determine whether or not they desired to be represented by the Union for the purposes of collective bargaining.

At the close of the election a Tally of Ballots was furnished to the parties. The Tally shows that there were approximately 67 eligible voters and 63 of these voters cast ballots, of which 30 were for the Union, 19 were against the Union, and 14 were challenged.

Thereafter, pursuant to Article III, Section 10, of the Rules and Regulations,[2] the Board provided for an appropriate hearing upon due notice before Robert E. Greene, Trial Examiner. The hearing was held at Worcester, Massachusetts, on April 30, 1946. The Com-

[1] By amendment of November 27, 1945, this Section of the Rules now permits the conduct of a secret ballot of employees prior to hearing in cases which present no substantial issues.

[2] As amended November 27, 1945, this Section provides that in instances of prehearing elections, all issues, including issues with respect to the conduct of the election or conduct affecting the election results and issues raised by challenged ballots, shall be heard at the subsequent hearing.

pany 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 opportunity to file briefs with the Board.

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

## Findings of Fact

### I. THE BUSINESS OF THE COMPANY

Worcester Woolen Mills Corporation, a Massachusetts corporation with its plant and offices located at Cherry Valley, Massachusetts, is engaged in the manufacture, sale, and distribution of woolen cloth. During the calendar year 1945, the Company purchased for its plant raw materials exceeding $100,000 in value, of which approximately 30 percent was received from points outside the Commonwealth of Massachusetts. During the same period, the Company manufactured at its plant woolen cloth exceeding $150,000 in value, of which approximately 70 percent was shipped to points outside the Commonwealth of Massachusetts.

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

### II. THE ORGANIZATION INVOLVED

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

### III. THE QUESTION CONCERNING REPRESENTATION

The Company has refused to grant recognition to the Union as the exclusive bargaining representative of its employees in the alleged appropriate unit.

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

We find, in accordance with the agreement of the parties, that all production and maintenance employees at the Company's Cherry Valley plant, excluding office and clerical employees, executives, foremen, 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

#### *Background*

The prehearing election was held among the Company's employees on March 22, 1946, March 12 having been the eligibility date.[3] On February 27, 1946, most of the Company's employees struck for recognition of the Union as their bargaining representative. "A day or so" after the strike was called, the Company invited the strikers to return to work, and informed them that it would try to replace them, if they remained on strike. On March 6, 1946, it was agreed by the Company, the Union, and a Federal conciliator, that the strike would be settled on the following basis:

> We [the Company] agree to your [the Federal conciliator] recommendation that the strike be terminated and all striking employees be reinstated without discrimination to the job and shift on which they were employed at the time the strike began.

The President of the Company testified that it was also understood that the Company had extra employees in the finishing room, that it might not need all of them, and in that case they would be rehired as the need for them arose. *The strike terminated and the employees returned to work on March 11 the day before the eligibility date.*

The issues raised at the hearing relate to the Company's objections to the election, and the eligibility of the 14 persons whose votes were challenged.

#### *Objections to the election*

The Company contends that the election should be set aside on the grounds that (1) the Board agent, without consulting the Company, selected its observer at the election and failed properly to instruct her; (2) certain alleged illegal actions on the part of the Union in obtaining authorization cards so influenced the employees that they were deprived of a free choice in the election; and (3) five named individuals[4] were ineligible to vote, but nevertheless cast ballots.

(1) It appears that the Board agent selected the Company's bookkeeper to act as its observer. The Company admits in its brief that it was fully informed of its right to appoint its own observer, yet it did not object to the selection of its bookkeeper, permitting her to serve in the capacity of company observer, and apparently made no effort to

[3] The election was conducted pursuant to rules identical to those laid down in the Board's usual Direction of Election.

[4] They are J Lynch, J Leonard, Wyman Sperry, James Dulligan and Maud Hiller

designate a different person. Moreover, the bookkeeper was a logical person to act as the Company's observer, as she had prepared the list of eligibles which the Company submitted. Under the circumstances, we find that there was no prejudicial irregularity in the designation of the Company's observer.

