**Arizona Public Service Company *and* Utility Workers Union of America, AFL–CIO.** Case 28–RC–5068

February 17, 1993

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached).[1] The request for review is denied[2] as it raises no substantial issues warranting review.[3]

[1] Review was requested of the Regional Director's findings that: (1) the petitioned-for, single plant production and maintenance unit is an appropriate unit; (2) the reactor operators are not supervisors as defined in Sec. 2(11) of the Act; and (3) the reactor operators are not professionals as defined in Sec. 2(12) of the Act.

[2] Member Oviatt would permit the senior reactor operators to vote subject to challenge.

[3] In denying review, the Board disavows the Regional Director's reliance on *Maine Yankee Atomic Power Co.*, 239 NLRB 1216 (1979), enf. denied 624 F.2d 347 (1st Cir. 1980), which was overruled by the Board in *Big Rivers Electric Corp.*, 266 NLRB 380, 383 fn. 2 (1983), to the extent inconsistent with that case. That does not affect the result in this case, however, because we find *Big Rivers Electric* to be factually distinguishable.

APPENDIX

Regional Director's Decision and Direction of Election in Case 28–RC–5068

The Petitioner seeks to represent a collective-bargaining unit consisting of all production and maintenance employees who are employed at the Palo Verde Nuclear Generating Station (Palo Verde) by the Employer, an electric utility company. The Employer operates Palo Verde, a nuclear power plant located approximately 70 miles west of Phoenix, Arizona, where it employs approximately 950 production and maintenance employees. Contrary to the Petitioner, the Employer contends that the Palo Verde employees do not by themselves constitute an appropriate bargaining unit. Rather, the only appropriate unit in which Palo Verde employees could be included, according to the Employer, is the systemwide unit consisting of approximately 3000 production and maintenance employees which is presently and historically represented by the International Brotherhood of Electrical Workers, Local Union No. 387, AFL–CIO, CLC (IBEW Local 87). Although notified of the instant petition and hearing in this matter, IBEW Local 387 did not intervene in this proceeding. Moreover, the Employer asserts that even if the petitioned-for unit which excludes all supervisors and professional employees were to be found appropriate, the approximately 74 employees working at Palo Verde in the reactor operator job classification should be excluded because they are either supervisors or professional employees. The Petitioner asserts that the reactor operators are neither supervisors nor professional employees, but simply part of the production and maintenance work force. This proceeding is the most recent of a number of representation cases filed in this Region involving the status of production and maintenance employees at Palo Verde. In *Arizona Public Service Co.*, 256 NLRB 400 (1981) (*APS I*), the Board granted unit clarification petition filed by IBEW Local 387 and held that the Palo Verde production and maintenance unit employees should be included in the systemwide production and maintenance unit of the Employer's employees represented by IBEW Local 387. In *Arizona Public Service Co. & Electrical Workers Local 387*, Case 28–RC–4459, issued January 8, 1988 (*APS II*), I denied IBEW Local 387's petition for an election limited to a unit of 950 employees employed at Palo Verde, concluding that the petitioned-for employees should be included in the systemwide production and maintenance unit if, in a self-determination election, a majority of the Palo Verde employees voted for representation by IBEW Local 387. No request for review of that decision was filed with the Board. In *Arizona Public Service Co.*, Case 28–RC–4812 issued May 11, 1990 (*APS III*), I granted the Petitioner's request for an election limited to the production and maintenance employees at Palo Verde, finding that such a unit is appropriate for collective bargaining. By order dated June 14, 1990, the Board denied the Employer's request for review. In *Arizona Public Service Co.*, Case 28–RC–4958 (*APS IV*), I again granted the Petitioner's request for an election limited to the production and maintenance unit employees at Palo Verde, finding that such a unit constituted ''an appropriate residual unit for the purposes of collective bargaining.'' (*APS IV*, p. 13.) By order dated September 13, 1991, the Board denied the Employer's request for review. In this proceeding now before me, the parties have placed in evidence the transcripts, exhibits, and briefs from several of the above-described cases. The only new evidence that the Employer introduced at the hearing in this matter, regarding the appropriateness of the petitioned-for unit was evidence showing that within the last year, one employee of an unknown job classification transferred from another of the Employer job locations to a production or maintenance job at Palo Verde, and three employees working in a production or maintenance job at Palo Verde transferred to other Employer facilities. Since there are approximately 950 production and maintenance employees employed at Palo Verde, these four transfers fail to show substantial interchange between Palo Verde and other Employer job locations and do not constitute evidence of changed circumstances which warrant a reexamination of *APS III* and *APS IV*.

In its brief the Employer asserts that the decisions in *APS III*, and *APS IV*, in which it was concluded that a residual unit consisting of the production and maintenance employees at Palo Verde was an appropriate unit, were erroneous. The Employer reiterates its arguments regarding the necessity of a systemwide unit which it presented to me in its briefs in *APS III* and *APS IV*. Having carefully reviewed the Employer's arguments in its briefs, and the Board's decision to deny the Employer's requests for review in *APS III* and *APS IV* the Employer's arguments that the petitioned-for unit is inappropriate is rejected, and I reaffirm my findings and conclusions therein that a residual unit of Palo Verde production

and maintenance employees is appropriate, as in *APS III* and *APS IV*.

