UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

AIR PRODUCTS AND CHEMICALS, INC.
Employer/Petitioner

and Case 26-UC-193

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND
ENERGY WORKERS INTERNATIONAL UNION,
LOCAL 5-727
Union

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, Air Products and Chemicals, Inc., is engaged in the production and distribution of industrial chemicals at a facility in Calvert City, Kentucky. The Employer and the Union, Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 5-727, are parties to a collective-bargaining agreement covering the production and maintenance employees at the Employer's Calvert City chemical plant.

The Employer filed a petition under Section 9(c) of the National Labor Relations Act seeking to clarify the existing bargaining unit to exclude the employees from its power generation plant, known as the cogeneration plant, from the existing bargaining unit. The Union opposes the clarification and urges the petition should be dismissed or the Board should defer to the parties' grievance procedure.

Following a hearing before a hearing officer of the Board, the parties filed briefs[1] with

[1] Subsequent to filing their post-hearing briefs, both the Employer and the Union submitted a supplemental statement regarding perceived inaccuracies of facts asserted by the other party and the issue of dismissal of the petition. Having fully considered the record itself, rather than relying on any party's description of the record, and since I have already fully considered all the issues and arguments relating to dismissal of the petition, I find no reason to permit either party to file a supplemental post-hearing statement. Accordingly, each party's supplemental statement is being returned to that party and will not be a part of the official record in this matter.

me. I have carefully considered the evidence presented at the hearing and the arguments presented by the parties and have decided that clarification is not appropriate because the Union does not seek to represent the employees that the Employer seeks to exclude. Accordingly, I am dismissing the petition.

I. FACTS

The Employer is structured into four different groups that are responsible for different areas of the Employer's overall operations. The chemicals group consists of its chemical production operations. The gases group includes electronics, industrial gases, and environmental and energy systems. The corporate structure group is comprised of global engineering and employee health and safety. The fourth and newest group, the home health care group, includes the home health care business recently acquired by the Employer.

As part of the chemicals group, the Employer operates a chemical manufacturing plant in Calvert City, Kentucky. Since 1963, the Union has represented the production and maintenance employees at the Calvert City chemical plant, including operational employees, electricians, material handlers, utility persons and janitors.

Until about April 2000, the chemical plant was powered by steam generated by two coal-fired boilers located in the boiler house at the chemical plant. The boiler house was part of the utilities department and was staffed by about 14 bargaining unit employees classified as operators who monitored the boiler gauges and ensured coal was loaded and processed in the boilers. Generally, the most senior bargaining unit employees at the chemical plant worked in the boiler house as operators because those were considered desirable positions. In 1999, the Employer's gases group began construction of a cogeneration plant to replace the boiler house and to provide an additional source of income through the sale of the power. The new plant,

located across the railroad tracks from the chemical plant, uses a General Electric turbine jet engine powered by natural gas to produce electricity. The exhaust from the engine is sent to heat recovery steam generators that produce steam, which is sent to the chemical plant. The plant's generation of two products, electricity and steam, is the basis for the "cogeneration" name.

When the Employer began hiring employees to staff the cogeneration plant in the fall of 1999, it advertised in the local newspapers and then interviewed and screened the applicants. Employees were hired and placed in either the operator repairman classification or the instrument and electrical mechanic position. All cogeneration employees were hired by December 6, 1999. The employees then underwent classroom and on-the-job training until the cogeneration plant became operational in April 2000.

After the cogeneration plant began operations, the Employer dismantled the boiler house. All the boiler house operators either retired or bumped into other positions in the chemical plant. None were hired to work in the cogeneration plant. The last employee left the boiler house in July 2000.

On October 27, 1999, while the Employer was hiring the cogeneration employees, the Union filed a grievance claiming the Employer violated the contract by not allowing bargaining unit employees to exercise their seniority rights for positions in the cogeneration plant. Article XXII, Section 14 of the contract provided that job openings in a "new operating plant" would be filled by plant wide bidding for a period of 1 year from the date of the posting of the first job opening. Article XXII, Section 7 defined "operating departments" to include "any other operating plant which may be added during the life of this contract."[2]

[2] This contract was effective from February 12, 1998 through February 11, 2001.

On November 5, 1999, the Employer denied the grievance asserting the cogeneration plant was not a part of the chemical plant and therefore not covered by the contract. When the Union attempted to arbitrate the grievance, the Employer refused to arbitrate. The Union then filed suit in district court to compel the Employer to arbitrate the grievance. On July 7, 2000, the district court granted summary judgment in favor of the Employer finding the issue was representational and under the jurisdiction of the NLRB. On October 25, 2000, the Union appealed to the United States Court of Appeals for the Sixth Circuit. On August 12, 2002, the Court of Appeals reversed the decision of the District Court and ordered the Employer to arbitrate the grievance. ***Paper, Allied-Industrial, Chemical & Energy Workers, Local 5-0550, Local 5-727 v. Air Products & Chemicals, Inc.***, 300 F.3d 667 (6th Cir. 2002). The court found the grievance was a question of work assignment and a matter of contract interpretation governed by the collective-bargaining agreement. As of the date of the hearing, the arbitration had not been conducted.

While the case was pending before the Sixth Circuit, the parties negotiated a new collective-bargaining agreement which was executed on February 12, 2001. During negotiations for the new agreement, neither party raised the issue of whether the cogeneration employees should be included in the unit. Currently, the cogeneration facility is staffed by 8 operator repairmen who monitor the facility and perform any necessary maintenance work, and 1 instrument and electrical mechanic. Nothing in the record indicates the Union has ever requested to represent the cogeneration employees.

