

**Continental Can Co. and United Can Workers Independent Union,<sup>1</sup> Petitioner and Local 245, Graphic Arts International Union, AFL-CIO,<sup>2</sup> Petitioner.** Cases 25-RC-5670 and 25-RC-5683

April 9, 1975

## DECISION ON REVIEW AND DIRECTION OF ELECTIONS

BY MEMBERS FANNING, JENKINS, AND KENNEDY

On July 23, 1974, the Regional Director for Region 25 issued a Decision and Direction of Election in the above-entitled proceeding in which he rejected as inappropriate Graphic Arts requested unit of lithographic production employees at the Employer's Burns Harbor, Indiana, facility and directed an election in the Independent's requested unit of production and maintenance employees at that plant as alone appropriate. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, as amended, the Employer and Graphic Arts filed timely requests for review of the Regional Director's Decision on the grounds, *inter alia*, that he made findings of fact which are clearly erroneous and that he misapplied precedent. The Independent filed opposition to the requests for review.

By telegraphic order dated September 11, 1974, the requests for review were granted and the election was postponed pending decision on review. Graphic Arts filed a brief on review.<sup>3</sup>

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 considered the entire record in this case with respect to the issues under review, and makes the following findings:

Petitioner Graphic Arts, whose predecessor<sup>4</sup> was certified by the Board in 1968 as representative of a unit of production and maintenance employees at the Employer's Burns Harbor plant, filed its petition herein for a unit of lithographic production employees (designated in its contract with the Employer as class A employees) after the Independent petitioned for an election in a production and maintenance unit.<sup>5</sup> The Regional Director, in rejecting Graphic Arts unit request, relied on the Board's earlier decision<sup>6</sup> finding

inappropriate the similar unit request of Graphic Arts predecessor made shortly after the Burns Harbor plant commenced operations, and he viewed as insufficient basis for reaching a different result the facts as to current plant operations and as to the bargaining history subsequent to the 1968 certification of the unit of production and maintenance employees. The Employer and Graphic Arts, in their requests for review, argue that the Regional Director's reliance on the Board's earlier decision was misplaced because despite the certification issued for the broader unit the negotiations which followed resulted in *de facto* separation of the employees into class A and class B groups with different terms and conditions of employment agreed to for each group conforming to existing patterns of bargaining in the industry. We agree.

As found by the Regional Director, except for expansion of the employee complement, the facts pertaining to plant operations have not changed significantly since our earlier decision. Now, as then, the Burns Harbor plant restricts its operations to the application of printed matter and/or coatings of protective material on sheets of metal which are then shipped to can producing plants.<sup>7</sup> At present, most of the complement of 105 employees and supervisors work on 10 production lines, each line being staffed by crews of 3 employees and operated on a 3-shift basis. There are four coating lines and six press lines; the latter have equipment for coating as well as offset presses. The press line crews are made up of a pressman (or apprentice) who spends 95 percent of his time operating an offset press, a feeder (or apprentice) who divides his time between printing and coating operations, and a stacker who apparently is engaged wholly in coating operations. Each shift has two foremen who supervise both coating and press lines.

As noted by the Regional Director in his Decision, in most but not all plants in the can industry, including the Employer's, lithographic production employees are separately represented apart from other production and maintenance employees.<sup>8</sup> In the negotiations which followed its certification for the production and maintenance unit at Burns Harbor, Graphic Arts predecessor presented an integrated package for all unit employees but later acquiesced in the Employer's position that benefits for nonlithographic employees should not exceed the established pattern for such employees in other organized plants in the industry where they

<sup>1</sup> Herein called the Independent

<sup>2</sup> Herein called Graphic Arts

<sup>3</sup> However, it stated therein that it wished the Board to treat its request for review and the arguments contained therein as its brief on review.

<sup>4</sup> Local 245, Lithographers and Photoengravers International Union.

<sup>5</sup> The Intervenor, United Steelworkers of America, sought a unit of production and maintenance employees, excluding lithographic production employees

<sup>6</sup> *Continental Can Co.*, 171 NLRB 798 (1968).

