

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

EAGLE-PICHER, HILLSDALE TOOL¹
DIVISION

Employer

and

Case 25-RC-10061

UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held August 24, 2000, 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 hearing officer's rulings made at the hearing are free from error and are hereby affirmed as more fully discussed below.²
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.

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

² The Employer's post-hearing Motion for Special Permission to Appeal the Hearing Officer's Ruling is granted and its arguments in support of reopening the record have been duly considered. For the reasons discussed herein, however, the Employer's post-hearing Motion to Reopen the Record is denied.

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 following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees employed by the Employer at its Hamilton, Indiana facility, BUT EXCLUDING all office clerical employees, all professional employees, all engineers, guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 202 employees for whom the record reflects no history of collective bargaining.

I. STATEMENT OF FACTS

The Employer, a Michigan corporation, is engaged in the manufacture of automobile components at its facility located in Hamilton, Indiana. The Petitioner seeks a production and maintenance unit with typical exclusions. The above unit description is in accord with the positions of the parties. In dispute however, are the appropriate unit placement of seven job classifications currently occupied by nine employees. These classifications are: Manufacturing Engineer, also known as Engineer Tech, CAD (Computer Aided Drafting) Engineer, Customer Liaison, Manufacturing Specialist, Purchasing Assistant/Accounts Payable, Maintenance Assistant, also known as Maintenance Clerk, and E I (Employee Involvement) Facilitator. Three employees occupy the Manufacturing Engineer/Engineer Tech classification, while one employee occupies each of the other classifications.³ It is the Employer's position that persons who occupy these classification share a sufficient community of interest with unit members to require their inclusion within the unit. For reasons not disclosed in the record, the Petitioner opposes the inclusion of these classifications in the unit.

The parties stipulated that individuals who occupy the following positions are supervisors who possess one or more of the characteristics of supervisory status enumerated in Section 2(11) of the Act: the Plant Manager, Manufacturing Manager, General Supervisors, Supervisors, Team Leaders, Maintenance Manager, Maintenance Leader, Human Resource Manager, Environmental

³ Current occupants of the contested classifications are: William Gaskill, John Nelson and Philip Vreeland, who occupy the Manufacturing Engineer classification, and Jason LaRue, Ron Tincher, Eric Smith, Laura Mann Tom Everetts, Nancy Fike and Theresa Osborne, who occupy the other disputed classifications, respectively.

Health and Safety Coordinator, Production Control Manager, Buyer, Quality Control Manager, Quality Supervisor and Engineering Manager.⁴

II. DISCUSSION

At hearing the Employer sought to introduce evidence in support of its contention that persons who occupy the seven disputed classifications share a substantial community of interest with unit members which requires their inclusion in the petitioned unit. The Hearing Officer, consistent with longstanding Board policy, declined to receive evidence on this issue on grounds that it would conserve agency resources to defer any litigation concerning the voting eligibility of the contested individuals to post-election proceedings. Since the unit placement of only 9 employees out of a unit of 202 is contested, (approximately 4% of the unit) the ballots of these individuals may not be determinative of the outcome of the election, thereby making litigation of their unit placement unnecessary. After permitting the Employer to make an offer of proof concerning the evidence it wished to place into the record, the Hearing Officer closed the record.

The ruling of the Hearing Officer is affirmed for several reasons. It has been a longstanding policy of the Board, in order to conserve Agency resources and foster expeditious elections, to defer to post-election proceedings, disputes concerning the unit placement of individuals where the number of individuals constitutes less than 10% of the bargaining unit, NLRB v. Doctors' Hospital of Modesto, Inc., 189 F.2d 772 (9th Cir. 1973) enfg. 183 NLRB 1210 (1970); Bituma Corporation v. NLRB, 23 F.3d 1432 (8th Cir. 1994), enfg. 310 NLRB No. 167 (1993); Avcor, Inc., 309 NLRB No. 9, Sl. Op. at 2, n. 15.⁵

In contrast, however, in Barre-National, Inc., 316 NLRB No. 149 (1995) and its progeny⁶ the Board has held that Section 9(c)(1) of the Act and related Board rules require that a pre-election hearing be conducted if, following the filing of a representation petition, a Regional Director has reasonable cause to believe that a question concerning representation exists. In Barre-National the Board found that the Regional Director's refusal to permit an employer to place into the record evidence concerning the alleged supervisory status of its 24 line and group

⁴ There are four General Supervisors, four Supervisors and six Team Leaders. Each of the other supervisory positions are occupied by just one person.

