

Thus, as the Petitioner actively assisted and directed the dissident employees of the Intervenor in their effort to affiliate with the rival union, we are convinced and find that the April 4 and 28 meetings do not warrant the application of the Board's schism doctrine.<sup>8</sup>

In view of the foregoing, we find that the 1954 contract between the Employer and the Intervenor is a bar to an election at the present time. Accordingly, we shall dismiss the petition.

[The Board dismissed the petition.]

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<sup>8</sup> *Barton Distilling Company*, 106 NLRB 361, 364; *Bendix Products Division*, 98 NLRB 1180, 1182.

**The Belden Brick Company and Robert W. Householder,<sup>1</sup> Petitioner and United Brick and Clay Workers of America, Local 809, A. F. L. Case No. 9-RD-145, September 12, 1955**

### DECISION AND DIRECTION OF ELECTION

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

The Union contends that the petition herein should be dismissed on the ground that the Employer allegedly instigated the filing of the petition. The record shows that: During a strike called by the Union at the Employer's Somerset, Ohio, plant, the only one involved herein, the employees, including the Petitioner, voted to return to work; the next day, when the employees sought to enter the plant, they found a picket line had been established by the Union with employees from other plants of the Employer; the Somerset employees did not attempt to cross the picket line; Metzgar, the Employer's superintendent at Somerset, thereupon, advised the Petitioner that one way the employees could get back to work would be to decertify the Union and that this would necessitate a trip to Cincinnati, Ohio; Petitioner retained local counsel, who aided him in preparing the instant petition; Petitioner borrowed 20 dollars from Metzgar, which was later repaid, to defray the expense of a trip to the Board's Regional Office in Cincinnati to file the instant petition, but did not disclose to Metzgar the purpose of the loan; and Metzgar frequently made loans to employees. While it appears from the foregoing that the Employer, through Metzgar, suggested to the Petitioner the filing of a decertification petition, we find that the Petitioner and the other employees adopted this suggestion solely because they thought it would prevent the Union

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<sup>1</sup> The Petitioner's name appears as amended at the hearing.

from interfering with their return to work. As there was no evidence that Metzgar knew of the purpose of his loan to Petitioner, or that any other expenses of the Petitioner were defrayed by the Employer, we do not find that the Employer knowingly gave any financial aid to the Petitioner in connection with the filing of the petition.<sup>2</sup> Accordingly, we reject the Union's contention that the petition should be dismissed.<sup>3</sup>

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

1. The Employer is engaged in commerce within the meaning of the Act.<sup>4</sup>

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

3. A question affecting commerce exists concerning representation of the employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.<sup>5</sup>

4. The Petitioner seeks a decertification election in a unit consisting of the Employer's production and maintenance employees at its Somerset, Ohio, plant, excluding foremen, assistant foremen, clerical workers, and office employees.

The unit conforms to that set forth in the most recent contract between the Union and the Employer. There is no dispute as to the composition of the unit,<sup>6</sup> except that the Union would exclude as supervisors the head setter, the shader, and the die man.<sup>7</sup>

The Employer is engaged in the manufacture and sale of face brick. The head setter works with a crew of 3 other setters and 1 transfer man. He maintains records of the output of the members of the

<sup>2</sup> The record shows that, when urged by a representative of the Union to withdraw the petition, Petitioner stated that the Employer might not "like it" and might subject him to reprisals. However, Petitioner denied at the hearing that the Employer had in fact threatened reprisals to secure the filing of the petition. We are unable to find on this evidence that Petitioner's statement to the Union was anything more than his conjecture as to the Employer's reaction to withdrawal of the petition.

<sup>3</sup> See *Plastic Molding Corporation*, 112 NLRB 179.

<sup>4</sup> The Employer's treasurer testified on the basis of his recollection of entries in the books and records of the Employer that the sales of the Somerset plant for the preceding year total about \$680,000, of which about \$500,000 had been shipped out of State. The Union contends that such evidence was not competent, and moves that the petition be dismissed for failure to establish jurisdiction by proper proof. However, representation proceedings are essentially investigatory and technical rules of evidence are not controlling. *Pacific Tent & Awning-Co*, 97 NLRB 640, 641. The Union's motion to dismiss is therefore denied.

<sup>5</sup> Although, in its brief filed with the Board, the Union contended that it had a current contract with the Employer which barred the petition, the Union has since advised the Board that it has abandoned this contention.

<sup>6</sup> At the time of the hearing there were no employees classified as assistant foremen or as office employees. Accordingly, we do not pass upon the unit placement of these categories.

<sup>7</sup> The Union would also exclude the "shipping foremen." However, this category appears to be the same as the "assistant foreman" category, which, as already stated, is presently vacant. See preceding footnote.

crew,<sup>8</sup> and is paid 20 to 40 cents a day more than they are. While there was some evidence indicating that head setters, in addition to engaging in production work, direct the work of other members of their crew, the record does not establish that such direction involves the exercise of independent judgment. As they have no other statutory indicia of supervisory status, we find that the head setters are not supervisors and we shall include them.

Each shader works with a crew consisting normally of 2 shaders and 2 wheelers. He draws the brick from the kiln and determines on the basis of the color and grade of the brick which of several piles it shall be delivered to by the wheelers. In reaching this determination, he consults with the other members of the crew. He is paid about 50 cents a day more than the wheelers. The record does not establish that the shaders responsibly direct the work of other employees. As they have none of the other statutory indicia of a supervisor, we find that the shaders are not supervisors and we will include them.