<sup>7</sup> At the time it was opened, the Burns Harbor plant was the only one of the Employer's plants so restricted in its operations. All its other plants had facilities for coating and printing as well as for can production.

<sup>8</sup> In the earlier decision the Board took cognizance of this pattern but noted the Employer's argument that its Burns Harbor facilities were unique in the industry because its operations were confined to the printing and coating of metal sheets.

were represented in separate units. The resulting contract executed in 1968 divided the unit employees into two categories: class A, comprising pressmen, feeders, and their apprentices; and class B, comprising stackers and all other nonlithographic employees. Under the terms of the contract, wage levels for employees in each of the two classes conformed to the industry pattern for their counterparts in other plants.<sup>9</sup> In like manner, the workweek, overtime provisions, the cost-of-living formula, vacation benefits, and other pension plans for the two classes of employees differed.<sup>10</sup> The same dichotomy of terms and conditions for class A and class B employees, following the industry pattern for employees in each class, was carried over to the second contract which was executed in 1971 and expired on June 30, 1974.<sup>11</sup>

Over the years class B employees became dissatisfied with the separate treatment given them under these contracts and with the representation accorded them by Graphic Arts and its predecessor.<sup>12</sup> This dissatisfaction culminated in recent meetings of class B employees and in their decision to form the Independent.<sup>13</sup>

The above-summarized evidence demonstrates, in our opinion, that the Employer and Graphic Arts (and its predecessor) have departed from the unit found appropriate by the Board in 1968 and have themselves voluntarily established two separate units covering the above-defined class A and class B employees, respectively. Although the factors of common supervision of all production employees and the close integration of coating and printing functions carried on exclusively at the Burns Harbor plant now, as they did in our earlier published decision, clearly militate against the requested lithographic production unit, we are persuaded, in the circumstances here revealed, that they are outweighed by the history of bargaining on the basis of separate units of lithographic and nonlithographic

employees herein, predicated on the dominant patterns of bargaining in the can industry.

Member Kennedy would insist upon a plantwide unit here, contending that the earlier published decision dismissing several units, including one limited to pressmen, should be followed. He would adhere to that dismissal and the later certification of Graphic Arts in an overall unit even though the actual bargaining which resulted has been for two separate units. Bargaining history of this sort is a factor the Board often views as significant. For example, in decertification cases the appropriate unit in which to conduct an election is the certified *or* contract unit. If the certified unit has been changed by contract, the Board relies upon the unit recognized by collective bargaining and on that basis holds an election to determine whether the employees wish to continue being represented.<sup>14</sup>

Also, Member Kennedy views the bargaining here as showing disparate treatment of class B employees, but such contention is moot for, as our decision points out, charges of failure to represent fairly have been dismissed and some withdrawn, and the upshot has been that the incumbent, Graphic Arts, provided separate shop committees for each unit. To us the assertion that recognition of the existing bargaining pattern encourages a union to seek a broader certification in order to represent only part of a group seems very much an oversimplification of the difficulties in achieving majority representation in augmented voting groups and in serving the employees thereafter.

The quote which Member Kennedy selects from Member Fanning's dissent in *Farmers Insurance Company*, 209 NLRB 1163 (1974), is out of context and its pertinence here vanishes when the facts are examined. It involved a determination that insurance agents found to be employees after a protracted hearing and oral argument were, with no significant change in the actual status of the agents, independent contractors not covered by the Act. The concept remains valid: it is unstabilizing for the Board to change its mind on a question such as the Act's coverage soon after a thoroughly litigated decision and with no significant factual change thereafter. Realistic recognition of specific bargaining history—which here accords with the industrywide pattern of separate units for lithographic production employees and has existed for 6 years—is another matter. That we view as stabilizing, as do the parties.

It is true, as Member Kennedy states, that the 1971-74 contract, in paragraph 1, recognizes the Union for all employees at Burns Harbor and defines the unit as including all production and maintenance employees. Paragraph 2, however, defines two "Groups" of employees because of "some differences in certain provisions." These differences concern not only wages

<sup>9</sup> Wage provisions for class B employees were made retroactive to conform to the effective date of wage changes made for similar employees at other plants in the industry.

