

**A. A. Mathews Associates and Local 77, International Union of Operating Engineers, AFL-CIO, Petitioner. Case 5-RC-8050**

November 13, 1972

**DECISION ON REVIEW**

BY MEMBERS JENKINS, KENNEDY, AND  
PENELLO

On May 31, 1972, the Acting Regional Director for Region 5 issued a Decision and Direction of Election in the above-entitled proceeding in which he directed elections in two voting groups. One voting group consisted of inspectors and inspector-trainees; the other professional employees, including engineer-inspectors whom he found to be professionals, and Engineers Joe Antonelli, Jon Blanck, and Arthur Simpson whom all parties agree are professionals. He also found Engineer-Inspectors Doyle Jones and Jon Whyte to be supervisors and, accordingly, excluded them from the voting group. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer and the Petitioner filed timely requests for review. The Employer contends that there was error in finding Jones and Whyte to be supervisors. The Petitioner contends that there was error in finding the engineer-inspectors to be professionals and that Engineers Antonelli, Blanck, and Simpson should be excluded from the unit.

On June 28, 1972, the National Labor Relations Board, by telegraphic order, granted both requests for review and stayed the election pending decision on review. Thereafter, the Petitioner filed a memorandum on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review and makes the following findings of fact:

The Employer provides engineering inspection services in Washington, D.C., on two construction sites known as the Rock Creek tunnel and Dupont Circle station projects which are being constructed for the Washington Metropolitan Area Transit Authority.<sup>1</sup> The Employer's overall operation is directed by Area Manager L. B. True who maintains an office at 1346 Connecticut Avenue in Washington, D.C. Also located at that office are two of the engineers whose unit placement is disputed, and an office clerical employee. The third engineer whose

unit placement is disputed, Blanck, spends a substantial portion of his time in the field. The Employer's resident engineers, F. A. Huntington and C. H. Arnold, directly supervise the Employer's inspection work at the Rock Creek tunnel and the Dupont Circle station jobsites, respectively.<sup>2</sup> There are five engineer-inspectors (including alleged supervisor Whyte), four inspectors, and one inspector-trainee employed on the Rock Creek tunnel job. At the Dupont Circle station job, two engineer-inspectors (including alleged supervisor Jones) and one inspector are employed. The Petitioner seeks, in effect, to represent a single unit of all engineer-inspectors, inspectors, and inspector-trainees, excluding, *inter alios*, professional employees.

With respect to the professional status of the engineer-inspectors, the record shows those employees hired for inspection work who hold engineering degrees are so classified, whereas those who lack degrees are classified as inspectors or inspector-trainees depending on their level of experience. Regardless of classification, the principal function of all employees engaged in inspection work is to confirm that the construction being performed by the Authority's contractors is in accordance with the contract plans and specifications.

In addition to their inspection duties, the engineer-inspectors are occasionally assigned other work such as making engineering calculations in connection with contract modifications which the Employer recommends to the Authority, as well as other functions which make use of their educational background. Furthermore, there is testimony that the engineer-inspectors are capable of exercising more discretion than the employees who do not have formal engineering education. For these reasons, the Employer seeks to maintain a mixed complement of engineers and nonengineers engaged in inspection work.

However, Area Manager True testified that only a small portion of the engineer-inspectors' time is spent performing assignments other than inspection work. With regard to the following engineer-inspectors, True gave more specific testimony as follows: John Amelunxen spent approximately 95 percent of his time in the past year engaged in inspection work and his remaining time was spent doing contract modification work; Karl Franz, whose educational background is in geological engineering, spends 85 to 90 percent of his time engaged in inspection work while the remaining time is usually spent preparing geological reports for the Employer; Benjamin Anderson spends approximately 55 percent of his time engaged in inspection work and in the other 45

<sup>1</sup> Hereinafter called the Authority

<sup>2</sup> The parties are in agreement that True, Huntington, and Arnold should

be excluded as supervisors and that the office clerical employee should be excluded

percent of his time, he performs such work as making engineering calculations with respect to quantities and modifications, checking shop drawings, and performing other engineering functions. There is no specific testimony with respect to the amount of time the Employer's other engineer-inspectors spend in performing duties other than inspection work. Furthermore, True testified that some of the engineering calculations performed by its engineer-inspectors could be performed by an experienced inspector and that although the Employer's pay rates are based on the nature of the work performed by its employees engaged in inspection work, some of the inspectors earn more than some of its engineer-inspectors.

