

IN the Matter of FORD COLLIERIES COMPANY, EMPLOYER and LOCAL UNION No. 50, UNITED CLERICAL, TECHNICAL AND SUPERVISORY EMPLOYEES UNION OF THE MINING INDUSTRY, DIVISION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

Cas No. 6-R-1213.—Decided August 28, 1946

Rose, Eichenaur, Stewart and Lewis, by Messrs. John Corcoran and Adie Allen Stevens, of Pittsburgh, Pa., for the Employer.

Mr. Samuel Krimsly, of Pittsburgh, Pa., for the Petitioner.

Mr. Nathan Saks, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

Upon a petition duly filed, hearing in this case was held at Pittsburgh, Pennsylvania, on July 8 and 9, 1946, before Henry Shore, Trial Examiner. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

At the outset of the hearing the Employer stated that it was appearing specially, reserving the right to challenge the jurisdiction of the Board in the event that the Employer, at any stage of this proceeding, is denied any right to which it is entitled under the Act, including, in particular, the right to have the legal question here presented passed upon by a court of competent jurisdiction.¹ This statement was predicated upon the position of the Employer, as stated by it both at the hearing and in its brief, that, inasmuch as the Employer's mines are now in possession of the United States Government pursuant to Executive Order No. 9728,² and are being operated under the direction of the Coal Mines Administrator,³ the Administrator, and not the Employer, is the proper party to this proceeding; but that, if the

¹ However, notwithstanding this declaration, the Employer participated fully in the hearing

² Executive Order No. 9728, dated May 21, 1946, authorized the Secretary of the Interior to take possession of and to operate certain coal mines whose operations were interrupted or threatened by interruption as a result of existing or threatened strikes and other labor disturbances.

³ Pursuant to the authority vested in him by Executive Order No. 9728, the Secretary of the Interior, by order dated May 22, 1946, delegated the authority to supervise and direct the operation of the mines affected to the Coal Mines Administrator.

Employer is still to be considered the employer, inasmuch as the Administrator has expressed a determination to enter into collective bargaining agreements with unions certified by the Board as collective bargaining agents for the employees of the mines being operated by him, the Board should withhold action in this proceeding until the Administrator has indicated that he will take such action as is necessary to insure the Employer's right to have a judicial review of any Board certification which might be issued herein. We find the position of the Employer to be untenable.

With respect to the Employer's first contention, although the United States Government has taken possession of and is now operating the Employer's mines, the latter continues to be the "employer" within the meaning of the Act of the employees involved herein. This conclusion follows from the provisions of the War Labor Disputes Act, under the authority of which the executive order directing seizure of the mines was issued, the terms of the executive order and the regulations issued by the Secretary of Interior, all of which provide for the safeguarding of employee rights under the Act, including the right of collective bargaining, during the period of governmental operation. Accordingly, the Employer is the proper party to this proceeding.⁴

The Employer's alternative position is tantamount to a request that any certification that may issue in this proceeding be conditioned on the inclusion of a clause in any collective bargaining contract between the Coal Mines Administrator and the Petitioner requiring the latter to file an unfair labor practice charge against the Employer alleging refusal to bargain. Not only is the Employer's request premature since the Petitioner may lose the election directed herein, in which case no certification will issue, but, also, it is reasonable to assume that the Administrator, without direction by the Board, will include such a clause in any contract with the Petitioner, as is evidenced by the recent agreement signed by the Administrator covering supervisory employees in the mines owned by Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, following certification of the contracting union by the Board.⁵

⁴ See *N. L. R. B. v. West Kentucky Coal Company*, 152 F. (2d) 816 (C. C. A. 6), cert. denied June 10, 1946. The executive order, pursuant to which the Employer's mines were seized in the instant case, and the regulations issued by the Secretary of the Interior governing their operation, include the same provisions with respect to the continued recognition during the period of Government possession of the rights secured to the employees under the Act as were included in the executive order and the regulations of the Secretary of the Interior in that case.

⁵ The contract covering supervisory employees of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, provides:

(a) This agreement, directions of the Coal Mines Administrator hereunder or compliance therewith by the management, shall in no sense be viewed as a waiver by the affected coal company or the Union of such rights as may be possessed by them includ-

At the hearing the Employer moved to dismiss the petition. The Trial Examiner referred the motion to the Board. For reasons set forth hereinafter, the motion is hereby denied.⁶

At the hearing the parties stipulated that certain specified portions of the record and exhibits in the *Jones & Laughlin* case⁷ be incorporated by reference as a part of the record in this case.⁸ The Petitioner, while agreeing to the stipulation, objected to the materiality and relevancy of the matters contained therein. The Trial Examiner reserved ruling on the objection for the Board. The Petitioner's objection is hereby overruled.

