

IN the Matter of KRAFT FOODS COMPANY, EMPLOYER and RALPH J. KRUEGER, ET AL., EMPLOYEES, PETITIONERS and FOOD DRIVERS, SALESMEN, DAIRY AND ICE CREAM WORKERS, INTERNATIONAL TEAMSTERS UNION, LOCAL No. 463, A. F. L., UNION

Case No. 4-RD-2.—Decided March 2, 1948

Mr. N. S. Parker, of New York City, for the Employer.

Mr. Ralph J. Krueger, of Philadelphia, Pa., for the Petitioners.

Mr. Edward Davis, of Philadelphia, Pa., for the Union.

DECISION
AND
DIRECTION OF ELECTION

Upon an amended petition for decertification duly filed, hearing in this case was held at Philadelphia, Pennsylvania, on October 24, 1947, before Helen F. Humphrey, hearing officer.¹ 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 Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Kraft Foods Company, a Delaware corporation, is engaged in the sale and distribution of food products at its Philadelphia branch, which is the only facility involved in this proceeding.

During the year 1946, the Employer received at its Philadelphia branch food products valued in excess of \$4,500,000, approximately all of which was shipped from points outside the State. During the same period, the Employer at its Philadelphia branch sold products valued in excess of \$4,000,000, approximately 30 to 35 percent of which was shipped outside the State.

¹ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-man panel consisting of the undersigned Board Members [Houston, Reynolds, and Gray].

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

II. THE PARTIES INVOLVED.

The Petitioners, employees of the Employer,² assert that the Union is no longer the representative of the Employer's employees as defined in Section 9 (a) of the Act.

The Union, a labor organization affiliated with the American Federation of Labor, claiming to represent employees of the Employer, is currently recognized by the Employer as the exclusive representative of the employees involved in this proceeding.

III. THE QUESTION CONCERNING REPRESENTATION

The Union contends (1) that the instant petition is barred by an existing agreement between the Employer and the Union, (2) that various provisions of the amended Act involved in this proceeding are unconstitutional, (3) that the petition is defective in form, and (4) that the Board, in any event, has no authority to entertain the petition in view of the fact that the majority of the employees in the unit involved herein are still members of the Union in good standing. We shall consider these contentions in more detail below.

(1) *The "Contract-Bar" Issue*

In 1942 the Employer first recognized the Union as the exclusive bargaining agent of its salesmen, the employees herein involved, and a series of contracts were subsequently executed covering these employees.³ After the expiration of one of these contracts in the summer of 1947, negotiations were begun for a new contract. Oral agreement on the terms was reached on August 19, 1947. On September 12, 1947, the original petition in this case was filed.⁴ On September 17, 1947, the oral agreement of the Employer and the Union was reduced to writing, made retroactive to August 15, 1947, and signed.

The Union contends that under the foregoing circumstances, the Board is barred from proceeding to a determination of representatives. As stated in an earlier case,⁵ when dealing with the question of "contract-bar" in decertification cases, we will apply the same rules of deci-

² The original petition in this case, filed September 12, 1947, was executed by 17 employees of the Employer, including Ralph J. Krueger. The amended petition, filed on October 1, 1947, was signed by Krueger purporting to act for all 17 employees.

³ From 1942 to 1946 the salesmen, drivers, warehousemen, etc., were all covered by a single contract. In 1946 a separate contract was executed for the salesmen.

⁴ The amended petition was filed October 1, 1947.

⁵ *Matter of Snow & Nealley Company*, 76 N. L. R. B. 390.

sion as are applied in certification cases. In the latter cases we have consistently held that where, as in the instant proceeding, the petition was filed while an oral agreement was in effect but before such agreement was reduced to writing and signed, neither the oral agreement nor the subsequent written contract will bar a determination of representatives.⁶ This is true notwithstanding the written contract, as in the instant case, is made effective retroactively as of a date prior to the filing of the petition.⁷

We find, therefore, that the instant proceeding is not barred by any of the foregoing contracts between the Employer and the Union.

(2) *The Constitutional Issue*

At the hearing the Union moved to dismiss the amended petition on the ground that Section 9 (c) (1) (A) (ii) and other provisions of the amended Act were unconstitutional.

As an administrative agency, this Board is not competent to pass on the constitutionality of an Act of Congress. That is exclusively a judicial function. In the absence of any court decision to the contrary, the Board assumes that the Act, as amended, does not violate any provision of the Federal Constitution.⁸

The motion to dismiss on constitutional grounds is, accordingly, denied.

