

In the Matter of JOHN N. BURKHART, RAYMOND MILLER AND JOE W. PATTERSON, CO-PARTNERS D/B/A BURKHART FRUIT & VEGETABLE COMPANY and TEXAS FRUIT & VEGETABLE WORKERS UNION, LOCAL 35, UCAPAWA-CIO

*Case No. 16-R-852.—Decided April 12, 1944*

*Strickland, Ewers, and Wilkins, by Messrs. J. F. Ewers and Scott Toothaker, of Mission, Tex., for the Company.*

*Mr. Otis G. Nation, of Mercedes, Tex., for the Union.*

*Mr. Louis Cokin, of counsel to the Board.*

DECISION  
AND  
DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon petition duly filed by Texas Fruit & Vegetable Workers Union, Local 35, UCAPAWA, affiliated with the Congress of Industrial Organizations, herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of John N. Burkhart, Raymond Miller and Joe W. Patterson, co-partners d/b/a Burkhart Fruit & Vegetable Company, Alamo, Texas, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Glenn L. Moller, Trial Examiner. Said hearing was held at Edinburg, Texas, on March 15, 1944. The Company and the Union appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. At the hearing the Company made motions that the petition be dismissed. The Trial Examiner reserved rulings on those motions for the Board. The motions are hereby denied. All parties were afforded opportunity to file briefs with the Board.

Upon the entire record in the case, the Board makes the following:  
55 N. L. R. B., No. 227.

## FINDINGS OF FACT

## I. THE BUSINESS OF THE COMPANY

John N. Burkhart, Raymond Miller and Joe W. Patterson are engaged at Alamo, Texas, in purchasing, distributing, packing, and selling citrus fruits. They use raw materials valued in excess of \$15,000 annually, about 90 percent of which comes from points outside the State of Texas. During the 1942-1943 packing season they sold fruits valued at about \$667,214, approximately 95 percent of which was shipped to points outside the State of Texas.

We find that the Company is engaged in commerce within the meaning of the National Labor Relations Act.<sup>1</sup>

## II. THE ORGANIZATION INVOLVED

Texas Fruit & Vegetable Workers Union, Local 35, UCAPAWA, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the Company.

## III. THE QUESTION CONCERNING REPRESENTATION

On February 17, 1944, the Union requested the Company to grant it recognition as the exclusive bargaining representative of certain of the Company's employees. The Company did not reply to the request.

A statement of a Board agent, introduced into evidence at the hearing, indicates that the Union represents a substantial number of employees in the unit hereinafter found to be appropriate.<sup>2</sup>

We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

## IV. THE APPROPRIATE UNIT

The Union seeks a unit of all employees on the pay roll of the Company, exclusive of watchmen, foremen, and clerical and supervisory employees. The Company asserts that an appropriate unit should consist of all employees of all employer members of Texas Citrus and Vegetable Growers and Shippers Association, herein called the Association, of which it is a member.

In support of its contention the Company points to the fact that the Association is its representative in various matters, including collec-

<sup>1</sup> The Company asserts that the Board is without jurisdiction because the employees of the Company fall within the definition of the term "agricultural laborer" in Section 2 (3) of the Act. We find no merit in this contention. See e. g. *North Whittier Heights Citrus Ass'n v N. L. R. B.*, 109 F. (2d) 76 (C. C. A. 9) Cert. den. 310 U. S. 632.

<sup>2</sup> The Field Examiner reported that the Union submitted 13 authorization and membership application cards. There are 40 employees in the appropriate unit.

tive bargaining; that wage increase applications have heretofore been filed with the National War Labor Board by the Association for permission to institute wage increases for packers and handlers employed by all the members of the Association; and that the National War Labor Board approved certain wage increases on such an Association-wide basis.

The Association has about 110 employer members engaged in a fruit or vegetable business similar to that of the Company; these employers do not, however, constitute all concerns thus engaged in Texas.

While each member of the Association, by virtue of his membership therein and the terms of individual contracts with the Association, authorizes the latter to represent it in various matters including "labor problems," there is no evidence that the Association has in the past represented its members in collective bargaining on the basis of an Association-wide unit, or that any collective bargaining in the past has proceeded on such a basis.<sup>3</sup> On the contrary, the record reveals that subsequent to the formation of the Association, various of its employer members, engaged in collective bargaining with Fruit Packers Federal Labor Union No. 22981, affiliated with the American Federation of Labor, and that in each instance the unit recognized by the parties was the single-employer unit. There is nothing to indicate any managerial interrelation between members of the Association, which operate as separate and distinct business enterprises. There is no interchange of employees between the members, except that which arises from the employees' voluntary transfer from one employer to another. In addition, the Union has thus far attempted to organize the employees of only 20 employer members of the Association, as well as the employees of 7 non-members, and claims to represent a majority at only 5 plants.

We see no reason to withhold from employees at individual plants the benefits of collective bargaining under the Act simply because the entire industry has not been unionized. While it cannot be said that under no circumstances would an industry-wide unit be appropriate, under all the circumstances here present, including the absence of a history of collective bargaining on an Association- or industry-wide basis, the past bargaining on an individual-employer basis, and the present extent of union organization, we are of the opinion that the rights of the employees here involved to bargain collectively through

<sup>3</sup> The Association's applications to the National War Labor Board, and subsequent steps, and representation by the Association of its members before other Government agencies, do not constitute negotiations with labor organizations within the meaning of the phrase "collective bargaining" as ordinarily employed. The Company, through the Association, specifically denied that any negotiations with a labor organization preceded or accompanied the wage increase applications. Consequently, the Association's acts in these respects do not establish any history of collective bargaining on an Association-wide unit basis

representatives of their own choosing will be most effectively preserved through a separate bargaining unit covering the employees of the Company.<sup>4</sup>

The Company employs one watchman whom the Union would exclude from the unit. The watchman is not armed, uniformed, or deputized. We shall include him in the unit.

We find that all employees of the Company, including watchmen, but excluding clerical employees, foremen, and any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

#### V. THE DETERMINATION OF REPRESENTATIVES

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of the Direction of Election herein, subject to the limitations and additions set forth in the Direction.<sup>5</sup>

#### DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 3, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with John N. Burkhardt, Raymond Miller and Joe W. Patterson, co-partners d/b/a Burkhardt Fruit & Vegetable Company, Alamo, Texas, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Sixteenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately

---

<sup>4</sup> See *Matter of Chapman Dehydrator Company, Inc.*, 51 N. L. R. B. 664, and cases cited therein

<sup>5</sup> While no direct issue was made at the hearing as to the inclusion in the unit of non-citizen employees and their eligibility to participate in the election, it is evident from the record that such an issue may arise at the time of the election. The Act does not differentiate between citizens and non-citizens. In order to effectively carry out the purposes of the Act, we conclude that no distinction should be drawn on such a basis. (Cf. *Matter of U. S. Bedding Co.*, 52 N. L. R. B. 382.) Non-citizenship of an employee shall not, consequently, constitute a disqualification for participation in the election.

preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, 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 Texas Fruit & Vegetable Workers Union, Local 35, UCAPAWA, affiliated with the Congress of Industrial Organizations, for the purposes of collective bargaining.

CHAIRMAN MILLIS took no part in the consideration of the above Decision and Direction of Election.