

conclusions and recommendations as to these objections, and shall adopt them. These objections are therefore hereby overruled.

CERTIFICATION OF REPRESENTATIVES

IT IS HEREBY CERTIFIED that the American Federation of Labor has been designated and selected by a majority of the employees of Southern Fruit Distributors, Inc., in the appropriate unit described in the Decision and Direction of Election, as their representative for the purposes of collective bargaining, and that pursuant to Section 9 (a) of the Act, the said labor organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Chairman Herzog took no part in the consideration of the above Supplemental Decision and Certification of Representatives.

AMERICAN OPTICAL COMPANY *and* SOUTHERN CALIFORNIA OPTICAL TECHNICIANS UNION, INDEPENDENT, Petitioner. Case No. 21-RC-2736. April 21, 1953

DECISION AND CERTIFICATION OF REPRESENTATIVES

Pursuant to a stipulation for certification upon consent election, an election by secret ballot was conducted on September 23, 1952, under the direction and supervision of the Regional Director for the Twenty-first Region. At the conclusion of the election, the parties were furnished a tally of ballots which showed that of approximately 14 eligible voters, 14 cast ballots, of which 7 were cast for the Southern California Optical Technicians Union, Independent, herein called the Petitioner, 6 were cast against the Petitioner, and 1 ballot, that of Charles Schwinn, was challenged by the Petitioner on the ground that Schwinn was a supervisor. No objections to the conduct of the election were filed within the time provided therefor.

As the challenged ballot was sufficient to affect the results of the election, the Regional Director, acting pursuant to the Board's Rules and Regulations, investigated the issues raised by the challenge, and on September 30, 1952, issued his report on challenged ballot in which he concluded that Schwinn was a supervisor within the meaning of the Act; recommended that Schwinn be ruled an ineligible voter and that the Petitioner be certified as the exclusive bargaining representative of the Employer's employees in the stipulated unit. On October 9, 1952, the Employer filed exceptions to the Regional Director's report on challenged ballot. On October 13, 1952, the Employer filed supplemental exceptions.

Thereafter, on the 13th day of November, 1952, the Board issued its Order directing that a hearing be held to determine the supervisory status of Charles Schwinn. The Board further ordered that the hearing officer, designated for the purpose of conducting the hearing, prepare and cause to be served upon the parties a report containing resolutions of the credibility of the witnesses, findings of fact, and recommendations to the Board as to the disposition of the challenged ballot.

Pursuant to the Board's direction, a hearing was held on December 11 and 12, 1952, before George H. O'Brien, hearing officer. Both the Petitioner and the Employer appeared and participated. On February 5, 1953, the hearing officer issued and caused to be served upon the parties his report on challenged ballot. In his report, the hearing officer found that, although the employees in the stipulated unit¹ are so skilled that a minimum of direct supervision is required, and although responsibility for direct supervision of the employees is lodged in the Employer's branch manager, nevertheless the branch manager has the power to delegate and has, in fact, delegated supervisory authority to Schwinn. He found that Schwinn was introduced to the employees as their new supervisor and that the employees were told to take all their problems to him and not to Bartley, the branch manager. The hearing officer further found that Schwinn exercises the authority delegated to him, in that he uses independent judgment in advising workers in the performance of their jobs, in permitting absence from work, and in making effective recommendations for hire, discharge, and increase in pay. The report concluded with the recommendation that the ballot of Charles Schwinn be not opened or counted and that the Board certify the Petitioner as exclusive bargaining representative of the employees in the stipulated unit.

Thereafter, on February 23, 1953, the Employer filed timely exceptions to the hearing officer's report and recommendations and filed a brief in support of the exceptions.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Murdock and Peterson].

The Board has reviewed the rulings of the hearing officer at the hearing and finds no prejudicial error was committed.² The rulings are hereby affirmed. The Board has considered the hearing officer's report, the Employer's exceptions and brief, and the entire record in this case, and hereby adopts the findings and recommendations of the hearing officer. We find, as did the hearing officer, that Schwinn, although performing largely nonsupervisory duties, nevertheless regularly

¹ Hereinafter found appropriate in paragraph numbered 4 hereof.

