In the Matter of R. W. HUMMEL D/B/A HUMMEL FURNITURE MANUFACTURING COMPANY, EMPLOYER *and* UNITED FURNITURE WORKERS OF AMERICA, LOCAL 262, CIO, PETITIONER

Case No. 20–R–1741.—Decided January 28, 1947

Messrs. Aaron Turner and *E. A. Woodside*, both of Oakland, Calif., for the Employer.

Messrs. Gladstein, Andersen, Resner, Sawyer & Edises, by *Mr. Norman Leonard*, all of Oakland, Calif., for the Petitioner.

Messrs. Tobriner & Lazarus, by *Mr. Albert Brundage*, all of San Francisco, Calif., for the Intervenor.

Mr. Jerome A. Reiner, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

Upon a petition duly filed, hearing in this case was held at San Francisco, California, on August 30, and September 20, 1946, before Mr. Robert E. Tillman, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the case, the National Labor Relations Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

R. W. Hummel, an individual doing business as Hummel Furniture Manufacturing Company, owns and operates a plant at Berkeley, California, where he is engaged in the manufacture of furniture. During the year 1945, the Employer purchased raw materials having a total value of approximately $75,000, of which approximately 50 percent represented shipments from points outside the State of California. During the same period, the Employer manufactured and sold products valued at approximately $250,000, of which approximately 40 percent represented shipments outside the State of California.

The Employer admits and we find that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

The Petitioner is a labor organization affiliated with the Congress of Industrial Organizations, claiming to represent employees of the Employer.

Furniture Workers' Union, Local No. 3141, United Brotherhood of Carpenters and Joiners of America, herein called Intervenor, is a labor organization affiliated with the American Federation of Labor, claiming to represent employees of the Employer.

III. THE QUESTION CONCERNING REPRESENTATION

Although the facts are in dispute as to whether or not a CIO representative advised the Employer at any time either before or after the filing of the instant petition on April 11, 1946, of its claim to represent certain employees of the Employer, it is clear from the Employer's position at the hearing, that it refuses, in view of the conflicting claims of the Petitioner and the Intervenor, to recognize the former in the absence of a Board certification.

The record discloses that from 1938 until June 3, 1946, the Employer was a member of the East Bay Furniture Manufacturers Association, more recently incorporated as the Furniture Manufacturers of Northern California.[1] This Association has at all times material herein included in its membership 8 to 10 furniture manufacturers in the area embraced by the cities of Oakland and San Francisco, California, and has been authorized by its membership to bargain collectively in their behalf. During the above 8-year period the Association entered into a series of collective bargaining contracts with the Intervenor for all production and maintenance employees of its member employers.[2] The contracts were always signed by the Association in behalf of its members and, in at least two instances, all the members affixed their signatures thereto as well. These contracts provided among other things for wage schedules, hours and conditions of employment, grievance machinery, and contained a closed-shop clause under the terms of which the Employer members of the Association were to employ only members of the Intervenor's union. The last complete contract was entered into on April 5, 1943, and was made effective

[1] Hereinafter referred to as the Association

[2] There is testimony that there were from 20 to 25 furniture manufacturing firms in the area but that all did not belong to the Association. The composition of the membership of the Association has changed from time to time but the total membership has varied generally between 8 and 10 members. There is also testimony that at various times some of these independent firms in the furniture manufacturing business in the area signed contracts with the Intervenor on behalf of their employees which were identical with the contract between the Association and the Intervenor

retroactively to January 1, 1943. It provided for an initial period ending December 31, 1943, and for its automatic renewal thereafter in the absence of notice to terminate prior to December 31 of any year of the life of the agreement. This contract was automatically renewed in accordance with its terms in 1943. In 1944 the Intervenor notified the Association of desired changes. Negotiations ensued and on August 29, 1945, a supplemental agreement was entered into between the Association and the Intervenor. It incorporated changes as to wages and vacations into the April 1943 contract and extended its terms from January 1, 1945 to July 31, 1946. It provided for its further extension by yearly terms thereafter subject to reopening by either party upon 60 days' notice prior to July 31 of each year. As noted above, on April 11, 1946, considerably before the operative renewal date of the afore-mentioned contract as supplemented, the instant petition was filed. Thereafter on June 3, 1946, the Employer resigned from the Association and on June 5, 1946, independently contracted with the Intervenor relative to wages, hours, and working conditions of its employees, the agreement to be effective from August 1, 1946 to July 31, 1947.

