

Pepsi-Cola Bottling Company of Merced-Modesto, Pepsi-Cola Distributing Company of Merced-Modesto and Ronald P. Jones, Petitioner, and Arthur David Courtroul, Petitioner, and Teamsters Local No. 386, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases Nos. 20-RD-400 and 20-RD-401. August 13, 1965

DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer William E. Engler. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Thereafter, the Employers, the Petitioners, and the Union filed briefs with the National Labor Relations Board.

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 [Chairman McCulloch and Members Fanning and Jenkins].

Upon the entire record in this case,¹ the Board finds:

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

2. The Petitioners assert that Teamsters Local No. 286, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the currently recognized bargaining representative of the employees involved herein, is no longer their representative as defined in Section 9(a) of the Act.

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Sections 9(c) (1) and 2(6) and (7) of the Act.

Pepsi-Cola Bottling Company of Merced-Modesto, herein called Merced, and Pepsi-Cola Distributing Company of Merced-Modesto, herein called Modesto, are California corporations engaged in the business of manufacturing, bottling, and the wholesale distribution of beverage products. Both corporations have common officers, directors, and stockholders.

Modesto is managed by Edgar Cadmus, the vice president of both corporations. His office is located at Modesto. The corporation has a franchise from Pepsi-Cola covering Tuolumne and Stanislaus

¹ Subsequent to the hearing herein the Employers offered in evidence a document purporting to be two pages of transcript of the arbitration proceedings noted *infra*. The Employers had access to this document at the time of the hearing but apparently chose not to offer it at that time. The Employers have not shown good cause why it should now be accepted. We, therefore, reject the documents. This ruling is without prejudice to the Employers' right to offer the document in evidence at any future hearing in this case which might be necessary in view of our disposition of the petitions herein.

Counties. It bottles the product and distributes it to retail outlets within these counties. Modesto purchases its own merchandise and maintains its own separate purchase orders. Its employees live either in Modesto or in its suburbs.

Merced is approximately 38 miles from Modesto. It is managed by James Hunter, the assistant secretary-treasurer for both corporations, who is also the sales manager at Merced. Merced has a franchise from Pepsi-Cola covering Merced and Mariposa Counties. Merced does not bottle the product, but obtains its supply from the Modesto operation. Merced also purchases its own merchandise and maintains its own purchase orders. Its employees live in Merced.

Each plant manager has managerial authority in his own plant. The employees at the two plants have separate supervision. There is no interchange of employees between the two operations. Accounting for payroll purposes for both operations is performed at the Merced operation; however, the accounting costs are prorated to each company. Overall industrial relations policy is set by the respective plant managers and by the president of the corporation and a representative of the California Association of Employers.

In 1960 Modesto was a member of the Stanislaus Soft Drink Association. As a member of the Association it entered into a contract with the Union for the period May 1, 1960, to May 1, 1962. At that time a single contract was signed by a representative of the Association and by all parties to the agreement. During the term of that contract the Association went out of existence.

In 1962 the manager of Modesto, along with representatives of several other Modesto bottling companies, drew up proposed changes to the then existing contract. At the negotiations of the contract the Modesto manager informed the Union that he could not speak for the Merced operation. An agreement was reached between the Union and Modesto, and a separate 3-year contract was signed by the manager of Modesto on June 1, 1962. There is no evidence concerning the contracts, if any, signed by other area bottling companies, or whether the parties involved considered themselves bound by the group bargaining result or individually retained the right to accept or reject any contract reached.

At a subsequent date, after separate negotiations, the president of both Pepsi-Cola corporations executed a 3-year contract with the Union covering the Merced operation. The contract was in some respects similar to that covering Modesto, except that wage scales differed and one job classification was deleted in the Merced contract.

Early in 1963 Modesto joined the California Association of Employers, herein called CAE. Approximately 6 months later Merced

also became a member of the organization. CAE has separate authorizations from the Merced and the Modesto operations to represent them individually in collective bargaining.

