

Accordingly, because the Employer's conduct interfered with the employees' exercise of a free choice of bargaining representative, we shall sustain the Petitioner's objections to the election and set the election aside. When the Regional Director advises the Board that the circumstances permit the free choice of a bargaining representative, we shall direct that a new election be held among these employees.

Order

IT IS HEREBY ORDERED that the election held on November 28, 1950, among the employees of the General Shoe Company (Marman Bag Plant), Nashville, Tennessee, be, and it hereby is, set aside.

MEMBER REYNOLDS, concurring:

I disagreed with the majority holding in the earlier *General Shoe* case⁵ that the preelection activities of the employer warranted setting aside the election. As the conduct of the Employer in the instant case with respect to the manner in which meetings were held with employees is indistinguishable from that of the employer in the earlier decision I deem myself bound by the majority finding therein. I therefore concur in my colleagues' conclusion that the election in the present case should be set aside. If I were not thus compelled to regard as coercive the employer meetings, I would view the conversations with Wright, Hunt, and Reeves as isolated incidents affording insufficient basis for directing that a new election be held.⁶

MEMBER MURDOCK took no part in the consideration of the above Supplemental Decision and Order.

⁵ Footnote 3, *supra*.

⁶ *Wilson and Company, Inc.*, 95 NLRB 882; *S & S Corrugated Paper Machinery Co. Inc.*, 89 NLRB 1363; *General Shoe Corporation*, footnote 3, *supra*.

COCA-COLA BOTTLING COMPANY OF POTTSVILLE *and* EMPLOYEES OF COCA-COLA BOTTLING COMPANY OF POTTSVILLE, PETITIONER *and* LOCAL 429, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL. *Case No. 4-RD-64. December 12, 1951*

Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Harold X. Summers, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹

¹ The hearing officer referred to the Board the Union's motion to dismiss the petition in this proceeding. For the reasons set forth in paragraph 3, *infra*, this motion is hereby granted.

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

1. The business of the Employer:

The Employer, a Pennsylvania corporation with its office and sole place of business at Pottsville, Pennsylvania, bottles, sells, and distributes a nationally advertised drink, Coca-Cola, as well as other carbonated beverages, in Pottsville and surrounding territory. It operates under a franchise granted by Coca-Cola Bottling Co. (Thomas), Inc., a Delaware corporation having its principal office at Chattanooga, Tennessee;² this franchise gives the Employer the exclusive right to make and distribute bottled Coca-Cola in a part of Schuylkill County, Pennsylvania.³ Pursuant to the franchise, all syrup used in the manufacture of bottled Coca-Cola by the Employer is shipped to it from the Delaware corporation's Kearney, New Jersey, plant, upon orders placed with that corporation's Chattanooga office. The Employer's purchases of such syrup during 1950 were valued at approximately \$50,000. In addition, the Employer purchased other materials such as bottles, crowns, cases, and chemicals, valued at approximately \$10,000; practically all of such materials were shipped to the Employer from outside Pennsylvania. During this same year, the Employer sold all its bottled drinks, valued at approximately \$208,000, within Pennsylvania; approximately 20 percent of its sales were made to plants of industrial concerns which ship goods in interstate commerce.

On the basis of the foregoing, and particularly the franchise agreement and the fact that the Employer purchases all its syrup from the Delaware corporation, we conclude that the Employer operates as an integral part of a multistate system devoted to the manufacture and distribution of a national product. We find that the operations of the Employer affect commerce within the meaning of the Act and, contrary to the contention of the Union, that it would effectuate the policies of the Act to assert jurisdiction in this case.⁴

2. The Petitioner, a group of employees of the Employer, asserts that the Union is no longer the representative, as defined in Section 9 (a) of the Act, of the employees designated in the petition.

3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9

² The Delaware corporation in turn operates under contract with The Coca-Cola Company, a Nation-wide organization having its principal offices at New York City, and Atlanta, Georgia.

³ The franchise prohibits the Employer from bottling, selling, or distributing substitute or imitation products, from selling or distributing Coca-Cola outside its franchised territory, and from transferring any part of its franchised territory without the consent of the Delaware corporation and The Coca-Cola Company. Approval of the Delaware corporation and The Coca-Cola Company was required for the transfer of the franchise, in 1946, to the Employer from the Employer's predecessor.

⁴ *Seven Up Bottling Company of Miami, Inc.*, 92 NLRB 1622.

(c) (1) and Section 2 (6) and (7) of the Act, for the following reasons:

The Union, which has never been certified by the Board, was voluntarily recognized by the Employer, about June 1, 1947, as the representative of the employees designated in the petition. The most recent contract between the Employer and the Union was executed for a term of 1 year from June 1, 1950, and from year to year thereafter, unless notice of intention to modify or terminate was given at least 60 days prior to the anniversary date of the contract. By letter dated March 25, 1951, and received by the Employer on March 27, 1951, the Union requested a meeting with the Employer to negotiate a new contract. About April 6, 1951, the Employer was presented with a letter signed by a majority of the employees in the contract unit, stating that such employees preferred to work for the Employer without belonging to the Union, and requesting the Employer not to enter into any negotiations on their behalf. The petition in this proceeding was filed on April 17, 1951. Because of the pendency of this proceeding and the doubt cast on the Union's majority status by the employees' letter of April 6, the Employer has refused to enter into negotiations with the Union, and has not recognized the Union as the representative of its employees since May 31, 1951, the end of the contract's yearly term.

