

In the Matter of THE OHIO POWER COMPANY and UTILITY WORKERS
UNION OF AMERICA (CIO)

Case No. 8-C-2179

AMENDED DECISION

December 17, 1948

On August 9, 1948, the Board issued a Decision and Order in the above-entitled proceeding,¹ finding that the Respondent had engaged in certain unfair labor practices affecting commerce and ordering that the Respondent cease and desist therefrom and take certain affirmative action which the Board found will effectuate the policies of the Act.

On October 20, 1948, the Board, desiring to reconsider its Decision and Order and determine whether to amend the same, in accordance with Section 10 (d) of the Act, issued an Order to Show Cause why (1) it should not accept the offer of proof submitted by the Respondent at the hearing on February 24, 1948, and thereupon consider whether or not certain of the Respondent's employees classified as control operators are supervisors within the meaning of Section 2 (11) of the Act, as amended, and why (2) upon acceptance of such offer of proof and consideration of the above question, the Board should not make such findings of fact and modifications of its Decision and Order as may appear appropriate. Thereafter, the Respondent and the Union respectively filed responses to the Order to Show Cause.

We have considered the responses of the parties and find that no sufficient cause has been shown why we should not proceed as indicated in the aforesaid Order to Show Cause. Accordingly, we hereby accept the Respondent's offer of proof rejected by the Trial Examiner and, upon the basis thereof, and the entire record in the case, we hereby amend our Decision of August 9, 1948, to the limited extent hereinafter indicated.²

¹ 78 N. L. R. B. 1134.

² The Order issued in conjunction with the Decision of August 9, 1948, however, remains in effect without change.

80 N. L. R. B., No. 205.

As noted in the Intermediate Report,³ the Respondent's chief defense to the refusal to bargain allegation of the complaint is that the bargaining unit alleged to be appropriate therein is not appropriate, because it includes control operators who the Respondent contends are supervisors within the meaning of the definition of "supervisor" contained in Section 2 (11) of the Act, as amended.⁴ The Trial Examiner found the Respondent's contention to be without merit because, in his opinion, under Section 103 of the Labor Management Relations Act,⁵ the amendment made in Section 2 (11) was not operative as to this case. The Trial Examiner therefore made no specific finding as to whether the control operators are in fact supervisors under the amended Act, but predicated his appropriate unit finding upon the Board's prior unit determination in Case No. 8-R-2463.⁶ In view of findings hereinafter made with respect to the supervisory status of the control operators under the amended Act, however, we deem it unnecessary to adopt the Trial Examiner's conclusion as to the applicability of Section 103 to this case.

SUPPLEMENTAL FINDINGS

On April 14, 1947, the Board issued a Decision and Direction of Election⁷ finding, *inter alia*, an appropriate unit of all regular employees at the Respondent's Tidd plant, including control operators. With respect to these control operators, whose inclusion or exclusion from the unit by reason of their alleged supervisory status constitutes the sole issue herein, the decision stated:

Control operators: The Tidd plant is probably the most highly automatic electric generating plant in the industry. Practically all the controls for operating the generating unit, consisting of boilers, turbine, generators, fans, pumps and related auxiliary and accessory equipment, is concentrated in a single control room. Because of the automatism of the equipment only one control operator aided by two assistants, an assistant control operator

³ Issued on March 25, 1948.

⁴ *Infra*.

⁵ Section 103 provides:

No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

⁶ *Matter of The Ohio Power Company*, 73 N. L. R. B. 384. The amendments to the Act were passed and became effective between the representation hearing and the complaint hearing herein.

