

Flexograph Division, and in the stereo department; the stone man; the two mercury cutting machine master pressmen; the two lead diemakers in the Flexograph Division; the cylinder cutting master pressman; and the carpenter leadman. These leadmen are more experienced employees, who, in some instances, routinely direct the work of four employees each and are responsible for the quality of work so performed. They have no authority to hire or discharge employees or to reprimand or discipline them. Unlike the foremen and other supervisory personnel whom the parties agree to exclude as supervisors within the meaning of the Act, the leadmen herein do not make effective recommendations affecting the status of employees, but merely make individual work performance reports, which their supervisors, in turn, use to make their own independent recommendations. Under all the circumstances, and as the 10 leadmen herein do not possess or exercise the statutory authority of supervisors, we find that they are not supervisors as defined in the Act. Accordingly, we shall include them in the unit.¹¹

Accordingly, we find that all production and maintenance employees in the Employer's paper board container manufacturing Plants Nos. 1 and 2, and auxiliary warehouses, in Atlanta, Georgia, including warehouse employees, laboratory technicians, corrugated sample and package engineering sample makers, production art employees, plant clerical employees, over-the-road truckdrivers, cafeteria employees, and leadmen, but excluding office clerical employees, professional and technical employees, lease machinery employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

[Text of Direction of Election omitted from publication.]

¹¹ *United States Gypsum Company*, 118 NLRB 20, at 29.

Humko, a Division of National Dairy Products Corporation¹ and Martin Diepholz and Ruben Cash, Petitioners and General Drivers, Salesmen & Warehousemen's Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case No. 32-RD-61. March 19, 1959

DECISION AND DIRECTION OF ELECTION

Upon a decertification petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Joseph

¹ The name of the Employer appears as amended at the hearing.

W. Bailey, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record, the Board finds:

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

2. The Petitioners, individuals representing certain of the employees of the Employer, assert that the Union is no longer the bargaining representative of the majority of the employees under Section 9(a) of the Act.

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, for the following reasons:

The Employer does not have any presently existing or recently expired contracts with any labor organizations. The Union has first moved to dismiss the petition on the ground that it was filed by supervisors. However, the uncontroverted testimony discloses that the individual Petitioners have voted unchallenged in prior elections and that their employee status has remained unchanged. The record fails to show that they possess any supervisory authority. We therefore find no merit in this contention.

The Union would also have the petition dismissed on the ground that there is no question concerning representation, stating on the record that it has no interest in representing these employees. The Board has frequently held that a union's disclaimer of representation must be clear and unequivocal, and not inconsistent with its other acts or conduct.² We take official notice of the Board's records and find that at the time the Union herein was disclaiming interest at the hearing, on October 6, 1958, there was pending an appeal before the General Counsel from the Regional Director's dismissal of a charge filed by the Union, in Case No. 32-CA-606, alleging *inter alia*, a refusal to bargain by the Employer. The Union continued to pursue its appeal until November 28, 1958, when the appeal was formally denied by the General Counsel. In pressing the appeal on and beyond the date of the hearing, the Union was necessarily seeking as a prospective matter a Board affirmative order against the Employer that it bargain with the Union. We therefore reject the Union's disclaimer of representation as equivocal and plainly inconsistent with its concurrent conduct in seeking a bargaining order. In these circumstances, we believe it was incumbent upon the Union to indicate, on the record or otherwise, its withdrawal of the appeal if it truly intended to abandon its representation claim. Accord-

²E.g., *McAllister Transfer Inc.*, 105 NLRB 751; *Casey-Metcalf Machinery Co.*, 114 NLRB 1520.

ingly, we find that a current claim for recognition has sufficiently been made out to warrant an election.

4. We find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All hourly employees employed at the Employer's Memphis, Tennessee, plant, including truckdrivers, but excluding office clerical employees, the superintendent's clerk, professional and technical employees, engineers, salesmen, watchmen-guards, the head cook in the cafeteria, temporary employees, and all supervisors as defined in the Act.³

[Text of Direction of Election omitted from publication.]

MEMBER FANNING, concurring in part and dissenting in part:

I think it is time the Board reappraise its approach to the question of disclaimers, such as made by the Union on the record of this decertification proceeding. Section 9(c)(1) authorizes the Board to proceed to an election only when it finds that a question of representation exists. Where the sole union involved withdraws its claim of majority status, a question of representation, it seems to me, no longer exists. I am fully aware that some unions, although actually intending to persist in their representation claims, have resorted to the facile device of a disclaimer, in order to procure a dismissal of the petition for a Board election on the basis that no question of representation existed, and then be free to renew their claims upon the employer at their convenience.

