

IN the Matter of ACME BREWING COMPANY, AZTEC BREWING COMPANY, GRACE BROS. BREWING COMPANY, LTD., LOS ANGELES BREWING COMPANY, MAIER BREWING COMPANY, RAINIER BREWING COMPANY, STEWART MCKEE & COMPANY, BOHEMIAN DISTRIBUTING COMPANY, EMPLOYERS and INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL AND SOFT DRINK WORKERS OF AMERICA, C. I. O., PETITIONER

*Cases Nos. 21-R-3564 through 21-R-3570 and 21-R-3697.—Decided  
February 28, 1947*

*Brobeck, Phleger & Harrison*, by Messrs. Gregory Harrison, E. R. Hoerchner, and E. J. Ruff, of San Francisco, Calif., for Acme Brewing Company, Maier Brewing Company, Rainier Brewing Company, and Bohemian Distributing Company.

*Hanna and Morton*, by Mr. James M. McRoberts, of Los Angeles, Calif., for Grace Bros. Brewing Company, Ltd., Los Angeles Brewing Company, and Stewart McKee & Company.

*Katz, Gallagher & Margolis*, by Mr. John T. McTernan, of Los Angeles, Calif., for the Petitioner.

*F. Nason O'Hara*, by Mr. P. M. McCarthy, Jr., of San Francisco, Calif., for the Intervenor.

*Mr. Melvin J. Welles*, of counsel to the Board.

## DECISION

AND

## DIRECTION OF ELECTION

Upon separate petitions duly filed, a consolidated hearing in these cases was held at Los Angeles, California, on December 18 and 19, 1946, before George H. O'Brien, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>1</sup> Prior to the hearing, at the hearing, and in its brief, the Intervenor moved to dismiss the petition on various grounds, in substance as follows: (1) there is no evidence that the Petitioner represents a substantial number of employees in the alleged appropriate unit; (2) the petitions fail to state a cause of action; (3) the unit sought is inappropriate; (4) a contract between the Intervenor and the Employers is a bar to this proceeding; (5) the pendency of

<sup>1</sup> In affirming the hearing officer's rulings, we have considered claims by the Intervenor and the Employers that certain procedural error was committed at the hearing

unfair labor practice charges precludes the direction of an election at this time; (6) the Petitioner's waiver of the unfair labor practice charges is inadequate; and (7) the Board failed to advise either the Intervenor or the Employers of the contents of the unfair labor practice charges or the names of the charging parties. The Employers, at the hearing and in their briefs, also moved to dismiss the petition, on the grounds that (1) a contract between the Intervenor and the Employers is a bar to this proceeding; (2) the petitions fail to state a cause of action; (3) there is no evidence that the Petitioner represents a substantial number of employees in the alleged appropriate unit; and (4) the pendency of unfair labor practice charges precludes the direction of an election at this time. In addition, the Intervenor moved to strike as parties the Petitioner's local unions named in the various petitions.

The contention of the Intervenor and the Employers that the petition should be dismissed on the ground that there is no evidence that the Petitioner represents a substantial number of employees in the alleged appropriate unit is without merit. As we have declared in numerous cases, the question of whether or not a petitioner has made a sufficient *prima facie* showing of interest to warrant the holding of a representation election is an administrative matter to be determined by the Board itself, and is, therefore, not subject to direct or collateral attack by any of the parties to the proceeding.<sup>2</sup> And we have satisfied ourselves that, by reason of its long-enduring past relations with the Employers, the Petitioner has an adequate showing of interest among the employees here involved.<sup>3</sup>

We also find no merit in the contention of the Intervenor and the Employers that the petition should be dismissed because the petitions fail to state a cause of action. We are convinced that the petitions are sufficient as to form and substance.

For these reasons, and with respect to the remaining grounds upon which the Intervenor and the Employers base their motions to dismiss, for the reasons set forth in Sections III, IV, and V, *infra*, the motions are hereby denied.

The Intervenor's motion to strike as parties the Petitioner's local unions named in the various petitions is also denied, inasmuch as these locals have an interest in this proceeding.<sup>4</sup>

<sup>2</sup> *Matter of Nash Motors Division of Nash-Kelvinator Sales Corporation (Philadelphia Zone)*, 68 N. L. R. B. 651, *Matter of O. D. Jennings & Company*, 68 N. L. R. B. 516.

<sup>3</sup> See *Matter of Advance Tanning Company, et al.*, 60 N. L. R. B. 923. *Matter of Brewery Proprietors of Milwaukee, Wisconsin, et al.* 62 N. L. R. B. 163. *Matter of International Shoe Company (Rubber Plant)*, 55 N. L. R. B. 267.

