

**Bethlehem Steel Corporation and United Steelworkers of America, AFL-CIO.<sup>1</sup> Case 3-UC-22**

June 26, 1968

**DECISION AND ORDER**

BY CHAIRMAN McCULLOCH AND MEMBERS BROWN AND JENKINS

Upon a Petition for Clarification duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer John H. Sauter. All parties appeared and were given full opportunity to participate at the hearing. Thereafter, the Employer and Petitioner filed briefs in support of their respective positions.

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 considered the Hearing Officer's rulings made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

Upon the entire record in this case,<sup>2</sup> the Board finds:

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

2. Petitioner represents certain employees of the Employer.

3. In its petition for clarification, Petitioner seeks to include as an accretion to its certified unit, the approximately 18 senior and basic programmers, at the Employer's Lackawanna, New York, plant. The Employer, contrary to Petitioner, contends that these employees should not be included as an accretion since they are technical employees who do not have a community of interest with the bargaining unit employees.

On October 29, 1945, in Case 3-R-1016, Petitioner was certified to represent the following accounting department clerical employees at the Employer's Lackawanna plant:

. . . the clerks who work in the cashiers' office, the clerk who acts as assistant to the head receiving clerk, the clerk who acts as assistant to the head ledger clerk, the clerk who acts as assistant to the head inventory clerk, the clerk who acts as assistant to the head product clerk, and the class A clerk in the Pay-roll Division who is responsible for the preparation of monthly reports. . . .

In the most recent contracts negotiated since the certification, including the one negotiated in 1965 and still in effect, the unit has been similarly described substantially as follows:

The unit shall consist of the salaried employees in the bargaining units at the Plant for which the Union has been certified as the exclusive collective bargaining representative in National Labor Relations Board Cases Nos. 3-R-639 [Production Scheduling Department], 3-R-944 [Mills Division], 3-R-1016 [Accounting Department], 3-R-1145 [Strip Mill Division] 3-R-1146 [Mechanical Department], 3-RC-681 [Steel Division], and 3-RC-680 [Specialty Products Division].

Since the early 1940's, the accounting department has been responsible for processing information regarding payrolls, accounts receivable, cost analysis, inventories, insurance, pensions, etc. In the performance of these functions, the accounting department employees at first utilized and operated relatively simple electronic accounting machines [E.A.M.]. These machines, located in the accounting department's data processing division, performed simple arithmetic functions, and were controlled by means of wired panel boards which were inserted in the machines. Those panels which were permanent in nature, and which were fairly complex, were wired by either representatives of the vendor [IBM] or by supervisors employed by the Employer. Those panels which were less complex and which were temporary in nature were wired by employees classified as machine operators.

In 1960, the Employer acquired for its data processing division a Remington Rand USS 80, a "first generation" computer, consisting of a drum-type printer, a card reader with a rate of 300 cards per minute, and four tape units. The USS 80 had a drumtype memory of 9,500 words, and its speed was limited to the drum revolutions. In anticipation of the Employer's acquisition of this computer, a "Special Assistant" was employed in 1959 to prepare programming work for the USS 80. This employee was not placed in the bargaining unit, and, because he was not covered by the minimum wage and overtime provisions of the Fair Labor Standards Act, was noted and listed on the Employer's employment lists as an "exempt employee." Subsequently, the Employer increased from one to five the number of employees performing programming functions on the USS 80. These additional employees, like the "Special Assistant" hired in 1959, were also excluded from the bargain-

<sup>1</sup> The name of Petitioner appears as amended at the hearing

<sup>2</sup> Petitioner's request for oral argument is hereby denied as, in our

opinion, the record, including the briefs, adequately presents the issues and positions of the parties

ing unit and listed as "exempt employees."

In July 1963, the Employer replaced the USS 80 with IBM 1410 and IBM 1401 series computers. The 1410, a "second generation" computer consisting of a reader with a speed of 800 cards per minute and a 300 card-per-minute punchcard unit, has a core memory of 40,000 positions and a transfer rate on tape of 23,000 characters per second. In addition, it possesses a storage capacity in disc of 28 million digits. The IBM 1401 system is a scaled-down version of the 1410, having a smaller memory core and slower speeds than the 1410.