The Intervenor contends that this latter contract is a bar to this proceeding. However, inasmuch as this contract was executed after the filing of the petition herein, it cannot under well-established principles of the Board, bar a present determination of representatives.[3] Similarly, the above-mentioned contract between the Association and the Intervenor cannot prevent a current determination of representatives, for, apart from other considerations, the fact that the petition antedated the effective automatic renewal notice date of the contract prevents that instrument from acting as a bar.

In addition the Intervenor moved to dismiss the petition herein on the ground that a limitation in the appropriations rider [4] enjoins the present proceeding while the contract between the Association and the Intervenor is in existence. However, aside from the fact that the contract has already expired, it is clear that the limitation adverted to refers to complaint cases and not to representation cases.[5] The motion by the Intervenor to dismiss the petition for lack of jurisdiction is therefore denied.

Accordingly, we find that no contractual or other bar exists to a present determination of representatives and find further that a question affecting commerce has arisen concerning the representation of employees of the Employer, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

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[3] *Matter of Edward G. Budd Manufacturing Company*, 68 N L R B 153

[4] Title IV Act of July 3, 1945 The same limitation is in effect in the current appropriations rider.

[5] *Matter of Joseph Dyson & Sons, Inc.*, 60 N. L. R. B. 867.

IV. THE APPROPRIATE UNIT

The Petitioner seeks a unit of production and maintenance employees of the Employer. The Intervenor and the Employer both contend that a unit of the employees of the Employer is inappropriate and that only a multiple-employer unit based upon the past bargaining history of the Association is appropriate. Save for a dispute affecting certain classifications of supervisory employees, the parties are in agreement as to the composition of the unit.

Scope of the Unit

The Petitioner does not dispute that, as of June 3, 1946, the Employer had been a member of the Association for 8 years and had during that period entered into collective bargaining agreements through the Association with the Intervenor relative to its production and maintenance employees as part of a multiple-employer unit. However it argues, in effect, that the above history should be discounted because notwithstanding those contracts, the Intervenor from 1942 until very recently has not represented the Employer's employees and has made no attempt to maintain the multiple-employer unit as to them; and it contends further that the resignation of the Employer from the Association on June 3, 1946, and the Employer's separate contract with the Intervenor preclude a multiple-employer unit finding.

It appears from the record that the representative of the Intervenor, in the period from 1942 to April 1946, never visited the plant of the Employer and made no effort to enforce its contract with the Association in the Hummel plant; that the Intervenor made no attempt during this time to have the employees of the Employer join the Intervenor [6] and that none of the employees of the Employer knew of the existence of an Intervenor in the Employer's plant and were not aware of the fact that there was a contract in existence regulating their wages, hours and working conditions.[7]

The record further reveals that in March or April 1946, after the Petitioner had begun its organizational drive, the employees became

[6] Oddone, the Secretary and Business Agent of the Intervenor, testified that the last time he visited the Employer's plant prior to 1946 was in 1942 and that between 1942 and 1946 he made no attempt to enforce the closed-shop provisions of the contract because he had heard from persons who had worked there and also from relatives of employees working there that there was almost a 100-percent turn-over of employees in some months and that accordingly he did not think it advisable then to "indoctrinate them into the union." He waited until March or April 1946 before soliciting membership in the Intervenor

[7] Sanchez, a former employee, testified that he began to work for the Employer in January 1946 and did not learn about the Intervenor or the contract until April 12, 1946 Frisvold, another former employee, who had worked for the Employer from November 1943 until May 1946, testified that in 1943, Mr Hummel had told him that he did not have a union shop. Frisvold did not learn about the Intervenor in the Employer's plant or about the existence of a contract until April 1946

aware of the fact that a contract did exist, and that the Intervenor was, under the provisions thereof, their bargaining agent. Then, for the first time after approximately 4 years, the Intervenor put into operation the grievance machinery of its contract and procured for the employees certain wage and vacation benefits as provided in the existing agreement. Shortly thereafter on June 3, 1946, the Employer tendered, and the Association accepted, the Employer's resignation from the Association.

On June 5, 1946, the Employer independently contracted with the Intervenor relative to wages, hours and working conditions of his day after the contract between the Association and the Intervenor employees for a 1-year period commencing from August 1, 1946, the was to expire in the absence of automatic renewal. The independent contract was identical in substantially all respects with the then current Association contract. In addition it included a provision for a wage scale for upholstery employees which had not been provided for in the Association's contract inasmuch as none of the other members of the Association did upholstering, and a further provision that should the Association in renegotiating its contract with the Intervenor create changes or amendments in wage rates, hours and vacation schedules, then such changes as were effected should be incorporated into the Employer's independent contract with the Intervenor and remain in force for the life of that contract. A subsequent contract was thereafter negotiated on August 5, 1946, between the Association and the Intervenor, and the employees of the Employer were not embraced by its terms.

