

**Marion Power Shovel Company, Inc., Employer-Petitioner and United Steelworkers of America, Local 1949, AFL-CIO<sup>1</sup> and International Association of Machinists and Aerospace Workers, Local Lodge 1281, AFL-CIO.<sup>2</sup> Cases 8-UC-103 and 8-RM-719**

June 28, 1977

DECISION AND CLARIFICATION OF  
UNIT

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND MURPHY

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer William M. Kohner of the National Labor Relations Board. 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 8, this proceeding was transferred to the Board for decision. Thereafter, the Employer and the Machinists filed briefs.

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.

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 proceeding, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The Unions are labor organizations within the meaning of the Act and claim to represent certain employees of the Employer.
3. This proceeding presents issues concerning (1) the existence of a question concerning representation, (2) appropriate bargaining units, and (3) deferral to arbitration.<sup>3</sup>

The UC and RM petitions were filed by the Employer as a result of competing claims for representation by the Steelworkers and Machinists arising out of the reorganization and expansion of the Employer's plant facilities at Marion, Ohio, commencing in 1974. At the conclusion of hearings in August 1975 the Employer employed about 1,250

employees in its two plants. Approximately 880 were members of the Steelworkers (765 at Plant 1 and 115 at Plant 2), approximately 155 were members of the Machinists at Plant 2, and the remaining approximately 215, who worked in the Employer's expanded facilities at Plant 2, were claimed by both Unions. The Employer's UC petition requested that the Steelworkers unit be clarified to add the employees in the expanded facilities in the Plant 2 area to its existing unit. The RM petition requested the Board to find a single unit of production and maintenance employees in both plants to be the only appropriate unit and to direct an election in that overall unit.<sup>4</sup>

The presence of two unions representing employees engaged in similar functions at the Employer's two plants is the outgrowth of its historical development. Prior to 1955, the Employer's only facility was the West Center Street Plant in Marion, herein referred to as Plant 1, where it manufactured and produced both large and small earthmoving machines. Its employees at Plant 1 were and still are represented by the Steelworkers. In 1955, the Employer purchased the Marion, Ohio, facilities of the Osgood Company, herein referred to either as the Osgood Plant or Plant 2. This facility is located approximately 1-1/2 miles from Plant 1. Osgood's primary products were small earthmoving machines, and at the time of the acquisition its employees were represented by the Machinists. Following the acquisition of the Osgood Plant, the Employer discontinued the production of Osgood machines and produced its own line of small earthmoving machines at the Osgood Plant using the former Osgood employees who continued to be represented by the Machinists. During the early years, employee interchange between the two plants was infrequent because of the separate representation and the requirement that employees change their union affiliation with inter-plant transfers.

Between 1959 and 1963, the Employer discontinued its line of small shovels and made several transfers of production facilities and employees from Plant 1 to the Osgood Plant with resulting disputes as to the union representation of these employees. The Machinists claimed all employees at the Osgood plant, and the Steelworkers claimed employees at the Osgood plant doing work transferred from Plant 1. In 1963, an agreement was reached between the Employer and the Unions which departed from the prior practice of representation based exclusively on geographical considerations and gave some effect to

lengthy brief filed with the Board. The motion is hereby dismissed as lacking in merit.

<sup>4</sup> In its brief to the Board, the Employer argues that a single unit is the only appropriate unit.

<sup>1</sup> Herein called Steelworkers.

<sup>2</sup> Herein called Machinists.

<sup>3</sup> The Machinists filed a motion to dismiss the proceedings as barred by collective-bargaining agreements entered into with both Unions after the petitions were filed. The Machinists does not discuss this question in its

the transfer of functions from Plant 1 to the Osgood Plant. Under the agreement, the Steelworkers continued to represent employees at Plant 1 but also was granted jurisdiction over employees working at the Osgood Plant in buildings 1 and X. The Machinists continued to represent the remaining employees in the Osgood Plant including those employees in buildings 1 and X who worked on a plantwide basis. This arrangement remained in effect without dispute until 1974.