⁷ *Ibid*.

and an auxiliary equipment operator, are required to perform the work for which many more operators are needed in less highly automatic generating plants. The control operator spends practically all his time in the control room controlling the various pieces of equipment by push buttons or switches. Necessary work outside the control room is done by the assistant control operator or the auxiliary equipment operator under the direction of the control operator. The control operators are licensed stationary engineers of the State of Ohio. They are paid the highest hourly rate in the plant. The control operator is responsible to the shift operating engineer who in turn is under the supervision of the operations supervisor. The latter takes his orders from the plant superintendent. According to the Employer's superintendent of plants, recommendations of a control operator as to the employment, discharge, or discipline of his assistants "would be given a great deal of weight, but he would not, except under extreme circumstances, have anything to do with that." In view of the foregoing we find that the control operators are not supervisors within the Board's customary definition. As part of the regular operating force, we shall include them in the unit.

On June 10, 1948, the Board certified the Union as the exclusive bargaining representative of the employees in the appropriate unit upon the basis of election results which showed 22 votes cast for, and 20 votes against, the Union, and 1 challenged vote unopened. On June 13, 1947, when the Union made its demand, and thereafter, the Respondent refused to bargain with the Union, on the ground that the inclusion in the unit of the 4 control operators in question renders the unit inappropriate, and despite the Board's certification, removed the statutory duty to bargain.

At the complaint hearing on February 24, 1948, the Respondent sought to introduce further evidence bearing upon the supervisory authority of the control operators. The Trial Examiner limited the admission of such evidence to testimony showing that on December 1, 1947, the control operators were changed from hourly paid to salaried employees receiving in excess of \$325 per month and were made exempt under the Wage-Hour Law. Certain additional evidence offered by the Respondent was excluded by the Trial Examiner on the ground that it was not shown that such evidence was newly discovered or unavailable, or not known to the Respondent at the time of the representation hearing, or that the Respondent had not been given full opportunity to be heard. However, a proffer of the excluded evidence was received in the form of testimony by the Respondent's witness,

who was fully cross-examined by counsel for the General Counsel and the Union.⁸

An accurate and detailed discussion of the Respondent's offer of proof, as contained in the Intermediate Report, follows:

This proffer shows that the control operator is employed in the control room where instruments register the operation of the equipment at the plant. He is responsible to the shift operating engineer who spends part of his time in the control room. In the event an emergency is indicated on the instruments and the shift operating engineer is performing other of his duties either in or outside the plant, the control operator would, if he had the opportunity, report it to the engineer; if he did not have the opportunity to do so, he would proceed to meet the situation or at the first opportunity he would reach for the microphone and announce the circumstances on the public address system. The shift operating engineer would generally know independently of the emergency because of the variations in the sound of the operating equipment. Normally, the employees at the plant are directed in their work by their respective supervisors through a series of work orders, but during a minor or major emergency the control operator has authority to requisition and direct the activities of substantially all the employees to keep the plant in operation. Several times during the last winter, for example, when coal deliveries were diverted to another point and the plant used coal from storage which had been frozen and had the effect of clogging the conveying system, the control operators requisitioned men from the maintenance department to hammer on the chutes and poke the coal along to maintain a stream of supply.

The proffer also shows that the respondent plans to add additional sections to the Tidd plant and that when the Tidd plant is developed to its anticipated capacity, its output will be comparable to that of the respondent's Philo plant. The respondent plans at that time to set up a supervisory organization at the Tidd plant which it considers comparable to that of the Philo plant, where all persons in the supervisory organization are excluded from the bargaining unit. The proposed organizational set-up at the Tidd plant will consist of a shift operating engineer and 4 or 5 control

⁸ Taking of the Respondent's offer of proof in this fashion does not appear to conflict with the Rules of Civil Procedure for the District Courts of the United States (Rule 43); nor does it operate as a waiver of objection by counsel for the General Counsel and the Union and therefore render the proffered evidence admissible, as contended by the Respondent.

operators, one operator for each of the additional sections to the Tidd plant.⁹

As stated above, we have overruled the Trial Examiner's rejection of this offer of proof and have assumed as true the matter contained therein for the purpose of determining whether, upon all the facts before us, the control operators are "supervisors" within the meaning of Section 2 (11) of the Act, as amended.

