

Assistant to superintendent: The Employer would include and the Union exclude Judd, assistant to the shop superintendent. Judd substitutes for the superintendent during the latter's absence, contacts the leadmen, effectively recommends transfers, is consulted on wage increases, and has hired several employees during the superintendent's absence. He is on a salary basis and does no production work. We find that Judd is a supervisor within the meaning of the Act and exclude him from the unit. The parties stipulated that two men, Edwards and Faieta, have the same duties as Judd and should be placed in the same category. We therefore also exclude Edwards and Faieta.

Upon the entire record, we find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

All production and maintenance employees of Engine Rebuilding Corporation and Engine Parts Corporation at their Los Angeles, California, plant, including plant clerical employees⁴ and the shipping department employees, but excluding office clerical employees, selling employees,⁵ professional employees, watchmen, guards, leadmen, and all supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

⁴ This category includes the perpetual inventory clerk.

⁵ Excluded under this category are the outside salesmen, countermen, receiving clerks, and phone- and mail-order clerks.

The Eavey Company, Petitioner and Retail Clerks, International Association, AFL-CIO. Case No. 9-RM-121. June 29, 1956

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Harold V. Williams, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

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

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

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

4. The Employer is engaged in the operation of wholesale and retail grocery stores throughout the State of Ohio. The only store here involved is the Employer's retail store at Fairborn, Ohio.

The Employer contends that the appropriate unit is all employees of the Employer's Fairborn store, including all regular part-time employees who work more than 20 hours per week or who have worked during at least 18 separate weeks preceding the Decision and Direction of Election, but excluding part-time employees who work for the Employer 20 or less hours per week or who have worked for the Employer less than 18 separate weeks, meat department employees, management trainees, guards, professional employees, store manager, assistant store manager, head cashier, dairy department manager, grocery department manager, produce department manager, and all other supervisors as defined in the Act. The Union, contrary to the Employer, would include all part-time employees and the head cashier, the dairy department manager, the grocery department manager, and the produce department manager. Otherwise, the parties are in agreement as to the unit description.

The part-time employees issue: There are part-time employees in every department at the store involved. The largest grouping of part-time employees is composed of about 14 "carry-out boys," who primarily bag and carry out groceries for customers, but in addition work in other departments. The carry-out boys work according to a schedule prepared a week in advance by the head cashier. Most of the part-time employees are high school boys, 50 percent of whom work about 14 hours a week and the other 50 percent work from 14 to 24 hours per week. The annual turnover of the carry-out boys is high, nearly 50 percent of the present 14 have worked less than 18 weeks during the past year. These employees, unlike employees who work 30 hours or more per week, do not receive fringe benefits.

Upon these facts, we are of the opinion that part-time employees in the classification of "carry-out boys," who will have worked less than 18 weeks for the Employer at the date of this Decision and Direction of Election are not regular part-time employees within the term as used by the Board.¹ We shall, therefore, exclude part-time "carry-out boys" who have worked less than 18 weeks within the time limits noted above. Assuming that the foregoing part-time employees meet these requirements, we find no merit in the Employer's further contention that part-time employees working less than 20 hours per week should be excluded. In support of this contention, the Employer relies on cases wherein the parties have agreed to exclude such employees. Although, absent any violation of law or policy, the Board customarily finds stipulated units appropriate, we do not recognize cases of this type as establishing Board policy with respect to unit composition. The Board has recently included a regular scheduled employee in the

¹ *Alber Super Markets, Inc.*, 110 NLRB 474; *Liberal Market, Inc.*, 110 NLRB 65 and 66. The Board's requirement for part-time employees in this specific category is not to be regarded as establishing a similar requirement for other types of part-time employees.

unit who worked only 1 day per week.² The Employer's contention that the eligibility of part-time employees should be further limited by a minimum of 20 hours a week is therefore rejected.

The Supervisory Issues

There remains for consideration the supervisory status of the head cashier, the dairy department manager, the grocery department manager, and the produce manager.

