

The Firestone Tire & Rubber Company *and* Local Union No. 7, United Rubber Cork, Linoleum and Plastic Workers of America, AFL-CIO,¹ Petitioner. Case 8-UC-47

August 24, 1970

DECISION AND ORDER

Upon a petition of Local 7 for clarification of unit duly filed on January 14, 1970, under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Charles Z. Adamson. All parties appeared at the hearing and were given full opportunity to participate therein. On February 26, 1970, the Regional Director for Region 8 transferred the case to the National Labor Relations Board. Thereafter, briefs were timely filed by the Petitioner and the Employer.

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, 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 Petitioner, a labor organization within the meaning of the Act, is currently recognized bargaining representative of employees of the Employer in two separate bargaining units at the latter's Akron, Ohio, plant. In this proceeding Petitioner seeks the Board's consolidation of these two bargaining units. The Employer opposes the requested consolidation and has moved that the petition be dismissed. For the reasons hereinafter set forth, we shall grant the motion to dismiss.

3. The relevant facts are as follows: The Akron plant is one of 11 plants at which the Employer produces finished rubber tires.² Production and maintenance employees at all 11 plants are represented by the Petitioner's International as well as by separate local affiliates at each of the plants. For a number of years the Employer and the International have executed a master contract for all 11 plants. The master contract was supplemented by local agreements negotiated with the local representative at each plant involved. The agreement in effect on the filing date

of this petition bore an expiration date of April 20, 1970.

Petitioner is the local union which has for some time represented the approximately 4,285 employees in the uncertified production and maintenance unit at Akron. That unit, as defined in the Petitioner's contract with the Employer, expressly excludes, among others, employees classified as firemen. The Akron firemen remained unrepresented until about April 29, 1969,³ when, following a Board election held pursuant to an agreement for consent election executed in Case 8-RC-7741, the Regional Director for Region 8 certified Petitioner as the representative of a unit confined to the firemen. The firemen unit contains approximately 20 employees. In negotiations conducted after the issuance of the Board's certification, Petitioner requested that the firemen be added to the uncertified production and maintenance unit and be covered by the then existing plant contract. The Employer refused.

Thereafter, on January 14, 1970, Petitioner filed the instant clarification proceeding in which it seeks a Board unit determination that would add the firemen in the certified unit to the production and maintenance employees in the uncertified unit, either without or after a preliminary Board-conducted election among the firemen to determine their unit preference. In making this request, Petitioner does not assert that there has been any relevant change in circumstances affecting the firemen since the consent election agreement. Nor does it contend that the unit lines as now drawn define inappropriate units. Rather, it appears to be Petitioner's claim that the merger of the two existing units would form a more appropriate unit.⁴ For present purposes, we need not determine

³ Employees classified as firemen are employed at two other of the 11 plants covered by the master agreement, namely, at Los Angeles, California, and at Memphis, Tennessee. At Los Angeles, the plant firemen are included in the production and maintenance unit and are covered by the supplemental agreement between the Employer and the local union at that plant. At Memphis, the firemen are separately represented by the United Plant Guards. At the remaining plants covered by the master agreement, the fire-fighting and fire-prevention functions comparable to those of the firemen here involved are assigned to employees who are classified as guards and who concededly have guard status under the Act. All these guards are unrepresented.

⁴ In support of its merger request, Petitioner points to cases in which the Board has included in a plantwide production and maintenance unit firemen performing functions similar to those of the firemen here involved. See *Magma Copper Co.*, 115 NLRB 1, 3; *Wilson & Co.*, 101 NLRB 1755, 1756. In each of these cases the Board's unit determination was made in the context of an RC proceeding involving an initial request for a plantwide unit. We note, however, that where, as here, the parties themselves have voluntarily established a production and maintenance unit excluding certain fringe classifications which the Board would ordinarily have included in a plantwide unit and, after a history of bargaining in the plantwide unit, the parties request the Board to find appropriate a separate unit of the fringe employees, the Board has granted that request. See, e.g., *Swift & Co.*, 131 NLRB 143.

¹ Herein called Local 7 or the Petitioner

² The other 10 plants are located at Los Angeles, California, Memphis, Tennessee, Bloomington, Illinois, Decatur, Illinois; Des Moines, Iowa, Fall River, Massachusetts, New Castle, Indiana, Noblesville, Indiana, Pottstown, Pennsylvania; and Salinas, California

the merits of that claim, as we would dismiss this petition in any event for the reasons that follow.