In January 1965 the Union notified all parties who had taken part in previous negotiations that discussion would be opened in February concerning the renegotiation of the contracts due to expire May 2, 1965. In January, Merced and Modesto sent separate letters to the Union suggesting that meetings be set up in each of the cities to negotiate separate contracts with each Pepsi-Cola operation.

On February 10, 1965, the Union met with Sommerfield, a representative from CAE. Sommerfield was there on behalf of several bottling companies in Modesto, but he stated that he was not representing either of the Pepsi-Cola operations at that time. On February 11, Sommerfield again met with the Union and was accompanied by the manager of Modesto. At this meeting only the Modesto contract was discussed. Subsequent to February 11, Sommerfield and the Merced manager met with the Union to discuss the Merced contract. No agreements were reached as a result of these negotiations.

The Union contends that the Employers have a history of negotiating on a multiemployer basis for both Modesto and Merced and that they are continuing to negotiate on that basis. It makes an alternative contention that the separate contracts entered into by each of the plants are in effect one contract covering the combined operations and that both operations constitute the appropriate unit. The Union argues, therefore, that in either event, the petitions filed for the separate units are inappropriate. We find no merit in either contention.

Under established Board rules a multiemployer unit exists:

. . . only where the evidence establishes that the several employers expressly conferred upon their joint bargaining agent the power to bind them by its negotiations or that the employers have by an established course of conduct unequivocally manifested a desire to be bound in future collective bargaining by the group rather than individual action.²

A review of the facts clearly shows that neither Merced nor Modesto is part of a multiemployer group, nor have they participated in joint negotiations together. In 1960 Modesto was a member of a multiemployer association, the Stanislaus Soft Drink Association, and signed a contract with the Union along with other employers who were members of that Association. By 1962 the Association had ceased to exist. In 1962 Modesto bargained with the Union along with a group of other employers. However, contrary

² *Bennett Stone Company*, 139 NLRB 1422, 1424.

to its action in 1960, it signed a separate contract. The Merced contract was the result of separate negotiations and an agreement reached several days after the contract between Modesto and the Union was reached.

Although the record does not clearly establish whether Modesto had agreed to be bound by group bargaining or retained the right to reject any agreement reached in the 1962 negotiations, in 1965 both Modesto and Merced made timely notification to the Union that they wanted to negotiate their respective contracts on an individual basis. The Union clearly recognized this break from any possible past multiemployer association when it met with a representative of Modesto on the day following the group bargaining session in February, and met with the Merced representative sometime thereafter. Assuming, *arguendo*, that either Modesto or Merced were members of a multiemployer association prior to 1965, their timely requests for separate bargaining and the Union's compliance with these requests clearly establish that neither operation was a member of any multiemployer bargaining unit at the time the present petitions were filed.

As to any claim that Merced and Modesto are a combined operation, the record shows that both operations have bargained independently of each other. They are separated by approximately 38 miles, function under separate management, supervision, and control, and maintain different wage scales and job classifications. Furthermore, there is no interchange of employees, and their immediate labor relations policies are set by each plant manager in conjunction with a representative of the CAE, and, on occasion, by the president of both corporations.

We conclude that neither Merced nor Modesto is part of any multiemployer unit, and that each constitutes a separate appropriate unit.

At the hearing, the parties were agreed that the job classification of sales supervisor was properly included in the unit, but disagreed as to whether Harold Ricker was in that category or was a supervisor excludable from the Modesto unit as contended by the Union. The contract establishes a job classification of route salesman, and an additional clause states that sales supervisors shall be paid 10 percent above the highest classification supervised. Ricker is paid 10 percent more than the highest paid route salesman. His duties are primarily checking distribution routes to observe the manner in which the product is being merchandised; i.e., checking advertising and whether the outlet is getting proper service from the route drivers. He cannot hire, fire, discipline, promote, or effectively recommend such action. If he discovers any faults in the manner in

which a route is being serviced he reports them to the plant manager who then makes an independent investigation of the matter and takes the appropriate action.