Shortly after the acquisition of the new IBM machines, the Employer hired another employee to perform programming duties, and reclassified those employees performing programming duties in the data processing division to either "Systems Analysts" or "Computer Technicians." Subsequently, in 1964 or 1965, the Employer reclassified the "Computer Technicians" to "exempt Senior Programmers."

In order to meet the increasing demands being made on its programming staff, the Employer in 1965 further expanded its computer operations by hiring several additional employees. These employees were hired subsequent to the posting of a plantwide notice which stated that openings existed in the Employer's computer operations, and that interested applicants would take a "Programming Aptitude Test." Those employees subsequently hired, like the other existing members of the programming staff, were also excluded from the bargaining unit and classified by the Employer as "exempt employees."

During the above-described period, the Employer periodically informed Petitioner that the aforementioned employees in its data processing programming staff were classified as "exempt," non-bargaining unit employees. Petitioner did not, however, either protest the exclusion of these employees from the bargaining unit or seek their inclusion in the unit.

In October 1966 the Employer reorganized its computer operations, and transferred to the data processing division the programming operations theretofore performed elsewhere in the systems department, by nine "Systems Analysts" employed therein. The systems department, in existence from about 1959, was located on the seventh floor of the administration building and was mainly responsible for programming jobs which pertained to the Employer's production operations. The "Systems

Analysts" employed therein were never included in the bargaining unit and, because they were not covered by the provisions of the Fair Labor Standards Act, were listed by the Employer as "exempt employees." As the systems department was independent from the accounting department, there was, prior to the 1966 reorganization, very little contact between the "Systems Analysts" and their counterparts in the data processing division. Pursuant to the reorganization, however, the "exempt Systems Analysts" transferred to the data processing division programming staff were reclassified to "non-exempt Basic Programmers."<sup>3</sup> As an additional part of this reorganization, the Employer also reclassified the "exempt Computer Technicians" on its programming staff to "exempt Senior Programmers."

Immediately thereafter, Petitioner filed a grievance, claiming that the approximately 18 employees classified as basic and senior programmers were improperly excluded from the bargaining unit.<sup>4</sup>

Subsequently, the Employer installed an IBM 360 series computer in September 1967. The 360 is a "third generation" computer and is far more complex and efficient than any of its predecessors, being the first computer to have two printers and two card readers, and the first to process five or six programs concurrently. In addition, it has a core memory of 256,000 positions, a tape transfer rate of 64,000 characters per second, and a total disc storage capacity of 200 million digits.

During all of the foregoing period, the record indicates that programmers have been subject to the immediate supervision of a supervisor of programming, who in turn is responsible to the chief of the data processing division. The supervisor of programming does not supervise any other employees and programmers are subject to no other immediate supervision.

Programmers are presently responsible for developing programs for the IBM 1401, 1410, and 360 series in the areas of cost, payroll, and production. The record establishes that after the chief of data processing has received a request for programming some existing manually performed job, a programmer is assigned to investigate and to obtain the details of the job. The programmer's initial findings are then discussed with the chief of data processing and, if the request for programming is deemed feasible, the programmer is assigned to develop a program. The programmer then deter-

<sup>3</sup> The Employer stated at the hearing that the basic programmers are not exempt from the provisions of the Fair Labor Standards Act, and that, therefore, they are entitled to overtime pay and premium pay for Sundays and holidays.

