

**Howard Johnson Company and International Union  
of Operating Engineers, Local 68, AFL-CIO. Case  
22-CA-2961**

March 18, 1969

**SUPPLEMENTAL DECISION AND  
ORDER**

**BY CHAIRMAN McCULLOCH AND MEMBERS  
BROWN AND ZAGORIA**

On May 22, 1967, the National Labor Relations Board issued a Decision and Order in this proceeding,<sup>1</sup> finding that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain with the Union, the Charging Party herein, after it was certified by the Board,<sup>2</sup> as the bargaining representative for a two-man unit of licensed operating engineers at the Respondent's Englewood, New Jersey, ice cream producing plant and ordering the Respondent to take specific action to remedy such unfair labor practices. Subsequently, the Board sought enforcement of its Order before the United States Court of Appeals for the Third Circuit. On July 26, 1968, the court handed down its Decision.<sup>3</sup> The court agreed with the Board's unit determination, but found that an issue as to the supervisory status of Henry Koehler, one of the two employees in the unit found appropriate by the Board, had not been fully litigated in the representation hearing. Accordingly, the court remanded the case to the Board for a hearing on that question. On September 4, 1968, the Board accepted the remand and issued an Order reopening the record and directing a further hearing before a Trial Examiner consistent with the court's remand.

On December 30, 1968, Trial Examiner Samuel M. Singer issued his Supplemental Decision, attached hereto, in which he concluded that Koehler was neither a supervisor within the meaning of Section 2(11) of the National Labor Relations Act, as amended, nor a managerial employee within the meaning of that term as defined under the Board's existing policy. He recommended that the Board reaffirm its Order of May 22, 1967. Thereafter, the Respondent filed exceptions, and a brief in support thereof, to the Trial Examiner's Supplemental Decision. The General Counsel filed limited exceptions to the Supplemental Decision, as well as a brief in support of his exceptions and in support of the Trial Examiner's Recommended Order.

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.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Supplemental Decision, the Respondent's exceptions<sup>4</sup> and brief, and the General Counsel's brief and exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby overrules the objections to the election; affirms the certification of International Union of Operating Engineers, Local 68, AFL-CIO, as the representative of the employees in the appropriate unit; and orders that the Respondent take the action set forth in the Order previously issued herein on May 22, 1967.

<sup>1</sup>The Respondent excepts primarily to the credibility resolutions of the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions of credibility unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Such a conclusion is not warranted here. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

**TRIAL EXAMINER'S SUPPLEMENTAL  
DECISION**

**STATEMENT OF THE CASE**

**SAMUEL M. SINGER**, Trial Examiner: On May 22, 1967, the Board issued a Decision and Order in this proceeding (164 NLRB No. 121) affirming Trial Examiner Charles W. Schneider's decision that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by its refusal to recognize the Charging Party (herein called the Union) as the bargaining representative for a two-man unit of licensed operating engineers at Respondent's Englewood, New Jersey, ice cream producing plant, notwithstanding Board certification of the Union as such bargaining representative (Case 22-RC-3282). Trial Examiner Schneider had granted General Counsel's motion for summary judgment, rejecting Respondent's contentions with respect to the appropriateness of the bargaining unit and the alleged supervisory status of Henry Koehler (one of the two in the unit found appropriate) on the ground that Respondent was attempting to relitigate matters previously determined in the underlying representation proceeding. In adopting the Trial Examiner's findings and conclusions, the Board noted that "the status and duties of Koehler were, in fact, fully litigated in that hearing"; and that the testimony of Respondent's own officials demonstrated that "Koehler did not possess any indicia of supervisory status," his relationship to Vary (the second employee in the two-man unit) being that of "a senior, more experienced employee to a junior, less experienced employee."

Thereafter, the Board filed a petition with the United States Court of Appeals for the Third Circuit for enforcement of its Order. While agreeing with the Board's unit determination, the Court in its July 26, 1968, decision

<sup>1</sup>164 NLRB No. 121

<sup>2</sup>Case 22-RC-3282, not reported in NLRB printed volumes

<sup>3</sup>*NLRB v. Howard Johnson Company*, 398 F.2d 435 (C.A. 3)

found, contrary to the Board, that the issue of Koehler's supervisory status had not been fully litigated in the representation hearing, pointing out that the "entire thrust of that hearing was focused on other issues" *N L R. B. v. Howard Johnson Company*, 398 F.2d 435, 441 Without deciding "the merits of respondent's contentions," the Court stated that certain matters raised by Respondent after the close of the representation hearing, "if true, raise a substantial question" as to Koehler's status as supervisor, accordingly remanding the case for further hearing on this issue. *Id.* at 442

