The East Dayton Tool & Die Company *and* East Dayton and Hawker Tool Employees' Independent Union of Dayton, Ohio, Non-Affiliated, Petitioner. Case 9–RC–9156

November 19, 1971

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN MILLER AND MEMBERS FANNING AND KENNEDY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer James E. Murphy. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, by direction of the Regional Director for Region 9, the case was transferred to the Board for decision. Thereafter, the Employer, Petitioner, and the Intervenor[1] filed briefs with the 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.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, including the briefs filed herein, the Board finds:

1. The Employer, an Ohio corporation, is engaged in the manufacture and sale of machine tools and dies at its place of business in Dayton, Ohio. During the past 12 months, a representative period, the Employer manufactured and shipped goods valued in excess of $50,000 directly from its Dayton, Ohio, facility to points located outside the State. The Employer conceded, and we find, that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer. The Intervenor contends, however, that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act and, even if it does qualify as a labor organization, the petition should be dismissed because the Petitioner is, in effect, the same organization that affiliated with the Intervenor as found by the Board in 190 NLRB No. 115 and, therefore, is without standing to file the petition.

The Petitioner was recently organized by a group of employees. It admits employees to membership and was formed for the express purpose of representing employees in collective bargaining. At present it has no constitution or officers and is administered by a four-man organizing committee. The parties stipulated that on or about July 1, 1971, the Petitioner requested the Employer to recognize it as the collective-bargaining agent for the Employer's production and maintenance employees and that such request was denied. We are satisfied, on the record as a whole, that the Petitioner is a labor organization within the meaning of the Act.[2] Furthermore, the fact that Petitioner's organizers were members of the former independent union before its affiliation with the Intervenor, and the fact that Petitioner adopted a name similar to that of the former union and admits to membership employees of the Employer do not constitute the Petitioner the same labor organization as the Intervenor, nor do they preclude the Petitioner from filing the petition herein. We therefore deny the Intervenor's motion to dismiss the petition as lacking in merit.

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

4. The parties stipulated that a unit of all production and maintenance employees, excluding the designers, checkers, and detailers in the design room, all office clerical employees, professional employees, guards, and supervisors as defined in the Act is appropriate. They differ, however, on the question of including employee Joseph Cornor. The Intervenor contends that Cornor should be excluded from the unit because he is a sales trainee for a position as sales engineer, a category which all parties stipulated should be excluded from the unit. The Employer and the Petitioner contend, however, that Cornor should be included in the unit on the ground that he is considered to be covered by the Employer's and Intervenor's current contract.

Cornor was employed initially as a tool-and-die maker. In mid-1969 he became a sales trainee and since then has performed little or no manual labor. Unlike the shop employees who are engaged principally in the fabrication of tools and dies and in the maintenance of plant equipment, Cornor is now engaged primarily in processing job orders and in handling purchasing matters. He works under separate supervision and from an office on the floor above the Employer's production facilities. His conditions of employment differ from the shop employees in substantial respects. Cornor's hours of work are from 8 a.m. to 5 p.m. with an hour for lunch; the shop employees work on a two-shift basis, 7 a.m. to 3:30 p.m. and 3:30 p.m. until midnight with only one-half

[1] International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC, and its Local 668

[2] *N.L.R.B* v. *Cabot Carbon Company*, 360 U.S 203.

hour for lunch. Cornor enters his own hours of work on a timecard; shop employees punch a timeclock. As a sales trainee, Cornor is paid approximately 20 percent less than the highest paid toolmaker in the shop, but he receives the same vacation and fringe benefits as shop employees. It appears, though, that Cornor has been considered as covered under the contract, but since his status has come into question, his dues have been held in escrow.

On the foregoing evidence it is clear that Cornor's present duties and conditions of employment indicate that his community of interest lies with the sales engineers rather than with rank-and-file employees in the bargaining unit. We would exclude him from the unit, unless there is validity to the contention that his past inclusion under the contract requires his present inclusion in the unit.

The evidence is conflicting as to whether the Intervenor had previously requested that Cornor be removed from the bargaining unit. Cornor's inclusion in the bargaining unit was initially based on his status as a tool-and-die maker. There is some evidence that the sales trainee position existed in the past, but there is no evidence that the position was ever a subject of collective bargaining. Furthermore, there is no evidence that Cornor's present conditions of employment, which differ so substantially from those of the shop employees, were the subject of negotiations between the Employer and Intervenor rather than having been unilaterally established by the Employer upon its designation of Cornor as a sales trainee during the contract term. We cannot say, in these circumstances, that simply because the parties considered him to be covered under their contract and deducted dues payments, that fact constitutes an agreement that the position of sales trainee was to be considered part of a production and maintenance unit. We conclude that Cornor as a sales trainee has interests different from those of the production and maintenance employees, and that he is properly excluded from the unit.[3]

We find that the following employees of East Dayton Tool & Die Co. constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: all production and maintenance employees, excluding designers, checkers, and detailers in the design room, all office clerical employees, sales engineer trainees, professional employees, guards, and supervisors as defined in the Act.

[Direction of Election[4] omitted from publication.]

[3] *Rish Equipment Company,* 150 NLRB 1185, 1202; *Garrett Supply Company,* 165 NLRB 561, 562. Cf. *Montgomery Ward & Co., Incorporated,* 131 NLRB 1436.

[4] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Co.,* 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 9 within 7 days of the date of this Decision on Review. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.