

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

PACIFIC GAS AND ELECTRIC COMPANY

Employer

and

Case 20-UC-387

ENGINEERS AND SCIENTISTS OF CALIFORNIA,
LOCAL 20, AFL-CIO & CLC

Petitioner

DECISION AND ORDER

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The rulings made by the hearing officer at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated that the Employer is a California corporation engaged in the provision of gas and electric service throughout its service territory in the State of California. The parties further stipulated that during the past twelve months, the Employer generated a gross revenue in excess of \$250,000 and purchased goods and materials valued in excess of \$5,000 which originated outside the State of California. Based on the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the

purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of the Act.

4. By the instant petition, Petitioner seeks to have the certified bargaining unit clarified to include the Employer's 29 senior gas planning engineers and 13 senior electric planning engineers.¹ The Employer contends, contrary to the Petitioner, that all but eight of its senior planning engineers are statutory supervisors and therefore should not be included in the unit.² The Employer further contends that the petition herein must be dismissed because all 42 senior gas planning engineers and senior electric planning engineers were expressly excluded from the bargaining unit in the Stipulated Election Agreement and the Certification of Representative in Case 20-CA-17430.³ The Petitioner, on the other hand, contends that its petition is not inappropriate in these circumstances because the Board will entertain a unit clarification petition concerning supervisory status at any time, and because the positions in question have undergone substantial changes since the execution of the Stipulated Election Agreement.

Although the record does not clearly establish the scope of the existing bargaining unit, the record and the parties' briefs make it clear that the Petitioner has been the recognized collective-bargaining representative of certain professional and technical employees of the

¹ The planning engineers are also known and referred to in the record as "distribution engineers". At the hearing, the Employer and the Petitioner stipulated that eight of the 29 senior gas planning engineers do not possess the authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, direct, reward or discipline employees, and are not supervisors within the meaning of Section 2(11) of the Act.

³ Administrative notice is hereby taken of the formal documents and the Certification of Representative in Case 20-RC-17430.

Employer, including mappers, estimators and service planners, for an undisclosed period of time. The record does not establish how and when the Petitioner became recognized as the collective-bargaining representative in the professional and technical unit nor when the bargaining relationship between the Employer and the Petitioner was first established.

On June 29, 1998, following an organizing campaign among the gas planning engineers and electric planning engineers employed within the Employer's Distribution Engineering and Planning Division, Petitioner filed a petition for representation in Case 20-RC-17043. The petition requested a unit of "All gas planning engineers and electric planning engineers, excluding guards and supervisors as defined in the Act, and all other employees." The petition made no reference to the senior planning engineer classification. On July 16, 1998 the Regional Director approved the Stipulated Election Agreement in Case 20-CA-17430, pursuant to the which a mail ballot election was conducted in the following voting group between August 10 and 24, 1998:

All full-time and regular part-time gas planning engineers and electric planning engineers employed by the Employer throughout its service territory in the State of California; excluding senior gas planning engineers, senior electric planning engineers, entry (trainee) planning engineers, guards and supervisors as defined in the Act, and all other employees.

The Stipulated Election Agreement provided for two questions to be asked of this voting group:

1) whether they desired to be included in the existing unit with professionals and technical employees employed by the Employer; and 2) whether they desired to be represented for purposes of collective bargaining by the Petitioner. At the tally of ballots on August 25, 1998, it was determined that a majority of valid ballots were cast in favor of both inclusion in the existing bargaining unit and for Petitioner. On September 10, 1998, the undersigned certified the

Petitioner as the collective-bargaining representative of the above employees.

On December 14, 1998, the Petitioner filed a unit clarification petition seeking to clarify the unit to include senior gas planning engineers and senior electric planning engineers. On January 22, 1999, a hearing on the unit clarification petition commenced, but was adjourned in order for the parties to file briefs addressing the issue of whether a unit clarification proceeding was appropriate in light of the explicit exclusion of the senior planning engineers in the Stipulated Election Agreement in Case 20-RC-17430.

In its brief, Petitioner cites two exceptions to the general rule that individuals and classifications excluded in the certification may not be added to the unit by a UC petition. First, Petitioner contends that the Board will entertain a unit clarification petition concerning supervisory status at any time, citing Kirkhill Rubber Co., 306 NLRB 559 (1992). Second, Petitioner contends that unit clarification petition is not inappropriate in this case because the positions in question have undergone two substantial changes since the execution of the Stipulated Election Agreement. The Petitioner also notes that failure to resolve the dispute over the unit placement of the senior planning engineers is an impediment to reaching agreement with the Employer on a collective-bargaining agreement.

