

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

4. The parties agree and we find that the following employees of the Employer's Keokuk, Iowa, plant 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 office clerical employees, plant clerical employees, laboratory employees, technical employees, sales employees, medical department employees, all other office employees, watchmen and guards, professional employees, and supervisors (including leadmen and leadwomen) as defined in the Act.

[Text of Direction of Election omitted from publication.]

CHAIRMAN LEEDOM and MEMBER JENKINS took no part in the consideration of the above Decision and Direction of Election.

⁶ After this case was transferred to the Board, the Employer, by letter dated June 12, 1957, and the Intervenor, by letter dated June 17, 1957, notified the Board that they desired to withdraw their contract-bar claim. Accordingly, as the parties are now in agreement as to the desirability of holding an election at this time, we find, without considering the merits of the original contract-bar claim, that the contract does not bar an election.

The Bell Telephone Company of Pennsylvania, Petitioner and Pennsylvania Telephone Union, Local Union No. 1944, IBEW, AFL-CIO.¹ Case No. 4-RM-181. June 27, 1957

DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Herbert B. Mintz, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

On February 9, 1956, the Board granted leave to each of the following labor organizations to file a brief *amicus curiae*: Communications Workers of America, AFL-CIO, Alliance of Independent Telephone Unions, Engineers and Scientists of America, and International Brotherhood of Electrical Workers, AFL-CIO. Such briefs were filed on or before March 8, 1956, and a reply memorandum was received from the Employer on April 3, 1956. On September 12, 1956, the Board granted the request of the Union for oral argument. On

¹ After the close of the hearing, counsel for the Union sent a letter to the Board, with copies to all parties, advising that the Union, which was formerly known as Pennsylvania Telephone Union, affiliated with Alliance of Independent Telephone Unions, effective as of April 2, 1956, affiliated with the International Brotherhood of Electrical Workers, AFL-CIO. Since there has been no opposition, we have changed the Union's name as indicated above.

September 26, 1956, the Board heard oral argument in which the Employer and Union participated.

The Board has considered the entire record, the briefs of the parties, each of the briefs *amicus curiae*, and the oral argument in this case, and finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer. The Employer agrees that the labor organization does represent them.

3. For more than 15 years the Employer has recognized the Union as the exclusive bargaining representative of various categories of employees in its traffic department. The parties have had contractual relations on this basis since 1940 without benefit of a Board certification. However, the unit coverage was challenged in bargaining sessions which were held in the summer of 1955 when the parties were negotiating an amended contract. One of the issues in dispute involved the Employer's demand that those of its employees specifically classified as "supervisors" be excluded from contract coverage. The Employer filed the instant petition seeking resolution of this issue. The Employer does not deny that the Union represents a majority of its traffic department employees. The parties have clearly indicated both at the hearings and in their briefs that they wish a Board decision solely with regard to the inclusion in or exclusion from the contract unit of certain employees based upon whether they are found to be supervisors within the meaning of Section 2 (11) of the Act.²

The first question is whether or not the Board has authority under the Act to make a determination with respect to any unit issues raised by a petition presented in the posture of the instant one where (1) there has been no prior Board certification and where (2) as here neither party desires an election. There exists Board precedent to support the making of such a determination,³ but it does not appear from the cases that the question of the Board's power to act in these circumstances has ever been squarely raised or considered. We have concluded that the Board has no such authority, and that the rendering of advisory opinions in the absence of any question concerning representation is beyond the power conferred upon the Board by Congress.

² The Employer contends that the only question is whether employees classified as supervisors are supervisors within the meaning of the Act. The Union asserts that if the Board answers this question in the affirmative, then there are other employees having similar authority and duties who likewise should be excluded from the unit.

