In the Matter of COLONIAL HARDWOOD FLOORING CO., INC., EMPLOYER *and* ROBERT K. MILLER, PETITIONER *and* UNITED FURNITURE WORKERS OF AMERICA, CIO, UNION

Case No. 5–RD–4.—Decided March 31, 1948

Messrs. Gerard D. Reilly and *C. E. Rhetts*, of Washington, D. C., for the Employer.

Mr. Robert K. Miller, of Chewsville, Md., *pro se*.

Mr. Harry Weinstock, of New York City, and *Mr. Michael Tyson*, of Hagerstown, Md., for the Union.

DECISION

AND

DIRECTION OF ELECTION

Upon a petition for decertification duly filed, hearing in this case was held at Hagerstown, Maryland, on December 29, 1947, before Charles B. Slaughter, hearing officer.[1] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

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

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Colonial Hardwood Flooring Co., Inc., a Maryland corporation, is engaged in the manufacture and sale of woodwork at its plant in Hagerstown, Maryland, which is the only plant here involved. During the 6-month period preceding October 1, 1947, the Employer

[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].

[2] The hearing officer properly excluded evidence offered by the Union that he Employer had assisted in obtaining signatures in support of the decertification petition. *Matter of Magnesium Casting Company*, 76 N L. R B. 251. The hearing officer, also, in accord with our usual practice, prevented inquiry into the showing of interest by the Petitioner. *Matter of Mascot Stove Co.*, 75 N L R. B. 427. This and other rulings of the hearing officer are discussed in detail below.

bought lumber valued at about $131,739, of which an estimated 75 percent was received from points outside the State. During the same period, the Employer sold finished products valued at approximately $344,000, of which an estimated 75 percent was shipped to points outside the State.

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

II. THE PARTIES INVOLVED

The Petitioner, an employee of the Employer, asserts that the Union is no longer the representative of the Employer's employees as defined in Section 9 (a) of the amended Act.

The Union, a labor organization affiliated with the Congress of Industrial Organizations, was certified by the Board on August 2, 1944, as representative of the employees here involved.[3]

III. THE QUESTION CONCERNING REPRESENTATION

On August 2, 1944, the Union, as already noted, was certified as the representative of the production and maintenance employees of the Employer at its Hagerstown, Maryland, plant. On December 18, 1946, the Employer and the Union entered into a contract, which expired on October 15, 1947. On October 3, 1947, the Union called a strike, which is still in effect.

The Union contends that the Board may not entertain the instant petition, inasmuch as the Union is not in compliance with Section 9 (f) and (h) of the amended Act. This contention is overruled for reasons set forth in *Matter of Harris Foundry & Machine Company*, 76 N. L. R. B. 118.

At the hearing the Union offered in evidence authorization cards alleged to have been signed by 61 strikers, alleged to constitute a majority of the employees in the unit.[4] This evidence, which seems to have been offered primarily for the purpose of overcoming the *prima facie* showing of interest by the Petitioner, was properly rejected by the hearing officer. Such evidence, when offered by an intervening union in a *certification* proceeding, would not be admissible, under our

[3] Case No. 5–R–1509. The Decision and Direction of Election in that case is reported at 56 N. L. R. B. 1875. The Union was certified as representative of all production and maintenance employees, including inspectors, gang leaders, truck drivers, the shipping clerk, and the automobile mechanic, but excluding managers, salesmen, watchmen-firemen, office employees, superintendents, assistant superintendents, and all supervisory employees. A somewhat different unit was set up in the ensuing contract between the Union and the Employer. See footnote 10, below.

[4] There were 89 in the unit during the last pay-roll period prior to the strike.

rules of decision, to defeat the *prima facie* showing of the petitioning union in such a case.[5] We see no reason for adopting a different rule in decertification cases.[6]

As already indicated, the hearing officer also refused to permit inquiry into the nature of Petitioner's showing of interest. The Union contends that disclosure of this data is required by the language of Section 9 (c) (1) of the amended Act, which reads:

> If the Board finds *upon the record of such hearing* [i. e., a hearing on a petition filed under Section 9 (c) (1)] that such a question of representation exists, it shall direct an election . . . [Italics ours.]