On September 4, 1968, the Board issued an implementing order reopening this proceeding for "further hearing . . . before a Trial Examiner as to the supervisory status of Henry Koehler, in accordance with the Court's Opinion of July 26, 1968." The Board's order also directed that, upon conclusion of such hearing, the Trial Examiner should prepare a supplemental decision

A supplemental hearing was accordingly held before me on October 24 and 25, 1968, in Newark, New Jersey, at which all parties were represented by counsel and afforded full opportunity to participate, to introduce evidence relevant to the supervisory issue, and to file briefs. Briefs, received from General Counsel and Respondent, have been fully considered.

Upon the record of the entire case, including the record in the representation proceeding, of which (as indicated at the hearing) I have taken official notice, and from my observation of the witnesses, I make the following supplemental findings of fact and conclusions of law:

#### FINDINGS AND CONCLUSIONS

##### A. The Evidence

###### 1.

The testimony respecting Koehler's supervisory status is in sharp conflict in material respects. As to the following, however, there is no substantial dispute:

During the period here involved, April — July 1966,<sup>1</sup> Respondent employed approximately 38 employees in its ice cream manufacturing plant — 21 production, 15 shipping, and 2 "maintenance" employees. The last two, Koehler and Vary (the employees here directly involved), were also known as operating engineers. Plant Manager Burnham had "overall operating responsibility for the Englewood commissary."<sup>2</sup> The production supervisor, transportation and warehouse manager, and office manager were salaried, worked no fixed hours (they did not punch a timeclock), and were not paid overtime. All of them reported directly to Burnham.

An "evaluation booklet," prepared by one of Burnham's predecessors and produced in the representation hearing, describes the functions of the "maintenance man" as follows "Maintains all machinery, repairs breakdowns, does carpentry, plumbing, painting and electrical work, to the limit of tools available, does other work as required."<sup>3</sup> Burnham and other Company officials testified in the representation hearing that the two maintenance men (Koehler and Vary) spent about 2 hours,

or 25 percent of their time, in the boiler and compressor rooms operating and maintaining equipment to assure the proper steam pressure, temperature, and humidity necessary to the manufacturing process. Both men held licenses required by the State of New Jersey to perform these jobs.<sup>4</sup> In addition, State regulations required that the boiler and compressor rooms be attended by a licensed operating engineer during the entire workday. The remainder (75 percent) of the maintenance men's time was occupied in maintaining equipment on the production floor (conveyors, conveyor belts, power machinery, etc.), in carpentry, plumbing, painting, and electrical work, and in performing sundry tasks such as unloading trucks and freight cars, dumping flavoring in ice cream machinery, and assembling and stacking cake boxes.<sup>5</sup>

Koehler and Vary worked together on some jobs (e.g., construction work and repairs) and separately on others. Each periodically checked gauges, temperatures, and pressures and adjusted valves and controls on boiler and refrigeration equipment. However, unlicensed employees ("a pasteurizer" and porter) "on a regular basis" turned on the boiler and compressor upon arrival at work at 3 a.m. (before arrival of the maintenance men).<sup>6</sup>

Vary worked the 6 a.m.-2:30 p.m. shift while Koehler worked 9:30 a.m.-6 p.m. Each punched a timecard and was paid on an hourly basis. Koehler, the senior and more experienced man,<sup>7</sup> was paid \$3.70 and Vary was paid \$3.25 an hour. Each was paid for overtime, including weekends (Saturday and Sunday) when they alternated to check on operation of equipment. Each received the same benefits (holidays, vacations, leave, medical, etc.) received by all Company hourly employees.

<sup>1</sup>In the complaint hearing, Burnham testified that he "felt that [this job description] was incomplete," indicating that he did not confine the maintenance men, including Koehler, to this description. He admitted, however, that there were no "written" Company records identifying Koehler as a supervisor.

<sup>2</sup>Koehler held a second-class or red seal license entitling him to operate refrigeration equipment up to 300 tons, and Vary a third-class or blue seal license entitling him to maintain refrigeration equipment up to 65 tons. Respondent's Vice President Faust held a first-class or gold seal license, which was required to operate refrigeration equipment of tonnage in excess of 300. According to Koehler's uncontradicted testimony in the representation hearing, Respondent's refrigeration tonnage was "around 300 tons." Burnham testified in the complaint hearing that Koehler, whom he characterized as "chief engineer," had the required State license to operate the plant.