³ See, for example, *Hershey Estates*, 112 NLRB 1300; *Humble Pipeline Company, Southern Division*, 107 NLRB 892; *Houston Terminal Warehouse & Cold Storage Company*, 107 NLRB 290; *Luper Transportation Co., Inc.*, 92 NLRB 1178; *Librascope, Incorporated*, 91 NLRB 178; *York Motor Express Company*, 82 NLRB 801; *W. K. B. H., Inc.*, 81 NLRB 63; *Deep Rock Oil Corporation*, 81 NLRB 10; *Merrill-Stevens Dry Dock & Repair Company*, 79 NLRB 962; *Lake Tankers Corporation*, 79 NLRB 442.

Section 9 of the Act is the source of Board authority in representation proceedings. Section 9 (c) (1) provides, in part, that "Whenever a petition shall have been filed . . . the Board shall investigate such petition. . . . If the Board finds . . . that . . . a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."⁴ Thus, the Act mandates a direction of election by the Board, if a question concerning representation is found to exist. However, in the instant case the parties do not desire an election and the Employer does not deny that the Union represents a majority of its traffic department employees. Consequently, there is no question concerning representation in this case. The Board has customarily so found.

Where the basic unit involved has been established via a Board representation proceeding resulting in an election and in the issuance of a certification and the parties have sought a Board determination with respect to the status of certain disputed classifications of employees in the unit, the Board has dismissed the petition, as such, has treated it as tantamount to a motion to clarify or amend the certification, and has then made the requested determination on that basis.⁵ We do not think that it can be gainsaid that a necessary concomitant of the authority conferred upon the Board by Congress under the statute to issue certifications is the power to clarify those certifications. Thus, the Board has consistently asserted—and we believe correctly so—authority to police its certifications by clarification, amendment, and even revocation, either on a motion or petition by one of the parties or on the Board's own motion.⁶ Further, the Board stated long ago that a "certification must be viewed as a means of effectuating the policies of the Act. As such, the certification is not intended to be a final order comparable to a judgment rendered in a court, but is a determination that may be modified. . . ."⁷

In situations similar to the instant case where parties have established a bargaining unit based upon their contracts rather than a Board certification, and one of them has filed a petition asking for a Board determination solely as to the status of particular employees included in the contract bargaining unit, the Board has dismissed the petition, equated it to a motion to clarify the unit, and has likewise made the requested determination.⁸ Here we part company with our dissenting colleagues. For although the Board has handled both

⁴ Emphasis supplied.

⁵ See, for example, *The Daily Press, Incorporated*, 110 NLRB 573; *Amperex Electronic Corporation*, 109 NLRB 353; *United Aircraft Corporation*, 108 NLRB 52; *Hilton Hotels International, Inc.*, 106 NLRB 1312; *Bluff City Broadcasting Co.*, 102 NLRB 102; *Tide Water Associated Oil Company*, 101 NLRB 570.

⁶ See, for example, *The Daily Press, Incorporated*, footnote 5, *supra*, at page 579 and cases cited therein; see, also, *Pittsburgh Plate Glass Company*, 111 NLRB 1210.

⁷ *Cramp Shipbuilding Company*, 52 NLRB 309.

⁸ See footnote 3, *supra*.

types of cases in analogous fashion, we are unable to discern a comparable basis for such action. Thus, unlike the cases involving outstanding Board certifications where by making the requested determinations the Board is effectuating a function bestowed upon it by Congress, we find no similar basis in the statute to support a grant of authority to the Board to determine the status of employees in a unit which it has never found appropriate and where none of the employees of the particular employer have ever had the opportunity vouchsafed them under the Act to express their desires in a Board election.

Were the Board to decide this case on its merits, such a determination could not possibly be a declaratory judgment binding on the parties.⁹ A declaratory judgment is a creature of the statute¹⁰ which authorizes it.¹¹ There is no statute authorizing the Board to render declaratory judgments in representation cases.¹² Consequently, at best a decision herein would be an advisory opinion binding on no one. Nowhere in the Act is the Board, either expressly or by necessary implication, empowered to give advisory opinions on matters of this type. It is empowered to make a determination of a jurisdictional dispute in a Section 10 (k) proceeding which is in the nature of a declaratory judgment in that it does in a limited sense adjudicate the rights of the parties, but does not result in a cease-and-desist order enforceable in the courts.

