

(d) Post at its stores in the Kansas City area, copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the said notice to be furnished by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.<sup>17</sup>

<sup>16</sup> In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

<sup>17</sup> In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

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**Westinghouse Electric Corporation, Employer-Petitioner and Salaried Employees Association of the Baltimore Division, affiliated with the Federation of Westinghouse Independent Salaried Unions<sup>1</sup> and International Union of Electrical, Radio and Machine Workers (IUE), AFL-CIO, Local 130, Petitioner<sup>2</sup> and Salaried Employees Association of the Baltimore Division, Petitioner.** *Cases 5-RM-422, -500, 5-RC-1670, and 5-UC-3. January 9, 1967*

### DECISION AND ORDER CLARIFYING CERTIFICATION OF SALARIED EMPLOYEES ASSOCIATION OF THE BALTIMORE DIVISION

Upon separate petitions duly filed under Section 9(b) and (c) of the National Labor Relations Act, as amended, which petitions were subsequently consolidated for hearing, a hearing was held before Hearing Officer Louis Aronin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Briefs have been filed by the Employer, by SEA, and by IUE in support of their respective positions, SEA filed a brief in reply to the IUE, and the IUE filed a brief in reply to the Employer and SEA.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Zagoria].

<sup>1</sup> Hereinafter referred to as SEA.

<sup>2</sup> Hereinafter referred to as IUE.

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 organizations involved claim to represent certain employees of the Employer.
3. Contrary to the contention of IUE, we find that this proceeding involves the unit placement of certain employees of the Employer and is properly before the Board for resolution.

This dispute concerns employees in department P-20 at the Wilkens Avenue plant in Baltimore, Maryland, and is the same dispute as was involved in *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261. The IUE sought to resolve the identical issue of unit placement via the arbitration procedure under its contract. The Employer resisted and the IUE sought court enforcement of the arbitration clause of the contract. At all times IUE has contended that its claim involved a work assignment dispute, not a representation issue. The U.S. Supreme Court ultimately held that arbitration was appropriate and the matter was not within the exclusive jurisdiction of the Board, concluding:

The superior authority of the Board may be invoked at anytime. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area. [375 U.S. 261, 272]

Following issuance of the Supreme Court's decision, the Employer, on February 11, 1964, filed two motions, one for clarification of the certification of SEA in Case 5-RM-422 and one for clarification of the certification of IUE in Case 5-RC-1670. Thereafter, on March 9, 1964, the Employer filed the petition in Case 5-RM-500, requesting an election among the employees in dispute between IUE and SEA. Action on these matters was deferred by order of the Board dated April 21, 1964, pending the outcome of the arbitration proceeding. The Arbitrator's decision, which was incorporated in the record herein, was issued on August 19, 1965, and the SEA thereupon requested that the Board conduct a hearing on the Employer's motions and upon its petition in Case 5-UC-3 seeking clarification of its certification in Case 5-RM-422, the unit SEA was certified in.<sup>3</sup> The consolidated hearing before the Board's Hearing Officer on the various motions and petitions was held thereafter.

The Arbitrator's award rejected the IUE position as to the nature of the dispute. He held that "a reading of the grievance can only lead to the conclusion that it presents a representation issue." Nevertheless, the IUE continues to argue before the Board that this is a

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<sup>3</sup> SEA was at no time a party to the arbitration proceeding, nor did it participate therein  
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jurisdictional dispute and that the Board is without authority to resolve the issues because there has been no strike or threat of such action. Like the Arbitrator, we find no merit in the IUE's contentions. The IUE has consistently argued that the employees in department P-20 should be in the IUE bargaining unit, and its original grievance was framed in these terms.<sup>4</sup> It disputes the unit placement of the employees doing the work and complains of the failure to apply the IUE agreement to the employees doing that work; it does not wish to replace employees represented by the SEA with its own members. IUE is thus claiming the right to represent the particular employees who have historically been represented by SEA. This dispute as to which labor organization is entitled to represent a particular group of employees involves a representation matter over which the Board has statutory authority.