With respect to the senior planning engineers who are arguably statutory supervisors, in its brief, Petitioner makes an offer of proof that the Employer removed substantially all of their supervisory responsibilities during a reorganization in mid July, 1998, shortly *after* the Petitioner had entered into the Stipulated Election Agreement which excluded them from the bargaining unit. At that time, the Employer removed mappers, estimators and service planners from its Distribution Engineering and Planning Division and transferred them to its Operations,

Maintenance and Construction Division, both of which are departments within the Employer's Distribution and Customer Service business unit. As a result of this reorganization, the mappers, estimators and service planners, who were already represented by Petitioner in the existing professionals and technical unit, were removed from the supervision of the senior planning engineers. More specifically, to counter the Employer's claim that the Petitioner was on notice of the change at the time it entered the Stipulated Election Agreement, Petitioner's brief contains an offer of proof that although the reorganization was announced to the Petitioner in early to mid July, 1998, it was not until an unspecified later date that Petitioner became aware that the senior planning engineers were not also being transferred and, consequently, that their supervisory duties would be substantially diminished as a result of the transfer of the mappers, estimators and service planners.

Although the senior planning engineers continued to supervise the planning engineers, Petitioner argues that these duties were removed in a second reorganization in September, 1998. Relying upon organizational charts, Petitioner's offer of proof asserts that as of September 1998, the Employer again reorganized and changed the lines of authority so that planning engineers no longer report to senior planning engineers, but rather both classifications report to directors who are undisputed supervisors. Petitioner finds that this is particularly so with regard to the senior gas planning engineers, who, in some cases, supervised only one planning engineer after the reorganization.

As a separate grounds for claiming recent substantial changes in the duties and responsibilities of the employees in question, Petitioner contends that in September 1998, the work duties of six of the eight senior electric planning engineers changed when they were

transferred from the general offices to the field. (Two additional senior electric planning engineers remained in the general office.) The Employer and the Petitioner stipulated at the hearing that none of these eight employees are supervisors within the meaning of the Act.⁴

While the record contains no evidence as to whether this change in work location resulted in any significant change in duties, Petitioner's brief makes an offer of proof that the Employer had previously represented to Petitioner that the work done by these individuals was different from that of the planning engineers who worked in the field. Petitioner makes a further offer of proof that when six of the general office planning engineers were moved to the field their job duties changed and became identical to the duties of unit planning engineers. Accordingly, Petitioner urges that these employees be added to the unit as an accretion.

As an additional basis for adding the eight non-supervisory senior planning engineers to the bargaining unit, Petitioner alleges that at the time of the Stipulated Election Agreement, the Employer made misrepresentations to the Petitioner's Business Manager, Ben Hudnall, that all 42 senior planning engineers were statutory supervisors. At the time Mr. Hudnall did not challenge this assertion, based upon his knowledge of the supervisory authority the senior planning engineers had over the estimators, mappers and service planners who were already represented by Petitioner. In its brief, Petitioner notes that the petition for representation made no mention of the senior planning engineers and makes an offer of proof that the specific

⁴ In its brief, Petitioner's makes an offer of proof that Petitioner's Business Manager, Ben Hudnall, was unaware of the existence of the eight non-supervisory senior planning engineers at the time the Stipulated Election Agreement was entered. Petitioner asserts that Hudnall did not become aware of their non-supervisory status until August 1998, at which time the Employer represented to Petitioner that the work done by these individuals was different from that of the planning engineers who worked in the field.

exclusion of senior planning engineers in the Stipulated Election Agreement was drafted by the Employer.

At the hearing and in its brief, the Employer asserted that the instant unit clarification petition, which was filed on December 14, 1998, was precluded by the Stipulated Election Agreement approved by the undersigned on July 16, 1998, which explicitly excludes senior planning engineers from the bargaining unit. In its brief, the Employer argues at length that in light of the Stipulated Election Agreement the senior gas and electric planning engineers cannot be added to the certified unit without an election or showing of majority support. The Employer argues that Petitioner knew or should have known of the changes in supervisory duties and the work location of senior planning engineers prior to entering the Stipulated Election Agreement.

Contrary to the Petitioner, in its brief the Employer denies that the senior planning engineers classification has undergone any recent, substantial change in duties and responsibilities which would justify a unit clarification proceeding. First, the Employer denies that the senior planning engineers have lost their supervisory status as a result of the reorganization which removed mappers, estimators and service planners from their supervision. Rather, the Employer contends that the senior planning engineers continue to exercise supervisory authority over planning engineers. In support of its position that its senior planning engineers are statutory supervisors within the meaning of Section 2(11) of the Act, at the hearing, the Employer presented testimony by Steve Calvert, Senior Electric Distribution Engineer for the Employer's North Bay Division, who testified that he has four planning engineers under his supervision. In his testimony, Calvert gave two examples where he exercised the authority to impose discipline, both of which were over three years ago. Calvert's

testimony did not cover whether or not duties in this regard have changed since September 1998.