Upon the entire record in the case, the National Labor Relations Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Ford Collieries Company, a Pennsylvania corporation, is engaged in the mining of coal at two mines, the Berry and Francis Mines, located about 25 miles north of Pittsburgh, Pennsylvania. These mines are "captive" mines in part in that normally the Employer ships about 60 percent of its production to its parent company, Wyandotte Chemical Company, which is engaged in interstate commerce, and sells the other 40 percent on the open market. However, at the present time the Employer for a temporary period is shipping practically all of its production to its parent company.

ing the right to a final judicial determination⁶ of the rights of supervisors under the National Labor Relations Act

(b) The Union agrees that, in accordance with the procedure of the National Labor Relations Board, it will file as soon as practicable (but in no event later than 10 days after it receives a written notice from the Coal Mines Administrator to do so—which notice may be given so as to require the filing on or after August 25, 1946) a charge of refusal to bargain against Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, to the end that the Company may have an opportunity to obtain a final judicial determination of the rights of supervisors at its mines under the National Labor Relations Act (18 L R R 226)

⁶Two of the grounds urged by the Employer in support of its motion to dismiss the petition are its contentions that (1) Section 9 (c) of the Act, if applied as requested by the Union, is unconstitutional as violative of the provisions of the 5th Amendment to the Constitution of the United States, particularly since Section 9 (c) is vague, uncertain and indefinite, and provides no standard which the Board could apply, and (2) Section 9 (c) applied to this case is unconstitutional since it delegates power to the Board to legislate regarding the facts in this case in violation of Article I, Section 1, and Article I, Section 8, Par 18, of the Constitution of the United States. We find no merit in these contentions. The constitutionality of the Act has long since been settled. See *N L R B. v. Jones & Laughlin Steel Corp.*, 301 U S 1

⁷*Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division*, 66 N L R B 386

⁸The matters incorporated by reference relate to the history of the Petitioner, relationship of the Petitioner to the United Mine Workers of America, the history of collective bargaining in the mining industry with respect to the demarcation line between supervisory and non-supervisory employees, and certain opinion testimony as to the effect of the organization of supervisory employees in the mines on the maintenance of safety and discipline

We find that the Employer is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATION INVOLVED

The Petitioner is a labor organization affiliated with the American Federation of Labor, claiming to represent employees of the Employer.⁹

III. THE QUESTION CONCERNING REPRESENTATION

The Employer refuses to recognize the Petitioner as the exclusive bargaining representative of the supervisory employees of the Employer.

In support of its motion to dismiss the petition, the Employer also contends that the individuals included in the Petitioner's proposed unit are not employees within the meaning of the Act, and that, therefore, the Board lacks jurisdiction to consider the present petition. The contention that supervisory employees are not employees within the meaning of the Act, and the arguments in support thereof, have been considered in a number of previous cases. Both the Board and the courts have found that the definitions of "employer" and "employee" contained in the Act are not mutually exclusive; that a foreman is an "employer" when he acts in the interest of his employer, but he is an "employee" when he acts in his own interest, as when he seeks to better the terms and conditions of his employment.¹⁰ Inasmuch as this proceeding covers the "employee" aspect of their relationships, we find that the supervisors here involved are employees within the meaning of Section 2 (3) of the Act.

We find that a question affecting commerce has arisen concerning the representation of employees of the Employer, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

Petitioner's contentions

The Petitioner seeks a unit consisting of all night foremen, assistant mine foremen, fire bosses, coal inspectors, machine bosses or master

⁹ The Employer contends that the Petitioner is not a labor organization within the meaning of the Act. Section 2 (5) of the Act states: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, rates of pay, hours of employment, or conditions of work." The supervisors involved in this proceeding being employees within the Act's definition, it clearly follows that the Petitioner, which seeks to represent them for collective bargaining purposes, is a "labor organization."

