

**East Dayton Tool & Die Company and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 668. Case 9-AC-25**

May 28, 1971

**DECISION AND ORDER**

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

The petition in this case, filed August 27, 1970, seeks the amendment of a certification issued by the National Labor Relations Board on October 3, 1952, to East Dayton Tool Employees Independent Union of Dayton, Ohio, herein called the Independent, in Case 9-RC-1642 for a unit of the employees of East Dayton Tool & Die Company. The Petitioner, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 668, hereinafter referred to as IUE, seeks to substitute itself as the certified representative of the Employer's employees.

A hearing on the petition was held on October 1, 29, 30 and November 23, 1970, at Dayton, Ohio, before Hearing Officer William A. Molony. During the course of the hearing a group of individuals, herein called the Individual Intervenors, were permitted to intervene in the proceeding as interested parties.<sup>1</sup> Also, during the course of the hearing the Regional Director for Region 9 issued an order transferring the case to the Board for decision. Subsequent to the hearing, each of the parties filed a brief with the Board.

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

The Board finds the Hearing Officer's rulings made at the hearing are free from prejudicial error. These rulings are hereby affirmed.

Upon the entire record in this case, the Board further finds as follows:

The Board's certification dated October 3, 1952, was issued to the Independent following a Board-conducted election in a unit composed of the production and maintenance employees of East Dayton Tool & Die Company, hereafter referred to as East Dayton. Thereafter, as a result of the voluntary agreement of the parties, the employees of Hawker Manufacturing Company, herein called Hawker, a wholly owned subsidiary

of East Dayton Tool & Die Company, were added to and became a part of the bargaining unit.<sup>2</sup> The Independent then changed its name to East Dayton and Hawker Tool Employees Independent Union of Dayton, Ohio. The most recent bargaining agreement between the Independent (as thus named) and the Employer was executed on or about January 27, 1969, and is effective until September 30, 1971.

On June 28, 1970, Joe Barnett, president of the Independent, approached Harry R. Shay, business representative of the Petitioner, and discussed with him the question of affiliation by the Independent with the Petitioner. At Barnett's request, Shay agreed to meet with the executive committee of the Independent at a future date to discuss the affiliation question and to bring an attorney of the Petitioner with him. A meeting was thereafter held on July 8 between the executive committee of the Independent; John Shanks, the Independent's attorney; Petitioner's representative Shay; and Petitioner's attorney, Richard Price. In considering what steps could be taken towards bringing about affiliation of the Independent with the Petitioner, the parties discussed, among other things, the fact that article I of the Independent's constitution provided, *inter alia*, "This organization shall not be affiliated with any International Union or other trade, industrial or crafts union organization, but shall be an independent union." The Independent's attorney advised that in his opinion, it would be necessary for the Independent to amend the constitution so as to eliminate the prohibition if affiliation with the Petitioner were to be accomplished. The attorney further advised that the amendment could be effected at a duly noticed meeting of the Independent by an affirmative vote of 75 percent of the members present at such meeting.

On or about July 15, 1970, a notice was posted at the plant on a bulletin board on which the Independent normally posted notices to its members. The notice stated that a meeting of the Independent would be held on July 19, 1970, at the Grubsteak House, for the purpose of voting to amend article I of the Independent's constitution and bylaws.<sup>3</sup>

The membership meeting to amend the constitution was held as noticed on July 19. At that time resolutions were successfully introduced that: (1) article I of the Independent constitution be amended by substituting for the prohibition preventing affiliation with a national union a provision permitting affiliation of the organization with any labor organization upon majority vote of

<sup>1</sup> The Individual Intervenors are a group of employees opposing affiliation with the IUE. The group includes Joseph Cornor, Chester McKinney, and Jerome Ryan, each of whom is represented by Attorney James T. Lynn, Jr. All of them are employees of the Employer and were members of the Independent. None of them has served as an elected officer of the Independent. Cornor, however, has served as an appointed steward. None of these individuals purports to represent the Independent. They do not claim to be a labor organization.

<sup>2</sup> The parties stipulated that Hawker and East Dayton constitute a single employer of the employees involved within the meaning of the Act. The Hawker plant is adjacent to the East Dayton plant and the labor relations policies of both companies are formulated and administered by the officers and representatives of East Dayton. There is substantial interchange of employees between East Dayton and Hawker on a day-to-day basis.