The Union argues that the italicized language in the foregoing quotation precludes the Board from basing its decision that a representation question exists, upon evidence not in the record. However, it does not in our opinion follow from this that the Board must include in the record of a hearing the evidence relating to the Petitioner's showing of interest. Such a showing does not enter into the Board's final determination that a question of representation exists, but bears only on the preliminary question whether the Board is to investigate the petition. Accordingly, we do not believe that the Act, as amended requires any change in our practice of foreclosing inquiry into a Petitioner's showing of interest.[7]

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, in substantial agreement with the parties, that all production and maintenance employees at the Employer's Hagerstown plant, including truck drivers and inspectors, but excluding all office employees, foremen, assistant foremen, and all supervisors, guards, and professional employees, as defined in the amended Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.[8]

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[5] *Matter of Semon Bache & Company*, 72 N L R B 531; and *Matter of Potosi Tie & Lumber Company*, 73 N L R B 590

[6] The Senate Labor Committee report on the proposed amendments to the Act, in referring to the decertification provisions, states that those provisions do "not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing" Senate Report No 105, 80th Cong, 1st Sess, pp. 10, 24.

[7] *Matter of Mascot Stove Company*, 75 N L R B 427

[8] This is virtually the unit requested in the petition as modified upon oral motion of the Petitioner at the hearing to conform to the contract unit. The description has been changed slightly to conform with the provisions of the amended Act.

V. THE DETERMINATION OF REPRESENTATIVES

As already stated, a strike has been in effect at the Employer's plant since October 3, 1947. The Employer contends that 12 of the strikers have been replaced by new employees, and, on the assumption that the strike is an economic one, urges that these new employees be deemed eligible, and that the strikers who are found to have been replaced by them be deemed ineligible, to vote in the election. The Union, on the other hand, claiming that the strike was provoked by unfair labor practices, requests that all the strikers, but not the alleged replacements be deemed eligible to vote in the election. However, despite its claim of unfair labor practices by the Employer, the Union has not filed with the Board any charges of unfair labor practices.

For reasons indicated in an earlier case,[9] we shall direct an immediate election, permitting all employees to participate who were employed during the pay-roll period immediately preceding the date of this Direction. All persons hired since October 3, 1947, the date of the strike, and all strikers shall be deemed presumptively eligible to vote, subject to challenge.[10] The challenged ballots shall not be counted unless they affect the result of the election, in which case the question as to which of these ballots shall be opened and counted will await a further investigation concerning the employment status of the affected individuals.

As already stated, we shall place the name of the Union on the ballot, although it has not complied with the registration and filing requirements of the Act, as amended. 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 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 Colonial Hardwood Flooring Co., Inc., Hagerstown, Maryland, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from

[9] *Matter of The Pipe Machinery Company*, 76 N L R B 247.

[10] Nothing in this Direction should be construed as indicating that the Board has prejudged in any respect any of the questions which may be drawn into issue by a challenge to the eligibility of certain voters, including such questions as whether (1) a new employee is a permanent replacement, (2) a striking employee has been validly replaced, or (3) any employee's position no longer exists by reason of its permanent discontinuance for economic reasons. *Matter of Longhorn Roofing Products, Inc*, 67 N. L. R. B. 84, *Matter of Geilich Tanning Company*, 59 N L. R B. 1183; *Matter of The Pipe Machinery Company*, 76 N. L. R B 247.

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

the date of this Direction, under the direction and supervision of the Regional Director for the Fifth Region, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations—Series 5, and to our determination in Section V, above, 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 were on strike at that time and 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, to determine whether or not they desire to be represented by United Furniture Workers of America, CIO, for the purposes of collective bargaining.

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