Section 2 (11) provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, *or responsibly to direct them*, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [Emphasis supplied.]

Except for the addition of the phrase "or responsibly to direct them," Section 2 (11) reflects, in substance, the Board's customary definition of "supervisor" prior to the enactment of the amendment.¹⁰ Interpreting in the disjunctive the specific authorities enumerated in Section 2 (11),¹¹ we are of the opinion that the power thereunder "responsibly to direct" is sufficient to render an individual a "supervisor" within the Act's definition. Legislative history indicates, however, that the broad scope implied in a literal construction of the authority "responsibly to direct" was not intended by Congress, but rather that a specific qualified meaning was attached to this phrase.

Senator Flanders, in offering this additional authority as an amendment to the definition of "supervisor" in the Senate bill, apparently desired specifically to encompass those individuals who engage regularly in the basic acts of supervision but who do not exercise the

⁹ The Respondent indicated in its response to the Order to Show Cause that it is in substantial agreement with this résumé of its proffer.

¹⁰ See National Labor Relations Board Eleventh Annual Report, p. 31 and Twelfth Annual Report, p. 23. See also Senator Taft's comment respecting Senator Flanders' proposed amendments to Sec. 2 (11), *viz*:

Mr. President, this merely adds to the definition of the word "supervisor." The definition [of "supervisor"] in the [Senate] bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objection certainly to including the words "or responsibility [sic] to direct them" . . . 93 Cong. Rec. 4805; Legislative History of LMRA, Vol. 2, p. 1304.

¹¹ *N. L. R. B. v. Edward G. Budd Mfg. Co.*, 169 F. (2d) 571 (C. C. A. 6); see also *N. L. R. B. v. Brown & Sharpe Mfg. Co.*, 169 F. (2d) 331, 335 (C. C. A. 1) stating, in effect, that it is of no consequence that alleged supervisors possess authority to use their independent judgment with respect to some aspects of their work; the decisive question is whether they possess authority to use their independent judgment with respect to the exercise by them of *one or more* of the specific authorities listed in Section 2 (11) of the Act, as amended.

other specific powers of supervision set forth in the definition, e. g., power to hire, discharge, and effect changes in employment status, which are vested exclusively in a "personnel manager or department." These individuals, the Senator asserted, "responsibly direct" in the exercise of the remaining "basic" functions of supervision, and still "are above the grade of straw bosses, lead men, set-up men, and other minor supervisory employees."¹²

It is evident, therefore, that individuals having the authority "responsibly to direct" contemplated in Section 2 (11) fall within a narrow area lying between those "above the grade of straw bosses, lead men, set-up men and other minor supervisory employees," and those who do not possess *any* of the other specific authorities enumerated in the Act's definition. Apart from Senator Flanders' hypothetical illustration, what constitutes such responsible direction must necessarily be determined upon the facts in each case. Indeed, we have held before and after the amendments that fringe individuals, such as "lead men" and "set-up men," under certain circumstances, are supervisors,¹³ and, under other circumstances, that they are not supervisors.¹⁴

One of the circumstances considered by the Board in determining the supervisory status of an individual, where the evidence does not fairly show that he possesses the power to exercise independent judgment with respect to any of the authorities contained in Section 2 (11) of the amended Act, is the proportion or disproportion of supervisors

¹²The applicable portion of Senator Flanders' discussion of this amendment follows:

. . . As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this Act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer worker to another department on other work instead of discharging, disciplining, or otherwise following the recommended action.

In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what jobs shall be undertaken and who shall do it. He gives instructions for its proper performance. If needed, he gives training for the performance of unfamiliar tasks to the worker to whom they are assigned.

Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees." As enumerated in the report, their essential managerial duties are best defined by the words "direct responsibility," which I am suggesting . . ." 93 Cong. Rec. 4804; Legislative History of LMRA, Vol. 2, p. 1303.