Although Ricker's compensation is similar to that of a sales supervisor, we find it unnecessary to decide whether he is a route salesman or a sales supervisor, as it is apparent from the previously enumerated duties and responsibilities that he is not a supervisor within the meaning of Section 2(11) of the Act. Accordingly, we shall include him in the unit of Modesto's employees.

The Union contends that Modesto converted five unit employees into independent subcontractors in violation of section 10 of the Modesto-Local 386 contract. At the time of the hearing herein the issue was before an arbitrator; however, more hearings were to be scheduled and the arbitrator's award had not issued. The arbitrator's award, when and if one is made, will presumably determine whether these five individuals are to be returned to employee status, which would make them eligible to vote as members of the unit.

The Union contends that if the Board does not dismiss the petitions as it requests, the Board should defer any action until the arbitrator issues his award. The Employers and Petitioner Courtrol argue that there is no reason to delay the direction of an election pursuant to the petition. They argue that although the Board might show deference to an arbitration award under proper circumstances, in the instant case the arbitration proceedings are still in progress and no award has been issued. At most, the award will affect the eligibility of five individuals who are presently independent contractors. Both Employers and Petitioner Courtrol suggest the possibility of directing an election with the individuals in question casting challenged ballots.

Section 10(a) of the Act specifies that the Board is not precluded from adjudicating unfair labor practices even though they might have been the subject of an arbitration proceeding and award. However, the Board has found that under certain circumstances it will effectuate the policies of the Act to defer to such an award. In *Spielberg Manufacturing Company*³ the Board set forth certain standards it would consider in determining whether it should honor an arbitration award. Relying on *Spielberg* and *International Harvester Company (Indianapolis Works)*,⁴ the Board stated in *Raley's Inc. d/b/a Raley's Supermarkets*⁵ that it would honor an arbitrator's award in a representation case if it would effectuate the objec-

³ 112 NLRB 1080.

⁴ 138 NLRB 923.

⁵ 143 NLRB 256.

tives of the Act. In *Pacific Tile and Porcelain Company*⁶ the Board, in considering the validity of ballots cast in an election, held that it would defer its ruling on the challenges to the voting eligibility of two individuals whose terminations were the subject of pending grievances because their status on the eligibility and election dates depended on the outcome of the grievances.

In the present case, the subject matter of the pending arbitration is not relevant to the primary issue before the Board which is whether the elections petitioned for should be directed. It raises an issue of eligibility as to certain individuals, but the resolution of that question in no way reaches the primary issue before us. The Board has long followed the procedure of permitting employees to vote by challenged ballot where their eligibility could not be determined on the existing record. Therefore, the five independent contractors shall be permitted to vote in the election directed herein, and their ballots shall be challenged by the Board agent. If the votes of these individuals are found to be determinative upon tallying the unchallenged ballots, the Regional Director, at that time, shall make a further investigation and report as to the above eligibility matters.

We find that the employees of Modesto and the employees of Merced each constitute separate appropriate units. We further find that it would not be in furtherance of the objectives of the Act nor the interests of the employees involved herein to delay the elections until an award is made in the pending arbitration. Accordingly, we find that the following employees of the Employers constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(1) All employees of the Employer at Merced, California, including route salesmen, sales supervisors, vending machine servicemen, warehousemen and loaders, and regular part-time employees, but excluding office employees, professional employees, guards, and supervisors as defined in the Act.

(2) All employees of the Employer at Modesto, California, including route salesmen, sales supervisors, vending machine servicemen, warehousemen and loaders, warehouse delivery drivers, and regular part-time employees, but excluding office employees, professional employees, guards, and supervisors as defined in the Act.⁷

[Text of Direction of Elections omitted from publication.]

⁶ 137 NLRB 1358.

⁷ As noted *supra*, the five individuals whose status as independent contractors is the subject of the pending arbitration proceeding will be permitted to vote challenged ballots.