¹⁰ See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannonin Coal Division*, *supra*, and cases therein cited; *N. L. R. B. v. Packard Motor Car Company*, decided August 12, 1946, 157 F. (2d) 80 (C. C. A. 6).

méchanics, weigh bosses, motor bosses, outside foremen, house bosses, lamphouse superintendent, general master mechanic, safety engineer, and safety inspector, at the Employer's Francis and Berry Mines, excluding mine foremen, general superintendent, assistant general superintendent, clerical and technical supervisors, and all other employees.¹¹

Employer's contentions

The Employer's initial position is that no unit of its supervisory employees is appropriate, and that, therefore, the petition should be dismissed, on the grounds, *inter alia*, that: (1) The Petitioner is not qualified to represent the Employer's supervisory employees, since it is an integral part of the United Mine Workers of America, which is the exclusive bargaining representative of the Employer's rank and file production and maintenance employees; (2) the certification of the Petitioner as the bargaining representative of the Employer's supervisory employees would destroy every vestige of management control, and would be contrary to the express purposes and policies of the Act; (3) certain persons in the proposed unit are officers of the Commonwealth of Pennsylvania, with express power to enforce the laws of the Commonwealth, and the granting of the Petitioner's request for certification would be contrary to the laws of Pennsylvania, and, therefore, improper; and (4) the granting of the Petitioner's request for certification would destroy discipline in the mines and seriously impair the maintenance of safety. Alternatively, the Employer objects to the inclusion in the unit of night foremen, outside foremen, assistant mine foremen, general master mechanic, weigh bosses, house bosses, safety engineer, safety inspector, lamphouse superintendent and coal inspectors, either because they are not supervisors, or do not work at the mines, or are on a level of supervision equivalent to that of mine foreman, whom both parties would exclude from the unit.

The grounds urged by the Employer in support of its initial position, and the arguments therefor, were considered *in extenso* in the *Jones & Laughlin* case, and were found to be without merit.¹² The sole question, therefore, is whether the unit requested by the Petitioner represents a proper grouping of the Employer's supervisory employees for the purposes of collective bargaining.

¹¹ The Employer has a contract with the United Mine Workers of America covering all non-supervisory production and maintenance employees at the two mines. All of the categories in the Petitioner's proposed unit are excluded from the coverage of this contract.

¹² See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, supra*.

Inclusions in and exclusions from the unit

The Petitioner and the Employer, in the latter's alternative position, agree on the exclusion from the unit of the general superintendent, the assistant general superintendent, and the mine foremen, and the inclusion in the unit of fire bosses, master mechanics or machine bosses, and motor bosses. They disagree, however, on the following categories, all of whom the Petitioner would include, and the Employer exclude:

Night Foremen: There are two night foremen, one at each mine, who have charge of all the work in the mines on the night shift. Although state law requires the night foreman to have only an assistant mine foreman's certificate, the Employer's policy is to require the night foreman to have a mine foreman's certificate. The night foreman occupies the same position generally with respect to the employees on the night shift as the mine foreman does to the employees on the day shift. Accordingly, we shall exclude the night foremen.¹³

Assistant Mine Foremen: There are 12 assistant mine foremen, each of whom is in charge of a section of the mine and supervises the work of about 70 employees. He is required by state law to have an assistant mine foreman's certificate, and he is responsible under state law for the enforcement of safety laws in his section. The assistant mine foreman acts for the Employer in making individual contracts with the miners for the performance of "dead work" and "yardage," but the rates for such work are established by the collective bargaining agreement covering the rank and file employees. The contracts are also subject to the countersignature of the mine foreman. The assistant mine foreman reports and is responsible to the mine foreman, except that the assistant mine foreman working on the night shift is responsible to the mine foreman through the night foreman. He has the authority to assign or transfer the employees under him, but matters of discipline and discharge are usually handled by the mine foreman, with the assistant mine foreman merely making a report or recommendation to the mine foreman. It thus appears that the assistant mine foreman is on a lower level of supervision than the mine foreman. We shall, therefore, include the assistant mine foreman in the unit.¹⁴

Outside Foremen: There are two outside foremen, each of whom supervises about 50 employees engaged in surface operations. The

¹³ See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, supra*, where the similar category of general assistant mine foremen were excluded from the unit.

¹⁴ See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, supra*.

status of the outside foremen is similar to that of the mine foremen, who are excluded from the unit. We shall exclude the outside foremen.¹⁵

Weigh Bosses: At each mine there is a weigh boss who records the weight of the loaded coal cars and assigns the credit for the contents to the miners whose checks or tags are on the cars. The weigh boss performs his work at the bottom of the shaft in the mine, and is responsible to the mine foreman. He has no subordinates. We find that the weigh bosses are not supervisory employees as defined by the Board. We shall exclude them.¹⁶

General Master Mechanic: This individual¹⁷ has complete charge of all the mechanical and electrical installations both inside and outside the mines. His office is at the Employer's administrative offices, and he reports directly to the general superintendent. The master mechanics or machine bosses at each mine and the employees working under them are responsible to the general master mechanic insofar as the procedure and methods employed in their work are concerned,¹⁸ and to the extent that these employees come under his jurisdiction, the general master mechanic has the authority to discipline and discharge them. Thus, the general master mechanic occupies a status substantially similar to that of the mine foreman in his sphere of supervision. We shall, therefore, exclude the general master mechanic.¹⁹