<sup>4</sup> The Intervenor claims error in that its written motion to dismiss, filed with the Regional Director before the hearing, was referred to the hearing officer rather than the Board. Inasmuch as the hearing officer referred the motion to the Board and the Board has passed upon it, it is clear that the Intervenor was in no way prejudiced.

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

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYERS

Acme Brewing Company, a California corporation engaged in the manufacture of malt products, operates a plant in Los Angeles, California, with which we are concerned in this proceeding. Annually, this Employer purchases malt, grain, and hops, valued at more than \$100,000, from outside the State of California. During the period from July 1945 to June 1946, approximately 12.04 percent of the products produced at its Los Angeles plant was shipped to points outside the State of California.

Aztec Brewing Company, a California corporation, is engaged in the manufacture of malt beverages. Annually, this Employer purchases raw products, valued at more than \$75,000, from outside the State of California. During the year ending June 1946, approximately 7.55 percent of the products manufactured by this Employer was shipped to points outside the State of California.

Maier Brewing Company, a California corporation, is engaged in the manufacture of malt products. Annually, this Employer purchases raw products, valued at more than \$50,000, from outside the State of California.

Rainier Brewing Company, a California corporation engaged in the manufacture of malt products, operates a plant in Los Angeles, California, with which we are concerned in this proceeding. Annually, this Employer purchases grain and carton products, valued at more than \$100,000, from outside the State of California. During 1945, approximately 12.6 percent of the products manufactured at its Los Angeles plant was shipped to points outside the State of California.

Bohemian Distributing Company, a California corporation, is engaged in the distribution of malt products. This Employer purchases and distributes all of the products manufactured by Acme Brewing Company. Bohemian Distributing Company purchases other products, valued in excess of \$100,000, from outside the State of California. During the year ending June 1946, it shipped to points outside the State of California malt beverages valued in excess of several hundred thousand dollars.

Los Angeles Brewing Company, a California corporation, operates branches throughout the southern part of California, where it is engaged in brewing fermented malt liquors. During the past year,

this Employer purchased products, valued at approximately \$12,255,000, of which approximately 80 percent was shipped to it from points outside the State of California. During the same period, it manufactured and sold products, valued at approximately \$23,121,000, of which approximately 1 percent was shipped to points outside the State of California.

Stewart McKee & Company, a California corporation, is engaged in the manufacture of beer. During the past year, this Employer purchased products valued at approximately \$500,000, of which approximately 70 percent was shipped to it from points outside the State of California. During the same period, it manufactured and sold products, valued at approximately \$12,000,000, of which approximately 4 percent was shipped to points outside the State of California.

Grace Bros. Brewing Company, Ltd., a California corporation, is engaged in the manufacture of beer. Approximately 50 percent of the materials used by this Employer is purchased from points outside the State of California. During 1945, it sold 92,318.4 barrels of beer, all of which was sold within the State of California.

The Employers do not deny, and we find, that each of them 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.

Joint Local Executive Board of California, herein called the Intervenor, is a labor organization affiliated with the American Federation of Labor, claiming to represent employees of the Employers.

## III. THE QUESTION CONCERNING REPRESENTATION

For a long period before May 15, 1936, the Employers<sup>5</sup> were in contractual relationship with the Petitioner.<sup>6</sup> In 1936, a jurisdictional dispute arose between the Petitioner and International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America, A. F. L., herein called the Teamsters,<sup>7</sup> and the existing contract was terminated. Subsequently, in 1936 and 1937, negotiations took place between the Employers and the Petitioner, and the hours, wages, and working conditions then in existence were observed on a day-to-day basis. In

<sup>5</sup> All the breweries in southern California are operated by all the Employers, except Bohemian Distributing Company, which is a distributor in the same area.

<sup>6</sup> Until about October 16, 1941, the Petitioner was an A. F. L. affiliate. At that time it was suspended from the A. F. L., and about July 18, 1946, it became a C. I. O. affiliate.

<sup>7</sup> The Intervenor is composed of four locals of the Teamsters.

1939, the Petitioner demanded a written contract, to include a closed-shop for drivers. The Employers refused to enter into a contract containing such a provision. However, negotiations ensued which culminated in the Petitioner's submission of certain "Working Rules," which, with some exceptions, the Employers agreed to observe on a "day to day basis." In 1941 negotiations were again conducted between the Employers and the Petitioner. Once more the Employers refused to enter into a contract containing a closed-shop provision for drivers, but agreed to observe on a day-to-day basis the Working Rules adopted in 1939.

