

United States Gypsum Company, Petitioner and United Cement, Lime and Gypsum Workers International Union and its Local Union No. 321, AFL-CIO.¹ *Case No. 5-RM-329. December 13, 1956*

DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Henry L. Segal, 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. No 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, for the following reasons:

The Union, the certified bargaining representative of the employees involved herein at the Employer's Norfolk, Virginia, plant, had a contract with the Employer which expired on July 13, 1956. On or about June 19, 1956, the Employer and the Union met to negotiate a new contract. On July 9, 1956, while the parties were still negotiating, the Employer filed the instant petition. Thereafter, on July 13, 1956, the Employer signed a contract with the Union which does not expire until July 13, 1957. Although the recognition clause in this contract provided that "the unit is subject to any changes made by the Board in its final decision in the current representation case," the Union was nevertheless unequivocally recognized as the representative of the employees covered by the contract.

The Union contends that there is no question concerning representation because the Employer recognizes it as the bargaining representative of its employees. The Employer, however, argues that it filed the petition to resolve a valid question of representation, which it contends still exists,² and that it negotiated with the Union and signed the contract in order to avoid a charge that it had refused to bargain in good faith. Irrespective of the Employer's reasons, the record is clear that while its petition was pending, the Employer

¹ The name of the Union appears as amended at the hearing to conform with its certification issued on March 28, 1955, in Case No. 5-RC-1593 (not reported in printed volumes of Board Decisions and Orders).

² The Employer contends that there has been a 35-percent increase in plant personnel since the Union was certified and that it doubts the Union's present majority status. The Employer also desires the exclusion of two classifications of employees from the previously certified unit.

bargained with the certified Union and signed a contract in which it continued to recognize the Union. In so doing the Employer has, in our view, taken a position wholly inconsistent with its attempt to establish that a question concerning representation presently exists with respect to the employees involved herein. We do not believe that it would effectuate the policies of the Act to permit the Employer to proceed with its petition in view of this inconsistency, and we shall therefore dismiss the petition.³ However, as the parties desire a Board determination with respect to the supervisory status of calciners and car checkers, whom the Union would continue to include in and the Employer would exclude from the unit,⁴ and as the duties of these individuals have been fully litigated here, we shall, as a matter of administrative expedience, treat the Employer's petition as a motion to amend the certification issued in Case No. 5-RC-1593 and after determining their status, order the certification amended accordingly.⁵

Calciners work in the mill department which operates on a 3-shift basis. The Employer asserts that they are supervisors, contending that they (1) responsibly direct the work of other employees; (2) may effectively recommend changes in the status of other employees; and (3) act for the shift foremen during the latter's absence. As to (1), the record establishes that the complement on each shift in the mill department consists of a shift foreman, a calciner who receives from 6 to 39 cents more per hour than any of the other employees on the shift, a Raymond Mill operator, a utility man, a tube mill operator, and a rock recovery operator. The calciners, the highest skilled employee in each group, are responsible for controlling the flow of crushed rock through six kettles used in the automatic calcination process. They regularly check the temperatures on each kettle and see that the materials are properly processed. The Raymond Mill operators and the utility men work in the same area of the mill as the calciners. The Raymond Mill operators attend the Raymond mills, see that sufficient rock is supplied to them, and that the rock is properly ground and delivered to the kettle feed bin. The utility men were hired to relieve the calciners of some of their manual work when the mill was expanded from 3 to 6 kettles. They work directly with the calciners, assisting them in dumping the kettles and testing the product. The rock recovery operators, who

³ *Hollingsworth & Whitney Division of Scott Paper Company*, 115 NLRB 15.

⁴ Although both categories of employees were included in the unit by agreement of the parties in the election directed by the Board in 1955, the Employer now argues that both groups should be excluded because of their increased duties and responsibilities resulting from an expansion of the plant.

⁵ *Armour and Company, d/b/a Memphis Cotton Oil Mill*, 115 NLRB 515; *The Daily Press, Incorporated*, 110 NLRB 573, 579; *Tide Water Associated Oil Company*, 101 NLRB 570; *Bausch & Lomb Optical Company*, 92 NLRB 139.

transport rock from the storage sheds to the crushing building, and the tube mill operators, who operate the tube mill in a grinding and separating process, work in an area approximately 100 to 900 feet from the mill building under the immediate supervision of the shift foremen, and have little, if any, contact with mill department employees. The shift foremen divide their time between these employees and the employees in the mill department, the Employer estimating that they spend only 25 percent of their time in the mill department. During the remaining 75 percent of the time, the calciners are in charge and direct the work of the Raymond Mill operators and the utility men. The Employer contends that in directing the work of these employees, the calciners are required to exercise judgment and discretion. We are persuaded, however, on the basis of the entire record, including the routine nature of the work of such employees, and the automatic nature of the calcination process, that the degree of judgment and discretion which the calciners are required to exercise falls short of that necessary to qualify as "independent judgment" within the meaning of the Act.⁶ We find, accordingly, that the calciners do not responsibly direct the work of other employees.

