Utah Power & Light Company *and* Kent C. Jaffa and Rafe G. Black, Petitioners, and Union Local No. 57 of the International Brotherhood of Electrical Workers. Case 27-RD-535

September 30, 1981

DECISION AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on April 10, 1981, before Hearing Officer Wayne L. Benson of the National Labor Relations Board. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 27 transferred this case to the National Labor Relations Board for decision. Thereafter, the Petitioners filed a brief and a supplemental brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

The Board has considered the entire record herein and makes the following findings:

1. The Employer is a public utility engaged in generating, transmitting, and distributing electrical power and energy to the States of Utah, Idaho, and Wyoming. The Employer also provides steam heat in Salt Lake City, Utah. The Employer has annual gross volume of business in excess of $250,000. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction herein.

2. The parties stipulate, and we find, that Union Local No. 57 of the International Brotherhood of Electrical Workers is, and at all times has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The Petitioners seek a decertification election among the Employer's engineers.[1] The engineers are currently part of a production and maintenance unit represented by the Union. The current unit contains approximately 2,600 employees of the Employer, including, *inter alia*, mechanics, technicians, electricians, custodians, warehousemen, and clerks.[2] The Petitioners contend that we should order an election because the engineers are professional employees within the meaning of Section 2(12) of the Act, and are therefore entitled under Section 9(b)(1) to vote as to whether they desire to be included in the unit. The Union urges that the petition be dismissed. The Union asserts that the engineers are not professional employees, and, moreover, that the unit for decertification sought by the Petitioners is inappropriate because it is not coextensive with the existing unit. The Employer has taken no position except to agree with the Petitioners that the petitioned-for unit consists entirely of professional employees. There are no professionals in the current unit who are not in the unit sought by the Petitioners.

Since 1938, the Employer has recognized the Union as the bargaining representative for all of its employees, excluding management and supervisors. The bargaining unit was determined that year pursuant to a stipulation by the Employer and the Union.[3] The engineers have never had an opportunity to vote separately as to whether or not they desire to be included in the unit.

Sec. 2(12)(a) defines "professional employee" to mean:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from training in the performance of routine mental, manual, or physical processes.

The engineers employed by the Employer include specialists in electrical, civil, mechanical, aeronautical, and nuclear engineering. The current collective-bargaining agreement classifies the engi-

[1] The petition requests a unit consisting of "Graduate engineers from accredited colleges of Engineering recognized by the National Society of Professional Engineers." At present, approximately 100 employees of the Employer conform to this description.

[2] The current unit, as stipulated by the Employer and the Union in 1938, consists of "all employees of the Company, excluding management and those supervisory officials who have authority to hire and fire."

[3] The unit was thus determined prior to enactment of Sec. 9(b)(1) of the Labor Management Relations Act of 1947.

neers into three grades—junior engineers, associate engineer, and senior engineer. A newly hired engineer enters the company as a junior engineer, and will generally be promoted to the higher grades within the next few years.

The record indicates that the engineers are assigned to produce highly complex and technical projects. For example, electrical engineer Gordon Bowan testified that he is responsible for "defining protective relay schemes" to prevent serious damage to company equipment in case of short-circuits or faults in the company's electrical systems. He is responsible for designing these systems, determining what equipment is necessary, and ensuring that the systems are constructed properly. Civil engineer Gary Bowls is responsible for designing steel lattice transmission towers. He also submits these designs to construction firms and evaluates competing bids based on quality and cost-effectiveness. In order to perform these functions, he employs his knowledge of advanced mathematics and computer technology.[4]

Several engineers testified without contradiction that they work with a minimum of supervision. Supervisors assign projects to the engineers, and meet with them periodically in order to review their progress.[5] However, the engineers often have more training and greater experience in specialized areas than their supervisors and may be better equipped to solve specific problems. Associate engineers and senior engineers are responsible for all aspects of their projects. They are expected to set the work schedules, order equipment, prepare cost analyses, and oversee construction.

With respect to educational qualifications, the record reveals that virtually all of the engineers have a B.S. degree from an accredited 4-year engineering program.[6] Many have also received M.S. degrees in specialized fields of engineering. Additionally, in order to keep abreast of the rapidly changing developments in their fields, engineers attend college courses and professional seminars and conferences, and subscribe to professional journals.

The foregoing and the entire record demonstrate that the engineers in the petitioned-for unit are engaged in challenging intellectual work which requires advanced knowledge of engineering, and consistent use of informed discretion. Accordingly, we find that they are professionals within the meaning of Section 2(12) of the Act. See, e.g., *New England Telephone and Telegraph Company*, 179 NLRB 527 (1969); cf. *The Chesapeake & Potomac Telephone Company of Maryland*, 192 NLRB 483 (1971).