² The Employer contends that the hearing officer erred in not crediting certain testimony. A hearing officer in a proceeding such as this has the advantage of observing and hearing the witnesses and we attach great weight to his credibility findings. We do not overrule them except where the preponderance of all the relevant evidence convinces us that he is incorrect. No such conclusion is warranted here. Semet-Solvay Division, Allied Chemical & Dye Corporation, 96 NLRB 1374.

and responsibly exercises supervisory authority and is therefore a supervisor within the meaning of the Act.³ Accordingly, we sustain the challenge to his ballot and declare the same to be invalid.

Upon the entire record in this case the Board further finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved herein claims to represent employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

All bench and surface room employees at the Employer's Los Angeles, California, branch, excluding all other employees including watchmen, guards, professional employees, and supervisors as defined in the Act.⁴

Because, as the tally of ballots shows, a majority of the valid ballots were cast for the Petitioner, we shall certify it as the exclusive bargaining representative of all the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVES

IT IS HEREBY CERTIFIED that Southern California Optical Technicians Union, Independent, has been designated and selected by a majority of the employees of the American Optical Company, Los Angeles, California, in the unit found appropriate in paragraph numbered 4, above, as their representative for the purposes of collective bargaining, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

³See George W. Spratt Optical Company, 103 NLRB 397; Providence Washington Insurance Company, 100 NLRB 248.

⁴The unit is thus described in the stipulation for certification upon consent election.

HEARING OFFICER'S REPORT ON CHALLENGED BALLOT

Pursuant to an Order of the National Labor Relations Board issued November 13, 1952, directing that a hearing be held for the purpose of determining the supervisory status of Charles Schwinn, and upon due notice to all parties a hearing was held before the undersigned at Los Angeles, California, on December 11 and 12, 1952. All parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issue, and to file briefs. The Employer filed a brief which has been read and considered by the hearing officer.

I. PRELIMINARY STATEMENT

Pursuant to a stipulation for certification upon consent election between American Optical Company (herein called the Company) and Southern California Optical Technicians Union, Independent (herein called the Union), an election was held among all the employees in the Company's Los Angeles Laboratory on September 23, 1951. There were 7 votes cast for the Union, 6 votes cast against the Union, and 1 vote, that of Charles Schwinn, working supervisor, was challenged by the Union. On September 30, 1952, the Regional Director

issued a report finding that Charles Schwinn was a supervisor within the meaning of the Act, recommending that he be ruled an ineligible voter and that the Union be certified.

On October 29, 1952, the Company excepted to the Regional Director's report in the following particulars.

(1) To that portion of the Report which purports to quote the job description of Working Supervisor and to the paragraph immediately following which purports to be a statement of the employer.

(2) To that portion of the Report that reads as follows: "Investigation reveals that Charles Schwinn supervises 13 employees employed in the laboratory which is composed of two departments, bench and surface. There is a foreman in the surface department who is under the supervision of Schwinn. Schwinn supervises the employees in the bench department directly. Schwinn assigns work to the various operators to maintain steady flow of production. When necessary, Schwinn transfers the laboratory employees from one job to another. When problems arise concerning work the employees take the problems to Schwinn for necessary solution or action."

(3) To that portion of the Report that reads as follows: "Schwinn is directly under the supervision of the branch manager. When an applicant for employment is being interviewed by the branch manager Schwinn normally sits in on the interview and is consulted by the branch manager on the advisability of employing the applicant. When the branch manager decides to terminate an employee for economic or other reasons Schwinn normally notifies the employee that he is terminated."

(4) To that portion of the Report that reads as follows: "Schwinn's recommendation to the branch manager that an employee be terminated for inefficiency or other causes normally results in the branch manager investigating the matter and taking what action he deems appropriate. The employee may be transferred to another job or discharged."

(5) To that portion of the Report that reads as follows: "Schwinn estimates that he spends approximately 90 percent of his time in inspecting the work of and laying out work for the employees."

(6) To the fact that the Report fails to mention the employer's contention that Schwinn's functions of assignment, direction and instruction are overwhelmingly routine and constitute only a negligible portion of his duties.

