BRUNSWIG DRUG COMPANY, MCKESSON & ROBBINS, INC., THE LOS ANGELES DRUG CO., AND MORGAN & SAMPSON, INC. *and* WAREHOUSE PROCESSING AND DISTRIBUTION WORKERS UNION, LOCAL 26, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, PETITIONER. *Case No. 21–UA–3472. September 26, 1951*

Decision and Order

Upon a petition for a union-shop election duly filed, a hearing was held before Jerome A. Reiner, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

Upon the entire record in this case, the Board finds:

1. The Employers are engaged in commerce within the meaning of the Act.

2. The Petitioner is the exclusive bargaining representative of employees of the Employers as provided in Section 9 (a) of the Act.

3. The alleged question concerning authorization of a union shop:

On February 28, 1949, the Petitioner, as exclusive bargaining representative of the employees described in the present petition, entered into a contract with the Employers to extend to February 28, 1951. Thereafter, on April 14, 1950, the contracting parties executed a supplemental agreement extending the original contract to February 28, 1953, and providing, *inter alia*, that:

> Notwithstanding the provisions of Article II, Section 3, or any other provision of this Agreement, each party hereto expressly waives any obligation or duty presently or hereafter imposed by State or Federal law on any other party, and acknowledges and recognizes that *no obligation or duty exists under this Agreement* (except relative to general wage changes pursuant to Sections 2 and 3 of Article XIX, under the conditions and during the periods therein specified) *on any party to bargain collectively or negotiate with any other party over or pertaining to wages, hours, pensions, insurance, or any terms or conditions of employment or any other matters or subjects whatsoever during the life of this Agreement.* [Emphasis added.]

The Employers contend mainly that, by virtue of the above provision, they are not obligated to, and will not, bargain with the Petitioner concerning union security until after February 28, 1953, and, therefore, no election should be conducted at the present time. We find merit in this contention.

[1] At the hearing, the Employers moved to dismiss the petition on grounds relating to the question concerning authorization of a union shop. For the reasons stated in paragraph numbered 3, *infra*, the motion is granted.

It is clear from the terms of the existing contract that the Employers are absolved from any *legal* obligation to bargain with the Petitioner concerning union security until at or near the termination of the contract.[2] Moreover, as indicated above, the Employers have categorically stated that they would not voluntarily enter into negotiations with the Petitioner with respect to union security even if that organization won the election. Under these circumstances, and particularly because no bargaining order could presently issue to implement any authorization issued herein, we believe that the conduct of an election at this time would be both a futile gesture and an unwarranted dissipation of Board funds. Unlike our dissenting colleague, we do not believe that either the language of Section 9 (e) of the Act or prior Board decisions compel the holding of an election which could thus serve no useful purpose.[3]

Accordingly, we are of the opinion that the instant petition should be dismissed, without prejudice to the timely filing of a new petition.[4]

Order

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

MEMBER HOUSTON, dissenting:

I cannot agree with the decision of the majority that the petition for union-security authorization should be dismissed.

The Board has repeatedly held that Section 9 (e) (1) of the Act sets forth only two prerequisites to the holding of a union-security authorization election: (1) That the labor organization shall have presented evidence that at least 30 percent of the employees within the unit desire such labor organization to negotiate and execute a union-shop contract, and (2) that no question of representation shall exist.[5]

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[2] Cf. *The Jacobs Manufacturing Company*, 94 NLRB 175

[3] See *Giant Food Shopping Center, Inc*, 77 NLRB 791, where the Board, in refusing to conduct a union-security election in a State that prohibited union-security agreements, similarly found persuasive that such an election "would serve no useful purpose"

Utah Wholesale Grocery Co., et al., 79 NLRB 1435, and similar cases cited in the dissent, did not involve contracts with terms comparable to those present in this case and, accordingly, are not controlling. And while the Board is reluctant to admit evidence of unfair labor practices in a representation case, we perceive no reason for refusing to consider whether a bargaining order could issue where, as here, such consideration demonstrates the futility of a present election. *Giant Food Shopping Center, Inc., supra.*

[4] If the Employers should alter their position with respect to union security during the term of the existing contract, then, of course, a petition filed at that time would be deemed timely.

[5] *Utah Wholesale Grocery Co., et al, supra; Western Electric Company, Incorporated*, 84 NLRB 1019; *Kay & Burbank Company*, 92 NLRB 224

As the Board emphasized in the *Utah Wholesale Grocery* case, "Once these conditions have been met, the Board 'shall' conduct such an election . . . the existence of a collective bargaining agreement is not a factor to be considered in determining whether or not a union security authorization election should be conducted."[6]

It is uncontroverted that the preliminary requirements for a union-security authorization election have been fully met in this case. There is manifestly no reason, therefore, as a matter of law, for denying the Petitioner's request for an immediate election.

Nor in my opinion, are any policy considerations present which militate in favor of a contrary result. The majority deems persuasive in this respect its determination that an 8 (a) (5) order could not issue if the Petitioner wins the election and if the Employers then refuse to bargain concerning union security. Yet, the possibility that the Employers will refuse to bargain if the Petitioner is successful in the election is purely speculative regardless of their currently stated opposition to such bargaining. The Employers may at any time lawfully change their position, and, indeed, such change is not unlikely in view of the concessions which the Petitioner might well make in return for a union-security agreement. Significantly, the existing contract is subject to reopening on the matter of wages as early as December 16, 1951. Moreover, the majority is, in effect, actually deciding the 8 (a) (5) case in this union-security authorization proceeding.[7] The Board has consistently refused to litigate unfair labor practice charges in representation cases,[8] and the same principles are clearly applicable to union-security authorization proceedings.[9]

For the foregoing reasons, I would direct that an immediate election be held.

CHAIRMAN HERZOG and MEMBER STYLES took no part in the consideration of the above Decision and Order.

[6] 79 NLRB 1435, at page 1436.

[7] It may be observed that in the present case the majority bases its determination on the language of the existing contract In a future case in order to resolve whether an 8 (a) (5) order would issue, the Board conceivably will be required to undertake an extensive investigation of past negotiations to ascertain whether any reference to union security was made. See *The Jacobs Manufacturing Company, supra.*

[8] *P R. Mallory & Co , Inc ,* 89 NLRB 962; *Arkansas City Flour Mills,* 88 NLRB 1293; *Ronwit Teller, Inc.,* 84 NLRB 414

[9] *The Manufacturer's Protective and Development Assn ,* 95 NLRB 1059.