Asserting that inadequate instructions were given its observer, the Company contends that this prevented her from challenging the ballots of the five alleged ineligible individuals who voted without objections. It is true that the Company's observer testified at the hearing that she was not instructed by the Board agent. But the testimony of the Union's observer indicates that before any of the five persons in question voted, both observers were instructed by the Board agent at the same time and in each other's presence, and that the Board agent informed them of their rights, including the privilege of challenging the ballots of employees they claimed to be ineligible. This testimony is corroborated by the fact that the Company's observer actually challenged the ballots of seven persons. In her testimony the Company's observer claimed that when James Paris came to vote and she protested because he did not work on the eligibility date, the Board agent said, "Let him go ahead." As a result, she further testified, she believed it futile to challenge the ballots of the five persons in question, these individuals having voted after James Paris.[5] James Paris voted under the Company's challenge, however, and the Company's observer admitted that she was not told that she could not challenge the ballots of the five individuals in dispute. In view of the above facts we are of the opinion and find that the Company's observer was adequately instructed by the Board agent, and should have been aware of her right to challenge the ballots of the five persons in question. Accordingly, we shall overrule the Company's first objection.

(2) At the hearing the Company offered to prove in connection with its second objection to the election that the Union engaged in an unlawful strike and other alleged illegal activity which coerced employees into signing union authorization cards. The Company argues that this conduct so influenced the employees that they were deprived of a free choice in the election. The Company's offer of proof was rejected by the Trial Examiner, and the Company contends that his ruling constitutes error. Assuming that the Company had proved such activity on the Union's part, this would not have warranted the conclusion that the employees were deprived of a free choice in the election. For, as stated by the Trial Examiner on the record, the

[5] The facts regarding the eligibility of James Paris are the same as those relating to the eligibility of the five individuals, except that James Paris did not return to work until after the day of the election whereas these five individuals were working at that time. The challenge to James Paris' ballot is discussed, *infra*.

employees were protected in their right freely to select bargaining representative by means of an election by secret ballot, which occurred after the alleged misconduct, and they were not bound by their authorization cards when they voted. We find that the Trial Examiner ruled properly on the Company's proffer, and we conclude that there is no merit in the Company's second objection.

(3) Finally, the Company contends that the election should be set aside on the ground that the five individuals named above who voted without challenge were ineligible to cast ballots. The Company asserts that these individuals were ineligible because they were not on the Company's pay roll on the eligibility date, and because they engaged in an illegal strike. However, the Company failed to challenge the ballots of these five persons. In view of the fact that the Company did not exercise its power of challenge it cannot now be heard to object to the election.[6]

In any case, we find that these five individuals were eligible voters. As already indicated, before the eligibility date the Company had agreed to reinstate all strikers. These five persons were striking employees who were reinstated after the eligibility date, but before the date of the election. Apparently they were not reinstated on March 11, 1946, only because there was no work for them at that time. It is clear that, during the period of the strike, these persons were employees of the Company within the meaning of the Act, and that after the strike and until their reinstatement they were temporarily laid off because there was no need for their services. They were unmistakably eligible to vote, having been temporarily laid off on the eligibility date and having been at work at the time of the election.[7]

Despite the offer of proof, discussed above, which was specifically made in connection with an objection that the employees were not permitted to register a free choice, the Company claims in its brief that these five persons were ineligible to vote for the additional reason that they participated in an alleged illegal strike. This matter is clearly an afterthought, as evidenced by the limited purpose of the Company's offer of proof. Assuming, however, that the Company's offer of proof was tendered with the view of establishing this point, and assuming further that the Company had proved that these five individuals had engaged in an illegal strike, they nevertheless were eligible to vote. It seems to be the Company's thesis that participation in illegal activity *per se* deprives strikers of their employee status, even though, as here, an employer has taken no affirmative steps to discharge them. The Company relies entirely upon the following

[6] See *Matter of A. J. Tower Company*, 60 N. L. R. B. 1414; *Matter of Chrysler Corporation*, 63 N. L. R. B. 866.

[7] Their cases are identical to that of William Paris, whose ballot was challenged: the challenge to the ballot of William Paris is discussed, *infra*.

statement in its brief to show a severance of the employment ties of the five persons in question:

> Their names were not on the eligibility list of March 12 as under the employment practice of the Company, having left their jobs February 27 on the walkout, their employment terminated.

It is clear that no overt action was taken by the Company during the course of the strike or at any other time to discharge these persons. Consequently, the principal issue in the *Columbia Pictures* case [8] is not present here. It is clear from the foregoing facts that the five individuals in question were qualified voters, since they were at all material times employees of the Company. For all these reasons, we overrule the Company's last objection.[9]

### *Challenged Ballots*

Six of the challenged ballots were cast by voters whom the Union claims are supervisory employees; six of the challenged ballots were cast by voters whom the Company claims were not employed either on the eligibility date or on the date of the election; one challenge made by the Union was withdrawn when it was shown at the hearing that the voter was employed by the Company on both the eligibility date and the date of the election; [10] and in its brief the Company also withdrew one challenge.[11]

The ballots of *Mae Hidenfelter*, *Albion Smith*, *Tom Donahue*, *Vincent Rivers*, *Philip Le Blanc* and *William Scheren* were challenged by the Union on the ground that they are supervisory employees. None of these employees has the authority to alter the status of employees, or the power effectively to recommend such action. There is no evidence in the record which indicates that any of these workers are supervisory employees within the meaning of our customary definition. Accordingly, we shall overrule the challenges to their ballots.