In *APS III* (a pertinent portion is annexed and made a part of this decision) it was pointed out that the Board had stated in *Baltimore Gas & Electric Co.*, 206 NLRB 199, 201 (1973), that the optimum bargaining unit in the public utility industry is a systemwide unit. However, due to the particular facts in *APS III*, it was determined that the *Baltimore Gas* principle must give way to a superior statutory principle, enunciated in Section 9(b) of the Act, which permits the Board to decide ''in each case'' the appropriate unit ''in order to assure the employees the fullest freedom of expressing the rights guaranteed by the Act.'' It was noted that since IBEW Local 387 represented only one-third of the Employer's systemwide work force, consisting of approximately 9000 employees in a variety of job classifications, it could scarcely be claimed that IBEW Local 387 currently represented employees in the most optimal unit. It was also noted that the Employer had permitted the fragmentation of the systemwide unit by entering into a collective-bargaining agreement with the Carpenters Union even though its agreements with IBEW Local 387 have included carpenter helpers in the IBEW Local 387's recognized bargaining unit. Thus, a residual unit consisting of the production and maintenance employees at Palo Verde was found to be an appropriate unit in *APS III*. In so finding, it was noted that IBEW Local 387, the incumbent union representinng approximately 3000 production and maintenance employees at the Employer's six fossil fuel stations and in the Employer's line departments, was not seeking to represent the approximately 950 production and maintenance employees at Palo Verde who received different wages and benefits than the 3000 represented employees.

It was further explained in *APS III* that the Board in *Eastern Container Corp.*, 275 NLRB 1537 (1985), had modified its rule that all unrepresented employees must be included in a residual unit. In that case a union petitioned for a unit of maintenance employees, while another union, the incumbent bargaining representative of a large number of production employees, claimed that the only appropriate unit was an overall unit of production and maintenance employees. Noting that the incumbent union did not seek to represent the maintenance employees and that the parties stipulated that unrepresented employees other than maintenance employees should be excluded from the petitioned-for unit or the combined production and maintenance unit, the Board found that the maintenance employees constituted an appropriate residual unit. See also *Mosler Safe Co.*, 188 NLRB 650 (1971). In *APS III*, it was noted in response to the Employer's claim that all unrepresented residual employees should be required to vote in any residual election directed that the record revealed that the Employer had time and time again voluntarily consented to representation elections in segments of the residual or unrepresented employees employed by it systemwide. It was further noted in that decision that the Employer failed to establish that the unrepresented employees employed outside of Palo Verde had any meaningful community of interest with the Palo Verde employees except for the fact that they were all performance review employees whose terms and conditions of employment had been unilaterally established by the Employer. It was concluded that in these circumstances it would be contrary to the employees' representation rights under Section 9(b) of the Act to require the Palo Verde production and maintenance employees to remain unrepresented until such time, if ever, that a labor organization other than IBEW Local 387 sought to represent them as well as the production and maintenance employees at the other locations systemwide who were then currently represented by IBEW Local 387 or sought to represent all the remaining 6000 unrepresented employees in one residual unit. I do not view these as viable options for the Palo Verde employees. Rather, they constititute barriers to their rights of collective bargaining under the Act.

Based upon the foregoing, and the record as a whole, I reach the same unit conclusion in the instant matter as in *APS III* and *APS IV* and, accordingly, find that a unit limited to the Employer's production and maintenance employees at Palo Verde to be appropriate. See also *Monongahela Power Co.*, 252 NLRB 715, 716 (1980), enf. denied on other grounds, 657 F.2d 608 (4th Cir. 1981) (a bargaining unit consisting of all employees including control room foremen at only one of the utility company's electrical generating stations found to constitute an appropriate unit).

The second issue raised by the Employer is whether the approximately 74 reactor operators at Palo Verde should be excluded from the bargaining unit because they are either professional employees or supervisors as defined in the Act.

There are three nuclear reactors and accompanying facilities (units) at the Employer's Palo Verde site. Each reactor unit has a 30-foot by 50-foot control room which contains a variety of indicators, gauges, alarms, and computer equipment. On a typical 12-hour shift there are two reactor operators and one assistant shift supervisor on duty in the control room. The assistant shift supervisor has a desk located in the back portion of the control room to allow him or her to view the entire control room. The shift supervisor's office is adjacent to and separated by a see-through glass wall from the control room. The principal responsibility of a reactor operator is to help monitor and control a nuclear reactor from the control room. The reactor operators keep the unit operating within the technical specifications of the Employer's nuclear power plant operating license by following detailed Employer and Nuclear Regulatory Commission (NRC) procedures and regulations.

Each reactor unit includes approximately 45 major systems, such as the safety injection system, reactor coolant system, generator hydrogen system, and radioactive drains. These systems can be individually controlled by reactor operators in the control room. Additional adjustments, however, frequently have to be made directly to these systems to place the systems in or out of service, or to adjust the systems. These adjustments are made by auxiliary operators who are in constant communication with the reactor operators. A reactor operator may talk with an auxiliary operator over the radio as much as once every 20–30 minutes during normal operating shifts. The Employer's job description states, in part, that the reactor operator ''[d]irects subordinates.'' Robert McKinney, the Employer's operations supervisor, tesified that the reactor operators planned the auxiliary operator's tasks, set timeframes at which particular actions must be completed by the auxiliary operator, and established times when they expect the auxiliary operator to report back on the progress made.

Normally there are six auxiliary operators working in each of the three units during each shift. The auxiliary operators usually work in, and have responsibility for covering, one of eight areas outside the control room. A reactor operator may direct an auxiliary operator from one area to help another auxiliary operator if the other auxiliary operator has excessive work in his or her area. The reactor operator, however, has the responsibility to inform the assistant shift supervisor of plant conditions and the location of auxiliary operators. For instance, when a reactor operator gets an indication from a control room gauge that there may be a problem with a piece of equipment, the reactor operator dispatches an auxiliary operator to directly check the piece of equipment to determine whether the control room gauge is correct. On occasion, a particular alarm may go off in the control room indicating a problem in a control circuit, and the reactor operator would then tell an auxiliary operator that a particular temporary pump needed to be started in his or her area. At another time, the reactor operator may observe various gauges in the control room which indicate that there was not appropriate pressure in a vessel maintained with hydrogen gas. The reactor operator would then direct the auxiliary operator to raise the pressure 10 or 20 pounds per square inch based upon the information in the indicators and the reactor operator's knowledge of overall conditions in the unit. The reactor operator is in direct and continual communication with the assistant shift supervisor about the conditions in the unit. If a reactor operator runs into any problems, he or she is to consult with, and take direction from, the assistant shift supervisor.