<sup>3</sup> The Grubsteak House is a location at which the Independent normally held its meetings.

those members voting in such an election; and (2) the membership be polled by mail ballot on a proposal that the Independent become affiliated with the Petitioner; that a charter be issued to the organization as Local 668; and on issuance of the charter, all books, records, and moneys of the organization become the moneys, books, and records of Local 668. These resolutions were passed by unanimous vote.<sup>4</sup>

On the following day (July 20) a notice signed by Joe Barnett, president of the Independent, was posted on the plant bulletin board. This notice described the affiliation resolution adopted at the meeting of July 19 and further described the voting procedures which would be followed in polling the members on the question of affiliation. The notice stated in relevant part as follows:

On July 21, 1970, ballots will be mailed to all members at their addresses as listed on current union records. If you do not receive a ballot by Friday, July 24, 1970, contact or call Paul Leingang, at 299-4709, and a ballot will be forwarded to you. After marking, the ballot should be placed in the enclosed blank envelope and sealed. The sealed envelope should then be placed in the second envelope, which is a self-addressed envelope which requires no postage and should be mailed. Ballots must be received by midnight, August 8, 1970, to be counted. Ballots will be counted at 2:00 p.m. on Sunday, August 9, 1970, at the Grubsteak, 1410 North Main Street.

On July 21, the ballots described in the above notice together with two enclosed envelopes were mailed to the approximately 136 unit employees who were members of the Independent at the addresses listed on current union records.<sup>5</sup> One of the two enclosed envelopes was blank. The other was an envelope stamped for mailing, bearing the name and address of the member to whom the ballot had been sent in the left-hand corner and the name and address of Paul Leingang, secretary of the Independent, as the addressee.

On August 9, the officers of the Independent and the business representative of Petitioner met for the purposes of tallying the results of the poll. Leingang brought with him the approximately 108 sealed pre-addressed envelopes which he had received to that date. Barnett then read off the name of the individual on the left-hand corner of each envelope as Leingang checked and marked off the name on the list of eligible voters. In each case, when satisfied as to eligibility, Barnett

then opened the outer envelope and placed the blank internal envelope with other similar envelopes in a separate pile. Of the 108 envelopes received, 6 or 7 were not opened because of doubts in each case as to the membership eligibility status of the individual sending in the ballot. The 101 blank envelopes were then assembled. These were opened by Shay and by Leingang, and one or the other read off the vote "yes" or "no." The tally was marked by two other Independent officers—Bryant and Holbrook. According to the undisputed evidence, 86 of the 101 ballots counted were marked for, and 15 were marked against, affiliation.<sup>6</sup>

On August 10, Barnett handed to a representative of the Employer a letter describing the affiliation election and stating that the membership of the Independent had decided to affiliate with the Petitioner by a vote of 86 to 15. The letter "officially informed" the Employer that effective as of that date, "the Independent was now one and the same as the Petitioner and its Local 668." The letter also stated ". . . all officers of the union will remain the same until further notice. Further, we will continue to honor the contract for its duration." Finally, the letter asked for a meeting "to discuss the modification of the contract to reflect the status of IUE and Local 668 as the bargaining agent." In response to this letter the Employer first decided to schedule a meeting, but on the advice of its attorney, it later canceled that decision, refused to recognize the affiliation, and questioned its validity.

As of the date of the hearing, and despite the vote of affiliation, no steps had been taken to actually dissolve the Independent. All financial affairs of the Union have been conducted in the name of the Independent. Thus the bank account is still in the name of the Independent; union dues are checked off in the name of the Independent; and membership forms and check-off authorizations are still executed in the name of the Independent.

In opposing the request for an amendment of certification upon the above facts, the Employer and/or the

<sup>4</sup> No individual told any officer of the Independent prior to the election that he had not received a ballot. However, after the election, Joseph Cornor, one of the Individual Intervenors herein, complained that he had not received a ballot. Cornor's name was admittedly not contained on the eligibility list. His status as a member of the Independent in good standing is not established by the record.

Similarly, there was no protest made about the manner in which the affiliation poll was conducted until after the results were known. The first protest about this was made on August 10 by Daniel Luddington—another of the Individual Intervenors herein. Luddington voiced his protest to Barnett and Leingang. Next, in late August or early September, Cornor prepared a petition of objection to the attempted affiliation which contained also a request that the Union's status as Independent be continued. That petition was thereafter signed by 24 employees, who were members of the bargaining unit and of the Union, and was presented at the hearing in this case.