Under Section 2(12) of the Act, it is the work performed and the "consistent exercise of discretion and judgment in its performance," rather than the employee's qualifications, which is controlling in determining whether an individual is a professional employee.<sup>3</sup> Applying that test to the record herein, we conclude, contrary to the Acting Regional Director, that the engineer-inspectors are not professional employees within the meaning of the Act. As detailed above, the major portion of the engineer-inspectors' work involves inspection of construction work similar to that performed by admittedly nonprofessional employees herein. Moreover, such inspection work is similar to that of others whom the Board has found not to be professional employees.<sup>4</sup> Even assuming the other duties assigned the engineer-inspectors involve the exercise of discretion and judgment predominantly intellectual in character, the record before us does not warrant finding that these employees *consistently* exercise such discretion and judgment as required by Section 2(12).<sup>5</sup> Accordingly, as these employees have a close community of interest with other employees engaged in inspection work, we shall include them together in the same unit.

The Petitioner, contrary to the Employer, seeks to exclude Jones and Whyte as supervisors. Jones is assigned to the Rock Creek tunnel job and Whyte

works at the Dupont Circle station job. Both are classified as engineer-inspectors and spend most of their time engaged in inspection duties. In addition to their regular duties, they are also assigned to assist the resident engineer in charge of their respective jobs. In this latter regard, their primary function is to schedule work for others engaged in inspection, including the assignment of work and the scheduling of breaks, but we are unable to determine whether this work is other than routine in nature. There is testimony that they also have authority to send employees home for flagrant violations of the Employer's rules—such as reporting to work intoxicated—and to recommend suspension of employees for less serious violations; but the evidence does not disclose that this authority has ever been exercised or whether their recommendations are effective. Furthermore, we note that in addition to the resident engineer, an acknowledged supervisor, there are only two other employees assigned to the Dupont Circle station job where Jones is employed. In our opinion the record is inconclusive as to the supervisory status of Jones and Whyte, and we shall, therefore, permit them to vote subject to challenge.

The Petitioner and the Employer agree that the Employer's other engineers, Antonelli, Blanck, and Simpson, are professional employees. Since the Petitioner does not seek to represent these employees and, as the unit is otherwise appropriate, we shall exclude them.<sup>6</sup>

Based on the foregoing, we find the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All engineer-inspectors, inspectors and inspector-trainees employed on the Employer's Rock Creek tunnel and Dupont Circle station jobs in Washington, D.C. but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

Accordingly, the case is remanded to the Regional Director for the purpose of conducting an election

<sup>3</sup> *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB No. 121, *Hertzka & Knowles*, 192 NLRB No. 126; *Starrett Brothers & Eken, Incorporated*, 77 NLRB 275, 280, 281

<sup>5</sup> Although our finding herein results principally from evidence showing that the engineer-inspectors spend such a small portion of their time performing duties that could require the exercise of professional judgment, we have considered the evidence that Engineer-Inspector Anderson spends 45 percent of his time performing duties other than inspection. Although the percentage of time spent by Anderson on noninspection work is higher than that of the other engineer-inspectors, it is clear that he spends more than a majority of his time on inspection work. With regard to his other duties,

some appear to require judgment that may be professional in character but the record does not show whether all his other duties detailed above require like judgment or how his time is divided among these other duties. Under all the circumstances, we find that the record fails to establish that Anderson is a professional employee and that he has a close community of interest with the other engineer-inspectors.

<sup>6</sup> Although there is some record evidence that Simpson's duties are primarily administrative rather than professional, we would exclude him in any event as his interests arising from his separate location, functions, and working conditions are sufficiently distinct from those of the employees included in the unit.

pursuant to his Decision and Direction of Election, as modified herein, except that the payroll period for

<sup>7</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed

determining eligibility shall be that immediately preceding the date of issuance.<sup>7</sup>

by the Employer with the Regional Director for Region 5 within 7 days of the date of this Decision on Review. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.