

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

THE DOW CHEMICAL COMPANY

Employer¹

and

CASE 7-UC-536

LOCAL 12075, UNITED STEELWORKERS
OF AMERICA, AFL-CIO-CLC

Petitioner

APPEARANCES:

Robert W. Sikkel, Attorney, of Holland, Michigan, and Lawrence A. Looby, Attorney, of Midland, Michigan, for the Employer.

Gail M. Wilson, Attorney, of Detroit, Michigan, for the Petitioner.

DECISION AND CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, hereinafter the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter 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 Regional Director.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as amended at the hearing.

² The parties filed briefs which have been carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner by the instant unit clarification petition seeks to accrete approximately eight employees, classified as prototype technologists, who allegedly perform bargaining unit work in the Employer's materials engineering center (hereinafter MEC) at its Midland facilities. The Petitioner has represented a unit of approximately 1,540 hourly and day-rate employees of the Employer at Midland for more than 40 years.³

As a threshold matter, the Employer contends that the petition is untimely because the positions occupied by the disputed employees have been in existence for about 12 years. Currently, the parties are mid-term of a collective bargaining agreement that became effective on January 1, 1998, and expires February 12, 2001. The Board has found that a unit may be clarified mid-contract where the unit clarification procedure is invoked to determine the unit placement of employees performing a new operation. *Crown Cork & Seal Co.*, 203 NLRB 171 (1973); *Alaska Steamship Co.*, 172 NLRB 1200 (1968). When, however, employees have not been included in a unit for some time and the union has made no attempt to include the position in the unit, the Board may find that the position is historically outside the unit and that the union has waived its right to a unit clarification proceeding. *Sunar-Hauserman*, 273 NLRB 1176 (1984); *Plough, Inc.*, 203 NLRB 818 (1973). Accord: *ATS Acquisition Corp.*, 321 NLRB 712 (1996). These cases presuppose that the union is aware of the existence of the disputed employees and has either previously unsuccessfully attempted by the grievance procedure or through contract negotiations to include the employees in the unit, or despite knowing of their existence has failed to take steps to perfect its claim to the employees. It is a well established principle that a waiver of a statutory right may not be lightly inferred or implied, but must be clear and unmistakable. See *N L Industries, Inc. v. N.L.R.B.*, 536 F.2d 786, 789 (8th Cir. 1976); *RAHCO, Inc.*, 265 NLRB 235, 258 (1982); *Navajo Freight Lines*, 254 NLRB 1272, 1283 (1981).

Despite the unusual length of time that the disputed employees have been in existence in the instant case, I find that the weight of the evidence supports the Petitioner's assertion that it did not know of, nor could it have with reasonable diligence become aware of, the nature of the work of the prototype technologists until at least September 1998.

The Employer's chemical operations in Midland, Michigan, consists of a large, sprawling complex of numerous buildings and facilities wherein both unit and non-unit employees work. The MEC where the disputed employees work is located in building #433, which is a

³ The unit is described in the collective bargaining agreement as "all hourly, and day-rate employees of the Company at Midland, Michigan, Beaver Creek Gas Collection System, whether such employees are employed regularly or temporarily, excluding, however, all Superintendents, Supervisors, Plant Protection employees, and salaried employees."

very large and "monumental" building covering more than a city block. The building principally houses warehouse, production, research and technical operations on five separate floors. At one time, as many as 2,000 employees worked in the building, which over time has been reduced to 500-700 employees as various operations were moved. The MEC is one of many shops in the building and occupies a relatively small enclosed area.

Entry to the prototype shop where the disputed employees work is limited to a single entrance through a shop office. The Employer submitted testimony that access to the prototype shop is open to any employee who may wish to enter, although it did concede that a special access code is needed to enter a portion of the MEC operation where expensive rapid prototype equipment is located. By contrast, the Petitioner's witnesses testified that unit employees and union officials alike are denied access to the prototype shop without a special badge or access code for locked doors. Furthermore, they assert one would not even know of the presence of the shop or the nature of the work being performed even if one worked in the building every day. The shop does bear a sign on a wall separating the shop from a main hallway designating it as the "MEC Prototype Shop." The hallway is regularly used by unit employees driving forklifts and has glass windows from which the shop and its equipment can be viewed from the hallway. However, it is not uncommon that work areas and equipment in the shop will be cordoned off from view because of the secrecy surrounding many of the projects performed by the MEC employees. Secrecy is of tantamount concern in the MEC because of the prototype mold making activity that these employees perform for customers wishing to develop new products and parts. MEC employees are required to sign confidentiality agreements, and MEC employees do not divulge to other employees the nature of their work on particular projects, or for that matter that they even work in the MEC.

