

Texaco Port Arthur Works Employees Federal Credit Union and Office and Professional Employees International Union Local No. 66, AFL-CIO. Case 16-CA-16449

December 16, 1994

DECISION AND ORDER

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On July 7, 1994, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Texaco Port Arthur Works Employees Federal Credit Union, Port Arthur, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Robert G. Levy II, Esq., for the General Counsel.

John J. Durkay, Esq. (Mehaffy & Weber), of Beaumont, Texas, for the Respondent.

Patrick M. Flynn, Esq., of Houston, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried March 24, 1994,¹ in Port Arthur, Texas. The charge was filed by the Office and Professional Employees International Union Local No. 66, AFL-CIO (the Charging Party or Union) on December 15, against Texaco Port Arthur Works Employees Federal Credit Union (Respondent). On February 15, 1994, the Regional Director for Region 16 of the National Labor Relations Board, issued a complaint and notice of hearing alleging Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The principal claim raised in the complaint is Respondent repudiated its collective-bargaining agreement, as modified on November 22, by refusing to recognize the Union as the collective-bargaining representative of the employees holding the newly created position of loan officer and refusing to meet and bargain with the Union concerning the wages, hours and other terms and conditions of employment of these individuals.

Respondent's timely filed answer to the complaint admits certain allegations, denies others, and denies any wrong-

doing, claiming the loan officers were "professional employees" who did not vote to be included in the unit.

All parties were given full opportunity to appeal and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, including my observation of the demeanor of the witnesses, and having considered the briefs, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Based on Respondent's answer to the complaint, I find it meets one of the Board's jurisdictional standards and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also admitted and I find the Union is a statutory labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The facts are not in dispute. Respondent and the Union have a longstanding collective-bargaining relationship. The most recent agreement runs from May 1, 1992, through April 30, 1995. As here pertinent, the agreement provides it covers "hourly paid office employees of TEXACO PAW F.C.U." Another provision of the agreement declares: "It is understood that this agreement applies only to nonexempt employees. Nonexempt employees as used herein mean employees who are subject to the overtime provisions of the Fair Labor Standards Act." The duration portion of the agreement also provides that supplementary agreements entered into by Respondent and the Union "shall become a part of this agreement."

Excluding the loan officer position, Respondent has about 35 employees covered by the collective-bargaining agreement. The classifications of these employees are in the agreement. Respondent has not determined if loan officers are exempt or nonexempt employees under the Fair Labor Standards Act. Respondent admitted it never inquired whether loan officers are exempt or nonexempt employees under the Fair Labor Standards Act.

In the operation of the credit union,² Respondent makes loans to its members. The initial processing of loan applications was generally handled by five to six employees called loan interviewers. According to Respondent's president and Chief executive officer William Ferrett,³ the loan interviewers interview the applicant, fill out the application, obtain credit reports, calculate the applicant's debt ratio, and present the papers to a supervisor. The supervisor determined if the loan application was approved. At the time Ferrett commenced his employment with Respondent, one loan interviewer, a Ms. Taylor, had the authority to approve loans.⁴

² Respondent is a Federal Credit Union insured and regulated by NCUA. It has about \$127 million in assets and has as members employees from about 100 organizations.

³ Ferrett commenced working for Respondent in January 1993. He is answerable to Respondent's board of directors and considers Chairman Johnson of the board his superior.

⁴ Ferrett did not know how long Taylor had the authority to approve loans. There was no evidence concerning how long she held

¹ All dates are in 1993 unless otherwise indicated.

Taylor was compensated \$5 a day more for this added duty. The loan interviewers were historically members of the unit. There was no question Taylor was a member of the unit.⁵

Shortly after Ferrett commenced his employment with Respondent he decided to create the position of loan officer. Ferrett did not inform nor consult with the Union concerning the establishment of this new position. In or about February, Respondent offered three loan interviewers, including Taylor, the position of loan officer. They accepted. Respondent also hired an individual as a loan officer who was "from outside." Loan officers were paid salaries.⁶ Unlike the loan interviewers, loan officers were not considered by Respondent as eligible for overtime pay.⁷

Employees who were promoted to the position of loan interviewer were selected on the basis of seniority. When Ferrett chose the three loan interviewers who became loan officers, they were the three most senior loan interviewers but were selected based on his assessment of their capabilities and not on their seniority. Ferrett believed they had the training and background to perform the job of loan officer.