<sup>10</sup> It was possible to negotiate minor variations in certain provisions, such as vacations, to accommodate special desires of class B employees at Burns Harbor, so long as adjustments were made in other provisions, to maintain a total cost at the same level as set by the industry pattern.

<sup>11</sup> We note that since the inception of the Burns Harbor plant, the Employer established a similar plant within 5 miles of it at Portage, Indiana, and that the Board has issued certifications for separate units of lithographic production employees and nonlithographic employees respectively, at that plant, pursuant to stipulations for certification upon consent election.

<sup>12</sup> Charges were filed in Cases 25-CB-884 and 25-CB-1843 in 1969 and 1973, respectively, alleging breaches of the duty fairly to represent the class B employees. The former charges were dismissed and the latter withdrawn. For the last 2 years Graphic Arts has provided for a separate shop committee for each of the two employee classes and in the past year grievances peculiar to employees of each class have been handled by their own shop committees.

<sup>13</sup> Although the Independent petitioned for a production and maintenance unit, it stated at the hearing that if Graphic Arts requested unit of lithographic production employees is found to be appropriate it does not wish to participate in an election in that unit.

<sup>14</sup> *Clohecy Collision, Inc.*, 176 NLRB 616, 617 (1969).

but other basic conditions of employment. In effect the bargaining pattern reflected by the contract—and the preceding contract as well—is not the certified unit or the contract unit, if one stops at paragraph 1. It is two units, a fact which Graphic Arts ascribes to the insistence of the Employer that the provisions for the two groups at Burns Harbor parallel the provisions in other plants of the Employer where other unions represent the nonlithographic employees separately. Granted, if this were a decertification proceeding, the unit problem would not be without some difficulty. The *Clohecyc* case is cited simply as a relatively recent published statement of the rule that a currently recognized unit is appropriate for decertification as well as a certified unit.

In our view neither the Act as a whole nor the employee bargaining rights it sought to foster will be served by rigid adherence to the Board's 1968 decision dismissing the petitions for less than plantwide units. Initial decision or not, the Board is bound to consider whether that decision is still viable in light of 6 years of bargaining history. Unit was not the problem in *Farmers Insurance Company*, but an abrupt change disqualifying insurance agents as employees.

Member Kennedy apparently views the 6-year bargaining history here as reflecting only that the Union has lost the support of group B employees by its own fault. We would call attention to the Regional Director's finding that after certification the Employer insisted that overall benefits for the nonlithographic group be no greater than the existing pattern at its other plants, and that the Union ultimately yielded rather than strike. But in this case we are not called upon to assess responsibility for any asserted defection of group B. We are called upon to find the unit appropriate for future bargaining. We have done so.

Accordingly, we shall direct elections in the following units of employees at the Employer's Burns Harbor, Indiana, plant,<sup>15</sup> which we find to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(1) All class A or lithographic production employees at the Employer's Burns Harbor, Indiana, plant, including pressmen, feeders, and their apprentices, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

(2) All class B or production and maintenance employees at the Employer's Burns Harbor, Indiana, plant, excluding all employees in voting group (1), office clerical employees, factory clerical employees, confidential employees, food service employees, nurses,

outside truckdrivers, watchmen, guards, professional employees, and supervisors as defined in the Act.

[Direction of Election omitted from publication.]<sup>16</sup>

MEMBER KENNEDY, dissenting:

I would affirm the Regional Director's finding that the appropriate unit is the plantwide unit of all production and maintenance employees and his Direction of an Election in that unit.

The Regional Director properly relied upon the earlier decision of a panel of this Board which included Members Fanning and Jenkins.<sup>17</sup> My colleagues properly acknowledge that the "facts pertaining to the plant operations have not changed significantly since" they issued their 1968 decision in which they found that separate lithographic process and maintenance department units are not appropriate for purposes of collective bargaining. I simply cannot understand my colleagues' reversal of their own decision when there has been no change in the Employer's operations.<sup>18</sup>

The only difference revealed by the record herein is that after the Board found the lithographic unit inappropriate, Petitioner, Graphic Arts, was certified for a plantwide production and maintenance unit. The contracts which the Graphic Arts negotiated thereafter with the Employer, however, divided unit employees into two categories: class A (pressmen, feeders, and their apprentices) and class B (all other employees). Although in some respects the two groups were treated similarly, in a number of respects, including, *inter alia*, wages, hours, pensions, overtime, and cost-of-living increases, the distinctly different provisions favored the class A group. The Regional Director states in his Decision that Graphic Arts "has, according to its own claim, lost support of the Class B employees."