The die man starts and stops the brick-forming machine and changes the die in the machine. In the same crew with him are 1 pugger, who tempers the clay used in the machine, 4 hackers, who place the brick from the machine on the drier cars, and one "transfer man." The record shows that the die man has no authority to direct the other members of his crew and that he has no other statutory indicia of a supervisor. Accordingly, we find that he is not a supervisor and we will include him.

We find that all production and maintenance employees at the Employer's Somerset, Ohio, plant, including head setters, shaders, and die men, but excluding clerical workers, foreman, and other supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication.]

MEMBER MURDOCK, dissenting:

I dissent from the majority's decision to direct an election in this case in the face of the strong evidence in the record of Employer participation in the institution and maintenance of this decertification proceeding before the Board. My disagreement with the majority is based upon the following facts revealed by the record:

The Employer and the Union were parties to a collective-bargaining agreement which expired December 31, 1954. Sometime prior to the contract's expiration date the parties commenced negotiations for a new agreement. As a result of these negotiations, the Employer, on April 12, 1955, signed and forwarded to the Union a proposed new

<sup>8</sup> They are paid on a piecework basis.

contract. On April 14, 1955, the employees went on strike. Thereafter, on May 6, 1955, the Employer, by letter, advised the Union that ". . . we are withdrawing our willingness to enter into the proposed contracts . . . dated April 12, 1955, which we forwarded to you." On May 18, 1955, the Employer received from the Union a copy of the agreement it had sent to the Union fully executed by the Union but with the date of May 6, 1955, substituted for April 12.

In the meantime, soon after the strike started, a group of employees including the Petitioner attempted to return to work but were confronted with a picket line established by the Union and did not enter the plant. Following this incident, Metzgar, the plant superintendent, advised Householder, the Petitioner, that the employees could get back to work if they decertified the Union and that to do so they would have to visit the Board's Regional Office in Cincinnati, Ohio. Immediately thereafter, Householder retained a local attorney who prepared the proper petition which Householder, assisted by several employees of the Employer, circulated among the employees to obtain the adequate number of signatures. Next he again approached Metzgar and borrowed \$20 to defray the expense of a trip to the Board's Regional Office in Cincinnati to file the instant petition. Shortly after the decertification petition was filed with the Board, Johnson, the Union's International representative, attempted to persuade Householder to withdraw the petition but Householder refused because, as he stated to Johnson, "he was in the middle, and when the company found out about it [that is that he had withdrawn the petition if he were to do so], they would be out to get him."

As I analyze these facts, they show that the Employer, after having offered the Union a proposed agreement which needed only the signature of the Union to make it a binding contract, was faced with a strike which, after a few days, lost the support of many of its employees. Seizing upon this dissension among the striking employees as a means of retracting its offer and ridding itself of the Union, the Employer through Superintendent Metzgar suggested to the leader of the dissident group that he file a decertification petition with the Board. Metzgar then loaned Householder \$20, which he used to pay the expenses of a trip to the Board's Regional Office in Cincinnati to file the petition. While there is no direct evidence that Metzgar knew of the purpose of this loan, inasmuch as the petition and the trip to Cincinnati to file it were his suggestions, the inference is reasonable that he was aware of the purpose for which the money was to be used by Householder. Further evidence that Householder was in fact acting at the behest of the Employer not only in instituting but in subsequently maintaining this decertification proceeding is the fact that, when urged by Johnson to withdraw the petition, Householder refused because he feared that the Employer would subject him to re-

prisals if he did withdraw the petition as requested. Thus, although the Employer may not have threatened Householder with reprisals to secure the filing of the petition, it does not follow that Householder's fear of reprisals by the Employer if he withdrew the petition was unfounded or merely conjecture on his part. At least Householder's statement to Johnson belies the fact that the maintenance of this proceeding was voluntary on the part of the Petitioner.

The Board has held that an employer may not foster or take an active part in the filing of a decertification petition.<sup>9</sup> Thus, in the *Gold Bond* case, the Board found that the employer took an active part in, and fostered, the filing of the decertification petition, by advising the employees about the matter and furnishing them with legal advice and it rationalized its dismissal of the petition as follows:

As the statutory provisions for decertification proceedings provide a remedy exclusively for and on behalf of employees, and not of employers, we cannot, as a matter of policy, permit an employer to do indirectly that which we would not permit him to do directly.

The circumstances surrounding the filing of the petition and the maintenance of this proceeding before the Board convince me that this decertification proceeding was instituted at the behest and for the benefit of the Employer rather than the employees, and that its maintenance does not represent the free and voluntary act of the Petitioner.

Accordingly, in my opinion, the same policy considerations that caused the Board to dismiss the petition in the *Gold Bond* case require dismissal of the petition in this case.

<sup>9</sup> *Gold Bond, Inc.*, 107 NLRB 1059.

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**A. O. Smith Corporation of Texas and District 37, International Association of Machinists, AFL,<sup>1</sup> and Pipe Fitters Local 211, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the U. S. and Canada, AFL,<sup>2</sup> Petitioners. Cases Nos. 39-RC-894 and 39-RC-895. September 12, 1955**

#### DECISION, ORDER, AND DIRECTION OF ELECTION

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

<sup>1</sup> Hereafter referred to as Machinists.

<sup>2</sup> Hereafter referred to as Pipefitters