The language and legislative history of Section 9(b)(1) of the Act clearly indicate that professional employees are entitled to vote as to whether or not they wish to be included in a mixed unit with nonprofessional employees. This section provides:

> That the Board shall not . . . decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; . . .

In enacting this proviso, Congress clearly recognized that professional employees often have a separate community of interest from other employees. The Senate Report, with reference to professional employees, states that:

> Since their number is always small in comparison with production or clerical employees, collective agreements seldom reflect their desires. Under the committee bill, the Board is required to afford such groups an opportunity to vote in a separate unit to ascertain whether or not they wish to have a bargaining representative of their own.[7]

Senator Taft explained Section 9(b)(1) to his colleagues on the Senate floor as follows:

> It would mean that the Board could not include professional employees with non-professional employees if the majority of the professional employees in a plant did not desire to be in the general union.[8]

The Supreme Court has found Section 9(b)(1) to be "clear and mandatory."[9] In *Leedom* v. *Kyne, supra*, the Court indicated that the self-determination election was a "right" given by Congress to professional employees and that Congress intended that right to be enforced. In compliance with Section 9(b)(1), when faced with a petition for a unit

[4] Several other engineers testified that their responsibilities also require extensive technical knowledge. The projects assigned to engineers vary in accordance with their specific areas of expertise.

[5] The engineers meet with their supervisors between once a week and once a month.

[6] Manager of Employee Relations Haycock testified that the Employer does not officially require a B.S. degree, but would consider hiring an applicant that had the "equivalent." He stated that it is "not impossible" to obtain the equivalent of a degree, but it would require a combination of a substantial amount of formal education and work experience. At present, one engineer employed by the Employer does not have a B.S. degree.

[7] S. Rept. 105, 80th Cong. 1st sess., p.11, 1 Leg. Hist. LMRA 417 (1947).

[8] Remarks of Senator Taft, 93 Cong. Rec. 3952, I Leg. Hist. LMRA 1009 (1947).

[9] *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958). The Court therein held that a Federal district court had jurisdiction of an original suit to vacate a Board determination that a mixed unit was appropriate, where the Board did not first conduct a self-determination election among the professional employees to authorize their inclusion in such a unit.

of both professional and nonprofessional employees, the Board will order a self-determination election among the professionals to determine whether or not they wish to be represented in a unit which includes nonprofessionals. See, e.g., *Chrysler Corporation (Airtemp Division)*, 192 NLRB 1208 (1971); *Sonotone Corporation*, 90 NLRB 1236 (1950).

The Petitioners, however, do not request that we certify a new unit, but that we decertify part of an existing unit. The Board will not normally direct a decertification election in a unit not coextensive with the existing unit.[10] In accordance with this principle, in *Westinghouse Electric Corp.*, 115 NLRB 530 (1956), the Board refused to direct a decertification election in a unit of professional engineers who were part of a larger mixed unit. In that case, the Board stated that:

> although the desirability of according specialized representation to specialized groups of employees is sufficient to warrant disrupting an existing relationship when separate representation is sought, such considerations are not operative in a decertification proceeding which does not result in separate *representation* for purposes of collective bargaining.[11]

The Board concluded therein that neither statutory mandate nor policy considerations warranted ordering a decertification election.[12]

Westinghouse Electric, supra, however, does not control our determination herein. In that case, the professional engineers that sought decertification had been included in the mixed unit pursuant to their vote in an earlier self-determination election. The instant case is clearly distinguishable in that the professional engineers here were never afforded an opportunity to vote whether to be included in the unit, as required by 9(b)(1).[13]

We reaffirm the policies set forth in *Campbell Soup* and *Westinghouse Electric, supra*, and will continue to require that the unit for decertification be coextensive with the existing unit. However, since in this unique situation the professional employees seeking decertification have never had an opportunity to vote in a self-determination election, the policies inherent in Section 9(b)(1) require that we make an exception herein. Accordingly, we conclude that the unit petitioned for is not inappropriate and that an election should be directed as requested by the Petitioners.[14]

We find that a question exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. In accordance with the above findings and the record as a whole, we find that the following unit may constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of the Company; excluding management and those supervisory officials who have authority to hire and fire.

The unit set out above includes professional and nonprofessional employees. However, as discussed previously herein, it is necessary to ascertain the desires of the professional employees as to inclusion in a unit with nonprofessional employees.