The head cashier is directly responsible for the work of the cashiers and the carry-out boys of the store. In performance of these responsibilities, he trains new cashiers and schedules and directs the work of cashiers. He also is in charge of the carry-out boys. The head cashier and the department managers are considered as members of a management team and each has authority effectively to recommend hiring, discharge, and transfer of employees whom he directs. To refute the existence of such authority, the Union introduced, as witnesses, three cashiers who testified that they were hired directly by the store manager rather than by the head cashier. None of these witnesses could state whether or not the head cashier had been consulted about their employment. However, the testimony shows that practice is for the store manager to consult with the head cashier and other department heads regarding their qualification of applicants for employment. Moreover, the department heads, including the head cashier, hold weekly meetings at which personnel problems as well as other policy matters are discussed. The limited testimony of the three cashiers as to who was directly responsible for their being hired plainly does not prove that the present head cashier is lacking in supervisory authority. This conclusion is supported by the Employer's evidence as to the other elements of supervisory authority possessed by the head cashier. Although there is no specific evidence as to the number of times that the head cashier has effectively exercised authority in connection with the hiring or firing of employees,³ it is clear that he presently responsibly directs other employees.⁴

² *Greenberg Mercantile Corporation*, 112 NLRB 710; also see *J. S. Latta & Sons*, 114 NLRB 1248, where a part-time employee who worked 15 to 18 hours per week was included in the unit.

³ We note, however, that supervisory status is not dependent upon the exercise of such authority, but upon the existence of such authority. *Ohio Power Co. v. N. L. R. B.*, 176 F. 2d 385 (C. A. 6), cert. denied 338 U. S. 899; *N. L. R. B. v. Leland-Gifford Company*, 200 F. 2d 620 (C. A. 1).

⁴ This conclusion is supported not only by the testimony of C. E. Shaffer, vice president of the Employer, but by admissions of witnesses called by the Union.

Shaffer testified that he visits the store about once a week to observe whether or not the head cashier, as well as the other department heads, are responsibly directing their departments. Shaffer further testified that the head cashier is in charge of the store in the absence of the store manager and the assistant store manager.

Lynn Alexander, a cashier called by the Union, admitted, on cross-examination, that the head cashier "trains" and "assigns" employees and that Alexander considered the head cashier's authority, with respect to the cashiering department, "equal" to that of

Our dissenting colleague would find the head cashier as well as other department heads to be nonsupervisory upon the ground that they are not a part of the "front line of management." However, we do not take this phrase, which appears in the legislative history of the present statute, to mean that a specific individual must be a top policy-making officer in the Employer's supervisory hierarchy in order to fall within the definition of supervisor under the Act. The Board has, both before and after the amendment to the Act,⁵ frequently found minor supervisors such as leadmen and strawbosses to be supervisors where the evidence showed that their dues and authority brought them within the statutory supervisory definition.⁶ It is enough, in our opinion, that an individual has the authority to exercise the duties and responsibilities from which the Act draws the necessary inference of supervisory status. Furthermore, although the Board has sometimes found department heads to be nonsupervisory as was done in the cases cited by our dissenting colleague, these cases upon which he has commented⁷ were based on their particular facts and in no way establish a practice to find nonsupervisory individuals classified as department heads.⁸ The fact that the Board has come to opposite conclusions on the supervisory status of department managers, depending on the circumstances in each case, is demonstrated by the two cases of *Atlantic & Pacific Supermarket*, 102 NLRB 1564, and *Safeway Stores, Inc.*, 102 NLRB 758, cited by our dissenting colleague.

the store manager. Evabelle Daly, another cashier called by the Union, testified on cross-examination that she had heard the testimony of Shaffer concerning the duties of the head cashier and that Shaffer's testimony was correct. She also specifically admitted that the head cashier "assigns" and "directs" employees. Lee Roland, a full-time carry-out boy and also a witness for the Union, testified on cross-examination that the head cashier directs him concerning his work and also grants him permission for time off.

⁵ Our dissenting colleague takes the position that the amendment to the Act did not enlarge the group of persons to be found supervisors but adopted the test which the Board has made in certain cases. Such test, as noted herein, has resulted in minor supervisors being found both supervisory and nonsupervisory as required by the particular record and the evidence as to their duties.

