

**WNYS-TV (WIXT) and National Association of Broadcast Employees & Technicians, AFL-CIO, Petitioner. Case 3-UC-134**

November 1, 1978

**DECISION ON REVIEW AND ORDER REMANDING TO REGIONAL DIRECTOR**

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On June 19, 1978, the Acting Regional Director for Region 3 issued his Decision, Order, and Clarification of Bargaining Unit in which he clarified the certified bargaining unit to include the producer of community and public affairs programs, but dismissed that part of the petition seeking to add by way of clarification the floor managers, newswriters, photo managers, news producer, and commercial producer.<sup>1</sup> Thereafter, the Petitioner filed a request for review of the Acting Regional Director's refusal to include the commercial producer on the grounds that in denying that part of its clarification request he made erroneous findings of fact and conclusions of law, particularly his conclusion that the Union's failure to insist upon inclusion of the disputed classification in the unit during the most recent contract negotiations precludes the addition of the disputed employee to the unit by way of clarification. On August 9, 1978, the Board by telegraphic order granted the request for review. Thereafter, the Petitioner filed a brief on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record, including the Petitioner's brief on review, the Board makes the following findings:

On October 30, 1969, the Petitioner was certified as the collective-bargaining representative of a unit described as:

All full and part-time production and maintenance employees, including all engineers and technicians, film editors and processors, news reporters and editors, photographers, artists, directors, camera persons, crew persons, announcers and persons who regularly and frequently

appear on camera, excluding all part-time students, independent contractors, office clerical employees, janitors, salespersons, guards and supervisors as defined in the Act.

The Employer contends that the commercial producers should not be included because, historically, the position has been a nonunit position.

The position of commercial producer was created during the term of the previous collective-bargaining agreement but was never included in the unit. During negotiations for the current contract, the Petitioner proposed that the classification be included in the unit but the parties did not reach agreement on this issue. The Petitioner explains that this issue was the only one unresolved in negotiation and that it did not wish to risk economic warfare and/or possible unfair labor practice charges over this question and withdrew the proposal. The Petitioner did, however, express its intent to pursue the matter through other channels in the future. The agreement was signed on March 17, 1978. The Union filed a grievance on this matter on March 27, 1978, and on May 1, 1978, it filed the instant petition.

The Acting Regional Director, citing *Northwest Publications*<sup>2</sup> and *Wallace-Murray Corporation, Schwitzer Division*,<sup>3</sup> reasoned that the requested clarification of the bargaining unit in these circumstances would be permitting one of the contracting parties to effect a change in the definition of the bargaining unit during the contract term. Therefore, he refused to clarify the unit to include the commercial producer.

In our view, the facts in this case are virtually identical to those in *Massey-Ferguson, Inc.*<sup>4</sup> In that case, the union was reluctant to make inclusion in the unit of a disputed classification of employees, a serious issue that would hold up contract negotiations, and informed the employer that it would pursue the matter "through legal channels" after the negotiations. The Union in that case filed a clarification petition shortly after the contract was executed. The Board found that clarification to include the disputed classification was proper, absent an indication that the petitioner there abandoned its request in exchange for some concession in the negotiations.

Inasmuch as there is no indication in the instant case that the Petitioner withdrew its proposal to include the commercial producer in exchange for a concession in negotiations, we find that its postponement of the filing of a clarification petition until

<sup>1</sup> All of these classifications with respect to which the petition was dismissed, except for commercial producer, were included by agreement of the parties.

<sup>2</sup> 200 NLRB 105 (1972).

<sup>3</sup> 192 NLRB 1090 (1971).

<sup>4</sup> 202 NLRB 193 (1973).

shortly after execution of the contract does not constitute its acquiescence in exclusion of the classification from the unit. We shall therefore remand the case to the Regional Director for the purpose of further appropriate action with respect to making a determination as to the community of interest that the commercial producer shares with employees included in the bargaining unit.

### ORDER

It is hereby ordered that this case be, and it hereby is, remanded to the Regional Director for Region 3 for the purpose of taking further appropriate action with respect to making a determination as to the community of interest that the commercial producer shares with employees included in the bargaining unit.