

In the Matter of J. G. McDONALD CHOCOLATE COMPANY, A CORPORATION
and CANDY WORKERS' LOCAL NO. 373

Case No. R-527.—Decided February 21, 1938

Candy Manufacturing Industry—Investigation of Representatives: controversy concerning representation of employees: refusal of employer to recognize and bargain with petitioning union until question of representation is determined by Board—*Unit Appropriate for Collective Bargaining:* all plant employees, including watchmen, but excluding foremen; occupational differences; no controversy as to—*Election Ordered*

Mr. Charles A. Graham, for the Board.

Mr. Oscar W. Carlson, of Salt Lake City, Utah, for the Company.

Mr. A. George Koplou, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

On November 9, 1937, Candy Workers' Local No. 373, Bakery and Confectionery Workers' International Union of America,¹ herein called the Union, filed with the Regional Director for the Twenty-second Region (Denver, Colorado) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of J. G. McDonald Chocolate Company, a corporation, Salt Lake City, Utah, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On December 9, 1937, the National Labor Relations Board, herein called the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice.

On December 11, 1937, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company and upon the Union. Pursuant to the notice, a hearing was held on December 17, 1937, at Salt Lake City, Utah, before Albert L. Lohm,

¹ The pleadings incorrectly designated the Union as Candy Workers' Local No. 373.

the Trial Examiner duly designated by the Board. The Board and the Company were represented by counsel and participated in the hearing. Representatives of the Union participated in the hearing as witnesses. Full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the course of the hearing the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The J. G. McDonald Chocolate Company is a corporation engaged in the manufacture of chocolate, cocoa, and candy, and in the sale of these products within and without the State of Utah. The Company also produces boxes and cartons for its own use. Its plant is located at Salt Lake City, Utah.

The total gross business of the Company in 1936 was between \$100,000 and \$700,000. The principal materials used by the Company are sugar, butter, eggs, condensed milk, cream, corn-syrup, cocoa beans, nut meats, flavorings, candied and preserved fruits, cardboard, ribbon, and paper.

Approximately 70 per cent (in terms of monetary value) of the materials used come from outside the State of Utah, and approximately 75 per cent (in terms of monetary value) of its products are shipped outside the State of Utah.

II. THE ORGANIZATION INVOLVED

Candy Workers' Local No. 373, Bakery and Confectionery Workers' International Union of America, is a labor organization affiliated with the American Federation of Labor.

According to the testimony of its representative, the Union admits to membership all plant employees engaged in the manufacture of confections. This includes persons who deal with the product through the point where it is placed in the consumer carton. It does not include warehousemen, truck drivers, or persons packing the cartons for shipment. The Union also has no jurisdiction over salesmen, supervisors, office and clerical employees, and employees of the box-making department.

Watchmen are admitted to membership in the Union. The Union's representative testified that since there is no American Federation

of Labor organization for watchmen, the American Federation of Labor has ruled that such employees are eligible to join the organization representing a majority of the employees in a plant.

III. THE QUESTION CONCERNING REPRESENTATION

The Union's organizational work among the Company's employees started in April or May 1937. It was granted a charter in June 1937, by Bakery and Confectionery Workers' International Union of America.

At the hearing, by stipulation between counsel for the Board and counsel for the Company, the following facts were agreed upon: On October 29, 1937, a representative of the Union approached the Company's counsel on the question of collective bargaining, after having been referred to counsel by the Company. It was then arranged to have the Utah Industrial Commission check the Union membership against the Company pay roll to determine whether the Union represented a majority of the employees of the Company. Shortly thereafter, the Union received information that the attorney for the Company had notified the Utah Industrial Commission that there was some doubt as to the jurisdiction of the Commission because of the interstate nature of the Company's business. As a result, on November 9, 1937, before the results of the Commission's check were known, the Union filed a petition for certification by the Board. After filing the petition the Union attempted to gain the consent of the Company, through its counsel, to the holding of a consent election by the Board, but this consent was not obtained.

On November 12, 1937, the Commission reported a majority of employees in the Company as having, by joining the Union, designated the Union as their representative for collective bargaining. Approximately three weeks later there was another conference between the Company's counsel and the Union's representative, at which time counsel for the Company stated his belief that the best procedure would be a hearing under the petition of November 9, 1937.

At the hearing the Company offered to stipulate that a secret ballot be taken by the Board, and that the unit claimed by the Union be considered an appropriate unit for the purposes of such ballot. The proffered stipulation was not accepted.

We find that a question has arisen concerning representation of employees of the Company.

IV. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company

described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE APPROPRIATE UNIT

The Union in its petition claimed that all plant employees with the exception of foremen, office and clerical help, and employees of the box factory, constitute a unit appropriate for the purposes of collective bargaining. The Company makes no objection to the unit claimed by the Union to be appropriate. This unit excludes all employees in the shipping and delivery department, the Union not classifying them as plant employees, since they deal with the finished product after it has been placed in its consumer carton. The exclusion of the shipping and delivery department employees is not unreasonable, is desired by the petitioner, and is not objected to by the respondent.