Chairman Miller, without reaching other questions that may be present, would dismiss the petition on the ground of untimeliness. The Union filed its petition herein less than a year after the Board had certified it as the representative of the Employer's Akron firemen and without, so far as appears, having first made a genuine effort to negotiate a separate collective-bargaining contract covering the employee unit for which it was certified. The principle is now deeply rooted in our law that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Frank Bros. v. N.L.R.B.*, 321 U.S. 702, 725. The Board has long recognized that consideration of claims questioning the continued viability of a Board certification within a year after issuance not only does violence to that principle but also disrupts the orderly and stable labor relations that a certification is designed to promote. Accordingly, the Board has established and consistently applied a rule requiring the dismissal of any representation petition filed during the certification year. See *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507. It is true that the petition in this case does not concern the representative status of the certified Union, but only the unit in which bargaining is to be conducted. But, in the opinion of Chairman Miller, the Board action sought by this clarification petition would be no less disruptive of the orderly and stable labor relations envisioned by a certification than would the action sought by a representation petition.⁵ This petition should, therefore, at a minimum, be governed by the same principles and be subject to the same rules with regard to timely filing. He would therefore dismiss the petition herein as having been untimely filed.⁶

Members Fanning and Jenkins agree with Chairman Miller's application of the Board's *Centr-O-Cast* rule to this petition. They would, however, also rest dismissal on other grounds. They adhere to the view, reflected in their opinions in *Libbey-Owens Ford Glass Co.*, 169 NLRB No. 2, and *P.P.G. Industries, Inc.*, 180 NLRB No. 85,⁷ that, absent a question concerning representation or a clear showing that as a result of changed conditions the employees composing existing units have become so merged into a single overall unit as to make their continued maintenance in separate units inappropriate, the merger of established

units is a matter which, under the statutory scheme, is to be left for voluntary bargaining by the parties. In the instant case there is no claim—let alone any showing—of changed conditions and no question concerning representation is involved. Further, Members Fanning and Jenkins note that a Board certification provides certain important protections to an employer⁸ (as well as to a union) so long as he continues to recognize the certified union and to bargain within the unit certified and that these protections would disappear if the firemen's unit was dissolved by the Board's inclusion of the firemen in the production and maintenance unit as requested by Petitioner. They note that, in a somewhat comparable situation in which an employer requested the inclusion of the employees composing a small certified unit in a broader unit, the Board declined to grant the request unless the certified union expressly waived its rights under the certification.⁹ They do not believe the Employer should be compelled to give up the statutory protections it is afforded under the certification simply because the Union prefers to bargain in a unit other than that certified—especially since the unit involved had been agreed to by the parties, with Board approval, as a basis for certification.

Members Fanning and Jenkins also note that as the election resulting in the Petitioner's certification was held in a separate unit confined to firemen, there exists the possibility that the firemen might not have voted for Petitioner had they been advised that this would or might result in their being submersed in the much larger production and maintenance unit in which they would have but a small minority voice. Although the doubt as to their desires would be resolved by the conduct of the kind of nonrepresentational election the Board conducted in *Libbey-Owens-Ford*, *supra*, they believe, for the reasons they stated in that case, that the Board is without authority to conduct that kind of an election.

ORDER

The Board orders that the petition filed herein be, and the same is hereby, dismissed.

MEMBERS MCCULLOCH AND BROWN, dissenting:¹⁰

As noted by our colleagues, the Petitioner urges in support of its petition that the inclusion of the

⁵ See Sec. 8(b)(4)(i)(C) and 8(b)(4)(i)(D) of the Act

⁹ See *Prudential Insurance Co.*, 50 NLRB 689, 694, and 53 NLRB 775, 776. These two citations are to the representation proceedings underlying the Board determinations which came before the Court in the context of an 8(a)(5) case in *NLRB v. Prudential Insurance Co.*, *supra*, fn. 5

¹⁰ Member Brown would grant this unit clarification petition without a self-determination election among the employees now in the firemen's unit. However, as he does not have majority support for that position he joins in the dissent of Member McCulloch

³ Cf. *NLRB v. Prudential Insurance Co.*, 154 F.2d 385 (C.A. 6)

⁶ Nothing in the opinion of Chairman Miller is to be taken as intimating any view on his part as to whether a unit issue of the kind sought to be presented in this case may, or may not, be determined in a clarification proceeding

⁷ Both decisions predate the incumbency of Chairman Miller

Akron plant's firemen in that plant's much larger unit of production and maintenance employees would result in a more appropriate unit. This contention finds support in the record and in applicable Board law. The facts presented leave little doubt that the firemen share a sufficient community of interests with other plant employees to justify their inclusion in the broader unit. A unit confined to firemen of the kind here involved will not be found inappropriate if established with the consent of the parties. But the Board has customarily held in cases where this employee category has been in dispute that such firemen *must* be grouped with production and maintenance employees for purposes of collective bargaining.¹¹ As the unit the Petitioner requests is plainly appropriate under Board standards, we believe that statutory policy, as reflected in part by Section 9(b) of the Act,¹² would best be served by allowing the employees now in the 20-man firemen's unit, should they so desire, to become part of the production and maintenance unit at the Akron plant. Accordingly, we would not dismiss the petition in this case, but would direct an election among the employees now in the firemen's unit to determine whether they wish to be represented for purposes of collective bargaining as part of the plantwide unit of production and maintenance employees. If the firemen so elect, we would clarify the unit accordingly. See, *Libbey-Owens-Ford Glass Co.*, 169 NLRB No. 2.¹³