(7) To the fact that the Report fails to mention that in all of the company's organized laboratories in the Western Region, the Working Supervisor has been included in the unit comprising bench and surface room employees.

II THE EVIDENCE

The laboratory which is the subject of this proceeding is one of a very large number of similar units in population centers throughout all of the United States and its territories. These laboratories process lenses which are manufactured in finished or semifinished form by the plant of the Company located in Southbridge, Massachusetts, and assemble these lenses with frames manufactured in the same plant to fill prescriptions from the eye care professions. Each laboratory is part of an integrated local office called a branch which also employs stock clerks, prescription clerks, and office clericals. The branches in addition to the work of the laboratory also engage in selling stock and related items to the trade. Each branch office is under a branch manager, who in turn is responsible to a zone manager, in turn responsible to a regional manager with final authority and responsibility lodged in the main office of the Company in Southbridge.

The western region with headquarters in San Francisco comprises 4 zones and 46 branches.¹

The Los Angeles branch shares space and personnel (except for the laboratory) with the Los Angeles zone. Stock clerks and prescription clerks receive instruction and supervision from both the branch manager, Mr. Bartley, and the zone manager, Mr. Davis.

It is the contention of the Company that all supervisory authority is lodged in the branch manager and his superiors and that (except in the New York laboratory which because of its size requires the services of a nonworking supervisor), there is no lower level of supervision. The Company further contends that the term "working supervisor" is misleading and that a more accurate description would be "all around man."

¹Laboratory employees in only four of these branches are organized and in the organized branches the "working supervisor" is included in the bargaining unit by agreement of the parties. The Union in this case was organized in 1952 and has no contract with any optical company.

Testimony was received from Mr. Schwinn himself, from the branch manager and Mr Schwinn's immediate superior, Mr Bartley, and from the regional manager, Mr McChesney Testimony was also received from seven workers in the Los Angeles laboratory.

The regional manager identified a job description for working supervisor and testified that this description was prepared by the Southbridge office and was applicable to the entire organization. He further testified that the branch manager, in this case Mr. Bartley, would have authority to change the duties and responsibilities of working supervisor from the manual description and he did not know whether or not Mr Bartley followed the job description in delegation of authority to Mr Schwinn

He did testify that all supervisory authority was vested in Mr Bartley I credit the testimony of Regional Manager McChesney

The job description of working supervisor is as follows:

Classification	Job #100	Working Supervisor
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Description. Assist, direct, instruct employees in performance of all jobs in laboratory. Assign work to operators according to requirements of schedule; give necessary instructions. Assist operators in solution of technical or routine questions; decide when to refer questions to Branch Manager, and be sure all facts are available. Instruct new employees in duties and laboratory routine, including proper care of laboratory equipment, break in older employees on new work. Be sure that work is assigned according to requirements of work load to maintain full flow, and that all operators are kept busy.

Job carries responsibility for assignment of work, instruction of operators, and assistance in technical problems, but not for hiring, firing, discipline, wage administration, and employee relations in general.

As required by work schedule, perform most or all of laboratory jobs as individually described usually assuming responsibility for particularly delicate or intricate jobs. Perform productive operations whenever not engaged in assisting other employees

Mr. Bartley, the branch manager, testified that he exercised direct supervision over all of the laboratory work, that he spent about 10 hours a week in the laboratory, that all hiring and firing was performed by him without advice from or consultation with Schwinn, that each laboratory employee was a skilled worker in his own line, and that the laboratory operates without any need for continuous supervision. He testified that Schwinn exercised no supervisory powers, that all Schwinn's time was occupied by routine and repetitive work. That Schwinn's only discretion extended to himself jumping in and helping with an operation which was temporarily unmanned or undermanned and that his regular duties kept him occupied.

For reasons which will appear hereafter, I do not believe that Bartley directly supervised the work of the laboratory and believe that he relied upon Mr Schwinn for such immediate supervision as there was, even though it appears that the entire operation is largely automatic.

Mr Schwinn testified that he had given a truthful statement to the Board agent and the statement was received in evidence without objection This statement, on which Regional Director relied, is as follows:

I, Charles Schwinn, after being duly sworn under oath depose and say.