<sup>3</sup>According to Respondent's witness Keenan (former production manager), the maintenance men's duties included unskilled janitorial tasks such as removal of garbage from production and lunchroom areas, putting away laundered uniforms, replacing towels, changing bulbs, carrying candy to the production area, replacing soap on the conveyors, mopping the warehouse floor, watering the lawn, and inspecting mousetraps.

<sup>4</sup>Plant Manager Burnham could not tell whether a license was required to turn on the compressor and boiler but added that "they [the unlicensed employees] are covered by licenses" of others.

<sup>5</sup>Koehler had been in Respondent's employ for 5 years and had had vocational training, he left the Company in February 1968. Although hired in 1959, Vary did not qualify as an operating engineer until 1965, working as checker until that time. As previously noted, Koehler held a higher grade license than Vary. In addition, Vary was less experienced than Koehler in such matters as electrical work, plumbing, and carpentry. In the representation hearing, Koehler characterized Vary as his "assistant." Vary testified that Burnham assigned him to the early shift because there were fewer breakdowns earlier in the day. Burnham testified that as "senior man" Koehler was given "the option of picking the shift that he wanted."

<sup>1</sup>The Union's representation petition was filed on April 29, the hearing thereon was conducted on May 18, and the election was directed and held on June 9 and July 6, 1966.

<sup>2</sup>Burnham was production manager from November 1, 1965, to February 6, 1968, when he left Respondent's employ. Keenan was plant manager from October 1964 to November 1965 and Faust (now Company vice president) from 1958 to October 1964.

The disputed evidence involving Koehler's authority may be summarized as follows

a. In the complaint hearing, Burnham testified that shortly after taking over as plant manager in November 1965, he told Koehler that he would be "chief engineer of the Englewood plant" and "responsible for the operation" of the boilers and refrigeration facilities (i.e., all licensed engineer work); and that Koehler would be "directing and assigning" other maintenance work to Vary. According to Burnham, he instructed Vary to take his assignments from Koehler. Burnham also testified that as to "any emergency breakdown," he instituted the procedure whereby Koehler was to be called by the production operator and, after evaluating the situation, Koehler was to correct the situation himself, call upon Vary to help him, or assign the work to Vary. He further testified that in case of scheduled work, he and Koehler would jointly compile a list of projects and would assign the order of work, with Koehler determining which he and Vary were to perform. Burnham admitted, however, that "at times" he personally assigned the work to Vary and that much of the engineer's work was routine since "you have an engine room that literally is automatic machine, it runs itself. There are switches when the machine cuts in and out."

Koehler specifically denied that Burnham had designated him as chief engineer and that Burnham had authorized him to direct Vary's work and to determine whether he or Vary were to perform any particular job. He testified that Burnham himself "laid out all the work for us," periodically preparing a list of required jobs, that Burnham selected the work to be done by each; and that Koehler "never planned" Vary's work. According to Koehler, Burnham summoned him and Vary to the office soon after Burnham's arrival at the plant in November 1965 and told them that he was "the new plant manager . . . that we will take orders from him, and [h]e would lay out the work that would have to be done." Koehler admitted that he sometimes called upon Vary to help on certain jobs since "a lot of jobs require two men," but that Vary would sometimes likewise ask him to help. As to machinery breakdowns, he testified that the operator would contact either him or Vary, "whoever was around at the time," for repairs.

Vary's testimony is essentially consistent with Koehler's. Thus, he testified that management never advised him that Koehler was chief engineer or that he was to take orders from Koehler. He also testified that he received assignments from Burnham from a list prepared by Burnham. He stated, however, that he assisted Koehler not only in connection with jobs requiring two-man handling, but also in construction work in which he was less skilled than Koehler.<sup>8</sup> He also admitted seeking Koehler's advice on the use of equipment and on repair procedures. According to Vary, in case of equipment breakdowns, a supervisor would call over the loudspeaker for a maintenance man and either he or Koehler would respond to make necessary repairs, indicating that Koehler had nothing to do with assigning this work.

b. In the complaint hearing, Burnham indicated that Koehler exercised discretion in assigning overtime to Vary. Thus, he testified that there were "many instances

when Mr. Koehler would have a project going . . . he would come to me and say, 'I feel it's necessary that we continue on with the job. Shall Vic Vary stay on the job and continue on working on it.'" Burnham would say, "If you feel this is what is necessary, you know what has to be done, all right, go ahead and use your own discretion." Burnham added that in weekend "emergency situations" Koehler "did call Victor Vary directly to come in to work to correct the situation without discussing it with me." However, he recalled only one instance when this was done, namely, a Saturday emergency when Koehler (then on duty) discovered "an improper functioning in the hardening room, with liquid ammonia coming back on a machine," causing a shutdown.