The Union filed a written complaint concerning the creation of the new position and transfer of employees to the position of loan officer. The Union requested "the job duties of loan interviewer be restored and returned to employees who have historically performed these duties under" the collective-bargaining agreement. The Union also objected to Respondent's failure to follow seniority in filling the loan officer positions. The Union considered the transfer to a loan officer position a promotion. On November 22, the parties met and discussed, among other matters, the loan officer issue.

The minutes of the November 22 meeting, which were signed by representatives of both the Union and Respondent, indicate the Union informed Texaco the preponderance of the job duties of the loan officer were being performed by the loan interviewer "except for signing checks and approving loans." One loan interviewer had been performing the job duties of a loan officer. Union Representative Herbert said "management could not simply create positions and assign the duties . . . to them and call them something else such as loan officers . . . if that were so, all of the union positions could be replaced by management with exempt positions." The Union informed Respondent it was ready to

this authority. Respondent never claimed, prior to November 29, that Taylor was not a member of an appropriate unit nor that any of her duties were not appropriately assigned to unit members.

⁵Ferrett conceded Taylor, while a loan interviewer who had authority to approve loans, was not considered to be a manager. This concession was made despite his testimony he considered loan officers to be "mid-management" based on his long experience in the banking field. Ferrett's sole reason for considering loan officers midmanagement was their authority to approve loans. He failed to distinguish why Taylor's authority to approve loans as a loan interviewer was any different than that of the holder's newly created position of loan officer. Ferrett admitted there was no difference between the loan officers duties and Taylor's when she was a loan interviewer authorized to approve loans.

⁶The current employees who were made loan officers were paid \$25,000 a year, and the new hire was paid \$24,000 a year.

⁷When the loan interviewers were interviewed by Ferrett for the loan officer position, they were informed they were not obligated to take the loan officer position, that the position would be salaried; thus they would not be eligible for overtime, and they would not be in the bargaining unit.

strike the panel and proceed to arbitration over the matter. Ferrett informed the Union he was not ready to "strike the panel" and proceed to arbitration.

The executed notes then provided, Johnson informed the Union:

[M]anagement was going to reinstate the four positions in the loan department. [Johnson] asked if the current loan officer position being filled by an outsider could be excluded. Mr. Herbert [for the Union] stated that it could not because the duties that were being performed under that position were board-certified. He stated that the union employee with the next lowest seniority must be offered the job. He stated that if no employee wanted the position, management could fill it from the outside or force the position on the lowest employee in the seniority line to avoid having to hire new staff.

Mr. Johnson stated that management needed to meet with the union to open the contract to negotiate the salary and duties of the loan officer positions. He asked if the union could meet the first part of the next week. It was jointly agreeable to meet.

While Ferrett conceded, reticently,⁸ that Respondent agreed to return loan officers to the unit, he proceeded to refer the matter to Respondent's counsel. Moreover, he testified:

Q. But did you view Ms. Taylor as a person who was a management person as a loan interviewer?

A. No, sir.

Q. Well, what was the difference between what Ms. Taylor did and the loan officer?

A. Not that much difference.

JUDGE WIEDER: What, if anything?

THE WITNESS: None, Your Honor.

Respondent's attorney, Durkay, informed Ferrett the loan officers may be professional employees and "[i]t would go to the Board and get their opinion." Respondent and the Union met again, but Ferrett could not recall when, only that it was not on the scheduled date of November 29. Respondent did not check with the U.S. Department of Labor, which administers the Fair Labor Standards Act, the statute referred to in the collective-bargaining agreement as the determinant of whether the employees are nonexempt employees who are entitled to overtime and thus are included in the unit. Durkay attended the meeting and informed the union representatives he was not sure if the loan officers are professionals or are eligible for inclusion in the unit. Ferrett admitted he did not consider Taylor a professional when she was a loan inter-

⁸I find Ferrett was not a convincing witness, and I do not credit his testimony where it is at odds with other evidence. This conclusion is based on his demeanor, which was not open and forthright. I also note he appeared to be tailoring his testimony, on occasion, to support Respondent's litigation theories. For example, he initially testified the parties did not reach an agreement on the loan officer matter on November 22; only after counsel for General Counsel pursued the matter exhaustively, did Ferrett admit Respondent agreed to return the positions to the unit. Ferrett also displayed poor recall, and much of his testimony under examination by Respondent's counsel was elicited by leading questions.

viewer who had the authority to grant loans and bind Respondent.