We shall therefore direct an election in the following voting group:

> All professional engineers employed by the Employer; excluding managerial employees and supervisors, as defined in the Act.[15]

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[10] See *Campbell Soup Company*, 111 NLRB 234 (1955). See also *Bell & Howell Airline Service Company*, 185 NLRB 67 (1970); *Great Falls Employers Council, Inc.*, 114 NLRB 370 (1955).

However, the Board has not followed this rule when to do so would perpetuate the existence of a mixed unit of guards and nonguards. See Sec. 9(b)(3) of the Act, *Fisher-New Center Co.*, 170 NLRB 909 (1968). See also *Newhouse Broadcasting Corporation d/b/a WAPI-TV-AM-FM*, 198 NLRB 342 (1972).

[11] *Westinghouse Electric Co., supra*, 533.

[12] By refusing to conduct an election, the Board did not indicate that the mixed unit was appropriate, but only that the existing bargaining relationship should not be disrupted.

See also *Retail Clerks Union Local Local No. 324 (Vincent Drugs No. 3, Inc.)*, 144 NLRB 1247 (1963).

[13] We note that in contrast to *Westinghouse Electric, supra*, in a prior decision, *Illinois Bell Telephone Company*, 77 NLRB 1073 (1948), we ordered a decertification election pursuant to a petition filed on behalf of professional employees who were part of a larger existing unit. In *Illinois Bell*, as in the instant case, professional employees were included in a mixed unit as a result of an agreement between the parties, without a self-determination election. *Westinghouse Electric* did not overrule *Illinois Bell*, but reached a different result based on policy considerations.

[14] In *International Telephone & Telegraph Corporation (ITT Federation Laboratories)*, 159 NLRB 1757 (1966) (Members Fanning and Jenkins dissenting in pertinent part), enfd. as modified 382 F.2d 366 (3d Cir. 1967), a Board majority held that an employer violated Sec. 8(a)(5) of the Act by withdrawing recognition from the union on the ground that the professional employees had been included in a mixed unit without a self-determination election. The majority held that the respondent was estopped from contesting the appropriateness of a unit that it had accepted for 14 years, but that its holding was "not to be construed as foreclosing the professionals in the unit from seeking self-determination at an appropriate time and in the appropriate proceeding." *International Telephone & Telegraph Corporation (ITT Federal Laboratories), supra* at 1764, fn. 15. This proceeding was initiated at an appropriate time by professional employees under a provision intended for their protection, not by an employer who seized upon this issue as an asserted basis for withdrawing recognition in the midst of a strike by its employees. Our opinion herein is also consistent with the dissenting view in that case, which would have found that the bargaining relationship was based on a certification which was void *ab initio* since the professionals were not afforded a self-determination election.

[15] As noted herein, the petition requests a unit consisting of "Graduate Engineers from accredited Colleges of Engineering recognized by the National Society of Professional Engineers." The record indicates that the Employer currently employs one non degree-holding engineer. This engineer, and others who may be hired in the future, have the same job responsibilities as the degree-holding engineers. Accordingly, we find that non-degree-holding engineers are professionals within the meaning of Sec. 2(12)(a) of the Act and have included them in the professional unit.

> The employees in the above voting group will be asked the following question:
>
> Do you desire to be represented for the purpose of collective bargaining by Union Local No. 57 of the International Brotherhood of Electrical Workers in a unit composed of all professional and nonprofessional employees of the Employer?

If a majority of the employees in the voting group vote "yes," the professional engineers will continue to be represented for the purpose of collective bargaining by the Union, as part of the current mixed unit. If a majority vote "no," the professional employees will be severed from the existing unit.[16] No labor organization seeks to represent these employees in a separate, all-professional unit. Therefore, if a majority vote "no" the engineers will be unrepresented.

In accordance with the above, we now make the following findings in regard to the appropriate unit:

If a majority of the professional employees vote for inclusion in the unit with nonprofessional employees, the following will constitute the unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of the Company; excluding management and those supervisory officials who have authority to hire and fire.

If a majority of professional employees do not vote for inclusion in the unit with nonprofessional employees, the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> *Unit* (a)
>
> All employees of the Company; excluding professional employees, management and those supervisory officials who have authority to hire and fire.
>
> *Unit* (b)
>
> All professional engineers employed by the Employer; excluding managerial employees and supervisors as defined in the Act.

[16] The Union will continue to be certified as the collective-bargaining representative of the Employer's nonprofessional employees.