The Employer affirms that the shift supervisor and assistant shift supervisor are statutory supervisors. Within each unit the reactor operators report directly to the assistant shift supervisors, while the assistant shift supervisors report to the shift supervisors and the shift supervisors report to the operations supervisors. The assistant shift supervisor has overall responsibility for the entire control room. At all times, either an assistant shift supervisor or shift supervisor is in the control room. At the beginning of each 12-hour shift the unit's reactor operators and auxiliary operators attend a meeting in the control room along with supervisors and representatives from both the Palo Verde radiation protection department and chemistry department. The meeting is conducted by the assistant shift supervisor who discusses the activities planned for the unit that day.

On a normal shift, the assistant shift supervisor will provide reactor operators with a list of components to be removed from service, and the reactor operator will in turn prioritize and assign the work to auxiliary operators. The Employer's reactor operator job description states that the reactor operator ''[d]irects the implementation of tagging and clearance procedures,'' which means tagging equipment for removal.

Reactor operators spend approximately 10 percent of the time responding to unexpected off-normal situations. The reactor operators identify abnormalities by looking at various instruments and gauges to determine whether a particular system not responding in an anticipated manner based upon their knowledge of the system's design and operating functions and upon their knowledge of how the system has responded in the past. If the reactor operator identifies an abnormality, he or she analyzes what is going on with the system and what action, such as removing a portion of the unit from automatic to manual control, is necessary to correct the problem. The reactor operator then announces to others in the control room what action he or she is going to take. If a reactor operator sees a problematical trend in the controls, he or she would seek approval from the assistant shift supervisor before placing the system from automatic to manual control. However, if the control room gauges indicate that the problem has gotten past a set point where the reactor operator does not have time to seek approval, the reactor operator will place the system on manual and at the same time announce what he or she is doing. If the assistant shift supervisor does not concur, the reactor operator will place the system back under automatic control. It is rare, approximately once a year when the reactor operator does not have sufficient time to consult with the assistant shift supervisor or shift supervisor before taking action. Palo Verde Operations Supervisor Robert McKinney testified that 99 percent of the time when there is a critical decision to be made by a reactor operator, the assistant shift supervisor or the shift supervisor are involved in the decision making and have the authority to overrule the reactor operator's decision or conclusion. A reactor operator's poor judgment in responding to an off-normal situation could result in one of the Palo Verde units shutting down, which could result in a major expense by the Employer in buying power to replace the power lost during the unit shutdown. Off-normal situations usually occur during reactor startups. Startups average two or three times every refueling interval of 18 months. The Employer has detailed, step-by-step procedures regarding the startup procedures to which reactor operators strictly adhere. During a startup the reactor operator, in conjunction with the entire control room staff, coordinates all the systems coming together to start up the unit. During startups there usually are more auxiliary operators working on shift in the unit than normal, and the reactor operators coordinate and direct their activities to make the various systems operational.

Eighty-five to ninety percent of the Employer's reactor operators served in the U.S. Navy on nuclear powered ships. A high school diploma or its equivalent is a minimum requirement for a reactor operator position at Palo Verde. The Employer requires its reactor operators to first work as an auxiliary operator at Palo Verde for a minimum of 18 to 24 months. During this time these auxiliary operators receive 12 weeks of full-time, in-house technical training and preparation for becoming a reactor operator, including classroom academic instruction in fundamental courses of chemistry, physics, electricity theory, and nuclear physics. These auxiliary operators receive six additional weeks of full-time, hands-on training in a simulated control room (simulation training). At the completion of this training program these reactor operator trainees are required to pass a United States NRC administered licensing examination. A valid NRC Reactor Operator license is a minimum reactor operator job requirement. Once an auxiliary operator is promoted to a reactor operator, that reactor operator is required to have 1 week of retraining, consisting of both classroom work and simulation training, every 6 weeks. Reactor operators can obtain further training and obtain a senior reactor license from the NRC. Only individuals with a NRC senior reactor license can supervise NRC licensed reactor operators. It takes a reactor operator aproximately 26 weeks to complete the training

necessary to obtain a senior reactor license. To maintain a senior reactor operator license, the reactor operator must supervise reactor operators at least 40 hours per quarter. Initially, the Employer had instructors from Memphis State University (MSU) teach its reactor operator courses. Employees could obtain MSU college credit for taking these classes, and this college credit was accepted at other universities. Currently, these courses are taught by in-house instructors who work for the Employer.

The Employer requires the reactor operators to wear gray slacks and blue shirts and the assistant shift supervisors and shift supervisors to wear tan slacks and white shirts. Auxiliary operators are not required to wear certain colored shirts or pants. The only individuals at Palo Verde required to wear certain specified colored shirts and pants are control room personnel. The Employer's monthly salary for shift supervisors ranges from $4,645 to $5,809 for assistant shift supervisors $3,984 to $4,981, for reactor operators $3,416 to $4,271, and for auxiliary operators $2,930 to $3,604.

As noted above, the Employer asserts that reactor operators should be considered statutory supervisors because they possess authority to the ''responsibly direct'' or assign work to the auxiliary operators. Upon careful review of the record, and cognizant that the burden of proving supervisory status is on the party alleging that such status exists, I find that the reactor operators are not supervisors as defined in the Act for the following reasons.

