

In the Matter of LIDZ BROTHERS, INCORPORATED and UNITED WHOLESALE EMPLOYEES, (LOCAL NO. 65)

Case No. R-360.—Decided March 3, 1938

Buttons, Buckles, and Novelties Merchandising—Investigation of Representatives: controversy concerning representation of employees: refusal of employer to recognize petitioning union as representative of its employees; substantial doubt as to majority status; controversy concerning appropriate unit—*Unit Appropriate for Collective Bargaining:* geographical differences; community of interest; eligibility for membership in only organization among employees—*Election Ordered*

Mr. Charles A. Graham, for the Board.

Mr. Meyer Kraushaar and *Mr. Samuel Allen*, of New York City, for the Company.

Mr. Henry H. Foster, Jr., for counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

On July 22, 1937, United Wholesale Employees, Local No. 65, herein called the Union, filed with the Regional Director for the Second Region (New York City) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Lidz Brothers, Incorporated, New York City, 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 August 18, 1937, an amended petition was filed with the Regional Director. On September 16, 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 September 17, 1937, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company and the Union. Notices of postponement of hearing, amended notices.

of hearing, and notices of continuance of hearing were likewise duly served upon the Company and the Union. Pursuant to the notices, a hearing was held on October 25, 1937, at New York City, before H. R. Korey, the Trial Examiner duly designated by the Board. The Board and the Company were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon 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 these rulings 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

Lidz Brothers, Incorporated, of New York, is engaged in the business of buying, selling, and jobbing buttons, buckles, and novelties used principally for ladies' wear. The Company has its principal office and its plant, consisting of a general stockroom and warehouse, in New York City and has a branch sales office in Chicago, Illinois. The purchases of the Company are made in the United States and in Europe, and the purchased articles are sold and distributed to the dress trade, dress-manufacturers, and wholesale jobbers, in various parts of the country. About 20 per cent of the Company's purchases are made outside the State of New York. About 60 per cent of the sales of the Company are made outside New York.

II. THE ORGANIZATION INVOLVED

United Wholesale Employees, Local No. 65, is a labor organization affiliated with the Textile Workers Organizing Committee, which is in turn affiliated with the Committee for Industrial Organization. Prior to July 1937, the local was affiliated with the American Federation of Labor as the Wholesale Dry Goods Employees Union, Local No. 19932. Local No. 65 admits to its membership employees of the Company, but only employees in the shipping and stock and order departments have become members.

III. THE QUESTION CONCERNING REPRESENTATION

On July 16, 1937, a committee composed of members and business agents of the Union approached the Company and requested recognition of the Union as the collective bargaining representative for

employees of the Company. Upon the Company's request discussion was deferred until July 19, at which time the Company refused to recognize the Union as such bargaining representative, basing such refusal upon the ground that the Union did not represent a majority of the employees. At that time, the Union representatives declined to show the membership cards upon the basis of which it claimed authorization to represent the employees. As a consequence of the Company's refusal to recognize the Union, seventeen employees of the Company went on strike. The strike was, however, terminated within a few hours by agreement to submit the question of representation to the Board.

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 operation 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, and has led to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE APPROPRIATE UNIT

The Union, in its original petition, alleged that all inside employees of the Company, excluding managers, foremen, confidential and supervisory employees, constituted an appropriate bargaining unit. Thereafter, the Union amended its petition also to exclude office employees and salesmen from the unit. At the hearing, it was pointed out on behalf of the Union that the portion of the petition asking for the exclusion of "manager, foremen, confidential and supervisory employees," was intended to cover only the three Lidz brothers, Hernstadt "an employee known to the Union as a manager," and Weisberg "an employee known to the Union as the employee in charge of buying."

The Company claims that all employees of the Company, excluding the three Lidz brothers, Hernstadt, and the employees in the Chicago office, should be included in the unit. In support of its claim, the Company stated that the Union attempted to organize the office employees and salesmen, and that only after it was unsuccessful in such efforts did it seek to exclude such employees from the bargaining unit. The record shows that the Union solicited for its membership a number of salesmen and at least one office employee.

The testimony at the hearing showed that the salesmen spend approximately four hours a day on outside selling and approximately the same amount of time on inside work. Their inside work consists in picking out orders in the stockroom, packing and preparing orders for shipment or delivery, and assisting generally in whatever work is to be done. At times, the salesmen make deliveries. They receive a salary plus a commission on sales. We conclude on the basis of all the facts presented in the record that the interests of the salesmen are closely related to that of the other employees within the bargaining unit and we shall, therefore, include the salesmen in the unit.

The Company seeks to have the office employees included in the bargaining unit. We find, however, no sufficient basis in the record for departing from our usual rule excluding such employees from the unit in case of contest over their inclusion or exclusion.

At the hearing, the Union took the position that the nominal heads of the various departments, such as Letwin of the shipping department and Silverman of the syndicate department, should be included in the unit. The Company claims that such employees exercise supervisory functions. The record shows that such employees do to a limited extent supervise the work of the other employees in their departments. However, they also spend a considerable amount of time doing such work as is done by the other employees. For example, Letwin spends part of his time sweeping the plant, packing orders, and cleaning toilets. The employees in question are eligible to membership in the Union and Letwin and Silverman have joined the Union. We conclude that the so-called heads of departments should be included within the bargaining unit. The term "supervisory employees," as used herein, shall be limited in its scope to the three Lidz brothers, and O. E. Hernstadt, who is a brother-in-law of the members of the firm and who is known as a manager. All parties agreed to such exclusion.

The Union seeks to exclude Morris Weisberg from the unit. The record discloses that he is engaged principally in clerical work, checking invoices against orders. The Company lists Weisberg as an office employee on its pay roll. Weisberg will be considered herein as an office employee.

The remaining question relates to the inclusion or exclusion of the employees in the Chicago office. We feel that due to geographical consideration their interests differ from those of the New York employees and shall, therefore, exclude them from the bargaining unit.

We find that the employees of the Company, excluding supervisory and office employees and employees at the Chicago office, 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 Union introduced into evidence 21 membership application cards which the Company claims are not sufficient evidence that the employees now desire the Union to represent them since the cards were signed prior to the date on which the Union became affiliated with the Committee for Industrial Organization. In any event, it is not clear from the record whether the 21 employees signing the cards represent a majority of the employees of the Company within the appropriate unit. We find that the question concerning representation which has arisen can best be resolved by an election by secret ballot. Those eligible to vote shall be the employees within the appropriate unit on the pay roll of the Company during the pay-roll period next preceding October 25, 1937, the date of the hearing, excluding those employees who have since quit or been discharged for cause. We direct use of the aforesaid pay-roll period to determine eligibility to vote rather than the customary pay-roll period next preceding the date of the filing of the petition inasmuch as considerable time has elapsed since the petition was filed and inasmuch as the evidence shows that the pay-roll period here chosen is a representative one.

CONCLUSIONS OF LAW

1. A question affecting commerce has arisen concerning the representation of employees of Lidz Brothers, Incorporated, New York City, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. The employees of the Company, excluding supervisory and office employees and employees at the Chicago office, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (c) 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 Lidz

Brothers, Inc., New York City, an election by secret ballot shall be conducted within fifteen (15) days from the date of this Direction, under the direction and supervision of the Regional Director for the Second Region, acting in the matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among the employees of the Company employed by the Company during the pay-roll period next preceding October 25, 1937, excluding supervisory and office employees, employees at the Chicago office, and those who have since quit or been discharged for cause, to determine whether or not they desire to be represented by the United Wholesale Employees, Local No. 65 for the purposes of collective bargaining.