Contrary to the Petitioner, the Employer denies that any misrepresentation occurred with respect to the supervisory authority of any of the senior planning engineers, noting extensive evidence that the Petitioner never sought to include the senior planning engineers in the unit. The Employer notes that the Petitioner did not include the senior planning engineers in its representation petition, and that Petitioner's business manager, Ben Hudnall, did not include them on Petitioner's proposed Excelsior list when he met with the Employer on July 7, 1998. Similarly, in its brief, the Employer makes an offer of proof that Hudnall knew the details of the reorganization which removed which removed mappers, estimators and service planners from the supervision of senior planning engineers at the time it executed the Stipulated Election Agreement, and therefore the changed circumstances, if any, which were caused by the reorganization preceded the Stipulated Election Agreement and therefore should be disregarded.

The Employer, both at the hearing and in its brief, contends that the evidence will show that the senior planning engineers at all times continued to supervise the planning engineers, and that no second reorganization occurred in September, 1998 or at any other time. The Employer asserts that a proposed reorganization in the gas planning department, whereby both the gas planning engineers and the senior gas planning engineers would report to directors (as reflected in the organizational charts relied upon by Petitioner's offer of proof) was proposed on July 21, 1998, was never implemented and in fact was abandoned on September 11, 1998. Contrary to Petitioner, the Employer contends that ratio of gas planning engineers to senior planning engineers actually increased after September 11, 1998.

With respect to the six non-supervisory senior electric planning engineers who were

transferred from the general offices to the field, in its brief the Employer contends that this occurred in July 1998, rather than in September 1998. The Employer's brief makes an offer of proof that the relocation to the field did not result in a change in their work duties and that the non-supervisory senior planning engineers have always done work which is identical to the planning engineers who are already included in the unit. Thus the Employer contends that there have not been any recent changes in the duties or responsibilities performed by the Employer's non-supervisory senior planning engineers at any time material herein which would warrant a unit clarification proceeding.

In Union Electric Co., 217 NLRB 666, 667 (1975), the Board described the purpose of a unit clarification proceeding as follows:

Union clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the Unit placement of individuals who, for example, come with a newly established classification of disputed unit placement or, within an existing classification which had undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classifications continue to fall within the category—excluded or included—that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

To the extent that Petitioner claims that the senior planning engineers were explicitly excluded from the certified bargaining unit based upon misrepresentations of the Employer or facts it was not aware of at the time the Stipulated Election Agreement was entered, these are the type of “mistaken reasons” found by the Board in Union Electric, above, to be an inappropriate basis for unit clarification. The Washington Post Company, 256 NLRB 1243, 1245 n.11 (1981).

Nor is a unit clarification proceeding appropriate based upon the fact that the supervisory status of the senior planning engineers is in issue. In this regard the Petitioner has misapplied the holding of Kirkhill Rubber Company, 306 NLRB 559(1992) and other cases which find that unit clarification is appropriate, even in midterm, if a contract covers individuals whose inclusion is contrary to the statute. Thus, while the Board has entertained midterm unit clarification petitions to exclude statutory supervisor classifications included in a unit by agreement of the parties, such as was the case in Kirkhill Rubber, Petitioner has not cited a case where the converse is true, i.e., where the Board has allowed the unit to be clarified to include employees in the existing unit based upon their non-supervisory status. See The Washington Post, 256 NLRB at 1246, n.14.

The Board has held that where the group or classification of employees sought to be added to a unit existed at the time the unit was certified, and these employees have had no opportunity to participate in the selection of the collective-bargaining representative, their unit placement raises a question concerning representation and a petition for unit clarification will be dismissed. Gould-National Batteries, Inc. 157 NLRB 679 (1966); AMF Electro Systems Division, AMF Inc., 193 NLRB 1113 (1971). Where, as here, the parties entered into a Stipulated Election Agreement to specifically exclude the senior planning engineers, and that unit has been certified, the Board policy against clarifying the unit to include those employees is even more compelling. The Board's policy on accretion is restrictive because employees accreted to an existing unit are not accorded a self-determination election, and the Board seeks to safeguard the rights of employees to determine their own bargaining representative. Consequently, the fact that a group of employees, such as the senior planning engineers, could

constitute a separate

appropriate bargaining unit is sufficient to mandate that no accretion be found. Towne Ford Sales, 270 NLRB 311 (1984), affd. sub nom. Machinists District Lodge 190 v. NLRB 759 F.2d 1477 (9th Cir. 1985). The general rule stated by the Board in Gould-National Batteries, supra, is applicable and bars the further processing of the unit clarification petition in the instant case which was filed only three months after the certification of the bargaining unit agreed to by the parties. Accordingly, Petitioner's request for clarification shall be denied and the senior planning engineers shall remain excluded from the unit.

ORDER

It is hereby ordered that the unit clarification petition in Case 20-UC-387 be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, NW Washington, DC 20570-0001. This request must be received by the Board in Washington by March 26, 1998.

Dated at San Francisco, California, this 12th day of March, 1999.

/s/ Robert H. Miller
Robert H. Miller, Regional Director
National Labor Relations Board
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Decision and Order
Pacific Gas and Electric Company
Case 20-UC-387

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