As above noted, the AC petition which initiated these proceedings before the Board was filed August 27.

<sup>4</sup> Thirty-six members voted for the resolution to amend the constitution. Some of the 36 thus voting did not attend the meeting, but submitted their votes by proxy to others in advance. Only those present at the meeting (about 16 to 20 in number) voted on the affiliation resolution.

<sup>5</sup> Ballots were sent to all members in good standing whose dues were current and who were on the payroll as of July 17. The July 17 payroll list was prepared by the Employer at the request of one of the Independent officers.

Individual Intervenors have presented a number of specific contentions.

1. *The AC petition herein constitutes an attempt to change the collective-bargaining representative during the life of the current bargaining agreement contrary to the Board's contract-bar rule.*

We find this argument without merit as, under Board law, an amendment to certification is not affected by contract-bar rules.<sup>7</sup> Besides, the Petitioner has clearly made it understood that all contractual commitments with the Employer will be fully honored.

2. *The IUE representatives "actively assisted, directed, and indeed enticed officers of the Independent in their efforts to encourage affiliation with the IUE," and thereby "raided" the Independent.*

This contention is unsupported. Thus, the record shows that it was the Independent which initially contacted the IUE, and not the other way around. It is true that in the months preceding the affiliation vote, representatives of the IUE and the Independent conferred together about procedural matters. Their mutual object was to insure that the contemplated affiliation election would conform with the constitutional requirements of both organizations and would provide the membership of the Independent with an opportunity to register their vote on the subject free of any coercion. We do not find that this activity by the IUE representatives amounted to a raid or otherwise served to nullify the affiliation election. On the contrary, it was largely directed towards assuring the regularity of the procedures used. Accordingly, we find no merit in this contention.

3. *The purported affiliation poll was conducted in disregard of the provisions of the Independent's constitution and the procedures therein specified for effecting constitutional amendments.*

In this respect, the Employer and the Individual Intervenors refer specifically to articles I and XIV of the Independent's constitution as initially adopted. These articles, respectively: (a) prohibited affiliation with any national union; and (b) required the vote of "75 percent of the members in good standing . . . at any meeting called for that purpose" in order to amend the constitution. The contending parties argue that as less than 75 percent of the union membership attended the July 19 meeting at which the resolutions resulting in the conduct of the affiliation poll in August were adopted, the resolutions were null and void.

In considering this contention, we note the undisputed evidence that before calling the July 19 meeting the executive committee of the Independent obtained from the Independent's attorney advice that article XIV should be interpreted to mean that a constitutional amendment could be effected by a vote of 75 percent of the members attending a union meeting

called for that purpose; and that resolutions adopted at that meeting were passed unanimously. Furthermore, the August 19 notice informed the membership of the July 19 resolutions and provided the membership thereby with an opportunity to object to the conduct of the affiliation poll. However no member objected to the method of polling prior to the time the results of the poll were known. In any event, the results of the affiliation election demonstrate the desires of the membership to authorize the affiliation without regard to the possible existence, at the time, of any inhibitory provisions in the Independent's constitution. These results may thus fairly be construed as either ratifying the constitutional amendment action of those attending the July 19 meeting, or as a presently effective *de facto* amendment of inhibitory constitutional provisions. We note, in this respect, that more than 75 percent of the membership cast ballots in the poll.<sup>8</sup> We accordingly reject this contention of the Employer and the Individual Intervenors.

4. *The mail ballot was not conducted with sufficient safeguards to insure either the marking of the ballot by the individual member to whom it was sent or the secrecy of the voter's choice.*

The relevant evidence showed that no individual objected to the poll on the grounds here asserted by the Employer; that all members were advised of the date and place the ballots would be counted; and that no member was prohibited from being present at that meeting if he so desired. Furthermore, there is affirmative evidence, detailed, *supra*, that the ballots were in fact opened and counted in a manner which both affirmed the eligibility of the voter and preserved the secrecy of his vote.