Respondent then prepared a new bargaining offer entitled, "Proposal to settle 'Loan Officer' dispute." This proposal would exempt the loan officer position from application of the collective-bargaining agreement, make it a salaried position that is not entitled to overtime, and selection of loan officers would be pursuant to seniority except Respondent would have the right to deny promotion based on its determination of the skill and ability of the individuals to perform the duties of the loan officer position.

In sum, it is uncontroverted Respondent created the loan officer position and transferred three loan interviewers who were unit employees into the new positions, hired a new employee as a loan officer, and failed to replace the loan interviewers, without informing and bargaining with the Union. Respondent, when confronted by the Union, initially agreed to "reinstate the four positions in the loan department." Subsequently, Respondent informed the Union they would not comply with Johnson's commitment to return the loan officers to the unit based on their attorney's advice the loan officers may be professionals. Respondent also filed a UC petition with the Board. As noted in Respondent's brief, it refused to bargain concerning the newly created position of loan officer which resulted in the Union filing the charge here under consideration. With the filing of the charge, the UC petition was dismissed.

General Counsel, joined by Charging Party, argue the "Proposal to settle 'Loan Officer' dispute" was an attempt by Respondent to undo the grievance settlement. Ferrett testified:

Q. All right, sir. Do you agree, then, that you did agree to return the people to the unit, you agreed to recognize the Union, and deal with the Union regarding the salaries and the duties of the loan officer positions? Is that not true, sir?

A. Yes. I guess so. Yes, sir.

As alleged in the complaint and admitted in the answer, on or about November 29, and continuing to date, Respondent withdrew recognition from the Union concerning employees who were loan officers and refused to meet and bargain with the Union regarding these employees. Respondent claims the loan officers are professional employees as defined in Sections 9(b) and 2(12) of the Act. As professionals, according to Respondent, the loan officers have the right under Section 9(b)⁹ of the Act to a consent election prior to their inclusion in a nonprofessional or mixed unit. Further, Respondent claims the loan officers did not waive their Section 9(b) rights. Respondent argues this is an accretion issue and prior to accreting the loan officers to the unit they must

⁹Sec. 9(b) of the Act provides, as here pertinent:

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both profession employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.

be afforded the opportunity to express whether they wish to be a part of the unit by a vote.

B. Loan Officers—Are They Professionals?

Respondent has the burden of proving inclusion of the loan officers in the unit is inappropriate. *Seven-Up/Canada Dry Bottling Co.*, 281 NLRB 943 (1986). In *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140 (1982), enfd. 721 F.2d 187 (7th Cir. 1983); the applicable precedent was expressed as follows:

In practical effect, there is a heavy burden on a party seeking to prove "accretion" to show that the group sought to be added to an existing unit is an "accretion" within the meaning of the Board's longstanding use of that term, whether it be a union claiming that group . . . or an employer seeking to justify its recognition of that group. . . . When, as here, an employer attempts to justify removing a particular group or groups from the coverage of a collective-bargaining agreement or relationship, it has the burden of showing that the group is sufficiently *dissimilar* from the remainder of the unit so as to warrant that removal. [Citing *Rice Food Markets*, 255 NLRB 884, 887 (1981).]

The decision in *Seven-Up/Canada Dry Bottling Co.*, found at 947,

Administrative Law Judge Melvin J. Wells observed in that case that "accretion" principals . . . have peripheral rather than direct application. . . ." [*Rice Food Markets*, 255 NLRB 884 (1981)], at 886. In finding that the change was insufficient to warrant the employer's unilateral exclusion of these employees from the established bargaining unit, Judge Wells cautioned that a "spinoff" of personnel had to be distinguished from cases involving "additions to" an existing unit. He reasoned that in the former, a departure from the traditional, restrictive approach in accretion cases is warranted.