⁶ See "*M*" *System, Inc, Mobile Home Div, Mid-States Corp*, 115 NLRB 1316, wherein our dissenting colleague joins the other Board Members in finding leadmen to be supervisors within the meaning of the Act; *Simplex Tool & Die Corporation*, 107 NLRB 750, 752, footnote 5 (leadmen); *Bunker Hill and Sullivan Mining Company*, 89 NLRB 243, 254, footnote 34 (leadmen); *Todd Galveston Dry Docks, Inc.*, 74 NLRB 1059 (leadmen); *Northern Redwood Lumber Company*, 88 NLRB 272, 276 (strawbosses); *The Babcock & Wilcox Co.*, 65 NLRB 83, 85, 86 (gang bosses).

⁷ In *Worth Food Market, Inc.*, 105 NLRB 682, the Board found department managers to be supervisors, citing by comparison the case of *Theriot Super Food Market, Inc.*, herein relied on by the dissent. The *Theriot Super Food Market* case is distinguishable not only from the *Worth* case, but also from the present proceeding, in that the duties of the department managers found nonsupervisory in the *Theriot* case were clearly routine in nature as distinguished from the independent management functions performed by the department managers in both the present case and in the *Worth Food* case.

⁸ On a number of occasions, the Board has held department managers or heads in retail stores to be supervisors where their duties warranted such a finding. See *Safeway Stores, Inc.*, 103 NLRB 758, 759; *The Fair Department Store*, 107 NLRB 1501, 1502; *Worth Food Market Stores, Inc.*, *supra*; *S. H. Kress & Co.*, 92 NLRB 15, 17, footnote 10 (cashier in charge of office excluded as supervisor from retail unit). See also *American Broadcasting Company*, 107 NLRB 74, 76 (cashier responsible for accounting department held supervisor).

In view of the foregoing, we find that the head cashier is a supervisor within the meaning of the Act. Because the facts in this record with respect to the supervisory authority of the dairy department manager, the grocery department manager, and the produce department manager are almost identical with those pertaining to the head cashier, *supra*, we, for the same reasons, find that they are supervisors within the meaning of the Act. Accordingly, we shall also exclude them from the unit.

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

All employees of the Employer employed at its retail store in Fairborn, Ohio, including part-time employees who have worked for the Employer during at least 18 separate weeks preceding the Decision and Direction of Election, but excluding part-time employees who have worked for the Employer less than 18 separate weeks, meat department employees, management trainees, professional employees, guards, the head cashier, the dairy department manager, the grocery department manager, the produce manager, the assistant store manager, the store manager, and all other supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

MEMBER BEAN, concurring in part and dissenting in part:

I disagree with the majority's conclusion that the head cashier and the dairy, grocery, and produce department managers are supervisors within the meaning of the Act. It is my view that these four individuals are not part of the "front line of management" which the Congress intended to exclude from "the anomalous status of employees"⁹ under Sections 2 (11) and 14 (a) of the Act.

The majority opinion states that the department heads in question are considered members of the management team and have been given authority effectively to recommend hiring, discharge, and transfer of employees whom they direct. The majority's paraphrasing of the language of the statutory definition of supervisor in describing the authority of these alleged supervisors is based on the testimony of C. E. Shaffer, the Employer's vice president. Shaffer testified as to company policy and standard procedure from the point of view of his position as corporate officer in charge of operating eight retail supermarkets, including the Xenia, Ohio, store involved here. According to Shaffer, applicants for employment are interviewed both by the store manager and appropriate department head who together

⁹ "It [the Senate Bill No 1126] merely relieves employers who are subject to the national act from any compulsion by this National Board or any local agency to accord the front line of management the anomalous status of employees." Sen. Rep. No. 105, 80th Cong., 1st Sess. (1947), p. 5.

decide whether or not to hire the applicant. Similarly, Shaffer testified that discharges, promotions, and demotions are determined by the manager after consultation with the department head. However, Shaffer was unable to recall a single specific instance in which a department head in fact had recommended any such personnel action. He did recall that on a visit to the store he had seen the manager and the head cashier conferring, but he did not know the subject of their conference. Shaffer admitted that a cashier might have been hired without seeing the head cashier: "It's always possible; it isn't in accordance with established procedure."