In 1973, in the light of a substantial increase in the demand for large power shovels, the Employer formulated plans for a major expansion of its facilities. Because Plant 1 was surrounded by streets and railroad tracks, the Employer concentrated its expansion program at the Osgood plant location. Pursuant to this program, the Employer purchased approximately 90 acres surrounding the Osgood plant and thereafter commenced construction of additions of existing facilities and new buildings, building Y, building Z (Ironton Building), the Weld Pad area, the outside storage area, employee parking lots, and a new substation were completed in 1974 and 1975. Construction of building W was commenced. The Employer also leased the Sycon Building as part of its expansion program. Following the availability of these new structures in 1974 and 1975 the Employer moved production equipment from Plant 1 into the new facilities in the Osgood Plant area, hired new employees, and transferred other employees from Plant 1. With each transfer of work or the manning of an additional facility representation disputes arose.<sup>5</sup>

After Building Y was completed, the Employer recognized the Steelworkers to represent its employees. On October 9, 1974, the Machinists filed a grievance demanding that it be recognized. When the Employer recognized the Steelworkers to represent storekeepers in the Sycon Building, the Machinists demanded their representation. When the Employer recognized the Machinists for maintenance employees servicing the Sycon Building, the Steelworkers filed a grievance claiming representation. When the Employer recognized the Steelworkers for employees at the new Weld Pad, the Machinists demanded recognition. When the Employer recognized the Steelworkers for employees in the new Z Building, the Machinists lodged a grievance for recognition. In 1974 both Unions struck over demands for recognition.

Faced with these conflicting demands of both Unions seeking representation of the newly hired and transferred employees working in the expansion

facilities, the Employer on January 30, 1975, filed the instant UC petition and on March 4, 1975, after both the Steelworkers and Machinists contracts had expired, filed the instant petition in Case 8-RM-719.<sup>6</sup> The Machinists contends that the UC petition for clarification should be dismissed, that the Board should defer to arbitration under the respective collective-bargaining agreements, that the expanded facilities in the Osgood plant area are within the Machinists unit, that there is no question concerning representation, that in light of the bargaining history a single unit is not appropriate, and that even if it is appropriate, it is not the only appropriate unit because the existing units of Steelworkers and Machinists are also appropriate. The Steelworkers initially took the position that all production and maintenance employees would comprise the appropriate collective-bargaining unit within the scope of either the UC or RM petition. After the hearing closed, the Steelworkers, by letter, in lieu of a brief, stated that its position "in this case is neutral," that it would comply with its contractual obligations with the Machinists "not to raid," that it would "participate in the pending arbitration with respect to the jurisdiction of the Unions," and that it did not waive the right "to representation of persons or a unit to which the Steelworkers Union is otherwise entitled."

The appropriateness of deferring to arbitration obviously depends on the nature of the dispute involved. In early 1975 during negotiations for new contracts both Unions demanded recognition as representative for all employees in Plant 2, including the employees previously represented by the other Union. At the present time, however, the Steelworkers has abandoned any claim to represent employees in the pre-1974 Machinists unit and the Machinists has abandoned any claim to employees in the comparable Steelworkers unit. But each Union continues to claim representation of employees in the facilities in the Plant 2 area, not a part of the original Osgood Plant, that were constructed or acquired in 1974 or later.

This dispute thus presents issues of whether a question of representation is present and what is the appropriate unit or units for the Employer's production and maintenance employees. We do not believe the Board should defer consideration of these issues to the parties' contract arbitration procedure. The determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are

<sup>5</sup> The status of foundry workers represented by the International Molders Union is not in dispute.