The IUE further contends in the alternative that (1) if the Board finds that it has no jurisdiction over this matter, the award of the Arbitrator which split the P-20 unit into two parts based upon the employees' wage level should be honored and the petitions dismissed, or (2) if the Board reaches the merits, it should find that all P-20 employees are an accretion to IUE's production and maintenance unit and should be added to that IUE unit.

For the reasons set forth below, we find no question of representation raised by the RM petition within the meaning of Sections 9(c) (1) and 2(6) and (7) of the Act, and shall therefore dismiss the Employer's petition in Case 5-RM-500. However, we shall grant the motions to clarify the SEA's unit.

The Arbitrator, as noted above, found the issue to be decided to be the unit placement of the individual employees in the P-20 department and concluded that what had previously been included as part of one unit should be split between two—one represented by the IUE and the other by the SEA. He used as a basis for the division the wage level of the individual employees. The threshold question before us then is what weight should be accorded to an arbitration award such as this, especially where all the parties were not before the Arbitrator, and two contracts are involved.

In *Raley's Inc.*, 143 NLRB 256, the Board held that, where in a representation case, involving only one agreement, that:

. . . [A] question of contract interpretation is in issue, and the parties thereto have set up in their agreement arbitration machinery for the settlement of disputes arising under the contract, and an award has already been rendered which meets

<sup>4</sup> The original grievance complained that:

The employees working on induction heating and are [sic] performing assembly and wiring; power brake operations; machining operations; and attending to the tool crib and storeroom operations should be in the IUE, Local 130 bargaining unit.

Board requirements applicable to arbitration awards, we think that it would further the underlying objectives of the Act to promote industrial peace and stability to give effect thereto.

However, in *Hotel Employers Association of San Francisco*, 159 NLRB 143, the Board limited the scope of *Raley's*, noting that in the latter case the contested question—whether the contract included a specified group of employees—was the sole issue presented to the Board. Also, the Board found in *Hotel Employers Association* that the Arbitrator's award interpreting the contract did not resolve the ultimate issue concerning representation since the Arbitrator did not consider the claim of a rival union to represent the employees in question. Here, as in the *Hotel Employers Association* case, the ultimate issue of representation could not be decided by the Arbitrator on the basis of his interpreting the contract under which he was authorized to act, but could only be resolved by utilization of Board criteria for making unit determinations. In such cases the arbitrator's award must clearly reflect the use of and be consonant with Board standards.

In this case apparently not all the evidence concerning all these standards was available to the Arbitrator for his consideration and appraisal, and his award reflects this deficiency. Thus, the award relies solely on an estimate of the skills involved in performing the various jobs in P-20. But it does not treat with the following significant factors, among others: bargaining history; the integration of operations of P-20; the progression of the employees from the lower to higher grades in that department; and the possible adverse effects of splitting the department on the Employer and the employees in the departmental unit. Consequently, while we give some consideration to the award, we do not think it would effectuate statutory policy to defer to it entirely.

Having rejected the procedural grounds for dismissal, we must consider the merits of the various contentions concerning the unit placement of the disputed employees. Department P-20 operation came into existence in 1952 at the Eagle Street plant with a complement of two technicians for development of induction heating equipment. By November 1956 it had gradually expanded to about nine technicians, and about this time the Company began to manufacture induction heating equipment. The laboratory technicians continued their same work as part of what was then known as the Induction Heating Department, assigned to the Industrial Heating Division. In 1958, the entire department, which was an independent division, was moved for economic reasons to available space at the Wilkens Avenue plant and continued as a totally separate operation, which is now known as the Industrial Electronics Division.

At the time the dispute arose, there were about 55 employees in the disputed group,<sup>5</sup> designated as department P-20, and at the time of the instant hearing the number was down to 36, while the allegedly parallel M-70 production group, discussed more fully below, increased from about 16 to approximately 66.