As the store manager and the department heads were not called as witnesses, there is no evidence in the record that the department heads were ever apprised of the authority attributed to them by Shaffer. On the other hand, six clerks or cashiers testified. All were hired by the manager without having met a department head before reporting for work. According to the uncontradicted testimony of one such cashier, when the last cashier to be hired reported for work the head cashier mistook her for a nurse, being apparently unaware that the manager had employed a new cashier. None of the six employees had heard of an instance of employment, discharge, transfer, reprimand, or other personnel action having been initiated or recommended by any of the department heads. One cashier testified that the only discharge or permanent layoff of another cashier that she knew about was accomplished by the manager alone within her hearing. Testimony of these witnesses showed that the employees take up any problems or grievances with the manager and that none of them considers the department head as a member of the management team. As to supervision and direction, all that appears from the record, other than the testimony of Shaffer, is that the department heads act as conduits for information from the manager, that they exercise routine supervision devoid of any significant independent judgment, and that they take responsibility for training new employees on the job.

It is clear in view of the foregoing that Shaffer's testimony on company policy and standard procedure, particularly with respect to hiring new employees, does not square with actual practice and to that extent should be discredited. Moreover, his testimony is conclusory in ascribing independent judgment and power effectively to recommend personnel action and is therefore of little probative value on that point.¹⁰ In any event, there are other considerations which impel me to conclude that the Board is delving too far below

¹⁰ As the Board has said in the past, employer testimony couched in the conclusory language of the statute is singularly unpersuasive. *Western Electric Company*, 98 NLRB 1018, 1039.

the management hierarchy in finding that these four individuals are supervisors.

The legislative history of the Taft-Hartley Act shows that its innovations with respect to supervisors were primarily concerned with excluding supervisory personnel from coverage of the Act. The Congress had no intention of broadening the definition of supervisor theretofore applied by the Board. In submitting its bill to the floor, the Senate committee stated the problem in these terms:

In drawing an amendment to meet this situation [success of labor organizations in invoking the Wagner Act for coverage of supervisory personnel], the committee has not been unmindful of the fact that *certain employees with minor supervisory duties* have problems which may justify their inclusion in that Act. It has therefore distinguished between *straw bosses*, leadmen, set-up men, and *other minor supervisory employees*, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire or discipline, or make effective recommendations with respect to such action. *In other words, the committee has adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file. . . . In framing this definition the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory.*¹¹ [Emphasis supplied.]

The House Conference Report on the final bill which was later enacted into law noted that the “. . . conference agreement, in the definition of ‘supervisor,’ limits such term to those individuals treated as supervisors under the Senate amendments.”¹²

Consistent with the legislative intent to follow the practice of including the “straw boss” in employee units, the Board customarily has held since Taft-Hartley that department heads in supermarkets are not supervisors.¹³ On facts almost identical to those before us in the instant case, a Board majority concluded in *Providence Public Market* that heads of grocery, fruit, bakery, and meat departments were not supervisors. These department heads were also charged with the routine functioning of their departments. Although they usually were consulted on hires and discharges, the Board held that they had no

¹¹ Sen. Rep. No. 105, 80th Cong., 1st Sess. (1947), pp. 3, 4, and 19. Discussing this aspect of the bill on the Senate floor, two of the bill's proponents, Senators Ellender and Aiken, emphasized the committee's intention to adopt the Board's past criteria for supervisory status as its definition. Cong. Rec., Sen., April 23, 1947, pp. 4259, 4260, 4262.

¹² House Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess. (1947), p. 35.

¹³ See *Archer Mills, Inc.*, 115 NLRB 674, where the Board's customary practice in finding knitting machine fixers to be supervisors was considered pertinent.

“actual authority effectively to recommend the hiring and discharge of employees,” but had “only qualified and infrequent authority of a routine nature over other employees.”¹⁴ The only significant difference I see between the *Providence* case and this case is that here the record does not establish that the contended consultation between the manager and the department heads actually takes place.