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

> 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.

Section 2(11) lists the supervisory powers ''in the disjunctive—so that the exercise of any of them is sufficient to make an individual a supervisor. . . . '' *First Western Building Services*, 309 NLRB No. 93, JD slip op. at 16–17 (Nov. 27, 1992).

Here, the record reveals that the Palo Verde reactor operators do not hire, transfer, suspend, layoff, recall, promote, discharge, or reward, auxiliary operators or other employees, or effectively recommend such actions. While there is some record evidence showing that shift supervisor may request the verbal input of a reactor operator before evaluating an auxiliary operator, there is no evidence to establish that such input constitutes an effective recommendation for a promotion or reward. See, e.g., *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493–494 (1965) (individual who reviews service provided by salesperson, and, if he discovers any faults, reports them to plant manager who makes an independent investigation, is not a statutory supervisor).

The Palo Verde reactor operators do provide some direction to auxiliary operators. Indeed, the Employer's reactor operator's job description lists ''[d]direct[ing] the implementation of tagging and clearance procedures'' and [d]direct[ing] subordinates,'' within the reactor operator's responsibilities. Directing, or assigning work to, employees alone, however, does not satisfy the 2(11) criteria. In *First Western Building Services*, supra, JD slip op. at 17, an administratve law judge, affirmed by the Board, state that Section 2(11):

> contains the conjunctive requirement that the power be exercised with ''independent judgment,'' ''rather than in a routine'' or ''clerical'' fashion. This requirement is an expression of Congressional intent to withhold supervisory status from ''straw bosses,'' ''leadman,'' as well as other low-level employees having modest supervisory authority. *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 920–921 (6th Cir. 1991).

The Employer has failed to establish that the reactor operators exercise independent judgment in their direction or assignment of work to auxiliary operators. For instance, while the Employer argues that the reactor operators can choose which auxiliary operators can best remedy a situation in the unit, the record evidence reveals that the six auxiliary operators in each unit have their own areas of responsibility and generally stay within those areas. A reactor operator may direct an auxiliary operator working in another assigned area to help an auxiliary operator in that employee's area due to an excessive work load or direct an auxiliary operator to check or make certain adjustments on piece of equipment during normal operations or during a reactor startup. This is accomplished, however, in the context of the Employer's detailed written instructions, the reactor operator's duty to keep the assistant shift supervisor informed of plant conditions and the locations of auxiliary operators, and the reactor operator's immediate and continual access and comuunication with the assistant shift supervisor. The reactor operator has only limited discretion regarding the prioritization and execution of work requests since only the assistant shift supervisor authorizes clearances and on a daily basis the shift supervisor hands the reactor operator a list of components to be removed.

In *Maine Yankee Atomic Power Co.*, 239 NLRB 1216, 1218 (1979), a decision that served as the basis for the Board's decision at 243 NLRB 319 (1979), enf. denied, 624 F.2d 347 (1st Cir. 1980), the shift operating supervisors (SOS) in the Maine Yankee nuclear reactor facility gave more direction to the auxiliary operators than the reactor operators give to the auxiliary operators at Palo Verde. Unlike the reactor operators, but like the assistant shift supervisors at Palo Verde, the Maine Yankee SOS had ultimate responsibility of the control room. Nevertheless, the Board in *Maine Yankee Atomic Power Co.* rejected the employer's contention that the SOS were statutory supervisors because they purportedly used independent judgment in their direction to the auxiliary operators. The Board noted that SOS could take a system out only after first clearing the matter with the plant shift superintendent. Similarly, here the reactor operator has to obtain the clearance of an assistant shift supervisor before, or concurrently with, taking a system out. The Board in *Maine Yankee Atomic Power Co.*, id. at 239 NLRB 1216, 1218, also noted that:

> the vast majority of the work performed by individuals in these classifications is routine and repetitive in nature, and governed to a large extent by both Nuclear Regulatory Commission guidelines and the Employer's own written procedures manual.

Similarly, I find that the reactor operators did not exercise independent judgment in part because the vast majority of their and the auxiliary operator's work is routine and repetitive and governed to a large extent by the NRC and the Employer's guidelines.

I find further support for my decision in *Arizona Electric Power Cooperative*, 250 NLRB 1132, 1132 fn. 1, 1136–1137 (1980). In that case, the Board found that the employer's dispatchers, who followed memorandums ''in which new or anticipated condition are set forth with closely circumscribed directions,'' and who worked in a control room under the close supervision of a crew supervisor, a supervisor who they ''normally'' consulted before ordering a generator on or off line, were not statuory supervisors. The Board concluded that these dispatchers were not in a position to observe or evaluate the work of plant or field employees because the dispatchers were stationed in the control room, imparted information to and coordinated work of employees outside the control room, but did not direct these employees using independent judgment.