As it is clear from the foregoing and the entire record that the Union's letter of March 25 effectively forestalled the automatic renewal of the contract, we find, contrary to the contention of the Union, that such contract is not a bar to this proceeding.⁵ We also find that the Employer does not recognize the Union as the representative of the employees involved herein. In this connection, we disagree with our dissenting colleagues that the Employer's withdrawal of recognition was not absolute, but was merely temporary and qualified. As noted above, the Employer has refused to negotiate with or recognize the Union since the end of the contract term, and there is no evidence that absent new proof of majority status, the Employer intended to resume recognition of the Union upon the conclusion of this proceeding. Moreover, as the Board has consistently held, it is the fact of an employer's withdrawal of recognition from a union, or his questioning of its majority claim, and not his motives or intentions, which is material in a representation proceeding.⁶ As the Union has never been certified and it is not currently recognized, we find that the Board

⁵ *Peters Sausage Company*, 95 NLRB 740. We find it unnecessary, therefore, to determine whether, as the Employer contends, the contract also contains an unlawful union-security clause.

⁶ See, e. g., *Philadelphia Electric Company*, 95 NLRB 71; *J. C. Penney Company*, 86 NLRB 920.

is not empowered to direct an election on the petition in this proceeding.⁷

Nor do we agree with Member Reynolds that the requirement of current recognition is to be tested as of the date of the filing of the petition, rather than as of some later date. Section 9 (c) (1) (A) (ii) of the Act, pursuant to which the petition herein was filed, directs the Board to investigate a petition for decertification when such petition asserts, in substance, that the certified or currently recognized bargaining representative is no longer a representative as defined in Section 9 (a), and further directs the Board to provide for a hearing if it has reasonable cause to believe that a question of representation affecting commerce exists. Such an investigation was made and such a hearing was held in this proceeding. Section 9 (c) (1) further provides, however, that the Board shall direct an election if it "finds upon the record of such hearing that such a question of representation exists." [Emphasis supplied.] Thus, the language of the Act provides that the record of the hearing, and not the contents of the petition, shall constitute the basis for the Board's determination of whether a question of representation exists, and consequently whether an election should be directed. Moreover, the use of the present tense in the above-quoted provision of the Act clearly indicates that the question of representation must exist at the time of the Board's finding and not, as Member Reynolds would hold, as of sometime prior thereto. As the question of representation, in our opinion, ceased to exist in this case when the Employer withdrew his recognition of the Union, the Board clearly may not make a finding that such a question still exists.

Furthermore, such a view is consistent with the Board's practice in determining in other situations whether the essential prerequisites are present for finding that a question of representation exists. Thus, with respect to a petition filed by a union, the Board has held that the refusal of an employer to recognize the union at the hearing is sufficient to raise a question of representation, irrespective of the allegations in the petition, or the fact that there had been no claim or refusal prior to the hearing.⁸ And with respect to decertification and employer petitions, the Board has held that a disclaimer of interest by the union is sufficient to require dismissal of the petition, although such disclaimer may have been made for the first time at the hearing,⁹ or even after the hearing.¹⁰ Consistency, and the mandate of Section 9 (c) (2) of the

⁷ *Anderson-Wagner, Inc.*, 94 NLRB 291; *Queen City Warehouses, Inc.*, 77 NLRB 268.

⁸ See, e. g., *Mesta Machine Company*, 94 NLRB 1624; *Advance Pattern Company*, 80 NLRB 29.

⁹ See, e. g., *Griffin Hosiery Mills, Inc.*, 83 NLRB 1240; *Terrytoons, Inc.*, 77 NLRB 471; *Ny-Lint Tool & Manufacturing Co.*, 77 NLRB 642.

¹⁰ See, e. g., *Bonita Ribbon Mills*, 88 NLRB 241; *Federal Shipbuilding and Drydock Company*, 77 NLRB 463.

Act,¹¹ require that the Board apply the same rules of decision to this proceeding, and determine the existence of the question concerning representation as of the present.

We cannot agree with Member Reynolds that the dismissal of the petition in this proceeding would subvert the intent of Congress. The decertification process was designed to enable employees at an appropriate time to unseat a union which, because of certification or recognition, enjoyed the status of a bargaining representative. Here the Union is not certified; it is not recognized, and there is thus nothing to decertify. To direct an election in these circumstances would not only result in a waste of Federal funds, but would also, for 12 months, deny to the employees the right to select a representative of their own choosing, should they so desire.¹² It is true, as Member Reynolds points out, that the Employer might, after our dismissal of the petition herein, again recognize the Union as the representative of its employees. However, we do not believe that such a speculative possibility is sufficient to warrant a strained construction of the Act which would require the Board to use Federal funds to conduct an election which may deny to the employees for 12 months the right to select any representative. In any event, the Board has sufficient power to prevent the abuse of its processes including the power to reinstate the petition herein.¹³

Accordingly, on the basis of the foregoing and the entire record, we shall dismiss the petition.¹⁴

Order

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

MEMBER REYNOLDS, dissenting:

I disagree with my colleagues' conclusion that the Employer does not "currently recognize" the Union within the meaning of Section 9 (c) (1) (A) (ii) of the Act and that therefore the Board is not empowered to direct an election on the instant decertification petition.