II. ANALYSIS

To determine whether any clarification of the unit is appropriate, I must first decide if this case involves a work assignment or representational issue. As explained below, I have decided

that it does not involve a representational issue and therefore it is not necessary for me to decide if clarification would otherwise be appropriate.

The Union's grievance asserted that the Employer violated the contract by refusing to allow bargaining unit employees to exercise their seniority rights to the jobs that would be available at the cogeneration unit. The requested relief was for the Employer to agree that unit employees were allowed to exercise their seniority to the cogeneration jobs when they became available. The record does not establish that the Union has ever sought to represent the employees who were hired to fill positions at the cogeneration plant.

The Board has held that unit clarification is not appropriate when a work dispute arose that did not present a question of representation. In ***Coatings Application and Waterproofing, Co.***, 307 NLRB 806 (1992), the employer used non-union employees from Louisville to work on a project the union believed was covered under its contract with the employer. When the employer said it would only use two or three union members, the union responded that all of its people should be on the job. The union filed a grievance claiming the employer violated the contract by not using its people. The employer then filed a unit clarification petition seeking to exclude the non-union Louisville employees from the unit. The Board affirmed the dismissal of the petition on the basis that the core issue was a work dispute and that the record failed to establish evidence of a "clear representational objective" on the part of the union with respect to the non-union Louisville employees the employer sought to exclude.

In this case, the Sixth Circuit has already examined whether this matter involves a work assignment dispute or a representational issue. The court rejected the Employer's claim that the underlying dispute involves a representational issue and concluded that it is a question of work assignment and a matter of contract interpretation. 300 F.3d at 674-675. The court held that

here the question is whether the Employer's chemical plant employees, who are undeniably governed by the contract, are entitled to jobs at the cogeneration plant. Id. at 674. In rejecting the Employer's claim, the court distinguished ***International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO v. Olympic Plating Industries, Inc.,*** 870 F.2d 1085 (6th Cir. 1989) on the basis that in ***Olympic Plating*** it had found that the underlying dispute was primarily representational notwithstanding that the dispute was described as a "breach of contract." The court also noted that, unlike the situation in ***Olympic Plating,*** no charge was pending before the Board.

Although the Employer has subsequently presented the issue to the Board, I do not believe the absence of a Board charge or petition was critical to the court's decision in this matter. In any event, I agree with the court that this case does not involve a representational issue which should be decided by the Board. Rather, it involves a work assignment dispute. The Union's grievance was based on its claim that under the contract, unit employees were entitled to bid on the cogeneration jobs. The record does not establish that the Union is seeking to represent the employees that the Employer hired to staff the cogeneration plant. Therefore, in accordance with the Board's decision in ***Coatings Application***, supra, and consistent with the Sixth Circuit's decision in this matter, I find that the petition should be dismissed because the dispute here is a work assignment matter and not a representational dispute. Although ***Coatings Application*** involved a dispute about a single work project and two groups of employees performing the same work – roofing, I do not find those distinctions to require a different result here. The crux of the decision was the Board's determination that the case involved a work dispute and there was no evidence of the union having a clear representational objective with regard to the employees the employer sought to exclude by the unit clarification petition.

Nor is a different result required by the Board's decisions in either ***Tweddle Litho, Inc.***, 337 NLRB No. 102 (2002) or ***Ziegler, Inc.***, 333 NLRB No. 114 (2001). In ***Tweddle***, the Board reversed the Regional Director's deferral of an employer-filed petition to the arbitration procedure. The employer had hired non-bargaining unit employees to work at a second facility. The union then filed a grievance claiming the employer failed to treat the new employees as part of the bargaining unit. The Board agreed with the employer's assertion that grievance posed a representation issue of whether the new employees should be accreted to the bargaining unit or added because they perform the same function as was historically performed by unit employees. The Board stated that determinations of representation do not depend on contractual interpretation but the application of statutory policy, standards and criteria and are matters for the Board to decide rather than an arbitrator. *Tweddle* is distinguishable from this case because the grievance here does not seek to represent or add the cogeneration employees to the unit but instead asserts a contractual right for unit employees to perform certain work.

In ***Ziegler***, the Board clarified a unit to exclude parts and warehouse employees that had been historically excluded from the unit in order to avoid an incongruous arbitration award. There, the union had filed a grievance alleging that the employer had failed to apply the terms of the collective-bargaining agreement to the parts and warehouse employees at six of the employer's locations. ***Ziegler*** is distinguishable from this case because here the Union has not asserted a claim that its collective-bargaining agreement should be applied to the cogeneration employees or otherwise sought to represent those employees. Rather, the Union has said that unit employees should have been allowed to bid on the jobs at the cogeneration plant. Given this distinction, I find that ***Ziegler*** does not require clarification here and it is unnecessary for me to decide whether the cogeneration employees have been "historically excluded."

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussions above, I conclude and find:

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

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 in this case.

3. The petition seeks to clarify the existing unit to exclude the cogeneration plant employees.

4. Clarification of the bargaining unit is not warranted because this dispute involves a work assignment rather than a representational issue.

IV. ORDER

The petition in this matter is dismissed.

V. 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. 20570-0001. The Board in Washington must receive this request by **5 p.m. EST on December 3, 2002**. The request may **not** be filed by facsimile.

DATED at Memphis, Tennessee, this 19th day of November 2002.

/S/

Ronald K. Hooks, Regional Director
National Labor Relations Board
Region 26
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