I find the instant case readily distinguishable from *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971), cited by the Employer. In that case the court held that the system load supervisors and assistant system load supervisors in the employer's system load dispatching department were statutory supervisors because they could direct employees in the field to do work which was not covered by ''comprehensive regulations and guidelines'' during emergencies and after hours when no other superior officers were present. During emergencies, the employer's system and assistant system load supervisors had authority to decide, without consulting anyone, whether a line could be de-energized, determine the feasibility of repairs, requisition any employee on the spot, and call employees out for overtime. Here, unlike that case: (1) there is no time that the reactor operator is working without a superior immediately nearby because the Employer requires an assistant shift supervisor or shift supervisor present in the control room at all times; (2) the reactor operators consult with the assistant shift supervisor before or concurrent with taking action in emergencies rather than handle emergencies on their own; (3) there are comprehensive regulations and guidelines limiting the reactor operator's individual judgment; and (4) there is no record evidence showing that reactor operators could authorize overtime. In *Arizona Public Service Co. v. NLRB*, the court also found the system and assistant system load supervisors to be statutory supervisors because the employer and other employees considered these individuals to be supervisors. The employer, through its witnness, Unit 1 Operations Supervisor Robert McKinney, tacitly admitted that it did not consider reactor operators to be supervisors when McKinney stated that at any one time there were two supervisors on shift, and these two supervisors were the shift supervisor and the assistant shift supervisor. Similarly, Charlie G. Allen, a witness called by the Petitioner and the only auxiliary operator to testify at the hearing, stated that he considered the asistant shift supervisor, and not the reactor operator, to be his immediate supervisor. These perceptions lend support to my conclusion that reactor operators are not statutory supervisors. See, e.g., *NLRB v. Yuba Natural Resources*, 824 F.2d 706, 709 (9th Cir. 1987) (in determining whether the supervisory indicia have satisfied the perception of supervisory status by other employees may be considered in ''borderline'' cases).

Secondary indicia of supervisory authority may lend support to a conclusion regarding supervisory status but do not themselves establish supervisory status. *McClatchy Newspapers*, 307 NLRB 773 (1992). Here, the secondary indicia of a disproportionately high ratio of supervisors to employees, four purported supervisors (and no employees) in the control room supervising six auxiliary operator employees, supports my conclusion that the reactor operators are not supervisors. See, e.g., *Ohio River Co.*, 303 NLRB 696 (1991). While attendance at a management meeting can be among secondary indicia of supervisory status, see *Auto West Toyota*, 284 NLRB 659, 661 (1987), the reactor operators' and auxiliary operators' attendance at a daily control room meeting, where the assistant shift supervisor discusses the activities planned for the day, does not support a finding that reactor operators are supervisors. Furthermore, while the pay differential between disputed employees and rank-and-file employees can be a secondary indicia of supervisory status, see *McClatchy Newspapers*, supra, there is insufficient record evidence to make a determination regarding this indicia because, while the record contains evidence of the auxiliary operators', reactor operators', and assistant shift supervisors' pay, it does not contain evidence of other Palo Verde employees' and their supervisors' pay. Finally, I do not regard the Employer's requirement that its shift and assistant shift supervisors wear tan slacks and white shirts, its reactor operators wear gray slacks and blue shirts, while requiring no other employees to wear specific colored clothes, standing alone, supports a supervisory finding. Based upon my finding that the Employer failed to demonstrate the existence of any statutory indicia of supervisory status, I conclude that reactor operators are not statutory supervisors and I, therefore, find that they should herein not be excluded from the unit found appropriate in this case on that basis.

Also, as noted above, the Employer asserts that even if the reactor operators are not supervisors, they should nevertheless be excluded from the Palo Verde production and maintenance unit because they are professional employees. Upon careful review of the record, I find that the reactor operators are not professional employees.

Section 2(12) of the Act defines a professional employee as follows:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in field of science or learning customarily acquired by prolonged course of specialized intellectual instruction and study in an institution of higher learning or hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is per-

> forming related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Employees must satisfy each of the four requirements set forth in Section 2(12)(a) before they qualify as professional employees within this definition. Obviously, Section 2(12)(b)'s portion of the definition does not apply here. Section 2(12)(a)'s first requirement, that the employees be engaged in varied intellectual work, has not been satisfied. The reactor operators spend the majority of their time engaging in highly specialized but routine monitoring and manipulating of the various complex control room devices according to detailed written procedures. See, e.g., *Western Assn. of Engineers*, 101 NLRB 64, 66 (1952) (Board rules that a cartographer-photogrammetrist without an engineering degree, who made surveys and maps from aerial photographs that required a ''high degree of skill in the use of very precise and complex instruments'' and some knowledge of higher mathematics, was not a professional employee because, although the work is highly specialized, the work became ''somewhat routine in nature''); *A. A. Mathews Associates*, 200 NLRB 250, 251 (1972) (Board rules that engineer-inspectors with engineering degrees were not professional employees because even if the engineering type work they engaged in during a small portion of their time could be assumed to be intellectual in character, their job principally involved routine inspection work to confirm that construction was performed in accordance with specifications.)

Section 2(12)(a)'s second requirement, that the employees' work involve ''consistent exercise of discretion and judgment,'' is also not satisfied. A great deal of the reactor operators' work is routine work monitoring and manipulating the control room instruments, instruments which sound an alarm when problems, arise. When a problematic trend or a serious problem arises, the two unit reactor operators are required to inform the assistant shift supervisor who then makes a final decision regarding what action the reactor operators should take in accordance with the Employer's detailed written procedures. See *Twin City Hospital Corp.*, 304 NLRB 173 (1991) (medical technologists found not to be professional employees where 70–85 percent of their work consists of running tests on automated instruments which flag abnormal, results and the technologists' work in determining why there is an abnormal result is routine, because they merely apply detailed written procedures to make the determination; while the technicians microbiology work does require discretion and judgment it constitutes only a minor portion of the technologists' workload); *St. John's General Hospital v. NLRB*, 825 F.2d 740 (3d Cir. 1987) (Board did not abuse its discretion in deciding that outpatient and rehabilitation counselors were not professional employees on the basis that the counselors ''received close supervision and that their exercise of judgment and discretion was quite limited.'')

Section 2(12)(a)'s third requirement, that the work cannot be standardized in terms of time also has not been satisfied. The Employer's requirements that the reactor operators constantly log information regarding the various systems and equipment, in conjunction with the detailed procedures which the Employer requires the reactor operators to follow, reveal that the reactor operators' work can be standardized.