That I have been employed by the American Optical Co. for about 7 years. I have been employed in Los Angeles for the last 5 or 6 months My classification is "working supervisor." Prior to coming to Los Angeles I was employed by the American Optical Co. in Dayton, Ohio as a working supervisor

In my capacity as supervisor I direct or supervise the work of 13 employees in the surfacing and finishing department. I have one foreman under me who is in charge of the surfacing department.

I route and assign work to keep the finishing and surfacing departments operating smoothly I also inspect the work of the surfacing and finishing departments to see that it is done properly.

I do not have the authority to hire or fire employees. However, when directed from the office by Mr. Bartley, the manager, I actually notify the employees that they are discharged. I do not notify new employees when they are hired, that they are hired.

In the case of Gloria Moreno I told Mr. Bartley that she was absent from work and that I had work to get out. I asked Mr. Bartley what we were going to do about Gloria Moreno. Mr. Bartley decided to terminate her employment, I sent her a telegram over my signature notifying her that her employment was terminated.

When new employees are being interviewed I generally sit in while they are being interviewed by Mr. Bartley. Mr. Bartley will generally ask me if we can use the applicant if he will fit into our operations.

After a new employee is hired I instruct him in his duties and supervise his work or ask others to help him in his work.

To my knowledge the Co. does not have a written merit rating system Mr Bartley will usually ask me how a new employee is making out.

If there is a shortage of work Mr Bartley will generally consult me about laying the employee off. He desires to determine if laying off employees will interfere with getting the work out. He also consults me if he thinks we need more employees.

I spend about 90% of my time inspecting and laying out work.

I have never recommended that any employee be promoted. I do not recommend pay raises. Wage increases are handled by the office.

I have never reprimanded or disciplined an employee. I have no authority to transfer an employee from one branch or factory to another. I do have the authority to transfer the employees under me from one job to another, such transfer would only be made to maintain the even flow of production.

I am paid on an hourly basis at the rate of \$2.15 per hour.

In his testimony Mr. Schwinn contradicted his statement almost in its entirety testifying that: All employees know what to do; he does not assign work; he has never interviewed an applicant for employment; he sometimes helps other employees with advice based on his greater experience; he has never recommended any termination; on one occasion he discharged an employee and on another occasion laid off two employees, both of which actions were taken on Mr. Bartley's specific instructions; and the work of the laboratory was so well organized and the workers so experienced and highly skilled that the laboratory runs without supervision.

Mr. Schwinn explained this inconsistency by saying that when he was interviewed by Mr. Driscoll he "tempted to blow the job up a little bit" I am inclined to believe that in the presence of his superiors, who had testified previously and under interrogation by a representative of the home office of the Company, Mr. Schwinn was tempted to and did blow his job down a little bit I am unable to credit Mr. Schwinn's denials that he had ever exercised supervisory powers.

I believe that Mr. Bartley did in fact delegate to Mr. Schwinn supervisory authority, and that Mr. Schwinn exercised this authority with the knowledge and ratification of Mr. Bartley, though perhaps not of Mr. Bartley's superiors.

Employee Marshall Orteago testified that he is the highest paid man in the surface room and is regarded as a foreman by the eight employees with whom he works. If he has any problems he takes them up with Mr. Schwinn. He gives pointers to new employees and if a job is unmanned or undermanned he does it himself. He has no direct contact with Mr. Bartley.

Margaret Weber (who had 10 years' experience) testified that she works in the surface room under Foreman Marshall Orteago and she consults with him 2 or 3 times a day with regard to work problems. In the absence of Mr. Orteago she goes to Mr. Schwinn, never to Mr. Bartley. On one occasion when she wanted a day off she asked and obtained permission from Mr. Schwinn. When Mr. Schwinn was introduced to the employees by Mr. Bartley, they were told that all problems should be taken up with Mr. Schwinn and should not be taken to Mr. Bartley.²

Louise Meo testified that she had over 10 years' experience and worked in the bench room under Mr. Schwinn, that she takes problems concerning her work to Mr. Schwinn. That when she suggested to Mr. Schwinn that she should have a raise, he got one for her.