Both Koehler and Vary denied that Koehler exercised authority respecting overtime assignments. Each recalled the emergency involving the ammonia, indicating that Koehler called in Vary because he could not handle the "dangerous operation" by himself. Koehler stated that he did this on his own because of the extreme emergency and his inability to reach Burnham by telephone for advance authorization. According to Koehler, Burnham "wrote me up and told me that next time I have no authorization to call anybody in on overtime . . . you can be fired."

c. In March 1966, Burnham granted Koehler a 20-cent hourly wage increase (\$3.50 to \$3.70) and Vary a 15-cent increase (\$3.10 to \$3.25). Burnham testified that he gave the increase to Vary after conferring on the matter with Koehler who told him, "I feel we should give a pay increase to him."

Koehler denied recommending the 15-cent increase to Vary, stating that his and Vary's increases were part of a "general" plantwide wage raise, that the increases were announced by supervisors to employees working under them, and that he first learned of Vary's raise when Burnham "came around and told us." Koehler's version is supported by Respondent's records showing that most of the plant employees were given comparable increases on the date in question.

Based on all of the foregoing and the entire record, including appraisal of comparative demeanor of witnesses, I resolve the conflicting testimony concerning the nature of Koehler's duties and authority in favor of Koehler rather than Burnham, although I am fully aware that in testifying in this proceeding, Koehler sometimes was not averse to minimizing his responsibilities, as was Burnham to magnifying them, in order to advance their respective interests.<sup>10</sup> It is to be noted that Koehler's testimony is

<sup>9</sup>I credit Koehler's version of the incident. Burnham was vague and uncertain about some of the details, including the disciplinary warning. Koehler referred to Respondent failed to produce Koehler's personnel folder which might have shed light on the nature of the warning, if any, given to Koehler.

<sup>10</sup>A seemingly glaring example of minimization by Koehler of his responsibilities is his testimony concerning his role in ordering and purchasing equipment and supplies, discussed *infra*, section A, 3. My failure to credit portions of Koehler's testimony on that point does not require alteration of my determination that he testified truthfully about other matters. "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it, nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corporation*, 179 F.2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474. See also *NLRB v. Izz*, 395 F.2d 241, 243-244 (C.A. 1), *Champion Papers, Inc v. NLRB*, 393 F.2d 388 (C.A. 6). This is particularly true where, as here, Koehler's testimony must be evaluated in relation to other contradictory testimony, practically all of his other testimony is corroborated by other credible evidence, and his testimony comports with the inherent probabilities in the entire context of the case.

<sup>8</sup>As previously noted, Vary was less experienced than Koehler in skilled operations such as carpentry, electricity, and plumbing. Vary and Koehler testified that when Burnham interviewed them shortly after arriving in Englewood, he suggested that Vary go to school for training in these skills.

corroborated in material respects by Vary, who impressed me as an essentially truthful witness. Vary is still in Respondent's employ and in a sense, therefore, his testimony (to the extent adverse to Respondent) was potentially inimical to his interest in retaining his employer's goodwill. On the other hand, Respondent called no witnesses to corroborate Burnham's testimony in the complaint hearing on the issue of Koehler's supervisory status.<sup>11</sup> To the extent that the testimony of Company officials (former Plant Managers Keenan and Faust) in the representation proceeding is relevant and material to the duties and authority of Koehler during the period here involved, it is clear that that testimony is totally at odds with Burnham's testimony in the complaint hearing. All Company officials who testified in the representation case (including Burnham) depicted Koehler and Vary as mere rank-and-file employees to be included in a single unit with all other Company rank-and-filers. None claimed that Koehler was vested with authority over Vary, each indicating that Koehler and Vary worked together and were on equal footing. Burnham himself testified that he would each morning give "the work assignments for [the] day" to his senior employee Koehler, who "in turn will generally talk with Mr. Vary," without at all indicating that Koehler was more than a conduit for relaying instructions. Burnham gave no inkling that Koehler was "chief engineer" (as he vigorously claimed at the complaint hearing), clothed with supervisory functions — a claim which, if established in the representation proceeding, would have defeated the Union's petition for an operating engineer bargaining unit, since Koehler's exclusion from the unit would have left only a one-man unit (consisting of Vary) which would have been inappropriate. Also significant is the fact that, as Burnham testified, Respondent does not have a single record — job description, payroll, or any other written document — identifying Koehler as a supervisory employee.