<sup>4</sup> After Petitioner processed its grievance through the various steps pro-

vided for in the collective-bargaining agreement, but before the grievance was arbitrated, it filed the instant UC petition. Although senior programmers earn a higher salary and possess greater training and responsibility than do basic programmers, we shall hereinafter, because of their similar duties and interests, refer to both groups as programmers.

mines which computer is most adaptable, whether the proposed program should be placed on disc, tape, or cards, and what input and output routines should be utilized. After he has made these initial determinations, the programmer writes up a proposed program or series of proposed programs, drawing diagrams and flow charts which show the steps which the computer must follow. Programs are subsequently key punched on cards by the keypunch operators and are then given to machine operators, who insert the cards in the computer in the manner prescribed in the programmer's flow charts. Although the keypunch and machine operators possess a rudimentary knowledge of the Employer's computer operations in order to operate their respective machines, the record discloses that they perform their specified tasks in a routine manner, requiring little, if any, independent judgment or specialized training. After the above-described operations have been performed, and after the chief of data processing has approved the finished program, it is then stored, to be utilized when needed.

Although the Employer does not require prospective programmers to have a specified minimum amount of formal education as a prerequisite for hire, it does require that they possess both a generally high level of education and specialized computer training. Accordingly, the record establishes that of the approximately 18 programmers, 1 has attended 1 year of business school, 2 have attended 2 years of business school, 4 have attended 1 year of college, 2 have attended 2 years of college, 1 has attended 3 years of college, and 5 have graduated from college. All have also had specialized computer training, acquired either by prior work experience or by attendance at formal programming courses. Moreover, in order to stay current with constantly changing computer techniques, programmers attend special computer schools throughout their employment. In addition, programmers frequently travel to the Employer's other plants for the purposes of comparing notes with their counterparts, and learning particular programs which have been proposed for the Lackawanna facility.

Programmers have traditionally worked in their own offices, in an area walled off from the keypunch and machine operators, and other bargaining unit employees. Programmers spend approximately 80 percent of their time at their own desks, devising and establishing the programs described above. The remaining 20 percent of their time is spent on visits to other plants, weekly

meetings, conferences, etc. It is unusual, therefore, for them to be either in the area where the keypunch machines and computers are located, or in those areas where other bargaining unit employees work.

Programmers are presently working irregular hours as a result of the Employer's need to convert some existing programs from the 1410 to the 360 series. Under normal conditions, however, programmers work on an 8 a.m. to 4:30 p.m. basis, Monday through Friday. Many of the bargaining unit employees, on the other hand, are rotated among middle, night, and day shifts.

The record establishes that the minimum rate for basic programmers is \$312.50 biweekly and that the maximum rate for senior programmers is approximately \$450 biweekly. The starting rate for basic programmers is, therefore, equal to or higher than all but one bargaining unit classification.

In support of its request to clarify the certification to include programmers, Petitioner asserts that: (1) programmers are clerical employees who have a community of interest with other salaried unit clericals; and (2) assuming that programmers are technical employees, they perform duties similar to those performed by bargaining unit employees. Petitioner further argues that since all programmers were "exempt" and the job classification of "non-exempt Programmers" did not come into existence until October 1966, it had no knowledge during the 1965 collective-bargaining negotiations that programmers were being improperly excluded from the unit.

We find, upon the basis of all the foregoing facts, that both the "exempt and non-exempt" programmers perform work which has heretofore never been performed by bargaining unit employees; that programmers have performed similar job functions for several years, albeit under different job classifications; and that Petitioner has neither protested the exclusion of the programmers from the unit nor claimed to represent them from 1960 until the fall of 1966. In particular, Petitioner did not attempt to bargain for any of these employees during the 1965 contract negotiations. Considering these factors, along with the differences which exist between programmers and unit employees in regard to job functions, responsibilities, use of initiative and independent judgment, immediate supervision, wages, and hours, we find, based upon the entire record, that programmers cannot be regarded as an accretion to the existing clerical unit.<sup>5</sup> We shall, therefore, deny Petitioner's request to amend the certification and shall dismiss the instant proceeding.

<sup>5</sup> Cf. *Worthington Corporation, Compressor and Engine Division*, 155 NLRB 22, *General Iron Works Co.*, 150 NLRB 190, and *Aluminum Companies of America*, 146 NLRB 929.