¹³*Matter of Underwood Corporation*, 67 N. L. R. B. 1017 (set-up men); *Matter of Grand Central Airport*, 70 N. L. R. B. 1094 (lead men); *Matter of Continental Industries, Inc., of Kansas City, Missouri*, 76 N. L. R. B. 561 (lead men); see also *Matter of United States Gypsum Company*, 79 N. L. R. B. 158 (gang leader); *Matter of Olin Industries, Inc.*, 79 N. L. R. B. 455 (group leader).

¹⁴*Matter of American Optical Company*, 63 N. L. R. B. 924 (leadmen); *Matter of The Schable Company*, 69 N. L. R. B. 522 (set-up men); *Matter of General Forge, Inc.*, 76 N. L. R. B. 488 (set-up men); see also *Matter of The Austin Company*, 77 N. L. R. B. 938.

over rank-and-file employees in the unit. Thus, we have found, for example, that certain persons were supervisors where a contrary finding would leave only 3 supervisors for 175 employees,¹⁵ and where the persons in question were responsible for the output of 8 to 30 employees.¹⁶ We have also excluded as a supervisor an individual who was in sole charge of the plant over substantial periods of time.¹⁷ On the other hand, we have included in a unit disputed persons, where a contrary conclusion would hold that groups of 3 or 4 employees in a relatively small organization are directly supervised in each instance by 5 persons.¹⁸

It seems clear on all the evidence in this case that the control operators do not possess direct authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." While the control operator on duty might direct the work outside the control room of the assistant control operator and the auxiliary equipment operator, only under "extreme circumstance" would he be called upon to make recommendations as to the employment, discharge, or discipline of these assistants. Assuming, *arguendo*, that the control operator does perform "supervisor" duties in major and minor emergencies,¹⁹ such as described hereinabove in the Respondent's offer or proof, this sporadic and infrequent exercise of authority is insufficient to invest him with the "supervisory" cloak contemplated in the amended Act.²⁰ Moreover, we find that the Respondent's expansion plans as to the Tidd plant have no significant bearing upon the present status of these employees, and that the higher rate of pay and different mode of payment governing the control operators are not determinative factors as to this issue.²¹ Nor do we deem it material to the issue that these control operators remained on duty at the Tidd plant, voluntarily or otherwise, while a strike was in progress.²² Furthermore, the immediate and substantially constant supervision exercised by each shift operating engineer, who, in turn, is supervised by the operations supervisor and the plant superintendent, convinces us that the control operators herein do not have such power

¹⁵ *Matter of Moroweb Cotton Mills Company*, 75 N. L. R. B. 987.

¹⁶ *Matter of Steelweld Equipment Company, Inc.*, 76 N. L. R. B. 831.

¹⁷ *Matter of Royal Tallow & Soap Co., Inc.*, 78 N. L. R. B. 834.

¹⁸ *Matter of The Austin Company*, 77 N. L. R. B. 938.

¹⁹ The necessary implication being that these are not normal and regular occurrences.

²⁰ See, e. g., *Matter of Providence Public Market Company*, 79 N. L. R. B. 1482

²¹ Cf. *Matter of General Motors Corp., Chevrolet Forge, Spring and Bumper Division*, 80 N. L. R. B. 145.

²² Such evidence was offered by the Respondent in its motion to reopen the record after the close of the complaint hearing; the motion was denied, as stated in our Decision and Order of August 9, 1948.

“responsibly to direct” their assistants as is intended in the Act’s definition of “supervisor.”²³

Accordingly, upon the entire record in the case, we find that the control operators at the Respondent’s Tidd plant are not supervisors within the meaning of Section 2 (11) of the Act, as amended, and that the Trial Examiner properly included them in the appropriate unit.

MEMBERS HOUSTON and GRAY took no part in the consideration of the above Amended Decision.

²³ See, e. g., *Matter of The Austin Company, supra*; see also *Matter of Allen-Morrison Co.*, 79 N. L. R. B. 903; *Matter of Fitzgerald Mills Corp.*, 77 N. L. R. B. 1156.