To be sure, as the Court of Appeals observed in its decision remanding this case for further hearing (*supra*), the testimony in the representation proceeding "was focused on other issues, issues related to the 'integration' of respondent's production process" (398 F.2d at 441) rather than on the "supervisor" question. This is not to say that Burnham's (as well as other Company witnesses') factual account of Koehler duties and responsibilities in the representation proceeding — including the circumstance that the testimony there was given without an eye to the strictly supervisory issue — should not be given the weight which it deserves. This includes the evaluation of the impact of inconsistent testimony upon credibility resolution. As I read the Court's decision, its determination to remand the case was predicated on the view that Respondent had not been afforded opportunity to "fully litigate" the supervisor issue, in view of preoccupation of the parties with the overall unit question. The Court did not, of course, preclude considering the testimony adduced there for purposes of evaluating credibility of testimony given in the complaint proceeding.

<sup>11</sup>Respondent called only one other witness (Lilley) whose testimony was confined to Koehler's alleged managerial authority concerning purchasing equipment and pledging Respondent's credit (*infra*, section A, 3)

3.

Burnham testified that during the period here involved (prior to the July 1966 Board election), Koehler possessed and exercised authority to purchase "small miscellaneous items . . . on a day-by-day basis, things like electrical fuses, some nuts and bolts," without prior clearance from Burnham. He further testified that in case of "major maintenance" projects, Koehler was authorized to order and purchase necessary items after the two agreed on proceeding with a particular project. Burnham cited two "sizable jobs" completed between December 1965 and April 1966 — construction of a shipping office and overhaul of the refrigeration system (four compressors) — for which Koehler without prior specific clearance from Burnham ordered parts and materials aggregating some \$6,000. According to Burnham, Koehler did report to him, however, on the given orders and Burnham did keep an eye and checked on the progress of the project. Burnham indicated that he terminated Koehler's authority to place orders without advance clearance in October 1966, when he instituted a requirement that "purchase orders [signed by Burnham] had to be used or that [the orders] had to be cleared through [him] in every case." As to capital expenditures, clearance and signed purchase orders were always required. Regarding Vary, Burnham testified that he, unlike Koehler, was never authorized to make purchases of any nature, without "prior clearance" from himself or Koehler.

Koehler specifically denied ordering any materials for the four-compressor overhaul (\$4,000 of the \$6,000 total expended, according to Burnham), asserting that he "had no authority on that at all." According to Koehler, when Burnham inquired whether he could handle the overhaul and he (Koehler) indicated that he could, Burnham contacted Respondent's supplier and manufacturer of the equipment (Wilbur Lilley, branch manager of St. Regis Pulp & Paper Company) who then selected all the necessary parts from a catalogue. Koehler further testified that Lilley would come to the plant "many times . . . when we had trouble with the refrigeration" and when replacement parts were needed. He admitted ordering parts by telephone directly from the supplier, but stated that he did this only upon direction or clearance from Burnham. Koehler testified that a purchase order, signed by Burnham, was always required for materials procured by himself and Vary, even for hardware items such as bolts and screws.

Vary corroborated Koehler's testimony concerning the purchase order and clearance procedures, but could not accurately fix the time these procedures were instituted, other than saying in general terms that it was in effect when Burnham "first started there" or "soon after he came there. I'd say a month or so." He testified, contrary to Burnham, that he had purchased various needed items and parts, and, indeed, that anybody ("whoever is available," even the porter) had made purchases after obtaining Burnham's approval. He gave as an example a situation when "a belt breaks, and you need it right away, so you go to Mr. Burnham" for permission to obtain a replacement. Another cited example was when he obtained Burnham's approval to buy a gasket cutter from a salesman in the plant.<sup>12</sup>

<sup>12</sup>Burnham's testimony that it was Koehler who purchased the gasket cutter and that Koehler did this on his own is not credited. Vary's vivid recollection of the event was most persuasive.