Lamphouse Superintendent: This employee is in charge of the lamphouses for both mines. He directs the work of two full-time and two or three part-time employees at each lamphouse. He is responsible to the assistant general superintendent, and has the authority to discharge and discipline the employees regularly under his supervision. Although the disciplinary authority of the lamphouse superintendent is thus somewhat similar to that of mine foremen and outside foremen, the very limited number of employees under his supervision and the narrow scope of his duties indicates that his interests are more closely akin to those of the included categories of employees than to those of the excluded categories. Accordingly, we shall include the lamphouse superintendent.

House Bosses: There are two house bosses who supervise the maintenance and upkeep of the company-owned houses in which the employees of the Employer live. These houses are located in three mine

¹⁵ See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, supra* where the similar category of tippie foremen were excluded from the unit

¹⁶ See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, supra*, where the comparable category of weighmasters were excluded from the unit

¹⁷ At the present time this position is vacant, but it is expected to be filled shortly

¹⁸ The master mechanics and their subordinates are also responsible to the mine foreman with respect to the statutory duties for which the mine foreman is responsible

¹⁹ See *Matter of Jones & Laughlin Corporation, Vesta-Shannopin Coal Division, supra*, where the general master mechanic was excluded from the unit.

villages. One house boss has charge of two of these villages, and has six men under him; the other has charge of the third village, and has two men under him. They assign the houses, handle the renting and signing of leases, and requisition from the Employer's purchasing department the supplies which are needed for the repair of the houses. The house bosses report to the general superintendent, and have the authority to discharge and discipline the men working under them. As in the case of the lamphouse superintendent, the house bosses thus have disciplinary authority somewhat like the mine foreman and the outside foremen, but the importance of their position is considerably below that of the mine foremen. We believe that the interests of the house bosses are closer to those of the supervisors included in the unit than to those excluded. We shall include them.²⁰

Coal Inspectors: There are two coal inspectors, one at each mine, who inspect the manner in which the coal is cut and shot, and check the coal being loaded for impurities. They have no subordinates. As their title indicates, they are inspectors rather than supervisors within the Board's definition. We shall exclude them.

Safety Engineer: This individual heads the safety department. His office is located at the general administrative office of the Employer. He looks after all the safety work, makes inspections of the mines, and makes reports covering those inspections. He also handles the workmen's compensation claims for the Employer, with authority to make adjustments for such claims, subject to the approval of the state Workmen's Compensation Board as required by law. He is responsible to the general superintendent, and has one assistant, the safety inspector, whose work he supervises. In view of the fact that his work is primarily of an administrative or technical nature, we shall exclude the safety engineer from this unit of production and maintenance supervisors.²¹

Safety Inspector: This employee assists the safety engineer. He has no subordinates. We shall exclude him.²²

We find that all assistant mine foremen, house bosses, fire bosses, machine bosses or master mechanics, motor bosses, and lamphouse superintendent, at the Employer's Francis and Berry Mines, excluding general superintendent, assistant general superintendent, mine foremen, night foremen, outside foremen, general master mechanic, safety

²⁰ Although their work is performed away from the mines, the employees who work under the house bosses are included in the contract covering the rank and file production and maintenance workers. The inclusion of the house bosses in the unit of production and maintenance supervisors, therefore, conforms to the unit pattern established for the rank and file production and maintenance employees. See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, supra*

²¹ See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, supra*, where the similar category of safety director was excluded from the unit

²² See *Matter of Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division, supra*, where the safety inspector was excluded from the unit.

engineer, safety inspector, weigh bosses, coal inspectors, clerical and technical supervisors, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.²³

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with Ford Collieries Company, Curtisville, Pennsylvania, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Sixth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of National Labor Relations Board Rules and Regulations—Series 3, as amended, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, to determine whether or not they desire to be represented by Local Union No. 50, United Clerical, Technical and Supervisory Employees Union of the Mining Industry, Division of District 50, United Mine Workers of America, for the purposes of collective bargaining.

MR. JAMES J. REYNOLDS, JR., took no part in the consideration of the above Decision and Direction of Election.

²³ The non-supervisory production and maintenance employees of the Employer are included within the coverage of an Association-wide unit represented by the United Mine Workers. No contention was made in the present proceeding that the proper unit for the supervisors should similarly be Association-wide. Accordingly, we need not pass on this question