My colleagues conclude that the history of contrasting treatment accorded class A and Class B employees furnishes support for their present unit determination contrary to their own previous decision. I do not agree. Indeed, I believe my colleagues are permitting Graphic

<sup>16</sup> [Excelsior fn omitted from publication.]

<sup>17</sup> *Continental Can Co.*, 171 NLRB 798 (1968)

<sup>18</sup> In *Farmers Insurance Company*, 209 NLRB 1163 (1974), Member Fanning professed concern about the Board majority reaching a different result in an earlier case. He stated:

It is ill-advised, and hardly stabilizing, for the Board to change its mind on the status of these insurance agents so soon after its most recent decision. Precedents involving the same parties certainly should be given more respect than is evidenced by this decision.

The inaccurate suggestion that the foregoing quote is out of context cannot obscure the fact that Member Fanning suggested in the second *Farmers Insurance* case that his colleagues, who were not on the Board and had not participated in the first *Farmers Insurance* case, should not depart from his initial decision. Nonetheless, in the instance case he is now voting to abandon his initial decision which is reported at 171 NLRB 798

<sup>15</sup> As noted, neither the Independent nor the Intervenor indicated any desire to appear on the ballot in an election held in the unit of lithographic production employees below found appropriate

Arts to take advantage of their own impermissible conduct.

The fact that the lithographic production (class A) employees have been singled out for preferential treatment in Graphic Arts negotiations and contracts covering the certified unit does not justify establishing a separate unit for them at the request of the Graphic Arts when it is confronted with a challenge to its representative status as bargaining representative for the certified unit. I view the disparate treatment accorded the other production and maintenance (class B) employees as in derogation of the certification. All employees covered by a certification are entitled to fair and impartial representation.<sup>19</sup> The results reached in the majority's decision can only tend to encourage a union required by the Board to accept a more comprehensive unit than sought to obtain certification, to disregard its certification, and to press for the special interest of the group originally sought to the detriment of the other unit employees. Such encouragement I consider contrary to the purposes of the Act and inconsistent with good practice.

The majority suggests that "in decertification cases the appropriate unit in which to conduct an election is the certified or contract unit." I view this basic principle as lending further support to my position that the appropriate unit in which the election herein should be conducted is the overall production and maintenance

<sup>19</sup> See *International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, Local No. 671 (Airborne Freight Corporation of Delaware)*, 199 NLRB 994 (1972), and cases cited therein.

The fact that the General Counsel has declined to issue a complaint on charges filed with him does not alter in any way my conclusion that the disparate treatment accorded class B employees constituted a failure to represent them fairly

unit. The recognized unit described in the 1971-74 contract reads as follows:

The Company recognizes the Union as the exclusive collective bargaining agent for all of its employees in the bargaining unit hereinafter defined, for the purpose of collective bargaining with respect to rates of pay, hours of work, or other conditions of employment. The bargaining unit includes all production and maintenance employees, excluding office clerical employees, factory clerical employees, confidential employees, food service employees, nurses, outside truck drivers, and all watchmen, general professional employees and supervisors as defined in the act.

It is evident that both the certified and contract unit is the overall production and maintenance unit and any decertification election would have to be held in such unit. *Campbell Soup Company*, 111 NLRB 234 (1955). I note that *Clohecy Collision, Inc.*, cited by the majority, involved a certification covering two separate corporations and enterprises. Separate negotiations had been conducted for each employer with separate contracts containing different terms and conditions. The duration of one contract was for 1 year and the other was for a term of 3 years. Any relationship to the factual situation in that case to that presented in the instant case eludes me.

In summary, I would not permit a union which has been certified for a production and maintenance unit to thereafter obtain a new election in a smaller unit limited to the employees it has favored in its contracts.