Further, Section 2(12)(a)'s fourth requirement, that the employees be engaged in work requiring knowledge of an advance type customarily acquired through higher education, has not been satisfied. Section 2(12) does not require that ''knowledge of an advanced type'' be acquired by all professionals in the unit. Nevertheless, in *Express-News Corp.*, 223 NLRB 627, 629 (1976), the Board explained that it is reluctant to conclude that a job-classification is professional if few members of the group have an appropriate advanced degree because it then ''logically follows that the education characteristics of the work are not those requiring the utilization of advanced knowledge.''

The Employer only requires by way of academics a high school diploma and only a few reactor operators have an advanced degree. In *Chesapeake & Potomac Telephone Co.*, 89 NLRB 231, 233 (1950), the Board further explained that:

> employees who are generally recruited from the labor force in a plant and who are primarily trained on the job were not intended to be included in the category of professional employees.

The record evidence reveals that the Employer recruited reactor operators from its labor force. Indeed, working as an auxiliary operator at Palo Verde for a minimum of 18 to 24 months is a prerequisite for becoming a reactor operator at Palo Verde. Moreover, the record evidence revealed that reactor operators are primarily trained on the job. I find that the knowledge acquired through this required on-the-job training, especially the hands-on training in the simulator, is closer to the knowledge acquired through an apprenticeship than the knowledge customarily acquired through higher education. Based upon my finding that the Employer has failed to demonstrate the presence of all four of the professional employee criteria, I conclude that the reactor operators are not professional employees and, therefore, should be included in the bargaining unit.

There are approximately 950 production and maintenance employees in the unit found to be appropriate herein. The approximately 75 reactor operators should vote and be included in the unit because I find them to be neither statutory supervisors nor professional employees within the meaning of the Act.

[Pertinent Portions of the Regional Director's Decision and Direction of Election in Case 28–RC–4812]

The hearing officer rejected Petitioner's Exhibits 2, 3, 4, and 5 on the basis that in his view they merely constituted campaign literature distributed by the Employer during the most recent self-determination election at the Palo Verde Nuclear Generating Station (Palo Verde) and were, thus, not relevant to this proceeding. The Employer similarly contended that the described exhibits had no relevancy or materiality to the issue of the appropriateness of the petitioned-for unit. I disagree with the hearing officer's conclusion and reverse his ruling rejecting the exhibits. Accordingly, I shall receive the exhibits in evidence for the following reason. At the outset, I note that the Employer raised no issues concerning the authenticity of the rejected exhibits. Each of the four exhibits consists of letters addressed on printed employer letterheads (The Arizona Nuclear Power Project) to its employees concerning the IBEW effort to organize the Palo Verde employ-

ees. Each letter is addressed and signed by E. E Van Brunt, Jr., executive vice president, project director of the Employer. Petitioner's Exhibit 5 is dated Auust 5, 1987, and contains a reference, at item 3, to some of the benefits that Palo Verde employees obtain as a result of their ''union-free'' status, including vanpools; $5-per-day travel allowance; B41 time; company-furnished tools; freedom from being bargained out of position by senior employees at other plants; and competitive wages and benefits. Petitioner's Exhibit 4, dated January 28, 1988, contains the statement that, ''[w]ages, benefits and working conditions at Palo Verde are different than those at APS fossil stations and line departments.'' Petitioner's Exhibit 3, dated January 27, 1988, refers to the unique wages, hours, and working conditions at Palo Verde, including vans; $5 per day travel allowance; B41 time; company furnished tools; shift schedules; and other benefits, which would be subject to the negotiation process if the employees voted to be included in the systemwide unit. Petitioner's Exhibit 2, dated January 15, 1988, admonishing employees to ''KNOW THE DIFFERENCE'' states, ''The wages and benefits at Palo Verde are not the same as at fossil stations and the line departments of APS.'' Petitioner, in support of its proffer of the exhibits into evidence, argued that they show that the Employer admitted that the Palo Verde employees received unique treatment with respect to their wages and working conditions, as distinguished from the IBEW-represented employees at the other six power generating plants operated by the Employer. Petitioner further contended that the uniqueness and special treatment of the Palo Verde employees, openly admitted and emphasized by the Employer, was probative evidence of Petitioner's claims of the appropriateness of a petitioned-for unit limited to production and maintenance employees employed at Palo Verde. Counsel for the Employer conceded that the Employer made these assertions during the IBEW election campaign conducted in 1987 and 1988, but he insists that there were other documents also distributed by management, so that Petitioner's Exhibits 2 through 5 do not constitute the complete set of materials distributed by the Employer. With respect to the hearing officer's rationale that the requested exhibits were merely campaign literature, in my opinion the only issue is whether the exhibits contain relevant and probative evidence relating to the unit issues raised in this proceeding. Based upon my reading of the rejected exhibits, I have concluded that the statements contained therein constitute relevant evidence in the form of admissions by the Employer's executive vice president to the effect that the wages and benefits of the employees at Palo Verde are different from the Employer's other six power generating fossil stations and the line departments of the Employer. I have concluded, therefore, that Petitioner's Exhibits 2 through 5 are relevant to the issues herein, and, thus, Petitioner's Exhibits 2 through 5 are received in evidence. With respect to the Employer's contention that the statements are incomplete, the Employer does not claim that the statements contained in Executive Vice President Van Brunt's letters were ever retracted, were inaccurate, or did not represent management's stated position as to the facts contained therein.

The instant matter is the most recent of a number of representation cases involving the status of production and maintenance employees at Palo Verde which is located approximately 70 miles west of Phoenix, Arizona. The most recent representation proceeding involving the Palo Verde employees is *Arizona Public Service Co*., Case 28–RC–4459. The parties stipulated that the Regional Director's Decision and Direction of Election (DDE) which was issued in that case on January 8, 1988, as well as the transcript and exhibits, be made part of the formal record herein. A copy of the DDe in Case 28–RC–4459 is annexed hereto and is incorporated in this decision. The parties also requested, and I take official notice of, various Board decisions, referred to hereinafter, which provide for historical background for the representation proceeding herein.

