

In the Matter of OSTLER CANDY COMPANY, A CORPORATION *and* CANDY
WORKERS' LOCAL NO. 373

Case No. R-528.—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, excluding foremen, office and clerical help, and employees of the shipping and delivery department; no controversy as to—*Representatives:* proof of choice: membership in union; certified list of names copied from official ledger of union; comparison of with employment records—*Certification of Representatives:* upon proof of majority representation.

Mr. Charles A. Graham, for the Board.

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

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

DECISION

AND

CERTIFICATION OF REPRESENTATIVES

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 Ostler Candy 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.

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

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, 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 Ostler Candy Company is a corporation engaged in the manufacture and sale of candy. Its plant is located at Salt Lake City, Utah.

The total gross business of the Company in 1936 was between \$60,000 and \$150,000. 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 40 per cent (in terms of monetary value) of the 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.

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, or office and clerical employees.

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 a ballot. The proffered stipulation was not accepted.

We find that a question has arisen concerning the 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, 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.

We find that all plant employees of the Company with the exception of foremen, office and clerical help, and employees of the shipping and delivery department, 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 37 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 17 employees to be outside the unit found to be appropriate, leaving 20 persons in the appropriate unit.

At the hearing the Board introduced a list ³ of 15 names certified by a notary public as having been copied from the official ledger of the Union. No objection was made to the introduction of this list in evidence or to the authenticity of the names on it. 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 15 persons named in the Union membership list, two were not in the employ of the Company on November 9, 1937. Omitting these two names there is still no doubt as to the clear membership majority established by the uncontroverted evidence introduced on behalf of the Union.

We find that the Union has been designated and selected by a majority of the employees in the appropriate unit as their representative for the purposes of collective bargaining. It is, therefore, the exclusive representative of all the employees in such unit for the purposes of collective bargaining, and we will so certify.

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

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. 4.

CONCLUSIONS OF LAW

1. A question affecting commerce has arisen concerning the representation of employees of Ostler Candy 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 Ostler Candy Company, Salt Lake City, Utah, with the exception of foremen, office and clerical help, and employees of 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.

3. Candy Workers' Local No. 373, Bakery and Confectionery Workers' International Union of America, is the exclusive representative of all the employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the National Labor Relations Act.

CERTIFICATION OF REPRESENTATIVES

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 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended,

IT IS HEREBY CERTIFIED that Candy Workers' Local No. 373, Bakery and Confectionery Workers' International Union of America, has been designated and selected by a majority of all plant employees of Ostler Candy Company, Salt Lake City, Utah, with the exception of foremen, office and clerical help, and employees of the shipping and delivery department, as their representative for the purposes of collective bargaining and that, pursuant to the provisions of Section 9 (a) of the Act, Candy Workers' Local No. 373, Bakery and Confectionery Workers' International Union of America, is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.