The Board's majority holding does not pass on the present appropriateness of the Petitioner's requested unit merger. Instead, applying the *Centr-O-Cast*

rule, the majority dismisses this unit clarification petition on the ground that it was filed less than a year after the Petitioner was certified as the representative for the firemen's unit. The *Centr-O-Cast* rule is limited in its stated application to representation petitions (RM, RD, and RC) filed during a certification year which challenge the majority status of an incumbent certified representative; it has never heretofore, as far as we know, been applied to unit clarification petitions. The administrative bar announced in *Centr-O-Cast* on the processing of untimely filed representation petitions was designed to support the long-recognized principle that a statutory bargaining agent must be left free of challenge to its majority status for a year after it is certified. We are unable to concur in the position of the majority that the unit clarification petition in this case should "be governed by the same principles and be subject to the same rules with respect to timely filing."

We regard as patently overdrawn the view expressed by the majority, that "the Board action sought by this petition would be no less disruptive of orderly and stable labor relations envisioned by a certification than would the action sought by a representation petition." A representation petition challenging an incumbent union's majority is clearly at war with certification's protective purpose, since it is aimed at the complete destruction of an established bargaining relationship. In contrast, the action which Petitioner seeks here looks toward the continuation of the collective-bargaining relationship that presently exists between the Petitioner and the Employer with respect to both units at the Akron plant for which it is now the recognized employee representative. All that the Petitioner asks the Board to do is to combine the two employee groups, for purposes of future collective bargaining, into a single and, under Board standards, a more appropriate unit. Far from being destructive of orderly and stable labor relations, the action sought by the Petitioner should, more likely than not, enhance the functioning of collective bargaining by providing a more appropriate unit base and eliminating a present cause of dissension.

Moreover, if the majority is laying down a new rule that the *Centr-O-Cast* principle shall apply to unit clarification petitions generally, we believe it would be unnecessarily tying the Board's hands and denying to employers and unions access to the Board's processes to resolve unit-scope disputes at the very time such resolution could be most useful in removing obstacles to the institution of a stable bargaining relationship.

If, as we believe, the Board could have effected the unit merger even within the certification year,

¹¹ See *Magma Copper Co.*, 115 NLRB 1, *Wilson & Co.*, 101 NLRB 1755, 1756

¹² Sec 9(b) mandates the Board in deciding unit issues to do so with a view toward assuring employees "the fullest freedom in exercising their rights under the Act"

¹³ The cited case rejects the position of Members Fanning and Jenkins in the instant case that, in the absence of a question concerning representation, the Board has no statutory authority to merge previously established separate units or to conduct an election to determine employee desires in that regard. See, also *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916 (C.A.D.C.)

We are not impressed by the argument made by Members Fanning and Jenkins—one not presented by the Employer—that the clarification request if granted would, by dissolving the firemen's unit, withdraw from the Employer protections now available to it under Sec 8(b)(4)(i)(C) and (D) of the Act. We suggest that our colleagues may be in error as to 8(b)(4)(i)(D) since, under its literal terms, the protections of that section would appear to be as much applicable under a Board clarification "order" adding the firemen to the production and maintenance unit as under the present certification. We note, too, that protections substantially as extensive as those provided by Sec 8(b)(4)(i)(C) are available to employers under Sec 8(b)(7). Unlike our colleagues, we cannot ignore the fact that the employees also have statutory interests and that Congress in Sec 9(b) of the Act emphasized the primacy that must be given to the interest of employees in the Board's determination of units. The loss of employer protections, such as they are, to which our colleagues advert—and for which the Employer's need is at best remote and conjectural—does not, in our opinion, transcend in statutory importance the employee rights and interests that are involved.

the issue of timely filing becomes irrelevant. But, even if we agreed that the relief requested was of a kind the Board should withhold during the initial year of certification, we still would not subject this petition to the *Centr-O-Cast* untimely filing rule. There is good reason for applying a strict rule against the processing of representation petitions filed during a certification year. The very act of filing calls into doubt the continuing majority status of the incumbent and thus tends to have an intrusive and disturbing effect on bargaining during the remainder of the certification year. That reason is not present in the case of a unit clarification petition. Nor has the Board heretofore announced any administrative-bar rules with respect to this kind of petition as it has

with respect to representation petitions. The Board is empowered to regulate its own certifications even during the initial year, and parties to a collective-bargaining relationship have a legitimate right and interest in having access to Board processes for that purpose. In the instant case, the petition was accepted by the Regional Director, processed through hearing, and is now before us on a full record for decision. As more than a year from the date of certification has now elapsed, and as the relief sought by the petition can now be granted, we do not believe that statutory policy is served by subjecting this petition to the *Centr-O-Cast* untimely filing rule.

For the reasons stated above, we note our dissent to the dismissal of the petition.