Here, there is no question the loan officers and loan interviewers are performing similar work. Loan officers have only one responsibility not given most loan interviewers, that of approving the loans. There is no claim the loan officers' work is "sufficiently *dissimilar* from the remainder of the unit so as to warrant [their] removal." (Emphasis added.) *Bay Shipbuilding Corp.*, supra, enfd. 721 F.2d 187 at 190 (7th Cir. 1983); *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 964 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981); *Metromedia, Inc., KMBC-TV v. NLRB*, 586 F.2d 1182, 1192 (8th Cir. 1978).

Respondent avers loan officers are excluded from the agreement. I find this argument is not persuasive. Taylor was the Union steward at the time she was a loan interviewer with authority to approve loans, and she signed the collective-bargaining agreement as a union committee person. There is no claim this arrangement was contrary to the terms to the collective-bargaining agreement. There was no bargaining history presented that refutes or alters the evidence Respondent agreed to pay a union steward and committee person more to be a loan interviewer with the authority to approve loans under the current collective-bargaining agree-

ment. Under these circumstances, I find Respondent agreed to include in the unit individuals who performed the duties of loan interviewers and also had the authority to approve loans. As Respondent admitted, Taylor, the union steward, was performing all the duties subsequently assigned the loan officers, yet agreed she was included in the unit. Consequently, any construction the recognition or other clause of the agreement excludes loan officers is “immaterial,” for there was a clear revision of the terms implemented by Respondent and the Union. *Gratiot Community Hospital*, 312 NLRB 1075 (1993).¹⁰

The next question is whether Respondent established the loan officers are professionals. Section 2(12) of the Act defines professional as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Prior to February, when Ferrett established the position of loan officer, except for Taylor, the loan interviewers performed all the work now performed by the loan officers except approving the loans. As noted above, Taylor could approve loans as a loan interviewer. The other loan interviewers had to get approval from either Marla Crippen, a supervisor, or Kermit Landry, a senior vice president.

The Board devised the test for determining professional status in *Western Electric Co.*, 126 NLRB 1346 (1960). The validity of this test was recently affirmed by the Board in *Avco Corp.*, 313 NLRB 1357 (1994) which held, citing *Western Electric*:

Section 2(12)(a) “defines a professional employee in terms of the work he performs,” not in terms of individual qualifications. Id. at 1348. Thus, if an employee performs work of a predominantly intellectual and varied character involving the consistent exercise of discretion and judgment, and requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intel-

lectual instruction and study in an institution of higher learning or a hospital, then that employee qualifies as a professional.

In addition, although educational background does not control, the Board examines educational background “for the purpose of deciding whether the work of the group satisfies the knowledge of an advanced type requirement of Section 2(12)(a).” Id. at 1348–1349. If a group of employees consists primarily of individuals with professional degrees, the Board may presume that the work requires “knowledge of an advanced type.” Id. at 1349. Conversely, if few in the group possess the appropriate degree, it logically follows that the work does not require the use of advanced knowledge. Id.

Respondent attempted to establish its loan officers are professionals through the testimony of Felix Legere who currently works for the Goodrich Federal Employees Credit Union as a loan supervisor. Legere has worked 48 years in banks and more than 6 years at a credit union. Legere opined loan officers are professionals because they are salaried and have the authority to approve loans. Admittedly, Legere was not familiar with Respondent’s operations; he did not visit Respondent’s offices, did not review any of the guidelines the loan interviewers and loan officers must follow, and was completely unfamiliar with Respondent’s operation.

Legere also did not know what criteria either banks or credit unions use in hiring loan officers. He acknowledged loan officers did not have to have college degrees although a local university did offer courses related to banking in conjunction with the American Institute of Banking, which is the educational branch of the American Bankers Association. While Legere knew of individuals from other employers who took courses through the American Institute of Banking, Respondent admitted none of the individuals working as loan officers at its facility have college degrees and none have taken any of these or other training courses for their position. Respondent is not a sponsor of the American Institute of Banking, and there is no evidence it or any of its agents are members of the American Bankers Association. The record is also silent concerning how long the individuals selected for loan officer held the position of loan interviewer and what, if any, experience they had that would qualify them for the position of loan officer.