And there are, of course, disclaimers which have been made in good faith, or at least have been accepted as such absent contrary evidence. In such cases, the Board properly realized that it would not direct an election. In the case of a certified union, for example, the Board has dismissed the petition, with the specific holding that the union

having disclaimed its interest, is no longer the exclusive representative of the employees in the unit involved in this proceeding. Moreover, the parties are advised that the Board will not entertain a petition filed by the Union within 6 months from the date of this Order, unless good cause is shown to the contrary. In the event that the Union purporting to represent the employees in the unit involved in this proceeding makes a claim upon the employer within 6 months from the date of this Order, the Board will entertain a motion by the Petitioner requesting reinstatement of the petition.⁴

³The unit was stipulated at the hearing.

⁴E.g., *Little Rock Road Machinery Company*, 107 NLRB 715.

I agree with such disposition. While the seriousness of the union's positive representation claim which gave rise to the petition is not to be discounted, it must be recognized that the union may have had bona fide reasons for reversing its earlier position that it represented a majority of the employees in the unit. The 6-month prejudice provision in this situation is necessary and salutary, as a general rule, certainly to prevent abuse of Board's processes.

I concur in the majority opinion, for the reasons therein stated, that in the present case the Union's disclaimer was equivocal. This type of disclaimer presents a more serious problem, for it involves the precise situation mentioned of the admitted minority union merely seeking momentarily to avoid the Board election. In more recent cases, as in the instant majority decision, where the Board concluded that the disclaimer was inconsistent with other acts and conduct of the union, the disclaimer was rejected and an election directed.⁵

I do not believe that directing an election in these circumstances comports with the terms of the statute, and it is not the solution to the disclaimer problem presented. Such an election is artificial! The Union admits it has no majority. There is no true question concerning representation.

Of principal concern to me is the unfair penalty visited upon employees, since the mechanical holding of such an election operates to deprive them of the opportunity of choosing any other union in a Board conducted election for a period of 12 months.⁶ It is also a matter of proper concern that the holding of the election under the circumstances of this case is a needless expenditure of Board time, energy, personnel, and funds which could be directed elsewhere to better discharge the Board's responsibilities.

I submit that the Board can accomplish by decisional process all it can by conducting the election. The Union's equivocal disclaimer constitutes a clear and deliberate admission against interest, i.e., that the Union does not represent a majority. This is a highly potent evidential fact which needs only to be given full weight and legal effect. This fact is as strong in evidencing nonentitlement of the Union to the status of bargaining agent as the loss of an election.

The Union, having demonstrated by its equivocal disclaimer a disposition to circumvent the Board's processes, should not be placed

⁵ For various types of conduct found inconsistent with the disclaimer, see e.g., *Francis Plating Co.*, 109 NLRB 35; *McAllister Transfer, Inc.*, 105 NLRB 751; *V & D Machinery Embroidery Co.*, 107 NLRB 1567; *Jerome E. Mundy Co., Inc.*, 116 NLRB 1487; *Carter Manufacturing Company*, 120 NLRB 1609; *Netti Wholesale Grocery of Watertown, Inc.*, 121 NLRB 619.

⁶ Sec. 9(c)(3) provides in part that "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

in a better position than if it has submitted to and lost the election. Loss of the election would have precluded it from utilizing the Board's election machinery to establish itself as representative of these employees for a period of 12 months.⁷ It is reasonable that the Union should be held to the same result.

Consequently, I am of the view that the instant petition should be dismissed, and based upon the Union's admission on the record, a formal ruling should issue that the Union is not the majority representative of the employees involved, that its certification is revoked, and that it may not have a petition entertained as to these employees for a period of 12 months.

MEMBER JENKINS, dissenting:

I do not agree that the action of the certified union in taking an appeal from the Regional Director's dismissal on September 5, 1958, of unfair labor practice charges (including a charge of refusal to bargain), relating back to October 18, 1957, is so inconsistent with its disclaimer of any interest in the employees in the bargaining unit on October 6, 1958, as to warrant the direction of an election. The appeal was taken on September 15, 1958, prior to the issuance of notice of hearing in the instant case. At the time of the appeal the union presumably had no knowledge that the decertification proceedings herein, held in abeyance by the Regional Director since May 2, 1958, were being revived, but at the hearing it disclaimed any present interest. The appeal in the unfair labor practice proceedings requested a review of the Regional Director's action and issuance of a complaint seeking remedy of the alleged unfair practices occurring almost 1 year prior to the hearing in this proceeding. I cannot equate this request for review and possible retroactive remedy with the assertion of a current and continuing claim in view of the Union's positive denial of such a claim. The Union has admitted it is no longer the representative of the employees as defined in Section 9(c). That is the sole issue raised in the instant proceeding. This proceeding is now in the posture where there are no unfair labor practice charges pending, there is a complete and unequivocal disclaimer of representative status and no subsequent action inconsistent with that disclaimer has been taken. I therefore find that no question concerning representation presently exists and I believe the direction of an election at this time a questionable expenditure of the Board's energies and funds. The rights of the Petitioners would be fully protected by a dismissal of the petition with leave to refile should the certified union assert any claim or embrace any action inconsistent with its disclaimer.

⁷ *Ibid.*