That same year, the Petitioner filed with the Board unfair labor practice charges against the Northern California brewers,<sup>8</sup> alleging an unlawful refusal to bargain because the Northern California brewers also rejected the Petitioner's demand for a written contract providing for a closed-shop for drivers. These charges were dismissed by the Board on the ground that the action of the Northern California brewers was justified in the circumstances.<sup>9</sup>

In 1943, the Petitioner met with the Employers and repeated its requests of 1939 and 1941. The Employers again refused to comply. A strike against certain brewing companies in Northern California resulted in a hearing before the War Labor Board. On May 2, 1944, the War Labor Board issued a Directive Order,<sup>10</sup> directing that:

The existing practice of posting the Working Rules shall be continued and the existing practice in carrying out the Working Rules shall be continued. No variations in these existing practices shall be made except by mutual agreement or by prior determination of the National War Labor Board.

The Employers then agreed by written endorsement of a copy of the Directive Order to be bound by the Directive Order "with the same force and effect as if a party thereto."

In 1945, the Petitioners again demanded a written contract with a closed-shop provision for drivers, and the Employers again refused, agreeing only to observe the Working Rules on a day-to-day basis as theretofore. In February 1946, the Employers and the Petitioners entered into negotiations concerning wage scales and certain modifications of the Working Rules. A memorandum, signed by Employer representatives only, was executed on February 8, 1946. Pertinent provisions of this memorandum are as follows:

\* \* \* \* \*

Discussion was held and mutual understanding reached with respect to the following subjects:

<sup>8</sup> The Northern California brewers have always bargained separately from the Southern California brewers.

<sup>9</sup> *Matter of Acme Breweries, et al*, 47 N. L. R. B. 1208

<sup>10</sup> Case No. 111-1376-D.

The following wage scale shall be effective the first payroll period after March 1, 1946, and shall remain in effect thereafter until May 1, 1947.

\* \* \* \* \*

By mutual understandings with the [Petitioner] through various officials, listed on the preceding page, the following clarifications and interpretations of the present [Petitioner's] working rules were made. All Employers shall be guided accordingly:

\* \* \* \* \*

[s] B. G. LEWIS  
 B. G. Lewis, *Secretary*  
*Southern Division,*  
*California State Brewers Institute.*

JAMES M. McROBERTS,  
*Labor Counsel,*  
*Southern California Brewing Industry.*

On April 11, 1946, a suit was instituted by the Petitioner against one of the Employers, the Los Angeles Brewing Company, in which the Petitioner alleged that this Employer was bound to it by contract, as evidenced by the Working Rules, the War Labor Board directive, and the memorandum of February 8, 1946, and that the Employer breached the alleged contract. The Petitioner prayed that the Court compel the Employer to observe the obligations of the contract. The Court (Superior Court of the State of California in and for the County of Los Angeles) entered judgment for the Employer, finding that no contract, as such, existed between the Petitioner and the Employer.

Sometime in July 1946, certain officials of the Petitioners transferred their allegiance to the American Federation of Labor. And on July 26, 1946, the Petitioner sent to the Employers, among others, the following telegram:

We have received information that our local union officials in San Francisco have divorced themselves from our organization and are attempting to take the membership, employees of your firm, over to the Teamsters' Union.

This is formal notice that our union represents the majority of your employees in all departments. You are hereby notified not to negotiate with any other union or representative thereof for your employees. Eugene J. McCann is the only authorized representative of this International Union in California, and he is prepared to meet with you at mutually convenient times and place to negotiate written contract covering all your employees.

By Order of the General Executive Board.

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Also on July 26, 1946, the Intervenor advised the Employers that its constituent locals represented a majority of employees of the Employers, and requested a conference for the purpose of collective bargaining negotiations. A meeting between the Employers' representatives and the Intervenor's officials was held on July 27, 1946, and one day later the Employers and the Intervenor executed a contract, effective on that date, to run until May 1, 1947.

The Petitioner instituted an action in the Superior Court of California on August 2, 1946, and obtained a temporary restraining order enjoining the Employers from enforcing or attempting to enforce the provisions of this contract. The order was vacated on August 15, 1946, reinstated on August 19, 1946, pending appeal, and finally vacated on August 20, 1946.

The Petitioner filed seven of its petitions on August 22, 1946, and the eighth on November 18, 1946.<sup>11</sup>

The Intervenor and the Employers claim that their contract of July 28, 1946, is a bar to the present proceeding.