The Petitioner seeks to represent a unit of all production and maintenance employees at Palo Verde on the basis that they constitute an appropriate residual unit under the Board's decision in *Easten Container Corp.*, 275 NLRB 1537 (1985). Contrary to the Petitioner, the Employer maintains that the employees at Palo Verde do not by themselves constitute an appropriate bargaining unit, citing the Regional Director's DDE in Case 28–RC–4459, in which it was concluded that the only appropriate unit was one in which the Palo Verde employees would be included in the systemwide unit represented by International Brotherhood of Electrical Workers, Local Unions No. 387, AFL–CIO, CLC (Local 387 IBEW). Also the Employer contests the Petitioner's assertion that the Palo Verde employees constitute an appropriate residual unit which would warrant an election covering only the production and maintenance employees at Palo Verde.

The Employer is a public utility engaged in supplying electric power throughout the State of Arizona to commercial and residential customers. In its operations, the Employer employs some 9000 employees, approximately 3000 of whom are in a single systemwide bargaining unit represented by Local 387 IBEW. The represented employees are essentially production and maintenance employees whose classifications are set forth in the existing collective-bargaining agreement between Local 387 IBEW and the Employer. The current agreement is for the period of April 1, 1990 to April 1, 1993.

The Board's Decision and Order in *Arizona Public Service Co.*, 256 NLRB 400 (1981) (*APS I*), involved a hearing on an RM petiton filed by the Employer and a UC petition filed by Local 387 IBEW. Local 387 IBEW contended in that proceeding that the Palo Verde production and maintenacne employees constituted an accretion to the systemwide production and maintenance unit of employees it then represented. The Employer argued therein that the Palo Verde employees were not an accretion to the systemwide unit ''but that substantial differences in skills, functions, and technological knowledge between the Palo Verde employees and bargaining unit employees and the local autonomy of the Palo Verde management compel refusal of the Union's [Local 387 IBEW] contention that the employees constitute an accretion to the systemwide unit, bargaining,'' *APS I* at 401, and urged instead that the Board provide the Palo Verde employees the opportunity in a self-determination election to decide for themselves whether to be incorporated into the systemwide bargaining unit or remain unrepresented. The Board rejected the Employer's analysis, noting that the parties had historically bargained on a systemwide basis, that in the past the Employer had voluntarily recognized Local 387 IBEW as the bargaining representative of employees added to the utility system, and that it was ''reluctant to grant less than a sys-

temwide unit where to do so would be contrary to extensive bargaining history on a systemwide basis.'' Id. at 402. Accordingly, the Board dismissed the Employer's RM petition and held that the Palo Verde production and maintenance employees constituted an accretion to and should be included in the systemwide production and maintenance unit represented by Local 387 IBEW.

Despite the Board's Decision and Order in *APS-I*, the Employer nonetheless refused to recognize Local 387 IBEW as the representative of the Palo Verde employees. On an 8(a)(1) and (5) complaint issued by the Regional Director of Region 28, the General Counsel filed a Motion for Summary Judgment with the Board alleging that, notwithstanding the Board's Decision and Order in *APS-I*, the Employer had refused to recognize and bargain with Local 387 IBEW, as requested, as the bargaining representative of the Palo Verde employees in the appropriate unit. In its ruling on the Motion for Summary Judgment, the Board in *Arizona Public Service Co.*, 259 NLRB 484 (1981) (*APS-II*), noted that the Employer's motion for reconsideration and renewed motion for reconsideration and renewed motion for reconsideration of its decision and order in *APS-I* had been denied, that it had rejected the Employer's repeated claim that a self-detemination was a prerequisite for Local 387 IBEW's representation of the Palo Verde employees, and found that the Employer, as alleged, violated Section 8(a)(5) and (1) of the Act by its refusal to recognize and bargain with Local 387 IBEW with respect to the Palo Verde employees. The Board, thus, affirmatively ordered the Employer to bargain with Local 387 IBEW as the representative of the Palo Verde employees.

It is undisputed that the Employer has never complied with the Board's Decisions and Orders in *APS-I* and *APS-II*. Thereafter, Local 387 IBEW acceded to the Employers' demand for a self-determination election for the Palo Verde employees, and an election was conducted in Case 28–RM–459, in which the employees voted against representation by Local 387 IBEW. The Certification of Results of Election in Case 28–RM–459 issued on August 23, 1984. On November 5, 1987, Local 387 IBEW filed a petition for election in Case 28–RC–4459 limited to a unit of some 950 employees employed at Palo Verde. The Employer maintained that a unit limited to Palo Verde was inappropriate since the Palo Verde employees were only part of a systemwide unit and, thus, the appropriate procedure was to conduct a self-determination election giving the Palo Verde employees either the option to be included in the systemwide production and maintenance unit represented by Local 387 IBEW or to remain unrepresented. It was concluded, for the reasons stated in my DDE in Case 28–RC–4459, that the petitioned-for employees should be included in the systemwide production and maintenance unit if, in a self-determination election, a majority of the Palo Verde employees voted for representation by Local 387 IBEW, or, alternatively, if a majority of the valid ballots were not cast for Local 387 IBEW the Palo Verde employees would remain unrepresented. The Palo Verde employees voted against inclusion in the systemwide production and maintenance unit represented by Local 387 IBEW, and have remained unrpresented to date. The Certification of Results of Election in Case 28–RC–4459 issued on February 10, 1988.