As to (2), the calciners have authority to make recommendations affecting the status of the employees whom they direct. Such recommendations are, however, subjected to an independent investigation by the shift foremen before action is taken,⁷ and the record fails to establish that any actions which may be taken are the result of the calciners' recommendations rather than the foremen's investigations. Under these circumstances, we find that the calciners do not make effective recommendations within the meaning of the Act.⁸

As to (3), although the calciners substitute for the foremen in the latter's absence from the plant, because of illness or vacation, in which case they are said to possess the latter's supervisory authority, such substitution is infrequent and sporadic, and is therefore insufficient to clothe the calciners with supervisory status.⁹ In view of the foregoing, we find that the calciners are not supervisors within the meaning of the Act, and they therefore shall continue to be included in the unit.

Car checkers are responsible for the proper loading of railroad cars according to prepared diagrams. There are 2 car checkers on 2 shifts in the packing department, and 3 on the 3 shifts in the board depart-

⁶ *Potomac Electric Power Company*, 111 NLRB 553, at pp 557, 558.

⁷ Neither the shift foremen nor the calciners have authority to effectuate a change in an employee's status.

⁸ *Potomac Electric Power Company*, *supra*, at p 560; *Warren Petroleum Corporation*, 96 NLRB 1428, at p. 1433; *Southern Industries Company*, 92 NLRB 998, at pp 999, 1000. Nor is authority to suspend an employee for 24 hours for being unfit for work sufficient to confer supervisory status. *Warren Petroleum Corporation*, *supra*; *Southern Industries Company*, *supra*.

⁹ *Sébastopol Cooperative Cannery*, 111 NLRB 530, 531.

ment. The car checkers in the packing department direct 5-man crews.¹⁰ These crews mix plaster and other materials, pack the materials into bags, and load them in railroad cars. There are more than 30 different types of plaster to be shipped, and the car checkers must lay out their loads for each shift, check the formula against specifications, check mixing, bagging, bag weights and sampling, and see that the finished products are properly loaded. In addition, they direct their crews in the unloading of rock from ships 3 or 4 times each month. In directing these various operations, car checkers rotate crew men from job to job,¹¹ and determine the sequence in which cars should be loaded. In so doing, they must exercise judgment in the selection of equipment, utilization of their crews, and the loading of materials. They enjoy the same benefits as other production and maintenance employees but receive 11 cents per hour more than the men under their direction. As the car checkers in the packing department have authority to assign jobs to crew members and responsibly direct their work, we find that they are supervisors within the meaning of the Act, and shall exclude them from the unit.¹²

The car checkers in the board department are assigned crews of 6 men and, like their counterparts in the packing department, receive 11 cents per hour more than the men in their crews and are responsible for the proper loading of board materials from this department. A foreman, a car checker, and 9 truckdrivers and loaders are employed on each of the 2 major shifts (first and third) in this department, and a car checker and 2 or 3 loaders are employed on the second shift. There is no other supervisor on this second shift, which is rotated among the car checkers on a biweekly basis. As the car checkers are the only responsible individuals on duty in the board department during the second shift, we find that they responsibly direct the work of the employees on that shift. Accordingly, we find that they are supervisors within the meaning of the Act, and shall exclude them from the unit.¹³

[The Board dismissed the petition and amended the certification of representatives, issued in Case No. 5-RC-1593, on March 28, 1955, so that the unit for which United Cement, Lime and Gypsum Workers International Union and its Local Union No. 321, AFL-CIO, would include the calciners and exclude the car checkers.]

¹⁰ As the packing and loading area extends over an area of approximately 600 feet, the foreman on each shift directs one of the two 5-man crews, while the car checker directs the other.

¹¹ In order to maintain quality control, the mixer operator is not rotated from job to job as are other members of the crew.

¹² *United States Gypsum Company*, 116 NLRB 638.

¹³ *Massachusetts Mohair Plush Company*, 115 NLRB 1516, at pp. 1523, 1524.