Section 9 (c) (1) (A) (ii) in pertinent part specifically provides that *whenever a petition is filed by employees asserting that a labor organization which is being currently recognized by their employer*

¹¹ Section 9 (c) (2) provides in pertinent part:

In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. . . ."

¹² Cf. *Federal Shipbuilding and Drydock Company*, *supra*.

¹³ See, e. g., *Standard & Poor's Corporation*, 96 NLRB 127; *Hollister & Company*, 95 NLRB 167.

¹⁴ In view of our disposition of this case, we find it unnecessary to consider the other grounds advanced by the Union in support of its motion to dismiss.

as the bargaining representative is no longer a representative the Board shall investigate such petition. This clear and unambiguous language of the section itself shows that the requirement of current recognition is to be tested as of the date the petition is filed and not at some time subsequent thereto as the majority does in this case.¹⁵ I see no reason, nor has the majority assigned any, for ignoring the standard of timeliness established by this section and substituting a rule which has the effect of subverting the intent of Congress to give employees the right to withdraw their prior designation of a bargaining representative. Thus, under the majority decision the employees' right to the processing of an otherwise proper petition may be barred by their employer's use of the simple expedient of withdrawing recognition of the union at any time after the filing of a petition and before the holding of an election. Indeed, the present decision would make it perfectly possible for an employer not only to veto the desire of his employees to divest themselves of an undesired bargaining representative, but also to foist that representative on his employees by entering into a contract with it after the petition of the employees was dismissed. I am convinced that such a result is incompatible with the intent of Congress in enacting this section of the Act. Since the Employer in the instant case recognized the Union on April 17, 1951, when the employee petitioners herein filed their petition, it is my opinion that the requirements of Section 9 (c) (1) (A) (ii) have been met and that the Board is thereby authorized to direct an election.

Moreover, even if I were to agree with the majority's position that only the present recognition status of the Union is relevant, I do not think the facts in this case warrant dismissal of the petition. In my opinion there was not here an absolute withdrawal of recognition by the Employer, but rather a mere temporary suspension of recognition pending resolution by the Board of the issue whether the Union in fact represents a majority of the employees. I would therefore find the Employer's withdrawal of recognition to be qualified and insufficient as a reason for dismissing the petition. It seems to me that my colleagues' resolution of this question leads to an anomalous result in that the very petition which an employer assigns as the basis for his refusal of recognition of a union is dismissed because of such refusal.

Accordingly, I would direct an election in this case.

¹⁵ Indeed, one of the earliest Board decisions on this subject, namely the *Queen City* case, footnote 7, *supra*, tends to support the view which I espouse. Thus, the basis for dismissing the petition in that case was that "the Employer, at the time the petition was filed, and also presently, refuses to grant unqualified recognition in the absence of proof of a majority." [Emphasis supplied.] If, as my colleagues now hold, only the present recognition status of a union is determinative, it is difficult to understand why the Board in the *Queen City* case found it necessary to attach significance to the fact that the employer refused to recognize the union at the time the petition was filed.

CHAIRMAN HERZOG, dissenting:

I join Mr. Reynolds in believing that an election should be directed here, limiting my reasons to those recited in the last paragraph of his opinion. His final sentence seems to me compelling.

MUSWICK BEVERAGE AND CIGAR Co., INC.¹ and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 878, AFL, PETITIONER. *Case No. 32-RC-388. December 12, 1951*

Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before John C. Truesdale, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Houston, Murdock, and Styles].

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

1. The Employer, an Arkansas company, with its sole office and place of business at Little Rock, Arkansas, is engaged in the wholesale distribution of beer, tobacco products, and sundry merchandise, and is the exclusive distributor of Pabst Blue Ribbon Beer for Pulaski County, Arkansas. During the year 1950 the Employer's purchases totaled \$676,868, of which more than 90 percent was shipped directly from points outside the State of Arkansas. During the same year, the Employer's sales amounted to \$772,964, all of which was sold within the State of Arkansas.

As the direct inflow is in excess of \$500,000 in value annually, we find, contrary to the Employer's contention, that the Employer is engaged in commerce and that it will effectuate the policies of the Act to assert jurisdiction in this case.²

2. The labor organization involved claims to represent employees of the Employer.

3. No 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, for the following reasons:

The Petitioner seeks a unit of all beer driver salesmen, excluding merchandise or foot salesmen,³ merchandise driver salesmen, mer-

¹ The Employer's name appears as amended at the hearing.

² *Federal Dairy Co., Inc.*, 91 NLRB 638.

³ The parties stipulated to the exclusion of this category.