

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

PERFORMANCE COAL COMPANY/UPPER
BIG BRANCH MINE ^{1/}

Employer

and

Case 9-RC-17451

UNITED MINE WORKERS OF AMERICA

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before hearing officers of the National Labor Relations Board, herein called the Board. ^{2/}

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, ^{3/} the undersigned finds:

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

^{1/} The Employer's name appears as amended at hearing.

^{2/} The hearing originally convened on September 25, 2000. At that time, the Petitioner took the position that 12 maintenance chiefs were supervisors within the meaning of Section 2(11) of the Act. Although the Employer expressed its opinion that the maintenance chiefs were supervisors, it expressed doubt as to their status and sought to litigate that issue. The hearing officer did not permit the Employer to introduce evidence concerning the supervisory status of the maintenance chiefs on the basis that their status apparently was not in dispute. On October 3, 2000, the undersigned issued and duly served upon the parties an *Order Remanding Proceeding for Further Hearing and Notice of Hearing* reopening the record in this proceeding for the limited purpose of adducing evidence concerning the supervisory status of the maintenance chiefs. The Petitioner did not appear at the hearing when it reconvened on October 12, 2000 and has not changed its position that the maintenance chiefs are statutory supervisors. On October 12, 2000 after availing itself of a full opportunity to adduce evidence concerning the status of the maintenance chiefs, the Employer took the position that the maintenance chiefs are supervisors within the meaning of Section 2(11) of the Act. The record, however, does not contain any stipulation to that effect.

^{3/} The Employer timely filed a brief which I have carefully considered in reaching my decision.

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.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer is engaged in mining coal at its Upper Big Branch mine near Naomi, West Virginia, the only facility involved in this proceeding, where it employs approximately 130 employees in the unit found appropriate.

The Petitioner seeks a unit of production and maintenance employees, including construction employees, surveyors, computer specialists, communications employees, warehouse employees, electrician trainees and overland belt employees employed by the Employer at its Upper Big Branch mine. The Employer stipulated, and I found, that the employees sought by the Petitioner constitute an appropriate unit for purposes of collective bargaining.^{4/}

The supervisory status of the Employer's maintenance chiefs was the only issue raised in this proceeding. Paul Morris, Bob Cox, Dave Massey, Andrew Milam, Robert Alderman, Anthony DeMarco, Delbert Bailey, Mike Greene, Cullen Medley, Harvey Zornes, Grover Skeens and Ira Collins are the 12 maintenance chiefs employed at the Upper Big Branch mine. Each is responsible for overseeing the work of a crew consisting of the chief and two or three other maintenance employees on a particular shift in a particular section of the mine. The crews are responsible for performing preventative and breakdown maintenance on the Employer's mining equipment.

There is no record evidence that the maintenance chiefs can hire or discharge employees using independent judgment. However, the maintenance chiefs make work assignments and direct the work of other employees. At the beginning of the shift, a maintenance chief receives a list of preventative maintenance tasks prepared by the maintenance superintendent. The maintenance chief then confers with the maintenance chief assigned to the mine section for the preceding shift to ascertain the condition of the production equipment and whether any breakdown maintenance or repairs are required. By observation of the production process or in the event of a breakdown, the maintenance chief may determine that additional work is required beyond that reflected on the preventative maintenance list or relayed by the maintenance chief from the previous shift. The maintenance chief is responsible for prioritizing the various tasks to be performed by his crew and assigning a particular crew member or members to perform these tasks. In making these assignment decisions, it is necessary for the maintenance chief to consider the relative skills of the members of his crew. A maintenance chief may reassign a

^{4/} The parties stipulated that Cary Harwood, president; Eddie Lester, general mine manager; Ron Williams, purchasing agent; Don Kelly, general mine foreman; Linda Wills, mine superintendent; Homer Wallace, mine superintendent; Mike Milam, chief engineer; Jennifer Chandler, human resources manager; Ben Dulin, long wall coordinator; and Bill Downey, long wall coordinator; all have the authority to hire, discharge and discipline employees or to effectively recommend such action. Accordingly, I find that these individuals are supervisors within the meaning of Section 2(11) of the Act and shall exclude them from the unit.

crew member from one task to another and may borrow members of maintenance crews from another section of the mine in appropriate situations. Maintenance chiefs have exercised their authority to require employees to work overtime and to permit them to leave work for such things as medical appointments.

The fact that maintenance chiefs must balance competing work priorities and consider employee skill levels in making work assignments, assigning overtime and releasing employees from work establishes that they exercise independent judgment in performing those functions. *Rose Metal Products*, 289 NLRB 1153 (1988). Accordingly, I find that the maintenance chiefs exercise independent judgment in responsibly assigning and directing the work of employees. Inasmuch as the authority to assign and responsibly direct employees are indicia of supervisory status and the possession of any one indicium within Section 2(11) of the Act is sufficient to confer supervisory status. *DST Industries*, 310 NLRB 957, 958 (1993). I find that the maintenance chiefs are statutory supervisors. See also, *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972) where the Board found an individual to be a statutory supervisor based solely on his authority to responsibly assign and direct the work of employees requiring the use of independent judgment. ^{5/}

In view of the foregoing, I find that the maintenance chiefs are supervisors within the meaning of Section 2(11) of the Act and I shall exclude them from the unit on that basis.

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

All production and maintenance employees employed by the Employer at its Upper Big Branch mine near Naomi, West Virginia, including construction employees, surveyors, computer specialists, communications employees, warehouse employees, electrician trainees and overland belt employees, but excluding all office clerical employees, warehouse clerical employees, independent haulers, maintenance chiefs and all professional employees, guards and supervisors as defined in the Act.

Accordingly, I shall direct an election among the employees in such unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this

^{5/} The record contains evidence bearing on whether the maintenance chiefs possess other indicia of supervisory status. Because their authority to assign and direct the work of employees is sufficient to confer supervisory status on them and their supervisory status is uncontested, I find it unnecessary to consider the evidence regarding the other indicia.

Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Mine Workers of America**.

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **October 27, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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 may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 3, 2000**.

Dated at Cincinnati, Ohio this 20th day of October 2000.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
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