We cannot believe that Congress, having specifically provided an effective procedure for definitive resolution of unit issues in Section 9 (c) (1), at the same time intended to authorize the Board to derogate from that procedure in cases of this type by giving an advisory opinion which is not binding upon the parties or the Board, and where if one of the parties is dissatisfied with the Board's view, it could file a petition at an appropriate time covering all employees in

⁹ "A 'declaratory judgment' is one which simply declares the rights of the parties or expresses the opinion of the court on a question of law without ordering anything to be done. . . ." 26 Corpus Juris Secundum 50. See, also, 16 American Jurisprudence 276.

¹⁰ A declaratory judgment "is distinguished from an advisory opinion in that such opinion is merely a giving of advice and is not binding, whereas a declaratory judgment is a final judgment and constitutes *res judicata*." 26 Corpus Juris Secundum 50. See, also, 16 American Jurisprudence 276.

¹¹ "Since a declaratory judgment is of purely statutory creation and unknown to common law in the absence of an authorizing statute a court cannot either at law or in equity entertain an action for or render a merely declaratory judgment declaring rights, obligations, or legal relations without awarding any remedial process." 26 Corpus Juris Secundum 54. See, also, *Yabucoa Sugar Co. v. United Puerto Rican Bank*, 59 F. 2d 492 (C. A. 1).

¹² Section 5 of the Administrative Procedure Act, subsection (d) thereof, confers a general grant of power on administrative agencies to issue declaratory orders in adjudicatory proceedings, except in six specific types of proceedings listed in Section 5, one of which is the certification of employee representatives. Thus, since a representation proceeding "falls within one of the numbered exceptions in the introductory clause of Section 5, . . . section 5 (d) does not apply" (Attorney General's Manual on the Administrative Procedure Act—1947, p. 59) and the Board is therefore not empowered under the Administrative Procedure Act to issue such declaratory orders. Nor is there anything in the Labor Management Relations Act which authorizes the Board to render a declaratory order in cases of this type.

the unit or a refusal-to-bargain charge seeking to obtain a redetermination of the status of the employees involved.¹³ One of the fundamental purposes of Congress in Section 9 (c) of the Act was to devise a method whereby the scope of the entire unit involved would be before the Board so that most, if not all, of the possible unit problems could be resolved at one time and a certification could issue which would be binding upon the parties. We do not think that Congress wished to place the Board in the position of dissipating its funds and energies in the capacity of arbitrator, mediator, or conciliator by providing a forum for parties to submit their questions on a piecemeal basis without any reasonable assurance that the Board's determination will thereby finally resolve even the specific problem presented by the parties.¹⁴

This is not a discretionary matter. It is a fundamental question of the existence of legal power. Being convinced that the Board has been acting beyond the scope of its delegated powers under the Act in making such determinations, we have no alternative but to discontinue doing so and to dismiss the petition forthwith.¹⁵

[The Board dismissed the petition.]

CHAIRMAN LEEDOM and MEMBER BEAN, dissenting:

We would in accordance with existing authority¹⁶ process the instant petition as a motion for clarification of the unit and would decide this case on its merits.

¹³ Advisory opinions have never been given by the Federal courts. 15 Corpus Juris 785. Story, Constitution (5th ed.) section 1571.

¹⁴ See Section 4 (a) of the Act which provides in pertinent part, "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, . . ."

¹⁵ To the extent that the cases cited in footnote 3, *supra*, and other similar decisions are inconsistent with our decision herein, they are hereby overruled.

¹⁶ See footnote 3, *supra*.

Ohio Consolidated Telephone Company, Petitioner and Communications Workers of America, AFL-CIO. *Case No. 9-RM-143.*
June 27, 1957

DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Thomas M. Sheeran, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.