More recently, the Board found that meat market managers were not supervisors in *Theriot Super Food Markets, Inc.* These managers regularly gave routine directions to their helpers and in at least two specific instances a manager effectively recommended transfer of a particular employee to the meat market as a helper. In addition, a manager could and sometimes did hire part-time temporary helpers. Furthermore, the company manual of standard procedure and policy stated that the meat managers had authority to select their assistants. However, the Board observed that “none of the managers who testified at the hearing had ever read the manual . . .” i. e., that none of them had been apprised of their authority.¹⁵

Similarly, head cashiers were recently included in an *Atlantic & Pacific* supermarket unit where their duties closely paralleled those of the head cashiers here. In addition to their routine clerical and bookkeeping duties, the head cashiers assigned lunch and rest periods, reprimanded checkers (cashiers) and package boys, and assigned employees to various locations.¹⁶ And, in *Safeway Stores, Inc.*, head produce clerks were held nonsupervisory despite provisions of the company’s store operating manual which purportedly delegated such authority to them.¹⁷

Not only do the cases show that the Board customarily treats supermarket department heads as distinguished from store managers, as nonsupervisory, but here the record shows that such department heads are generally included in collective-bargaining agreements covering supermarkets throughout the general area where the Employer’s store is located, a factor to which we have previously accorded weight.¹⁸

¹⁴ 79 NLRB 1482, 1483 Members Reynolds and Gray dissenting.

¹⁵ 101 NLRB 259.

¹⁶ 102 NLRB 1564, 1565. As the Employer points out in its brief, produce managers were found supervisors in that case. However, the decision does not set out the facts upon which that finding was based.

¹⁷ 102 NLRB 758. The Employer mistakenly cites this case in its brief as holding that grocery department heads were supervisors. Actually, however, the case holds only that grocery clerks who regularly substitute for store managers are supervisors. In other cases cited by the Employer, there was no dispute as to the status of the perishable food department managers. See *Albers Super Markets, Inc.*, 110 NLRB 474 and *Colonial Stores, Inc.*, 9-RC-2655 (a consent-election case).

¹⁸ *Providence Public Market*, supra, op. cit. 1483. Although the record here shows that the Union agreed to exclusion of produce department managers for purposes of a consent election among Colonial Store employees in this area, other department heads were included in that unit, and all department heads are included in the Union’s supermarket contracts with four other local supermarket chains including Atlantic & Pacific and Kroger supermarkets.

I would find, therefore, that these department heads are at best the sort of "minor supervisory employees" which the Congress intended us to treat as "employees" within the meaning of the Act, and which we have in fact so treated in the past.

Machinery Overhaul Company, Inc. and International Association of Machinists, for and in behalf of District Lodge No. 94, AFL-CIO, Petitioner. *Case No. 21-RC-4155. June 29, 1956*

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVES

Pursuant to a Decision and Direction of Election issued on December 5, 1955, and an Order Amending Direction of Election dated December 13, 1955, an election was conducted in the above-entitled proceeding on January 17, 1956, under the direction and supervision of the Regional Director for the Twenty-first Region, among the employees in the unit heretofore found appropriate. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 101 eligible voters, 93 cast valid ballots, of which 65 were for the Petitioner and 28 against the Petitioner. There were two challenged ballots, a number insufficient to affect the results of the election.

On January 23, 1956, the Employer timely filed objections to conduct of election and conduct affecting the results of the election. After investigation, the Acting Regional Director,¹ on April 4, 1956, issued and duly served upon the parties his report on objections in which he recommended that the objections be overruled and that the Petitioner be certified as the collective-bargaining representative of the employees in the appropriate unit. Thereafter, the Employer filed timely exceptions to the Regional Director's report.

For the reasons set forth below, we adopt the Regional Director's recommendations that the objections be overruled and the Petitioner certified. The objections, covered by the report on objections and exceptions thereto, are as follows:

Objection No. 1: The Employer alleges that in several instances more than one employee at a time was in a voting booth, thereby impairing the secrecy of the ballot. The Regional Director's investigation revealed that the secrecy of the ballot was destroyed in at least 1 instance in which 2 voters were involved.² There was further disputed testimony which disclosed that the secrecy of seven other ballots may

¹ Hereinafter also referred to as the Regional Director.

² Two employees signed sworn affidavits in which they stated that they were in the same voting booth at the same time, that they were in plain sight of one another, and that each observed how the other marked his ballot. This was corroborated by the testimony of other witnesses who stated that they had seen the above two employees together in the same booth.