Daniel Blitstein testified that he had been employed by the Company for 31 years and is an all around surface room man. Blitstein testified that Orteago was his foreman and that he occasionally asks Orteago for advice and assistance. Blitstein testified that when Schwinn came to work in Los Angeles the following transpired:

Mr. Bartley brought Charlie in and introduced him as our new supervisor and informed us if we had any problems we were to go to Charlie, and if we went to Mr. Bartley we would be going over Charlie's head and it wouldn't be the proper thing to do.

Blitstein, during the 7 months he worked in Los Angeles, never took any problem to Mr. Bartley. Recently Blitstein asked Schwinn for a wage increase and was informed by Schwinn that it was being considered.

² Mr. Bartley performed the duties of "working supervisor" or "all around man" in the laboratory from the resignation of Pete Ketterer until the appointment of Mr. Schwinn. Although Bartley testified that he spent 10 hours a week in the laboratory, the testimony of all other witnesses is that since the appointment of Schwinn, Bartley looks in on the laboratory only occasionally. Bartley gives no direct orders to any laboratory worker and consults with Schwinn only once or twice a week.

Roland Tullis, Jr., testified that he had worked 8 years in the Los Angeles laboratory. Tullis stated that Bartley in introducing Schwinn said that Pete (Ketterer) had quit, that Schwinn would be the supervisor, and that Orteago would run the surface room. All problems were to be taken up with Mr. Orteago or Mr Schwinn and that Mr Bartley was not to be bothered.

Jamie Ramos with 2 years of experience testified that he was hired by Mr. Schwinn about a month before the hearing and had not been interviewed by Mr. Bartley before he started to work.

I credit in full the testimony of employees Marshall Orteago, Margaret Weber, Louise Meo, Daniel Blitstein, Roland Tullis, Jr., and Jamie Ramos.

III. CONCLUDING FINDINGS

1. Laboratory employees are so skilled in their particular jobs that a minimum of direct continuous supervision is required.

2. Policies are laid down by the Southbridge office and expressed in an employee's manual so the duties of lower-level supervision are largely restricted to seeing that the policy and practice is complied with.

3. Responsibility for direct supervision of the laboratory is lodged in the branch manager.

4. The general duties and responsibilities of a working supervisor are prescribed by Southbridge.

5. Schwinn's actual duties correspond almost exactly with the official job description of working supervisor.

6. The branch manager has the power to delegate authority to the working supervisor.

7. Bartley did in fact delegate supervisory authority to Schwinn.

8. Schwinn uses independent judgment in advising workers in the performance of their jobs, in permitting absence from work, and in making effective recommendations for hire, discharge, and increase in pay.

9. Schwinn is regarded as their supervisor by the employees in the laboratory.

10. Bartley spends considerably less than one-fifth of the working day in the laboratory and exercises little or no direct authority over laboratory employees.

IV. RECOMMENDATION

In view of the foregoing and because it is impossible to conceive that an optical laboratory in which 14 persons are employed, where each operation must follow a special often complicated and sometimes unclear prescription, where intricate precision tools and inspection devices are used, could operate without immediate responsible direction for more than three-fourths of the working day, I recommend that the Board find that Charles Schwinn was, on the day of the election, a supervisor within the meaning of Section 2 (11) of the Act.³ Bausch and Lomb Optical Company, 92 NLRB 139, 140; Tri-Pak Machinery Service, Inc., 94 NLRB 1715, 1723.

I further recommend that the ballot of Charles Schwinn be not opened or counted and that the Board certify the Union as exclusive bargaining representative of the employees in the stipulated unit.

As provided in the Board's Order of November 13, 1952:

Within 10 days from the date of issuance of [this] report, any party may file with the Board in Washington, D. C., an original and six copies of exceptions thereto. Immediately upon the filing of such exceptions the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the Regional Director. If no exceptions are filed thereto the Board will adopt the recommendations of the Hearing Officer.

³ The Employer in his brief points out that the representative of the petitioning union in a prior proceeding agreed that Schwinn's predecessor should be eligible to vote.

The Board has recently (January 16, 1953) in *Valentine Sugars, Inc.*, 102 NLRB 313, reaffirmed its long standing rule that "Merely consenting that alleged supervisors be allowed to vote is not a determination of their status by the Board."