<sup>6</sup> On January 30, 1975, the Employer had filed a petition in Case 8-RM-

718. Because of then existing contracts which did not expire until March 1, 1975, and fearing a possible assertion of the contract-bar rule, the Employer withdrew the petition in Case 8-RM-718.

matters for decision of the Board rather than an arbitrator.<sup>7</sup> See *Combustion Engineering, Inc.*, 195 NLRB 909 (1972); *Hershey Foods Corporation*, 208 NLRB 452 (1974); *The Pulitzer Publishing Company (Owner and Operator of Stations KSD and KSD-TV)*, 203 NLRB 639, 641 (1973); *Westinghouse Electric Corporation*, 162 NLRB 768 (1967). We therefore proceed to the merits of the case.

The conflicting claims to representation of the employees in the expanded Plant 2 area facilities at first blush suggest the existence of a question of representation. It is clear, however, that the added facilities are merely an extension of the Employer's existing plants. The same character of work is performed in the enlarged complex as was previously carried on in Plants 1 and 2. The amount of work has been increased and the manner of accomplishing it has been reorganized and relocated. The employees in the expanded facilities utilize the same skills and work under the same job classifications that obtained in Plants 1 and 2. These employees, therefore, do not constitute a separate appropriate unit in which a question of representation is present.

A question of representation would be present, nevertheless, if their inclusion in either the Steelworkers or Machinists unit were equally appropriate and a self-determination election were necessary to determine their placement. An examination of this problem is therefore in order.

The Employer's expanded and reorganized facilities have been and are now operating on an integrated basis with production flowing from Plant 1 to Plant 2, the expanded Osgood plant, and vice versa. Much of the work at Plant 2 was originally performed at Plant 1, and was transferred to Plant 2 between 1959 and 1963, as previously noted. Transfers on a much larger scale occurred as a result of the Employer's major expansion which commenced in 1974 and the concomitant reorganization of its production flow. The Employer also transferred from Plant 1 to the expanded facilities in Plant 2 machinery and equipment, supervisory personnel, and some employees. The expansion resulted in the further integration of the Employer's operations by shifting the emphasis of production from Plant 1 to the Plant 2 area. The manufacturing capacity of the Plant 2 area more than doubled as a result of the expansion. The concentration of the Employer's material flow was located at Plant 2 rather than Plant 1 after the expansion.

<sup>7</sup> On December 11, 1975, an arbitrator issued an award finding that Marion Power Shovel Company, Inc., did not violate its contracts with either the Machinists or the Steelworkers by recognizing the Steelworkers as the bargaining representative for employees of its new weld building and annex (building 'Y'). He further found that the matter of representation of employees at the Ironton Building (building 'Z') was not arbitrable. Though

As a result of the integration of operations between Plant 1 and Plant 2 there has been an interchange of Steelworkers unit employees between the plants and among the buildings, there is common supervision, similar job classifications and skills are involved, all employees share a community of interest, and the expanded facilities are in close geographic proximity to buildings 1 and X in Plant 2 where employees are members of the Steelworkers. The employees in the added Plant 2 area structures would constitute less than 20 percent of the unit if deemed an accretion to the existing Steelworkers unit. If the Steelworkers were the exclusive representative of production and maintenance employees at both plants, there is little doubt that their accretion to the Steelworkers would be considered appropriate.

The Machinists, however, claims the expansion employees under the terms of their contract which defines its jurisdiction as including "all production and maintenance employees employed at the Osgood plant" excluding employees in building 1 or building X. The Machinists contends that the expansion employees, not being in buildings 1 or X, are literally within the scope of their contract jurisdiction. Even if we were to agree, which we do not, that the phrase "Osgood plant" encompasses all structures, new and old, in the Plant 2 area rather than just those acquired from the Osgood Company in 1955, we would have difficulty in finding the expansion employees an accretion to the Machinists unit.

The employees in the new facilities number approximately 215 compared to the present Machinists unit of approximately 155 employees. Because of the different union jurisdictions, there is virtually no interchange of employees between the two groups of employees. The work in the expanded plant area is principally an extension of the work done in Plant 1 and buildings 1 and X in Plant 2. When work was previously transferred from Plant 1 to buildings 1 and X, the Machinists agreed in 1963 to the Steelworkers taking jurisdiction of the employees performing that work. Moreover, the Machinists has acknowledged that the work performed by its members differs somewhat from that of the Steelworkers members.