Lilley, branch manager of St Regis Paper Company which supplied the compressor parts, corroborated Burnham's testimony that Koehler had personally ordered such parts in November 1965 — March 1966. Lilley testified that he dealt "basically" with Koehler and that the orders were not accompanied by purchase orders. In support of Lilley's testimony, Respondent introduced 10 invoices showing orders placed by Koehler for compressor parts (by telephone or person) on 10 occasions between November 1965 and March 1966, ranging from \$22.73 to \$585.10 and aggregating \$2,106. Lilley testified that when he took an order in person, Koehler would sometimes have a prepared list showing the parts "he wanted" and at other times would "ask" Lilley to help "pick out" the required parts.<sup>13</sup> He further testified that, particularly since he resided close to the plant, he would often visit on request of Burnham, Faust, and Koehler; that he would advise Koehler on equipment problems; that he would check the work of Koehler and Vary for accuracy while the overhauling was in progress, and that Koehler had "relied on [his] judgment." Finally, Lilley testified that in addition to Koehler and Burnham, two (production) supervisors placed orders for maintenance materials during 1966, and that his company would receive roughly 100 orders annually from Respondent, of which 40 were for refrigeration parts.

On the basis of all of the foregoing, particularly the testimony of Lilley (corroborated by Respondent's regular business records), I find that, contrary to his assertion, Koehler prior to the July 1966 election possessed and exercised authority to purchase some maintenance items (including compressor parts) without necessity for express prior clearance from Burnham and without purchase orders signed by Burnham for each item;<sup>14</sup> that in making certain purchases, however, Koehler frequently obtained assistance and relied on the advice and judgment of an experienced refrigeration engineer (Lilley); and that, contrary to Burnham's claim, only a portion of the purchases of compressor parts used for the 1966 overhauling (\$2,100 out of a \$4,000 total expended) was attributable to Koehler, the rest having been made by other Company officials, including Burnham.

## B Conclusions

1

Section 2(11) of the Act defines a "supervisor" as follows:

<sup>13</sup>In its brief, Respondent moved to correct p. 308 of the transcript to the extent it shows Lilley answering "yes" to counsel's question of whether he took any orders from Burnham for the compressor parts, contending that this answer "is inconsistent with all other testimony on this point and is an error in reporting." General Counsel filed a memorandum in opposition to the motion.

The motion is hereby denied. It is to be noted that two-three pages subsequent to the testimony in question (pp. 310-311), Lilley indicated that Burnham did place orders for compressor parts, the number of such orders being "rather difficult for me to answer," although he "would say not quite as often" as Koehler. In any event, the matter raised by Respondent is neither "critical" nor essential in reaching the conclusions herein, which would be the same even were the motion granted.

<sup>14</sup>As previously indicated, Burnham later (October 1966) did institute a clearance and purchase order procedure, but this was subsequent to the decisive time here in issue. Vary, whom I regard as an essentially truthful witness, but who supported Koehler's testimony that this procedure was in effect prior to July 1966, seemed confused on the timing of the effectuation of the change.

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Respondent does not claim that Koehler possessed or exercised authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, adjust grievances, or effectively to recommend actions with respect thereto. Its contention that Koehler was a supervisor is grounded basically on the claims that, in his capacity of "chief engineer," Koehler had authority to assign, responsibly direct, and evaluate the work of Vary, to assign him overtime work and regulate his hours, and to effectively recommend him for a pay increase. As found, however, it was Plant Manager Burnham, not Koehler, who assigned and directed Vary's (as well as Koehler's) work, established and regulated their hours and overtime, and granted them wage increases.<sup>15</sup>

To be sure, the record demonstrates that Koehler was and Respondent regarded him as a skilled and valuable employee. He was the senior and more experienced of the Company's two licensed engineers; as such, he advised and directed Vary, an engineer for only 1 year with the lowest (third class) license. But these factors did not constitute Koehler a supervisor vested with genuine management prerogatives. Koehler was no more than "a superior workman or lead man who exercises the control of a skilled worker over less capable employees." *NLRB v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (C.A. 4). See also *NLRB v. Quincy Steel Casting Co., Inc.*, 200 F.2d 293, 296 (C.A. 1), *NLRB v. Beaver Meadow Creamery, Inc.*, 215 F.2d 247, 251 (C.A. 3), *Northern Virginia Steel Corp. v. NLRB.*, 300 F.2d 168, 171-172 (C.A. 4); *Dubin-Haskell Lining Corp. v. NLRB.*, 375 F.2d 568, 570 (C.A. 4), *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 144 (C.A. 5). "Every order-giver is not a supervisor." *Security Guard Service*, 384 F.2d at 151. Mere lead or "direction" of the work of others is not equivalent to true power over subordinates nor need it require use of independent judgment; it may be no more than routine and cooperative in nature, reflecting the relationship of the older, more