The Employer provided no evidence that prior to September 1998, any official of the Petitioner was aware or informed of the nature of the work performed by the prototype technologists. At best, in years past a particular unit employee questioned his supervisor about the nature of the work in the MEC, but the employee was not provided any information because the supervisor professed not to know himself. Finally, in September 1998 the Employer held a joint meeting of unit tool and die employees located in building #1616 and the prototype technologist employees to announce that they were being reorganized into a single group under the supervision of Global Director for the MEC Robert Cleereman. In an effort to familiarize the employees from each group with the nature of the work of the other group, Cleereman and Doug Argyle, the supervisor of the tool and die shop in building #1616, described the work of the employees in their respective areas and a tour of the MEC prototype shop was arranged.

After the tour, unit employees informed the Petitioner that they believed the MEC prototype shop employees were performing essentially the same work as unit employees. Petitioner's president sent a letter to the Employer's labor relations manager requesting

confirmation of such work, and a meeting was arranged in October 1998 between the Petitioner and

management officials to explain the nature of the work performed in the MEC. Based on that explanation, the Petitioner requested that the joint shop committee consisting of representatives of both the union and management meet to address whether a violation of the collective bargaining agreement had occurred. The parties did meet in March 1999 after another tour of the MEC had taken place for committee members. When the joint shop committee was unable to reach agreement, the issue was raised at a meeting between the Employer's site director and the Petitioner's president on May 12, 1999, whereat the Employer refused to discuss the subject further. The Petitioner thereafter filed a grievance on the matter, but it appears that the issue is not subject to binding arbitration. After the parties were unable to resolve the grievance, the instant unit clarification was filed on July 2, 1999.

Based on the foregoing, I find that the Petitioner did not knowingly waive its right to represent the MEC prototype technologists and that it acted with due diligence upon first learning of the nature of the work performed by the MEC employees. Upon exhausting efforts to negotiate the inclusion of the disputed MEC employees into the unit, the Petitioner expeditiously filed the instant petition. Consequently, I find the petition to be timely, and considering the comparative large size of the existing unit and the relatively small number of employees covered by the petition, I do not find that entertaining the petition during mid-term of the contract would be disruptive of the bargaining relationship. Cf. *Arthur C. Logan Memorial Hospital*, 231 NLRB 778 (1977).

When the Board finds disputed employees to be an accretion it will clarify the unit to so indicate. *International Harvester Co.*, 187 NLRB 739 (1971). However, the Board follows a restrictive policy in finding accretion since it forecloses employees' rights to select their representative. *Passavant Retirement & Health Center*, 313 NLRB 1216, 1218 (1994); *Towne Ford Sales*, 270 NLRB 311 (1984), *enfd.* 759 F.2d. 1477 (9th Cir. 1985). Consequently, accretion will be found "only when the additional employees have little or no separate group identity...and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." *Super Valu Stores*, 283 NLRB 134, 136 (1987), citing *Safeway Stores*, 256 NLRB 918 (1981). Traditional criteria used in making community of interest determinations include centralized control over daily operations and labor relations, similarity of employee skills, duties and working conditions, extent of employee interchange, common supervision, geographic proximity, and past bargaining history. *School Bus Services, Inc.*, 312 NLRB 1, 5 (1993); *Mercy Health Services*, 311 NLRB 367 (1993). The Board has placed great reliance on separate supervision and employee interchange in unit accretion issues. See, e.g., *Executive Resource Associates, Inc.*, 301 NLRB 400, 401 (1991).

The MEC was created by Global Director Cleereman in February 1985, who at the time was lab director for the Employer's research and development department. The MEC was created to provide engineering functions to potential customers in an effort to expand uses for the

Employer's plastics. The MEC employees primarily perform work characterized as "art to part," which entails taking a new product concept and converting it to a prototype which can be tested. For instance, the MEC worked with General Motors Corporation to design and engineer plastic body panel doors to replace steel doors on the Saturn automobile. By contrast, the tool and die employees in the building #1616 group aid and abet the research and development people in developing internal fabrication processes for producing plastic products by the Employer. However, the 1616 group has also worked with outside customers in developing such products as Saran sheets. Both groups have visited plants of customers in the course of product development, although the MEC employees do so with more regularity.