(3) *Adequacy of Petition*

The Union also moved to dismiss the instant proceeding on the ground that the petitioners had failed to assert that the Union was no longer the representative of the employees, but had merely stated that they no longer desired to be represented by the Union.

Section 9 (c) (1) (A) (ii) provides for the filing of petitions alleging that a substantial number of employees assert that the currently certified or recognized bargaining agent "is no longer a representative as defined in Section 9 (a)." Section 9 (a) reads:

Representatives *designated* or *selected* for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining. . . . [Italics supplied.]

⁶ *Matter of Simplicity Pattern Company, Inc*, 74 N. L. R. B. 591; *Matter of National Chair Company, Inc*, 74 N. L. R. B. 1014

⁷ *Matter of Simplicity Pattern Company, Inc.*, *supra*; and *Matter of Public Service Corporation of New Jersey*, 72 N. L. R. B. 224

⁸ *Matter of Rite-Form Corset Company, Inc*, 75 N. L. R. B. 174

It is clear from this language that the only assertion required in a decertification petition is that the currently certified or recognized bargaining agent is no longer the agent designated or selected by the majority of the employees in the appropriate unit. The original petition in this case contained a statement signed by a majority of the employees in the unit that they no longer desired to be represented by the Union. The amended petition was on a form prescribed by the Board for use in decertification cases. We believe that either petition complied with the requirements of the Act. In any case, any defect in the original petition was cured by the filing of the amended petition upon a form prescribed by the Board. The Union's objection to the form of the petition is, accordingly, overruled.

The Union contends further, however, that, even if the instant petition is in proper form, the Board may not entertain it under the provisions of Section 9 (c) (1) (A) (ii) which, the Union maintains, were intended by Congress to be used only to decertify labor organizations which are defunct or the members of which have withdrawn. At the time the instant petition was filed and at the time of the hearing thereon, all subscribers to the petition were members of the Union in good standing and the Union was actively representing them.

Thus, the Union seems to construe Section 9 (c) (1) (A) (ii) as precluding the raising of a question of representation thereunder if a majority of the employees in the unit are, as here, members of the Union sought to be decertified. We find nothing in the language of the Act or its legislative history to support such a narrow construction. As already stated, Section 9 (c) (1) (A) (ii), when read together with the language of Section 9 (a), requires an assertion only that the Union sought to be decertified is no longer the agent "designated" or "selected" by the majority in the unit. Such an assertion is compatible with a majority showing by the Union where, as in this case, such membership is compelled by a union-shop clause and the majority of the employees in the unit have unequivocally repudiated the Union. We do not believe that Congress intended to require that in such a case the employees, as a condition of filing a decertification petition, should jeopardize their jobs by withdrawing from the Union. Accordingly, we find that the current majority showing of the Union does not preclude a determination of representatives on the instant petition.

We find that a question affecting commerce exists concerning the representation of employees of the Employer, within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

We find that all salesmen at the Employer's Philadelphia plant, whose sales are covered by the Employer's own trucks operated out of its Philadelphia warehouse, excluding all supervisors, guards, and professional employees, as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.⁹

V. THE DETERMINATION OF REPRESENTATIVES

As indicated in an earlier proceeding,¹⁰ we are not precluded from directing an election on the instant petition by the fact that the Union has failed to comply with the registration and filing requirements of Section 9 (f) and (h) of the amended Act. Accordingly, we shall place the Union's name on the ballot in the election directed hereinafter. Under our policy, the Union would be certified if it wins the election, *provided*, that at that time it is in compliance with Section 9 (f) and (h) of the Act. Absent such compliance, the Board would only certify the arithmetical results of the election.¹¹

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with Kraft Foods Company, Philadelphia, Pennsylvania, 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 Fourth Region, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations—Series 5, 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, 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, and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented by Food Drivers, Salesmen, Dairy and Ice Cream Workers, International Teamsters Union, Local No. 463, A. F. L., for the purposes of collective bargaining.

⁹ This is virtually the unit defined in the current contract between the Union and the Employer. The description has been changed slightly to conform with the provisions of the amended Act.

¹⁰ *Matter of Harris Foundry & Machine Company*, 76 N. L. R. B. 118.

¹¹ *Matter of Harris Foundry & Machine Company*, *supra*.