Whether or not a true collective bargaining agreement has existed between the Petitioner and the Employers since 1936, it is clear from the record that until July 27, 1946, the Employers did in fact abide by the Petitioner's Working Rules. Grievances were settled by the Employers and the Petitioner under the guidance of the Working Rules; a wage scale having a fixed term was negotiated between the Employers and the Petitioner; the Employers employed only members of the Petitioner's local unions from about 1939 to 1946, and certain employees were discharged at the request of the Petitioner since the inception of the Working Rules. This past relationship reveals that, for all practical purposes, the Petitioner was recognized by the Employers as the exclusive bargaining representative of their employees. When in 1946 the Petitioner received information that certain of its officials had transferred their allegiance, it immediately notified the Employers, in its telegram of July 26, of its continued claim to representation.<sup>12</sup> At that time, the Petitioner was a vital and recognized incumbent of the status of statutory representative. In the face of these facts, and despite the additional circumstance that less than 5 months of the 14-month term of the wage scale agreement between the Employers and the Petitioner had passed, the Employers and the Intervenor executed their contract.

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<sup>11</sup> Separate petitions were filed with respect to each of the eight Employers, all but that for the Bohemian Distributing Company having been filed on August 22, 1946; the Bohemian petition was filed on November 18, 1946.

<sup>12</sup> In their briefs, the Employers advert to the fact that the Petitioner did not prove when this telegram was received. But no evidence was adduced to overcome the presumption that the telegram was received the same day, or the day after, it was sent. We find, therefore, that the telegram was received before the contract of July 28, 1946, was made.

The Intervenor and the Employers seek to invoke the principle of the *General Electric X-Ray* case,<sup>13</sup> contending that the Petitioner's timely claim of July 26, 1946, was vitiated by the late filing of the petitions. Under our ruling in that case, where a petition is filed more than 10 days after a *naked* claim to representation has been made, an agreement, otherwise valid, which is executed in the interval between the claim and the filing of the petition, constitutes a bar to an election. This ruling was intended to prevent labor organizations from playing "dog in the manger," by frustrating collective bargaining indefinitely through advancing merely colorable claims to representation with the intention of gaining time in order to augment their strength. But the Petitioner's claim cannot be said to have been "naked" within the purview of the *General Electric X-Ray* case. On the contrary, the Petitioner's active incumbency at the time it asserted its continued claim to representation amply demonstrates the substantiality of that claim and refutes the implication that it was desirous of delaying valid collective bargaining for the purpose of strengthening its position. This is not the normal case, where the validity of a union's claim, when made, can be verified only by the Board's prompt administrative examination of its authorization cards or other proof of interest. In the normal case, failure to permit such an inquiry by the filing of a petition within 10 days after the claim is advanced, warrants the conclusion that the claim is unfounded and justifies a refusal to interfere with the bargaining relations between the contracting parties. Here, a prompt examination would have revealed nothing more than the facts disclosed by this record. The accuracy of dates and the genuineness of signatures on cards are not involved. We are persuaded that the contract of July 28, 1946, is not a bar to a current determination of representatives, having been made after the Petitioner's valid claim of July 26, 1946.

We find that a question affecting commerce has arisen concerning the representation of employees of the Employers, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

#### IV. THE APPROPRIATE UNIT

All parties, except the Intervenor, agree that the appropriate unit should include all employees in the brewing, bottling, checking, and delivery departments of the Employers' Southern California operations,<sup>14</sup> excluding maltsters, maltsackers and yardmen in the malt departments, brewmasters, assistant brewmasters, managerial employees, foremen, and all other supervisory employees. The Intervenor contends that the employees of all distributors in Southern California should also be included in the unit. The Employers would

<sup>13</sup> *Matter of General Electric X-Ray Corporation*, 67 N L R B. 997.

<sup>14</sup> All parties agree that Southern California, for the purposes of this proceeding, includes all of California south of Bakersfield and the Tehachapi Mountains.

further include in the unit, and the Petitioner and the Intervenor would exclude, the drivers of Aztec Brewing Company.

The eight employers include all breweries in Southern California, and one distributor, Bohemian Distributing Company. These eight companies have always bargained as a unit for their Southern California operations, separate and distinct from the distributors in Southern California (apart from Bohemian); each agreement between the Petitioner and the Employers has had as parties these eight companies. In addition, the contract of July 28, 1946, between the Employers and the Intervenor, includes these eight companies only.

To support its contention that the 40-odd distributors in Southern California should also be included in the unit, the Intervenor adverts to the testimony of one of the Petitioner's representatives to the effect that the Petitioner's telegram of July 26, 1946, and a subsequent letter along similar lines, was sent to other companies, including some distributors, in Southern California, in addition to the 8 Employers. This, argues the Intervenor, amounts to a concession by the Petitioner that the unit should include the Southern California distributors. However, the fact that a representative of the Petitioner sought to protect contract rights with other employers does not amount to such a concession. In our opinion the long history of collective bargaining overwhelmingly supports the Petitioner's position that the unit be confined to the employees of the 8 Employers.