<sup>15</sup>Respondent also introduced evidence purporting to show that approximately a year after the period here in issue (April — June 1967), Burnham and Koehler jointly interviewed nine applicants for engineer jobs, of whom two were hired on Koehler's recommendation. Actually, only one (Christensen) of the two reported to work and was made "chief engineer" and Koehler's superior. I cannot believe that it was Koehler's "effective recommendation" that prompted Burnham to engage Koehler's superior. I credit Koehler's testimony that since he knew more about the refrigeration and boilers than Burnham, he was asked "to sit in with him, when he interviewed a man, to see what his qualifications were," but that he had no real voice in selecting any applicant. In any event, this single instance of alleged participation in hiring — long after the crucial period here involved (April — July 1966) — is hardly sufficient to overcome the overwhelming weight of credited evidence demonstrating that Koehler did not occupy a supervisory position. Isolated or "sporadic" exercise of some supervisory tasks does not make a supervisor out of a rank-and-file employee. See *NLRB v. Lindsay Newspapers, Inc.*, 315 F.2d 709, 712 (C.A. 5), *NLRB v. Quincy Steel Casting Co., Inc.*, 200 F.2d 293, 296 (C.A. 1). "Moreover, the Board has long frowned on the view that a craftsman with one or two helpers who makes the customary recommendations with respect to them is a supervisor, stating that 'to do otherwise would be to attribute to Congress a result never intended.'" *Advance Envelope Manufacturing Company, Inc.*, 170 NLRB No. 166.

experienced, or more skillful to the younger, more junior, less experienced, or less skillful employee *Schott Metal Products Company*, 129 NLRB 1233, *Willis Shaw Frozen Food Express, Inc.*, 173 NLRB No 77. Contrary to Respondent's contention, Koehler did not regard himself as Vary's supervisor merely because he considered Vary his "assistant" or helper, and Vary surely did not view Koehler as his superior. Like Vary, and unlike Respondent's supervisors, Koehler worked fixed hours, was paid on an hourly basis, punched a timeclock, and was compensated for overtime. Finally, apparently without challenge from Respondent, Koehler identified himself with the Union, having served as its observer in a recent (1965) election.

Nor, in the circumstances of this case, does the requirement of the New Jersey licensing statute that Vary be supervised by a higher grade license holder in operating compressors of certain tonnage (*supra*, fn 4) require the conclusion that Koehler (a second class licensee) "supervised" Vary within the meaning of the National Labor Relations Act. To begin with, as Burnham testified, much of the engineer's work is routine since "you have an engine room that literally is automatic" and is controlled by switches. The record shows that Respondent has permitted Vary to attend to its boilers and compressors during regular hours and on alternate weekends when Koehler was off duty. Even unlicensed and unsupervised employees (the pasteurizer and porter) were allowed to turn on the compressors every morning before Koehler and Vary reported to work. In any event, the Board's decisions under the Act are not mechanically controlled by the wording of a local licensing requirement. See *NLRB v Randolph Electric Membership Corp.*, 343 F.2d 60, 64-65 (C.A. 4), *Independent Stave Company, Inc v NLRB*, 352 F.2d 553, 561-562 (C.A. 8), and cases therein cited. The criteria for "supervisor" established by a State do not necessarily satisfy the criteria of Section 2(11) of the National Labor Relations Act. Congress has entrusted to the Board the power and duty to determine "who is an employee for the purposes of the National Labor Relations Act." *NLRB v E C Atkins & Company*, 331 U.S. 398, 403; *NLRB v Hearst Publications, Inc.*, 322 U.S. 111, 130-134.

I conclude that Koehler was not a supervisor within the meaning of Section 2(11) of the National Labor Relations Act, since he did not possess the indicia of supervisory status enumerated in that section. I find that at most he was a "leadman" of a two-man maintenance engineer team in the plant. This does not "require that [he] be put in the supervisor class, and so deprived automatically of the organizational privileges of the Act." *NLRB v. Browne & Sharpe Mfg Co.*, 169 F.2d 331, 335 (C.A. 1)

## 2.

There remains the question whether even though not a supervisor, Koehler was a managerial employee since during the decisive period here involved he ordered and purchased maintenance materials and parts.<sup>16</sup>

As stated in *International Ladies' Garment Workers' Union, AFL-CIO v NLRB*, 339 F.2d 116, 123 (C.A. 2), "Although the Act makes no special provision for 'managerial employees,' under a Board policy of long duration, this category of personnel has been excluded