I find that the record does not establish that the work of the loan officer’s at Respondent’s meets the criteria found in Section 2(12) of the Act or are otherwise entitled to a the benefit of a *Sonotone* election to determine if they wish to be included in the unit.¹¹ Initially, Respondent failed to demonstrate the loan officer’s work is “predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work.” There was no evidence concerning the specific details of the loan interviewers’ and loan officers’ daily duties. Assuming the authority to approve loans is intellectual work, there was no evidence how much time the loan officers spend to make the decision as opposed to performing the work of the loan interviewers which is the gathering of the information, upon which the approval decision is made. If any of the loan officers’ work is intellectual and requires the exercise of discretion and

¹⁰ Respondent failed to adduce any evidence the collective-bargaining history demonstrated an intent to exclude loan officers from the unit regardless of subsequent changes in operations or supplemental agreements. On the contrary, the agreement clearly establishes they intended to incorporate midterm agreements.

¹¹ *Sonotone Corp.*, 90 NLRB 1236 (1950).

judgment, there is no recitation of whether such duties comprised a major portion of their work. *Twin City Hospital Corp.*, 304 NLRB 173 (1991). Further, Respondent failed to detail the duties of the loan officers to establish it is not regularly recurrent and routine. *Willett Motor Coach Co.*, 227 NLRB 882 (1977).

The record also failed to demonstrate the nature of the discretion and judgment actually exercised by the loan officers. Ferrett admitted Respondent has guidelines concerning when loan officer or others can approve loans, and Respondent is preparing more detailed guidelines, which could further reduce the loan officers' exercise of discretion. The exact nature of the strictures imposed by the guidelines were not placed in evidence. Respondent admitted its loan policies must be adhered to by the employees, including the loan officers. The record will not support a finding the loan officers' analysis of applications is not limited primarily to factual matters rather than matters of judgment. *Willett Motor Coach Co.*, *id.* The judgment exercised by the loan officers was not clearly shown to require knowledge of the advanced type ordinarily performed by employees' with professional standing under Section 2(12) of the Act. *General Dynamics Corp.*, 213 NLRB 851, 861 (1974).

Respondent conceded it uses ratios in determining if an applicant qualifies for a loan. However, there is no evidence the ratios are flexible formulas requiring the exercise of intellectually varied judgment and the application of advanced knowledge. There is no evidence the ratios and other guidelines cannot be, and are not, applied mechanistically. The record failed to demonstrate the loan officers consistently exercise discretion and judgment that cannot be standardized. Similarly, the record fails to show the work is predominantly intellectual in character.

There was no testimony by a loan officer or loan interviewer concerning the nature of the analysis, if any, they perform in the course of their duties; thus, Respondent has failed to establish the character of the loan officers' work clearly requires knowledge of an advanced type as that commonly required and usually performed by employees with professional standing under Section 2(12) of the Act. Moreover, there is no evidence of the work discretion involved, thus there is no basis to find the loan officers consistently exercise discretion and judgment. *General Dynamics Corp.*, *supra*.

Respondent also failed to demonstrate the loan officer position requires education and experience of the type required by the Act. All the incumbent loan officers do not have college degrees, there is no indication they have taken any courses in a specialty, and there is no description and/or analysis of the experience of these employees.¹² The loan officers have not gone to any of the courses offered or sponsored by the American Institute of Banking. Respondent has not offered the loan officers any courses.¹³ The record fails to persuade the position requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and

study in an institution of higher learning." *Westinghouse Air Brake Co.*, 121 NLRB 636, 638 (1958); cf. *Combustion Engineering*, 117 NLRB 1589 (1957); *S. S. White Dental Mfg. Co.*, 109 NLRB 1117 (1954); *E. W. Bliss Co.*, 81 NLRB 428 (1949).