⁵ This practice has been reaffirmed in the Board's Casehandling Manual, Part Two, Representation Proceedings. Section 11084.3 states that although as a general rule a Regional Director should not approve election agreements which permit more than 10% of a petitioned unit to vote subject to challenge, the Regional Director may do so, "if the Regional Director deems it advisable to do so." Not only does this section recognize the practice of approving agreements which defer the voting eligibility of less than 10% of the unit to post-election procedures, but also validates the practice of deferring the voting eligibility of more than 10% of the unit under certain circumstances.

⁶ North Manchester Foundry, Inc., 328 NLRB No. 50 (1999)

leaders was reversible error. The Regional Director in that case deferred a determination of the status of the line and group leaders to post-election proceedings in the event their ballots were determinative of the outcome of the election. Although the Board found this ruling to be in error, it did not reverse its past precedent of deferring unit placement issues to post-election proceedings where the number of disputed persons comprises only a small portion of the petitioned unit. To the contrary, the Board implicitly reaffirmed this policy by stating that the conclusion it reached in Barre-National

... is based on the facts of this case. We do not express a view as to whether a different result would be warranted if one or more of those facts were different, *Ibid*, Sl. Op. at 2, n. 9.

The facts in Barre-National and the rationale for not deferring the litigation of its contested positions, are distinguishable from those in the case at hand. In Barre-National the contested positions were all allegedly supervisory. A failure to determine the unit placement of alleged supervisors prior to an election could result in the election being tainted by their electioneering, which would subsequently require that the election be set aside in its entirety. Such is not the case here. There is no contention by the Petitioner that any of the 9 persons in the disputed positions are statutory supervisors. In addition, the number of potential voters involved in Barre-National comprised a substantially larger segment of the unit than the case at hand, thus making it more likely than here, that their votes might be determinative. 8 to 9% of the unit members were contested in Barre-National. Only 4% of unit members are contested in the case at hand.

The Employer argues that to defer a determination of the unit placement of its 9 employees will cause prejudice to the Employer and confusion to the individuals. The Employer argues that it is uncertain whether to include these employees in company meetings which discuss the union, or whether these employees' terms and conditions of employment may be changed prior to the election. While these arguments may at first blush appear to have merit, they fail to withstand scrutiny under closer examination. As mentioned above, there is no contention that any of the individuals are statutory supervisors. Therefore, their participation in pre-election campaigning cannot potentially jeopardize the election. Moreover, an employer is free to include in its pre-election meetings both employees who are potential members of a bargaining unit, as well as those who are not. For example, there is no Board law which precludes an employer from including in its campaign meetings non-voters such as office clerical or technical employees along with potential voters. Similarly, an employer is free to change terms and conditions of employment of its employees prior to an election, even those of potential unit members, so long as its actions are governed by factors other than the pending election, Waste Management of Palm Beach, 329 NLRB No. 20 (1999) (quoting American Sunroof Corp., 248 NLRB 748, 749 (1980), modified on other grounds, 667 F.2d 20 (6th Cir. 1981).

The Board's decision in North Manchester Foundry, Inc., 328 NLRB No. 50 (1999) is also distinguishable from the case at hand since there, about halfway through the first day of the hearing and after some evidence had already been placed into the record concerning the disputed job classifications, the hearing officer declined to receive additional evidence on the subject and closed the record. Unlike the case at hand where no litigation of the disputed classifications had occurred, in North Manchester Foundry the disputed classifications were partially litigated, thus arguably running afoul of Board Rule 102.64(a) which provides that once a record is opened, a hearing officer should obtain a full and complete record.

Representation proceedings impose dual and sometimes conflicting obligations upon the Board. They require a balancing of the fundamentals of due process against the Board's duty to protect the integrity of its processes and provide for the prompt resolution of questions concerning representation, HeartShare Human Services of New York, Inc., 320 NLRB 1, Sl. Op. at 10 (1995). To require the litigation of all unit placement and eligibility issues raised by parties will necessarily permit the unscrupulous to undermine the integrity of the Board's election process through the creation of artificial issues. For inherent in the process of pre-election litigation, briefing and the issuance of representational decisions, is a delay in the date of elections.⁷

III. 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 Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees in the unit who are 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 unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit 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 Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

⁷ The undersigned would welcome any clarification from the Board concerning the deferral of unit placement issues to post-election proceedings, including clear standards for determining those circumstances under which such deferral is appropriate and those under which it is not.

IV. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

V. LIST OF VOTERS

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 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). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **November 6, 2001**. 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. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VI. 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, DC 20570. This request must be received by the Board in Washington by November 13, 2001.

DATED AT Indianapolis, Indiana, this 30th day of October, 2001.

Roberto G. Chavarry,
Regional Director
National Labor Relations Board
Region 25
Room 238, Minton-Capehart Building
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