*Herbert Maylot* was one of the striking employees. On March 11, 1946, when the strikers returned to work, he notified the Company that he had been incapacitated by an automobile accident and could not resume his duties. He was replaced on March 11 or March 12. He had not been reemployed as of the date of the hearing herein. The Company's practice is to drop sick employees from its pay roll, although they may be rehired if there is work for them. Testimony in

[8] 64 N. L. R. B. 490.

[9] In view of his separate opinions in the *Tower* and *Chrysler* cases, *supra*, Mr. Reilly concurs in overruling the Company's final objection solely on the ground that the five persons in question were employees of the Company on the eligibility date and day of the election, and hence were eligible voters.

[10] This challenge was to the ballot of J. Burzell.

[11] This challenge was to the ballot of Tony Mongilio. It had been based on the ground that Mongilio is a supervisory employee. The record clearly shows that this individual is not a supervisory employee.

the record indicates that Herbert Maylot was permanently replaced on March 11 or March 12. Under these circumstances it is apparent that, even if Herbert Maylot was employed on the eligibility date, he was not employed on the date of the election, having been permanently replaced before that time. Therefore, we shall sustain the challenge to his ballot.

*William Paris* and *James Paris* are finishers and were striking employees. They applied for reinstatement on March 11, but were not returned to their jobs until March 13 and April 11, respectively, because there was no work for them.[12] It is thus evident that these two employees were merely temporarily laid off on the eligibility date, James Paris having continued in this status beyond the date of the election, and William Paris having been reinstated before that date. Consequently, we shall overrule the challenges to the ballots of William Paris and James Paris.

*Ann Maylot* quit the Company's employ on February 15, 1946, because she was transferred to the second shift. She has not worked for the Company since that time. Accordingly, we shall sustain the challenge to her ballot.

*Ann Lindstorm* left the Company's employ on January 4, 1946, because of illness, and has not worked for the Company since that date. In view of the Company's policy in regard to sick employees, discussed above, it is apparent that she was not an employee of the Company on the eligibility date or the day of the election. Therefore, we shall sustain the challenge to her ballot.

*Philip Kent*, another finisher, was also a striking employee. He applied for work on March 11, 1946, but was told that there was no work for him, and that the Company did not know when it could use him. On the day of the election he told the Company that he was going to work for another employer the following Monday. Although it would appear from these facts that Kent had made up his mind before the day of the election to leave the Company's employ, the record does not disclose whether he communicated this intention to the Company before or after he cast his ballot.[13] At the present time we shall not rule upon the challenge to Kent's ballot. In the event the Supplemental Tally of Ballots hereinafter directed to be made shows that Kent's ballot will affect the results of the election, we shall undertake to dispose of this challenge.

We shall direct that the ballots of Mae Hidenfelter, Albion Smith, Tom Donahue, Vincent Rivers, Philip Le Blanc, William Scheren, William Paris, and James Paris, hereinabove found to be valid, be

[12] As indicated above, at the time the strike was settled it was understood, according to the testimony of the Company's president, that there might not be work for all finishers, in which case they would be reinstated as the need for them arose.

[13] See *Matter of Midland Steamship Line, Inc.*, 66 N. L. R. B. 836.

opened and counted. Inasmuch as the challenges to the ballots of J. Burzell and Tony Mongilio have been withdrawn, and we are satisfied that these persons are eligible voters, we shall also direct that their ballots be opened and counted.

## DIRECTION

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, Sections 9 and 10, 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 Worcester Woolen Mills Corporation, Cherry Valley, Massachusetts, the Regional Director of the First Region shall, pursuant to said Rules and Regulations, within ten (10) days from the date of this Direction, open and count the challenged ballots of Mae Hidenfelter, Albion Smith, Tom Donahue, Vincent Rivers, Philip Le Blanc, William Scheren, William Paris, James Paris, J. Burzell, and Tony Mongilio, and shall thereafter prepare and cause to be served upon the parties a Supplemental Tally of Ballots, including therein the count of these challenged ballots.