While Ferrett asserted loan officers are midmanagement, he admitted he never considered Taylor to be a manager; and Respondent, by its counsel, has never asserted the loan officers are managers. Further, there was no evidence adduced which would support a conclusion the loan officers or loan interviewers were managers. Moreover, the description of the loan officers' duties indicate they are closely related to the clerical and cashier functions performed by clericals, not managerial. The decisions of the loan officers, and Taylor when she was a loan interviewer, were appealable to the loan review committee, which is comprised of a supervisor and Respondent's vice president. The applicant has the right of further appeal to then Respondent's board.

General Counsel avers Section 9(b)(1) of the Act is not applicable to this case for Respondent voluntarily recognized the unit, as described in the collective-bargaining agreement, including loan interviewers who have the authority to approve loans. That Taylor was paid \$5 a day more than the other loan interviewers does not alter the nature of Respondent's voluntary recognition. As Respondent notes on brief, the Board did not decide the appropriateness of the unit; Respondent voluntarily agreed to recognize the Union, the Board did not certify the unit.

Respondent argues that since the job description of "loan interviewer/assistant bookkeeper" contained in the collective-bargaining agreement lists as their job duties, among others; taking loan applications, submitting the applications to a loan officer or credit committee, the position of loan officer could not be included in the unit. While this is facially logical, Respondent has historically recognized as part of the unit Taylor, who had the same duties and responsibilities of the newly created position of loan officer. There is no evidence the loan officer position is anything more than an added part of the career ladder for "loan interviewer/assistant bookkeeper," admittedly nonprofessional positions.¹⁴

Moreover, the loan interviewers' and loan officers' duties include: copying work for members, all duties listed in the collective-bargaining agreement under "Job Duties of Cashier" and "Job Duties of Clerk"; taking loan applications; disbursing loan checks and making coupons; assisting the bookkeeper in credit union accounting procedures and related activities, including computer reconciliation, securing insurance policies, car titles (including typing of for credit union members); preparing loan folders for new and old loans; and, preparing loan documents and loans in general for eventual filing, including typing, checking payments, checking documents, etc. These duties, as noted above, are not the duties of professional employees. Further, as found herein and admitted in the pleadings, it is without dispute Respondent, by

¹² See *Western Electric Co.*, *supra*.

¹³ While Ferrett claims it intends to offer training, he admitted Respondent is planning training for all departments. There was no showing the training being contemplated for the loan officers is of a nature that would qualify these employees as professionals under the Act.

¹⁴ Respondent also argues Taylor's inclusion in the unit is not demonstrative of Respondent's acquiescence to her inclusion in the unit. As noted herein, the employer is not limited by the provisions of Sec. 9(b) of the Act; and there is no bar cited by Respondent either in the statute or in case law to having the one employee vote on the question of their inclusion in the unit.

its chairman of the board,¹⁵ agreed to modify the collective-bargaining agreement to include the loan officers.

Based on the admitted facts, I conclude Respondent has failed to demonstrate this is an accretion case; rather it is the removal of a group of employees whose qualifications and job duties remained substantially unchanged. Respondent failed to indicate inclusion of the loan officers in the unit would create any problems or would otherwise warrant their removal. As the Court found in *NLRB v. Wooster Division of Borg Warner Corp.*, 356 U.S. 352 (1958); such a unilateral change in the scope of the collective-bargaining unit would,

permit Respondent to alter unilaterally the scope of the established bargaining unit [which] would unnecessarily encourage parties to productive and viable collective-bargaining relationships to refuse to bargain over wages and other terms and conditions of employment of individuals who were intended to benefit from these relationships.

Respondent admitted Taylor had been covered under the current collective-bargaining agreement, and Respondent has not demonstrated it would have been appropriate for the Board to entertain a midterm clarification petition to exclude the loan officers. Also lacking is any evidence Respondent did not know when it executed the collective-bargaining agreement at least one loan interviewer was performing the same duties as she and the other loan officers performed when they worked in the newly created position of loan officer.