There remains for consideration the question of whether or not the drivers of Aztec Brewing Company should be included in the unit. These employees have been bargained for separately from the multi-employer unit since 1944. They are presently covered by a contract with a local of the Teamsters which did not participate at the hearing. In view of their separate representation, we shall exclude them from the unit hereinafter found appropriate.

We find that all employees in the brewing, bottling, checking, and delivery departments of the Employers' Southern California operations, excluding maltsters, maltsackers and yardmen in the malt departments, drivers of Aztec Brewing Company, brewmasters, assistant brewmasters, managerial employees, 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

The Petitioner has filed unfair labor practice charges,<sup>15</sup> alleging, *inter alia*, that certain employees of the Employers were discrimi-

<sup>15</sup> Cases Nos. 21-C-2868 through 2874 and 21-C-2928.

natorily discharged. The Petitioner, however, has formally waived the right to protect an election in this proceeding on any grounds set forth in the charges. Accordingly, we shall not postpone an election pending a determination of the unfair labor practice charges,<sup>16</sup> finding no merit in the contention of the Intervenor and the Employers that the pendency of the charges precludes the direction of an election at this time.<sup>17</sup>

At the time of the hearing, there were four strikes in progress in the Los Angeles area, affecting employees of Grace Bros. Brewing Company, Ltd., Maier Brewing Company, Stewart McKee & Company, and Los Angeles Brewing Company.

The Petitioner requests that the eligibility date for voting purposes determined by the weekly pay-roll period ending July 27, 1946, the week prior to the first strike and the alleged discriminatory discharges. In the alternative, the Petitioner requests (1) that employees on a current pay roll be eligible to vote, including discharged and striking employees, and excluding their replacements, or (2) that employees on a current pay roll be eligible to vote, including discharged and striking employees and their replacements, but that the ballots of the discharges, strikers, and replacements be challenged and impounded, with their eligibility to be determined by the Board in the event that the results of the election would be affected. All other parties desire that a current pay roll be used to determine voting eligibility.

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.

We shall, however, allow the alleged discriminatorily discharged employees,<sup>18</sup> the strikers, and the persons hired to replace strikers or employees who were allegedly discriminatorily discharged, to vote. But the ballot of each of such persons shall be segregated, sealed, and impounded by the Regional Director. We shall undertake to determine the validity of their ballots at an appropriate time in the future, provided such ballots may affect the results of the election.

At the hearing, the Petitioner expressed a desire to appear on the ballot under its full name: "International Union of United Brewery,

<sup>16</sup> *Matter of Fairmont Creamery Company*, 67 N. L. R. B. 688; *Matter of Knappe and Vogt Manufacturing Co.*, 65 N. L. R. B. 200

<sup>17</sup> The Intervenor contends further that the Petitioner cannot waive the charges on behalf of the individuals who were allegedly discriminatorily discharged. We find no merit in this contention.

Nor do we find any merit in the allegation in the Intervenor's motion to dismiss that the Board failed to advise the Intervenor or the Employers of the contents of the unfair labor practice charges or the names of the charging parties.

<sup>18</sup> Those named in unfair labor practice charges as having been discriminatorily discharged.

Flour, Cereal, and Soft Drink Workers of America, C. I. O.”; no objection was made to this request. The Intervenor expressed a desire to be designated on the ballot as “Brewery Workers, A. F. L.” To this request, the Petitioner interposed an objection. Although we are aware that the words “Brewery Workers” appear in both names, the letters “C. I. O.” in the Petitioner’s requested designation and the letters “A. F. L.” in the Intervenor’s requested designation should eliminate confusion if conspicuously recited on the ballots, and thereby clearly indicate to the voters the identity of the competing unions. In these circumstances, and in view of our desire, whenever possible, to place the names of labor organizations on the ballot in the form they themselves desire, we hereby grant the Intervenor’s request.

### DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with Acme Brewing Company, Vernon, California; Aztec Brewing Company, San Diego, California; Grace Bros. Brewing Company, Ltd., Los Angeles, California; Los Angeles Brewing Company, Los Angeles, California; Maier Brewing Company, Los Angeles, California; Rainier Brewing Company, Vernon, California; Stewart McKee & Company, Los Angeles, California; and Bohemian Distributing Company, Vernon, 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 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 persons who were on strike at that time, the individuals alleged in the unfair labor practice charges as having been discriminatorily discharged, and the replacements for both of these groups, and 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 International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C. I. O., or by Brewery Workers, A. F. L., for the purposes of collective bargaining, or by neither.