<sup>16</sup>As noted, this authority was admittedly terminated in October 1966, when Plant Manager Burnham set up new clearance and purchase order procedures

from the protection of the Act . . . The Board has defined 'managerial employees' as 'those who formulate, determine and effectuate an employers' policies' *American Federation of Labor*, 120 NLRB 969, 973." This exclusionary practice rests on the premise that the functions and interests of such individuals are more closely allied with those of management than with production workers and, therefore, that they are not truly "employees" within the meaning of the statute. However, as the Board has stated, "determination of an employee's managerial status depends upon the extent of his discretion, and the absence of established policy and regulations to aid in the exercise of such discretion is a factor entitled to considerable weight." *Central Maine Power Company*, 151 NLRB 42, 45. "The exercise of judgment within the limits of established policy does not confer managerial status absent authority to influence the establishment of such policies." *American Radiator & Standard Sanitary Corp.*, 119 NLRB 1715, 1717.

While the Board has held that individuals with "broad authority to pledge their employer's credit" qualify as "managerial employees,"<sup>17</sup> those whose authority "is strictly limited" or who exercise it only routinely or within clearly previously defined employer policy, do not. *American Federation of Labor and Congress of Industrial Organizations*, 120 NLRB 969, 974. See also *International Ladies' Garment Workers' v NLRB*, *supra*, 339 F.2d at 123.<sup>18</sup> It appears that here Koehler's orders and purchases entailed little if any independent judgment. Thus, he neither selected the vendor nor negotiated for or determined the price or quality of the materials which he "ordered." Cf. *Copeland Refrigeration Corp.*, 118 NLRB 1364, 1365. Other employees (including Vary) also ordered and purchased ordinary maintenance items in connection with their regular routine work. Koehler often required technical assistance in procuring materials and Plant Manager Burnham kept a close watch on his orders. Finally, capital purchases were admittedly outside the scope of Koehler's authority. Since Koehler was the senior of the two maintenance men on the spot, it fell to him as the logical person to obtain the maintenance materials routinely needed in his work.<sup>19</sup> It is clear that Koehler's authority in this area was not only strictly within limits of Company policy and instructions but did not require truly independent, important, or managerial judgment. See *Central Maine Power* and *American Radiator* cases, *supra*, and footnote 18, *supra*.

I conclude that the record fails to establish that Koehler's day-to-day activities in "ordering" supplies involved the exercise of such a degree of responsibility and discretion as to invest him with managerial status. I find that as to these functions, as well as to others he exercised

<sup>17</sup>*Eastern Camera and Photo Corp.*, 140 NLRB 569, 572. See also *Central Maine Power Company, supra*, *Brotherhood of Locomotive Firemen and Enginemen*, 145 NLRB 1521, 1527-28, 1535-36.

<sup>18</sup>*Accord St. Cloud Rendering Co.*, 116 NLRB 1069, *J. Segari & Co.*, 114 NLRB 1159, 1161, *Vulcanized Rubber and Plastics Company, Inc.*, 129 NLRB 1256, 1260. Cf., *Lumbermen's Mutual Casualty Co.*, 75 NLRB 1132, 1139.

<sup>19</sup>Burnham admitted that Koehler could not handle major engineering "problems" and, accordingly, that both Koehler and Burnham had "informally" taken up such problems with Vice President Faust, project engineer for refrigeration operations for all Howard Johnson facilities and a gold seal license holder whose office was in Englewood. Burnham testified that as plant manager he had sole responsibility for routine maintenance. He also admitted that when Englewood's refrigerator facilities were expanded in April 1967, it was Faust's gold seal which covered the plant until Christensen (another gold seal licensee and Koehler's new superior) was hired.

(*supra*, section B, 1), he was more closely allied to his fellow rank-and-file worker (Vary) than to management; and that he properly belonged in the appropriate (maintenance) bargaining unit

#### CONCLUSIONS OF LAW

1. At all times material herein Henry Koehler was an employee of Respondent within the meaning of Section 2(3) of the Act

2. At no time material herein was Henry Koehler a supervisor of Respondent within the meaning of Section 2(11) of the Act, nor a managerial employee of

Respondent within the meaning of that term under the Board's established policy

3. Henry Koehler was eligible to vote in the July 6, 1966, Board election in the appropriate licensed operating engineers bargaining unit established in Case 22-RC-3232

#### RECOMMENDATION

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that the Board reaffirm its Order of May 22, 1967, in this proceeding.