Respondent does not dispute the parties had a meeting of the minds on November 22 when Respondent agreed to include the loan officers in the unit in resolution of the Union's complaint. The executed meeting minutes provides objective indicia the parties reached a clear understanding. Respondent did not dispute Johnson's signature on the document demonstrated he entertained the intent, on behalf of Respondent, to include the loan officers in the bargaining unit pursuant to the collective-bargaining agreement.

Respondent has failed to demonstrate the loan officers are sufficiently dissimilar from the remainder of the unit, including the loan interviewers, to warrant their removal. *Westinghouse Electric Corp.*, supra; *Seven-Up/Canada Dry Bottling Co.*, supra. There was no evidence the loan officers and loan interviewers, as well as the rest of the unit, do not share a community of interest in wages, hours, and other terms and conditions of employment. *NLRB v. Action Automotive*, 469 U.S. 490 (1985). While Respondent has shown there is a difference in the method of compensating the loan officers, there was no evidence there was a difference in other employment benefits, separate supervision, a dissimilarity of qualifications, training and skills; different work location; substantial differences in job functions, infrequent or lack of contact with unit employees; lack of integration with the work functions of other unit employees; and the history of bargaining. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).¹⁶ In fact the job functions and bargaining history

¹⁵ Johnson did not appear and testify.

¹⁶ Although the *Kalamazoo* decision involved the severance of truckdrivers from a production unit, the principles established in that

demonstrate the loan officers share a strong community of interest with the unit employees, and on November 22 Respondent and the Union agreed to have them included in the unit. The duties of the loan officers had been performed for sometime prior to November 22 by unit member Taylor.

Respondent agreed to the inclusion of one or more employees in the unit who not only performed the duties of loan interviewers but also those of loan officers. This acquiescence included a fortiori the exclusive representation of these employees by the Union. To foster stable collective bargaining, usually the unit voluntarily recognized by the parties is controlling. *Union Plaza Hotel & Casino*, 296 NLRB 918 (1989). That the *Union Plaza* case referred to supervisors does not alter its applicability to the instant proceeding. Assuming the loan officers are professionals, the Board can issue an order concerning a unit which it could not have initially certified under the Act but on which the parties have knowingly and voluntarily bargained and agreed. *Retail Clerks Union Local 324 (Vincent Drugs No. 3)*, 144 NLRB 1247, 1254 (1963); *Arizona Electric Power*, 250 NLRB 1132 (1980).

The Board held in *A. O. Smith Corp.*, 166 NLRB 845, 847 (1967):

Congress did not intend the enactment of Section 9(b)(1) to render inappropriate previously established units combining professional and nonprofessional employees and that this section does not bar parties to an earlier established bargaining relationship in such a unit from continuing to maintain their bargaining relationship on the same basis. The sole operative effect of 9(b)(1) is to preclude the Board from taking any action that would create a mixed unit of professionals and nonprofessionals without first according the professionals involved the opportunity of a self-determination election.¹⁷

As noted in *Arthur C. Logan Memorial Hospital*, 231 NLRB 778 (1977); to permit an employer to knowingly enter into a collective-bargaining agreement, or in this case, an agreement that either at the inception of its term or midterm, to include the loan officers in the unit although they are salaried employees, and immediately thereafter unilaterally modify the agreement to exclude the loan officers undermines the parties' collective-bargaining relationship. This repudiation of the agreement is violative of Section 8(a)(1) and (5) of the Act.

I find the only change here to support the Respondent's refusal to bargain was the addition for some of the loan

case have been given wider application. *NLRB v. Campbell Sons Corp.*, 407 F.2d 969 (4th Cir. 1969).

¹⁷ Thus, even if it had been determined the loan officers are professionals, Sec. 9(b)(1) would not preclude the Union and Respondent from voluntarily recognizing a unit of professionals and nonprofessionals. Accordingly, I conclude that Sec. 9(b)(1) would not preclude the granting of the sought relief in the event the loan officers were determined to be professionals.