While the history detailed above is not impressive insofar as it relates to the employees of the Employer from 1942 to April 1946, and to their role in the multiple-employer unit we find it unnecessary to base our conclusion as to the appropriate unit on those facts alone.[8] For, it is clear from the foregoing that the Employer by its act of June 3, 1946, in resigning from the Association, indicated a desire to pursue an individual course with respect to its labor relations, that it cemented this position by negotiating and contracting with the Intervenor independently of the Association and that the Association and the Intervenor readily recognized this change in bargaining relationship by thereafter entering into a multiple-employer contract which did not embrace the employees of the Employer. While the Employer

[8] Except for the information that there were collective bargaining contracts entered into between the Intervenor and the Association the record is barren as to the facts relative to any bargaining history prior to 1942 See *Matter of Lamson Brothers Company*, 59 N L R B 1561, where the Board rejected the bargaining history urged in support of a multiple-employer unit and found a single-employer unit to be appropriate, saying

"In general, it appears that the only evidence of collective bargaining on an Association-wide basis, including Lamson's employees is the existence of the written contracts, and we are of the opinion that such evidence alone is wholly inadequate to demonstrate a 'history of collective bargaining determinative of the issue presented here"

patterned its contract with the Intervenor upon that of the multiple-employer contract about to expire, and while it also made provision for conforming its contract in other respects to the next contract to be consummated between the Association and the Intervenor, we are unable to conclude therefrom, as the Employer impliedly contends, that by such conduct it left unimpaired the collective bargaining on a multiple-employer basis antedating its resignation from the Association.[9] In our opinion the resignation from the Association, the separate contract, and the fact that the Employer had no part in the negotiation of the terms of the last multiple-employer contract, militate against the inclusion of the Employer's employees in a multiple-employer unit.[10]

Accordingly, upon all of the facts and upon the entire record in the case, we find that the unit position taken by the Employer and the Intervenor is without merit, and that the production and maintenance employees of the Employer constitute an appropriate unit for collective bargaining purposes.

The Composition of the Unit

We come now to a discussion of the disputed employees, classified respectively as foremen of the Machine Department, the Finishing Department, the Chesterfield Department and the Boudoir Chair Department. The Petitioner would exclude these employees; the Intervenor would include them; and the Employer would exclude only the foreman of the Boudoir Chair Department from the unit. The foremen in the first three departments mentioned have no authority to hire or discharge employees, to make recommendations relative to the status of their subordinates, to grant increases in wages or to effect promotions. Their supervisory duties are restricted to laying out the work and seeing that it is done. They are hourly rated employees receiving 15 cents more per hour than the men working under them. The Boudoir Chair foreman, on the other hand, devotes the major portion of his time to supervising and instructing others. He has absolute authority to hire and discharge employees under his supervision. In addition, he is not hourly rated but is paid a salary and is regarded by the Employer as having considerably more authority than the previously mentioned foremen. Under all these circumstances we find that only the foreman in the Boudoir Chair Department has supervisory authority within our customary definition

[9] The instant case is distinguishable on its facts from *Matter of George F Carleton & Co*, 54 N L R B 222, cited by the Intervenor in support of this position Moreover that case was overruled by *Matter of Advance Tanning Company*, 60 N. L. R. B. 923, to the extent that it was inconsistent therewith

[10] See *Matter of Bercut Richards Packing Company*, 68 N. L. R. B. 605, and 64 N. L R. B 133 · *Matter of Advance Tanning Company*, 60 N. L. R B. 923 Compare *Matter of Dolese & Shepard*, 56 N. L. R B. 532.

of that term. We shall therefore exclude him from the unit and shall include the others in the unit as production employees.

We find, therefore, that all production and maintenance employees at the Berkeley, California, plant of the Employer, including the foremen in the Machine Department, the Finishing Department, and the Chesterfield Department, but excluding office and clerical employees, the foreman in the Boudoir Chair Department, 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.

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with R. W. Hummel d/b/a Hummel Furniture Manufacturing Company, Berkeley, 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 Sections 203.55 and 203.56, of National Labor Relations Board Rules and Regulations—Series 4, 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 they desire to be represented by United Furniture Workers of America, Local 262, CIO, or by Furniture Workers' Union, Local No. 3141, United Brotherhood of Carpenters and Joiners of America, A. F. L., for the purposes of collective bargaining, or by neither.