The Union desires to include watchmen in the unit claimed to be appropriate. The Company makes no objection. In the past we have usually excluded watchmen from a bargaining unit composed primarily of production employees on the basis of the differences in function and interest of the two groups. We shall, however, permit the watchmen to be included in this unit because of the fact that neither party makes any objection to their inclusion, and because to hold otherwise virtually would deprive the watchmen of collective action and representation, since there is no other labor organization at the plant to which they are eligible for membership.

The Union seeks to exclude employees of the box-making department from the appropriate unit. One floor of the factory building is occupied almost entirely by this department, which employs about 15 persons. Boxes are not produced for sale, but only for the use of the Company itself. There is some slight interchange of personnel between the box-making and the other departments of the plant, as occasion arises, but, as a whole, employees of the box-making department devote themselves almost exclusively to this work. The only functional coherence or interdependence between this department and the others in the plant is that which exists between the distinct branches of any manufacturing enterprise. Further, the fact that there are other labor organizations to which this group of employees is eligible for membership carries some weight, though in itself it is not determinative of the point. The Company makes no objection to the exclusion of this group from the bargaining unit.

We find that all plant employees of the Company including watchmen but excluding foremen, office and clerical help, and employees of the box-making department and the shipping and delivery depart-

ment, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

VI. THE DETERMINATION OF REPRESENTATIVES

The pay-roll list ² shows 184 persons in the employ of the Company on November 9, 1937, the date the Union filed its petition with the Regional Director. Testimony at the hearing shows 51 employees to be outside the unit found to be appropriate, leaving 133 persons in the appropriate unit.

The Union claimed to represent these employees, alleging that a majority of them had, by joining the Union, designated it as their agent for purposes of collective bargaining. As proof of this allegation there was introduced at the hearing a list ³ certified by a notary public as having been copied from the official ledger of the Union and purporting to be a list of the Company's employees who were members of the Union.

At the hearing no check was made of the list of Company employees of November 9, 1937, against the list of Union members. In such a check made by the Board, it was found that of the 77 persons in the Union membership list, 11 were not in the employ of the Company on November 9, 1937; three more were ineligible for Union membership, according to eligibility requirements testified to at the hearing, and were not included in the number of the Company's employees determined to be in the appropriate unit. In addition, in the case of at least three other names there are serious doubts due to differences between the two lists in spelling and initials of names. Deducting these three doubtful names, the three ineligible persons, and the 11 who were not listed on the Company pay roll from the 77 names on the Union membership list, there are left only 60 employees of the Company who clearly are members^o of the Union. This is not a majority of the 133 employees in the appropriate unit.

We find that the question which has arisen concerning the representation of employees of the Company can best be resolved by the holding of an election by secret ballot. In accordance with our usual practice, eligibility to vote in the election will be extended to those who were in the employ of the Company, within the appropriate unit, on the pay roll of November 9, 1937, the date of the petition, exclusive of those who since have quit or have been discharged for cause.

² Board's Exhibit No 2 The pay-roll date of November 9, 1937, furnished by the Company, was introduced in evidence and was relied on by the parties for purposes of comparison

³ Board's Exhibit No 3.

Upon the basis of the above findings of fact, and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. A question affecting commerce has arisen concerning the representation of employees of J. G. McDonald Chocolate Company, Salt Lake City, Utah, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. All plant employees of J. G. McDonald Chocolate Company, Salt Lake City, Utah, including watchmen but excluding foremen, office and clerical help, and employees of the box factory and the shipping and delivery department, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

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, 49 Stat. 449, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

DIRECTED that, as part of the investigation authorized by the Board to ascertain representatives for collective bargaining with the J. G. McDonald Chocolate Company, Salt Lake City, Utah, an election by secret ballot shall be conducted within a period of twenty (20) days from the date of this Direction of Election, under the direction and supervision of the Regional Director for the Twenty-second Region, acting in this matter as the agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all plant employees of J. G. McDonald Chocolate Company, Salt Lake City, Utah, on the pay roll of said Company on November 9, 1937, including watchmen but excluding foremen, office and clerical help, employees of the box-making department and the shipping and delivery department, and those who since have quit or have been discharged for cause, to determine whether or not they desire to be represented by Candy Workers' Local No. 373, Bakery and Confectionery Workers' International Union of America, for the purposes of collective bargaining.

[SAME TITLE]

AMENDMENT TO DIRECTION OF ELECTION

March 11, 1938

On February 21, 1937, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election in

the above-entitled proceeding, the election to be held within twenty (20) days from the date of the Direction, under the direction and supervision of the Regional Director for the Twenty-second Region (Denver, Colorado). The Board, having been advised that a longer period is necessary, hereby amends the Direction of Election issued on February 21, 1937, by striking therefrom the words "within twenty (20) days from the date of this Direction" and substituting therefor the words "within thirty (30) days from the date of this Direction."