The bargaining history is not really in dispute.<sup>6</sup> On August 31, 1955, IUE was certified as the representative of employees at the Employer's Baltimore plants in a unit of:

All production and maintenance employees of the Employer at its Baltimore Works located at 2519 Wilkens Avenue and 3601 Washington Boulevard, Baltimore, Maryland, including group leaders, and shop clerical employees, but excluding all salaried technical, office and office clerical employees, salaried time study clerks, clerical employees in the production planning department, guards, professional employees, and supervisors as defined in the Act.

At that time, the disputed employees were located at Eagle Street, and the hourly employees at that location were included in the production and maintenance unit and voted in the election. IUE at no time protested the failure to include the P-20 technicians or raised any issue as to them.

With respect to the salaried employees, since 1941 SEA's predecessor and then SEA has been the representative of a unit of the salaried technical, office and office clerical employees at the various locations in Baltimore. In 1957, the Employer and SEA agreed that Wilkens Avenue should constitute a separate unit, which at that time included professional employees. On March 5, 1958, IUE filed its grievance, which led to the Supreme Court decision, asserting that the P-20 employees now engage in production work and properly belong in the IUE unit.

In 1960, the Employer in Case 5-RM-422 petitioned for an election in the SEA unit at Wilkens Avenue for the avowed purpose of securing a separate ballot for professionals. IUE participated in the hearing in that case but at no time questioned the inclusion of the P-20 personnel in the technical unit although it admittedly knew they were included within the petition and would vote in the election. Elections were ultimately directed by the Board;<sup>7</sup> however, IUE withdrew from the ballot while attempting to preserve its position by stating that its withdrawal "does not prejudice our position in

<sup>5</sup> Certain highly graded testers are designated as department P-30 but are a portion of P-20. IUE does not claim these jobs.

<sup>6</sup> IUE contends apparently that P-20 initially was a break off from its production and maintenance unit to avoid the effects of a strike. Apparently no charges were ever filed, and there appears to be no basis for this assertion.

<sup>7</sup> 129 NLRB 846.

regards to certain employees who are performing what we maintain is production and maintenance work, who no doubt will participate in the election to be held . . . ." As a result of those elections, SEA was certified for two separate units, one of professional employees and the one involved here, composed of:

All salaried technical, office and office clerical employees at the Wilkens Avenue plant, excluding all professional employees, all executive and supervisory employees, industrial relations assistants, clerical staff specialists, secretaries to department heads, clerical supervisors, production maintenance employees [sic], guards, and all supervisors as defined in the Act.<sup>8</sup>

Since 1958, when the present dispute arose, department P-20 employees have been in labor grades 6 through 15. The Arbitrator, on the matter of unit placement, concluded that employees in labor grades 10 or below should properly be included in the IUE unit and those above should remain in the SEA unit. As a result of this holding, the Employer placed the grade 10 and below jobs in a new department F-20.<sup>9</sup>

Department P-20 initially engaged entirely in experimental work, and standard repetitive type products which it needed were either made by production and maintenance personnel in another division or were purchased from outside. Any specialized, custom-built equipment that was required was made either by outside firms or by the technicians in the engineering laboratory. Department P-20 has come to be the department which creates induction heating units upon special customer order, and thus is the exclusive developer and producer of special equipment and coils for limited production. When the production of the machines it creates becomes repetitive, they are made by an admittedly production group known as P-70. Standard parts are made for P-20 by this production group, but P-20 does make certain standard parts, referred to as feeder items, which require less than 3 percent of its time. These items are used in general production by M-70.

There is no doubt that, in the creation of this special machinery, the department P-20 personnel uses the same type of equipment as M-70 employees, but the Employer and SEA contend that the difference lies in the amount of ingenuity, training or experience, and skill required to work with engineers in creating and developing, designing, building, and testing the equipment desired. In this con-

<sup>8</sup> This unit description is a composite of the holdings set forth in that decision in 129 NLRB 848.