Originally the MEC relied upon outside tool and die employees who had been contracted for their services, until about 1987 when the Employer began hiring them directly. Currently, the Employer has approximately eight employees in MEC who perform tool and die work similar to the unit tool and die employees in building #1616. However, only four of those individuals are directly employed by the Employer, while the remaining four remain contract employees. Since their direct hire, these employees have been classified as "prototype technologists" and are paid as non-exempt, salaried employees, entitled to time and half for overtime, similar to unit employees, for hours worked in excess of 40 hours a week. The prototype technologists earn between \$48,000 to \$55,000 a year compared to unit tool and die employees who at a base hourly wage rate of \$21.50 would earn about \$45,000 a year without any overtime. Because prototype technologists have been treated as non-unit, salaried employees by the Employer, they are paid under a separate, bi-weekly payroll system, while unit employees are paid weekly.

Being part of research and development rather than production operations as are unit tool and die employees, personnel and labor relations matters for MEC employees are handled by a separate administrative group. However, since the reorganization in 1998, Global Director Cleereman supervises both the prototype technologists and the unit tool & die employees in building #1616. The prototype technologists have no other supervisor than Cleereman, except for senior prototype technologists who serve as team leaders. Cleereman is responsible for all hiring, firing and discipline among the prototype technologists, a role he also assumed for the 1616 group upon its reorganization, although Doug Argyle continues to be the direct, day-to-day supervisor of the tool and die employees. Cleereman maintains an office at both locations, which are about five blocks apart. Employees from both groups enjoy similar benefits, although sick leave programs, vacation and disability plans, performance awards and savings plans are calculated differently for each group.

Prototype technologists in MEC routinely perform mold making and die casting work on special projects for prospective customers, oftentimes working closely with research and development employees and customers. At one time, the unit tool and dies employees in building

#1616 were part of the research and development unit before being reorganized under the production operation. The approximately 12 unit tool and die employees perform mold making work similar to the MEC, although they work on comparatively fewer molds for special projects during the course of a year, and the molds they make are normally smaller. This is due in part to the specialized machinery that the MEC has purchased, although overall the machinery used by prototype technologists is basically the same as that used by the 1616 group. Cleereman described that the purpose of the reorganization of the MEC and the tool and die 1616 group was "to coordinate the work to enhance the capabilities of both groups, so we can be much more productive and more valuable to the customer." The weight of the evidence suggests that projects done by MEC employees can be done by unit employees from the 1616 group. In fact, there have been occasions when unit tool and die employees have worked on the same projects or parts as MEC employees, such as a "flange mold" in May 1999. In March 1999, the 1616 group tool and die employees were told by Cleereman that there might be a project being done by the MEC employees that could be transferred to the 1616 group to work on, although for unexplained reasons that never materialized. However, there have never been any permanent or temporary transfers of employees between the two groups. Employees in the 1616 group were also told by Cleereman during meetings after the reorganization that the MEC was created as "non-union" to get around the work rules and constrictions associated with unit tool and die employees.

Similar to MEC employees, the 1616 group tool and die employees are required to sign proprietary work agreements upon their hire to keep their work on special projects confidential. The prototype technologists also have similar educational and training experience. Many members of both groups have two-year associates degrees and either have journeyman cards or are "certified" tool and die employees.

Based on the foregoing, I find that the four prototype technologists employed by the Employer⁴ have little or no separate group identity. There is overwhelming evidence that the prototype technologists and the unit tool and die employees have substantially similar skills, duties and training, and are basically interchangeable as to the type of work and projects they do. The Employer has basically recognized this fact by its administrative reorganization to

⁴ Four of the prototype technologists are "contractors" and apparently not directly employed by the Employer. As the record is silent as the nature of this contract arrangement, it is not appropriate at this time to include these contract employees in the unit herein. See *ATS Acquisition Corp.*, 321 NLRB 712 fn. 3 (1996).

place Global Director Cleereman in charge of both groups. The two groups also work in close proximity to each other, and other bargaining unit employees work in the same building as the prototype technologists. While there has been a lack of interchange between the two groups, and their pay structures and benefits are not identical, I do not believe these differences are sufficient to warrant excluding these employees from the existing unit.

Accordingly, I conclude that the prototype technologists in the MEC share an overwhelming community of interest with unit tool and die employees, and do not themselves constitute a separate appropriate unit. Thus, it would be appropriate to accrete them into the existing bargaining unit.

IT IS HEREBY ORDERED, based upon the foregoing, that the Petitioner's request that the bargaining unit be clarified to include the prototype technologists in the MEC be, and hereby is, granted.⁵

Dated at Detroit, Michigan, this 23rd day of September, 1999.

(SEAL)

/s/ William C. Schaub, Jr.
William C. Schaub, Jr., Regional Director
Region Seven
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue - Room 300
Detroit, Michigan 48226-2569

440-6725-7515-5033

⁵ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Clarification of Bargaining Unit may be filed with the **National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by **OCTOBER 7, 1999**.