It is suggested that the procedures used during this election may not have measured up to the standards the Board demands for its own mail ballot elections. But even so, on the facts of this case, we are not willing to find that the procedures used were so substantially irregular as to negate the validity of the election. On the contrary, it is our considered judgment that, in circumstances of this case, the poll represented a fair means for ascertaining the desires of the participating membership, and the vote in fact reflected the membership's free choice. Accordingly, we find no merit in this contention.<sup>9</sup>

5. *The Board should not permit its amendment of certification procedures to be used in a situation where, as here, the organization seeking to substitute itself for*

<sup>8</sup> As has been frequently stated, the Board does not ordinarily concern itself with determining whether membership meetings have been held in strict conformity with a union's constitutional provisions absent an affirmative showing—not here made—of clear irregularity. See *Hamilton Tool Co.*, 190 NLRB No 114; *Gate City Optical Co.*, 175 NLRB No 172.

<sup>9</sup> Cf. *Hamilton Tool Co.*, *supra*, *American Bridge Division, United States Steel Corporation*, 185 NLRB No 98, *Gate City Optical Company*, *supra*.

<sup>7</sup> See for example *Hamilton Tool and Die Company*, 190 NLRB No 114

*the certified representative is not precisely the same organization which it seeks to displace.*

This argument is identical to that made by the employer party to the *Hamilton Tool Company* case, *supra*. The Board's reasons for rejecting the argument in that case are fully applicable here. For here, as there, the certified labor organization does not oppose amendment and is not presently a separate functioning entity. Indeed, the certified union has now become the Petitioner.<sup>10</sup>

6. *Nonmembers were improperly denied the right to vote despite the fact that they were "vitally affected" by the affiliation action.*

This contention also is similar in nature to one presented in the *Hamilton Tool* case, *supra*. After due consideration it was rejected by a majority of the Board.<sup>11</sup> Furthermore, in this case approximately 90 percent of the approximately 146 unit employees were members; notices of the affiliation election were initially posted on plant bulletin boards over 3 weeks in advance; all members and presumably all former nonmembers who chose to become members in the interim were thus given an opportunity to attend and to vote. We also note, moreover, that even if all the votes of the nonmembers were to be taken as voting "no," the results of the election would not be affected.<sup>12</sup>

### Conclusions

1. Having carefully examined all the circumstances relevant to this question posed by the amendment to certification petition, we can perceive no reason for refusing to grant Petitioner's request.

As we believe that this requested amendment would insure the employees a continuity of their organization and representation, we shall amend the certification in this case to reflect the current name and affiliation of the certified union.<sup>13</sup>

<sup>10</sup> A conclusion that Petitioner is, in legal effect, no more than an organizational continuity of the Independent is not rebutted by the evidence showing that the organization's affairs (including its financial accounts and its administration of the contract) are conducted in the name of the Independent. For, as clearly appears, these practices were occasioned chiefly by the fact that the Employer refused to recognize Petitioner and insisted upon dealing with its officers only as representatives of the Independent.

<sup>11</sup> Chairman Miller concurred specially in that case. He deems the views there expressed to be equally applicable here.

<sup>12</sup> Cf. *North Electric Company*, 165 NLRB 942.

<sup>13</sup> This amendment is not to be construed, however, as having the force

2. We shall also grant the request of Petitioner, made at the hearing, for the further amendment of the certification so as to include within the unit as there described the production and maintenance employees who are carried on the payroll of Hawker Manufacturing Company and who perform their work functions out of a plant adjacent to that of the East Dayton Tool & Die Company. This request is predicated upon the undisputed facts, set out above, that shortly after the Board's certification issued, the parties agreed to bargain for the Hawker employees as part of a single unit embracing them together with the employees in the certified unit, and that all bargaining contracts since that date have been negotiated for such a unit. Although the Employer has opposed Petitioner's request that its name be substituted for that of the Independent on the certification, it has not opposed the request to amend the description of the certified unit. Indeed, the Employer stipulated that it and Hawker constitute a single employer of the employees of both within the meaning of the Act, that there is substantial interchange of employees between the two plants involved on a day-to-day basis, and that both plants' employees have been and are currently represented as one single unit.

### ORDER

It is hereby ordered that the petition to amend the certification filed by International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 668 be, and it hereby is, granted, and that the certification of representative issued in Case 9-RC-1642 be amended by: (1) substituting "International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 668" for "East Dayton Tool Employees Independent Union," and (2) by specifically including the production and maintenance employees of the East Dayton, Ohio, plant of Hawker Manufacturing Co. in the description of the appropriate unit.

MEMBER JENKINS, dissenting:

For the reasons stated in my dissent in *North Electric Company, Inc.*, 165 NLRB 942, I would not amend the certification.

and effect of a new certification of representative