<sup>9</sup> Actually some 6 persons were transferred to IUE coverage, while 13 were promoted to grades which remained in the SEA unit. We do not consider this change material, under the circumstances, and base our Decision on the facts as they existed prior thereto.

nection, it is contended that the P-20 employees do not merely make equipment according to specific instructions, as would a model maker, but they are given only general plans and must devise methods of achieving the desired result, performing the usual functions of industrial engineers, and draftsmen, design manufacturing, and tool design. The IUE, on the other hand, contends that all P-20 employees, except a few highly graded technicians now designated as P-30 who test equipment to determine that the customer's needs are met, are engaged in production work.

The nature of the work performed by the P-20 personnel and the contrast of similarities between their work and conditions and those of IUE production employees were litigated and discussed by the parties in some detail. Briefly, it appears that the M-70 production employees are hourly paid, whereas the P-20 technicians are salaried. While the P-20 and M-70 employees work in the same general area, they are physically separated by an aisleway and their work areas do not overlap. The record shows that it is unusual for the P-20 and M-70 employees to work together on the same item, and there is no interchange between them. On the first shift, each has a separate supervisor, while the second-shift employees have a single supervisor. The difference between the first- and second-shift supervisors is that the first has responsibility for the total operation of P-20, and plans, lays out, and administers it entirely, while the second shift merely continues the operation as directed by the first shift. While the lower rated P-20 and the M-70 employees work on similar machines, the lower rated P-20 employees do so in part as a step in their training. In any event, it is common for employees represented by SEA to use the same type of machinery as production employees work on. The distinction lies in the greater skill required of the technical employees and different use to which the products are put. Thus, P-20 employees consult with engineers and utilize sketches and electrical schematic drawings which are merely general diagrams and contain no details, such as point to point diagrams for electrical wiring. Production employees receive much more detailed instructions and diagrams, and while they also deal with engineers on occasion and use sketches and some form of schematics, this aspect of their work is less complex in nature than that of the P-20 employees.

SEA and the Employer contend that all the P-20 employees, regardless of grade, work toward a single purpose, with the higher graded employees instructing and training the lower graded people so that the lower eventually qualify for and are promoted to the better jobs and/or the more experienced people bump down into the lower jobs in case of a cutback. The Employer argues that placing the lower graded P-20 employees in the IUE unit results in the loss

of its training ground for skilled technicians in this field and that it must also lose senior people in a layoff because they have no lower jobs into which they can bump.

As previously indicated, the history of representation of all P-20 personnel by SEA is undenied, and no claim is made by IUE for concededly technical employees designated as testers, now in P-30. Nor is it denied that the P-20 employees have been salaried, and the IUE unit specifically excludes "salaried technical" employees. The record also establishes that the P-20 employees have had a different line of progression from that of production employees, in that the lower graded P-20 personnel were promoted into the higher labor coded jobs based on experience, while production employees do not move into this group. Further, in case of cutbacks in personnel, higher graded P-20 employees could bump back into lower graded jobs.

Under all the circumstances, we are persuaded that the P-20 employees in labor grades 10 and below as well as those in the higher grades left in the SEA unit by the Arbitrator have been and are properly within SEA's certified unit and that no question concerning representation presently exists. We shall, therefore, clarify the certification to include the P-20 employees in the SEA unit.

[The Board clarified the certification by specifically including in the description of the appropriate unit all employees in the department known as P-20.]

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**Midas Muffler Clinic, Inc., and Its Wholly-Owned Subsidiaries, Reliable Muffler Enterprise, Inc., Chicago Heights Muffler, Inc., and Echo Muffler, Inc. and Transportation Service and Allied Workers, Seafarers' International Union of North America, AFL-CIO, Petitioner.** *Case 13-RC-10896. January 9, 1967*

#### DECISION ON REVIEW AND ORDER

On July 20, 1966, the Acting Regional Director for Region 13 issued his Decision and Direction of Election in the above-entitled proceeding, finding appropriate a unit of the employees of Midas Muffler Clinic, Inc., and its three wholly owned subsidiaries (herein collectively referred to as the Midas group).

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, as amended, the Intervenor, Production and Miscellaneous Workers Union of Chicago and Vicinity, Chicago Truck Drivers Union of Chicago and Vicinity