

**Edison Sault Electric Company and United Steelworkers of America, AFL-CIO-CLC. Case 7-UC-435**

February 28, 1994

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND TRUESDALE

On March 24, 1993, the Regional Director for Region 7 issued a Decision and Order in which he granted the instant clarification petition to exclude foremen special from the collective-bargaining unit because they are supervisors. Thereafter, in accord with Section 102.67 of the National Labor Relations Board's Rule and Regulations, the Union filed a timely request for review of the Regional Director's decision. The Union argued that the petition should be dismissed because it was untimely filed, or, in the alternative, because the foremen special are not supervisors as defined by Section 2(11) of the Act and should continue to be included in the unit. The Employer-Petitioner (the Employer) filed a timely opposition. The Board grants the Union's request for review on the ground that it raises a substantial issue warranting review.

The Board has carefully considered the record and finds, contrary to the Regional Director, that the Employer did not reserve its right in a timely manner to file a unit clarification petition. We therefore find that the instant petition is untimely and must be dismissed.

The Employer is a utility company operating four facilities in the Eastern Upper Peninsula of Michigan. Between 1972 and 1987, the Employer created five "foreman special" (also known as superforemen) positions, which were included in the union-represented bargaining unit with production and maintenance employees. On the expiration of the parties' most recent collective-bargaining agreement on October 21, 1992, the parties began to bargain over a new contract. The new contract was ratified by the union members on or about November 10 or 11, 1992. On January 8, 1993, the Employer sent a letter to the union representative claiming that there was a disagreement over the inclusion of foremen special in the new contract.<sup>1</sup> Subse-

quently, on January 22, 1993, the Employer filed a petition with the Board to clarify the bargaining unit.

The Regional Director found, with little discussion, that the Employer filed its clarification petition in a timely manner, and proceeded to the merits of whether the foremen special were statutory supervisors. The Union now argues that, under *Arthur Logan Memorial Hospital*, 231 NLRB 778 (1977), the Board should dismiss the Employer's petition as untimely because the Employer failed to reserve its position that the foremen special were supervisors who should be excluded from the unit prior to conclusion of bargaining. We find merit in the Union's contention.

The Board has traditionally held that a unit clarification petition submitted during the term of a contract specifically dealing with the disputed classification will be dismissed if the party filing the petition did not reserve its right to file during the course of bargaining. *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). The Board's rule is based on the rationale that to entertain a petition for unit clarification during the mid-term of a contract which clearly defines the bargaining unit would disrupt the parties' collective-bargaining relationship. In other words, the Board has held that to permit clarification during the course of a contract would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition. *San Jose Mercury & San Jose News*, 200 NLRB 105, 106 (1972); *Monongahela Power Co.*, 198 NLRB 1183 (1972).

It is undisputed here that neither the Employer nor the Union discussed the placement of the foremen special during the contract negotiations. Indeed, the only evidence on this matter shows that the Union proposed wage rates covering this position and, further, that this classification has been included in the unit under the parties' contracts for the past 20 years. It was not until after contract ratification—that is, until negotiations were completed and the union membership accepted the contract—that the issue was raised by the Employer. The question, then, is whether the Board should extend the *Wallace-Murray* rationale to cases where a party files a unit clarification petition prior to signing the contract, but after negotiations have ended and a contract agreed to. We find that such an extension is appropriate.

We note, first, that the issue is not one of contract bar, where execution of a written contract has been made a requirement in order that the contract bar rules be clear and not subject to extended litigation. In fact, even a written, executed contract is not necessarily a bar to the filing of a UC petition—for example, where the classification is newly created, or otherwise not clearly covered by the contract. *Union Electric Co.*, 217 NLRB 666, 667 (1975); *Crown Cork & Seal Co.*,

<sup>1</sup> The letter states in relevant part:

This is to confirm that during our meeting on Thursday, January 7, 1993, the [Employer] raised an issue regarding the appropriateness of the Bargaining Unit. It is the [Employer]'s position that superforemen should not be included in the Bargaining Unit because they are supervisors under the National Labor Relations Act. The Union evidently does not agree with this position. Therefore, since the [Employer] does not wish to hold up settlement of our new contract over this issue, we are willing to sign the collective bargaining agreement which has been negotiated by the parties. However, the [Employer] is not waiving or abandoning the issue of whether the unit is appropriate because of the inclusion of the superforemen. We intend to raise this issue before the NLRB through a unit clarification petition.

203 NLRB 171 (1973). Hence, it is not the contract bar rule which is involved here. The *Wallace-Murray* principle is instead based on the rationale that, where the parties have reached a contract, it would be disruptive for the Board to change that contract midterm. *Wallace-Murray*, supra at 1090.<sup>2</sup>

The same rationale applies to the facts of this case. Here, the Employer has presented no evidence that it negotiated over the composition of the unit, to exclude the foremen, prior to ratification of the contract. In fact, there is evidence on the record that, to the contrary, the parties bargained over and agreed on wages of the foremen special prior to ratification. Thus, the issue of unit clarification was introduced for the first time almost 2 months after the contract was ratified. Allowing the Employer to file and have processed a unit clarification petition at this time would not be any less disruptive to the bargaining relationship of the parties than it would be if the petition were filed after the contract was signed by the parties.

Finally, we disagree that the timeliness grounds for our rejection of the Employer's petition would be in any way undermined by a finding that the foremen special are supervisors within the meaning of Section 2(11) of the Act. Thus, in *Washington Post Co.*, 254

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<sup>2</sup> Where the Board has found that a party filed a timely unit clarification petition after a contract's execution, it has premised its decision on the fact that the petitioning party reserved its right during the course of bargaining to file for clarification after a contract's execution. Where, however, the parties were aware that a disputed classification was encompassed by the unit, but did not protest until immediately after the execution of a collective-bargaining agreement, the Board has found the petition untimely. *Arthur C. Logan Memorial Hospital*, supra.

NLRB 168 (1981), a unit clarification case involving alleged supervisors, cited by the Regional Director, the Board directed processing of the petition only after expressly noting that the petition was timely; and it distinguished cases in which petitions were not timely filed. Id. at 169 and fn. 13. Furthermore, *Wallace-Murray* itself involved supervisors who were, as here, originally included in the unit by mutual consent. The stability rationale for extension of *Wallace-Murray* to cases of agreed-on, but not yet signed, contracts applies as logically to cases in which a party is attempting a postagreement exclusion of classifications on grounds of supervisory status as to those in which it is attempting exclusion on other grounds. Finally, we note that on the somewhat analogous question of whether an employer may repudiate an agreement that it has reached, but not yet signed, by invoking the inclusion of supervisors in the contractual unit, the Board has held, with court approval, that an employer may not lawfully do so. *Union Plaza Hotel & Casino*, 296 NLRB 918 fn. 4 (1989), enf'd. sub nom. *E. G. & H. Inc. v. NLRB*, 949 F.2d 276, 278, 280 (9th Cir. 1991). As the court reasoned, to allow such employer conduct "would be . . . destructive of stable bargaining relationships." 949 F.2d at 280. That would also be the result in this case were we to permit the processing of the unit clarification petition at this point. Accordingly, we find that the Employer's petition is untimely, and we dismiss it.

#### ORDER

The petition is dismissed.