When the parties agreed in 1963 to exclude buildings 1 and X from its jurisdiction, the Machinists was left with the Cab Shop, a few smaller buildings used for storage and similar support services, and the indirect employees (plantwides) at Plant 2. The Machinists asserts that the cab construc-

the award does not deal with the representation of employees at all of the Employer's expansion facilities, its result—as to building 'Y'—is consistent with our Decision herein. However, as stated above, the issues arising in this case are matters for resolution by the Board, and we therefore do not rely on the arbitrator's award in rendering our Decision.

tions, which its members perform, is a distinct function in manufacturing moving or earthmoving machines. The cab is constructed basically of sheet metal and is the only portion of the shovel machinery that is so constructed. The light welding involved in sheet metal work differs from the heavy welding performed by the Steelworkers members and the cab shop has its own supervision. The cab is a distinct element of the final product. Accordingly, relying on the bargaining history and the foregoing factors, the Machinists argues in its brief to the Board that Cab Shop and plantwide employees constitute an appropriate separate unit. In the circumstances, we find that the expansion employees cannot constitute an accretion to the Machinists unit.

Notwithstanding the various factors relied upon by the Machinists to justify a separate unit for the Cab Shop and plantwides, we would find all the production and maintenance employees in Plants 1 and 2 to constitute a single appropriate unit were it not for the long bargaining history of a separate Machinists unit. The Machinists unit dates back to a period prior to 1955 when the Employer acquired the Osgood plant. The modified unit recognized in 1963 has remained unchanged to the present time.

Thus the Machinists unit has a history of collective bargaining in the Osgood plant covering more than two decades. For the past 12 years it has represented Cab Shop, support service, and plantwide employees at Plant 2. The Board has long held that it will not disturb an established bargaining relationship unless required to do so by the dictates of the Act or other compelling circumstances.<sup>8</sup> We find no justification in the requirements of the Act or the present situation for disrupting the pattern of collective bargaining that has continued at Plant 2 for nearly 20 years. In the light of this long-established bargaining history, we find that the Machinists unit at Plant 2 continues to constitute an appropriate unit for purposes of collective bargaining. We also find, however, that a unit composed of the Machinists unit and the expansion employees would not be appropriate.

<sup>8</sup> *The Great Atlantic & Pacific Tea Company, Inc.*, 153 NLRB 1549 (1965).

<sup>9</sup> In view of these findings, the self-determination election which our dissenting colleague would direct would be inappropriate.

Since we find the expansion employees constitute a proper accretion to the Steelworkers unit, do not constitute a proper accretion to the Machinists unit, and would not be an appropriate unit if added to the Machinists unit, there is no question of representation with respect to this group of employees.<sup>9</sup> Accordingly, we shall dismiss the RM petition and clarify the unit represented by the Steelworkers. We find that the following constitutes a unit appropriate for purposes of collective bargaining within the meaning of 9(b) of the Act:

Plant production and maintenance employees in the Company's West Center Street Plant and production and maintenance employees whose work is performed in and is specifically directed to the work being performed in building "1" and "X," the new weld building and annex (building "X"), the Ironton building (building "Z") of the Company's Osgood plant, the Barks road complex and the Sycon Building, all in the County of Marion, Ohio, but excluding employees who perform work in any of the buildings in the Osgood plant area as a part of work performed on a plantwide basis common to other parts of the Osgood plant area and all other employees heretofore excluded from the Steelworkers collective-bargaining unit, including office clerical employees, guards, and supervisors as defined in the Act.

**MEMBER MURPHY, dissenting:**

I disagree with my colleagues' action in dismissing the RM petition and clarifying the unit by including the disputed employees in the unit represented by the Steelworkers. In my view, those employees may be part of either unit and are entitled to an opportunity to indicate whether they desire to be represented by the Machinists or the Steelworkers. Accordingly, I would direct a self-determination election with both Unions on the ballot.