I find Respondent's argument the decision in *Leedom v. Kyne (Westinghouse Engineers)*, 358 U.S. 184 (1958), requires a different decision than *A. O. Smith Corp.*, to be without merit and completely unsupported by any case law or logic. The *Leedom* case involved Board action which was proscribed by Sec. 9(b)(1), not voluntary recognition and inclusion of professionals with nonprofessionals.

interviewers of the duty to approve loans. The change in job duties was predominately a change in job title. The question of whether a job classification is included in the unit is based on the job content and not the job title. The loan interviewers' job functions as loan officers were predominantly unchanged, and Respondent has failed to carry its burden of showing removal of the loan officers from the unit was warranted. *Hill-Rom Co.*, 297 NLRB 351 (1981); *University of Chicago v. NLRB*, 514 F.2d 942, 949 (9th Cir. 1975); *Dahl Fish Co.*, 279 NLRB 1084 (1986), *enfd.* 813 F.2d 1254 (D.C. Cir. 1987).

Accordingly, under the circumstances of this case, I find Respondent's withdrawal of recognition from the Charging Party as the exclusive representative of the loan officers, and its continuing refusal to recognize and bargain with the Union about wages, hours, and other terms and conditions of employment of the loan officers, is an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Texaco Port Arthur Works Employees Federal Credit Union, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Office and Professional Employees International Union Local No. 66, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act for the unit described in the collective-bargaining agreement as "hourly paid office employees of TEXACO PAW F.C.U." who are nonexempt employees. "Nonexempt employees as used herein to mean employees who are subject to the overtime provisions of the Fair Labor Standards Act;" and as agreed on November 22, 1993, includes all loan officers.

4. At all times material herein, the Union has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 3 for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

5. By, on or about November 29, 1993, and continuing to date, withdrawing recognition of the Union as the collective-bargaining representative of the employees occupying the position of loan officer and refusing to meet and bargain with the Union concerning the loan officer, Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Employer has engaged in unfair labor practices proscribed by Section 8(a) (1) and (5) and 8(d) of the Act, I recommend that it cease and desist therefrom, and that it take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the Act.

I further find that, as part of the appropriate remedy, Respondent should recognize the Union as the representative of the loan officers as part of the overall unit and be ordered to bargain, on request, with the Union as the exclusive representative of all unit employees, including the loan officers.

See *Winn-Dixie Stores*, 243 NLRB 972 (1979); *Aley Refectories Co.*, 215 NLRB 785 (1985). Specifically, I recommend Respondent be ordered to bargain with the Union over the wages, hours, and other terms and conditions of employment of the loan officers, and, if agreement is reached, to reduce such agreement to writing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, Texaco Port Arthur Works Employees Federal Credit Union, Port Arthur, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from, and/or refusing to bargain collectively with the Union, as the exclusive representative of all the employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, composed of "all hourly paid office employees of TEXACO PAW F.C.U. except students working in a VOE Program . . . [and applies] only to nonexempt employees as used herein [to] mean employees who are subject to the overtime provisions of the Fair Labor Standards Act," and, to honor and apply the current collective-bargaining agreement, including the agreement of November 22, 1993, to include all loan officers in the unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union as the exclusive representative of the employees in the unit described above, including those employees denominated loan officers, and if agreement is reached, reduce the agreement to writing.

(b) Preserve and, on request, make available to the Board or its agent, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of money due under the terms of this Order.

(c) Post at its facility and place of business, in Port Arthur, Texas, copies of the attached notice marked "Appendix A."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the

¹⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition from, and/or refuse to bargain collectively and/or refuse to apply the current collective-bargaining agreement with the Office and Professional Employees International Union Local No. 66, AFL-CIO, as the exclusive representative of all the employees in a unit appropriate for the purposes of collective bargaining with the meaning of Section 9(b) of the Act, composed of "all hourly paid office employees of TEXACO PAW F.C.U. except students working in a VOE Program . . . [and applies] only to nonexempt employees as used herein [to] mean employees who are subject to the overtime provisions of the Fair Labor Standards Act," and as agreed on November 22, 1993, includes all loan officers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain with the Union as the exclusive representative of the employees in the unit described above, including those employees denominated loan officers, concerning wages, hours, and other terms and conditions of employment, and if agreement is reached, reduce the agreement to writing.

TEXACO PORT ARTHUR WORKS EMPLOYEES
 FEDERAL CREDIT UNION