The Employer maintains that the very facts, circumstances, and applicable representation principles described in Case 28–RC–4459 are controlling herein, and, accordingly, the petition should be dismissed because the Palo Verde employees do not by themselves constitute an appropriate bargaining unit. The Employer also rejects the Petitioner's contention that the Palo Verde employees constitute a residual unit appropriate for bargaining because, it asserts, such a residual unit is deemed appropriately only if it includes all of the Employer's unrepresented employees, while the Petitioner herein seeks to represent only that segment of the unrepresented employees employed by the Employer at Palo Verde.

The Petitioner does not contest the Board's prior conclusions that, given the nature of the Employer's operations, the Palo Verde employees would ordinarily share a community of interest with their counterparts elsewhere in the Employer's system, or that in the public utility industry the optimum unit is systemwide one. *Baltimore Gas & Electric Co.*, 206 NLRB 199 (1973). Rather, the Petitioner argues that in the particular facts and circumstances of this proceeding the *Baltimore Gas* rationale must give way to a superior statutory principle enunciated in Section 9(b) of the Act supporting the rights of employees to secure representation. The Petitioner also contends that the Palo Verde employees comprise an appropriate residual unit under the authority of *Eastern Container Corp.*, 275 NLRB 1537 (1985), and that it is appropriate to conduct an election in such a residual unit where the employees would otherwise go unrepresented in collective bargaining. In *Eastern Container*, the petitioner therein, Teamsters Local 404, filed a petition for election in a unit of eight employees in the employer's maintenance department. The IUE was the incumbent bargaining representative of over 150 production employees. The employer contended that the only appropriate unit was one overall unit including all the production and maintenance employees. The employer also claimed that the maintenance employees were only part of the unrepresented employees at the plant. However, the Board found that the maintenance employees constituted an appropriate residual interest from the production employees. In rendering its decision, the Board noted that the IUE did not seek to represent the maintenance employees, and that the parties had stipulated that all unrepresented employees, other than the maintenance employees, should be excluded from either the petitioned-for unit or a combined production and maintenance unit. In the instant proceeding, by contrast, the Employer does not stipulate to exclude other residual employees and apparently maintains that all remaining unrepresented employees in the utility system, some 6000, should be included in the appropriate residual unit.

In summary, the Employer contends that the petitioned-for employees do not constitute an appropriate unit with a separate and distinct community of interest; that there is an extensive history going back to 1956 for self-determination elections among groups of employees to be included only in the existing systemwide unit; that the appropriate bargaining unit for all APS production and maintenance employees is the systemwide unit (*Arizona Public Service Co.*, 182 NLRB 505 (1970)); that less than systemwide units are not ordinarily appropriate in the public utilities industry (*Baltimore Gas*, supra); and that the residual unit principle is not applicable herein since the petitioned-for employees would not constitute an appropriate residual unit even if the industry involved was one other than a public utility, since the Peti-

tioner seeks to represent a small segment of the unrepresented employees.

In assessing the merits of the respective arguments of the parties herein, it is necessary to review certain critical factors and circumstances which are undisputed and matters of historical record. ''Since at least 1947, the Employer and the Union [Local 387 IBEW] have had a bargaining relationship, during which time the Employer has by acquisition or construction added several generating units to its system. The practice of the parties in these cases has been to incorporate the production and maintenance employees at the newly acquired or constructed facilities in the contractual systemwide bargaining unit.'' *APS-I* at 400. ''[S]mall groups of employees have periodically been added to the existing single systemwide unit. Generally, such additions have resulted form elections based on stipulated election agreements between the parties [Employer and Local 387 IBEW], and, therefore, matters regarding unit placement have been uncontested.'' DDE, Case 28–RC–4459, at 3. The Employer's unrepresented employees are classified ''performance review'' employees. All of the performance review employees throughout the system are subject to salary guidelines and performance review policies established by central management. *APS-I* at 400. While some of the represented and unrepresented employees share some of the same employment fringe benefits, there are differences between the two groups of employees such as leave, vacations, holidays, reduction-in-force policy, probation and grievance adjustment. DDE, Case 28–RC–4459 at 3–4. Unrepresented employees may have their terms and conditions of employment unilaterally altered at any time, whereas represented employees' terms and conditions are specified for the duration of the existing collective-bargaining agreement and are subject to enforceable grievance and arbitration procedures. Thus, since 1977, when the Employer commenced hiring production and maintenance employees for the Palo Verde nuclear unit (*APS-I* at 401), there has been a substantially different and unique relationship between the unrepresented Palo Verde production and maintenance employees and the Employer, as contrasted with the relationship at the Employer with the represented employees at its other generating facilities who have been covered by Local 387 IBEW collective-bargaining agreements for over 40 years. In addition to the foregoing, Petitioner has demonstrated, by reference to admissions contained in Petitioner's Exhibits 2–5, that the wages and benefits at Palo Verde are different from the wages and benefits received by production and maintenance employees employed at the power generating fossil-fuel stations (Four Corners, Cholla, West Phoenix, Yucca, Ocotillo, and Saguaro) and the line departments at APS, where the employees are represented by Local 387 IBEW.

In the circumstances herein, were I to adopt the Employer's arguments, it would require me to dismiss the petition since the Petitioner does not seek to represent the Palo Verde employees as part of a systemwide unit of production and maintenance employees and also because a residual unit of employees at Palo Verde is inappropriate as it only constitutes a segment of the 6000 unrepresented employees remaining in the systemwide operation.

Thus, under the Employer's rationale, the only occasions that the Palo Verde employees could ever secure representation rights in the absence of Local 387 IBEW's intervention would be for a competing union to seek Local 387 IBEW's systemwide representation rights by filing a petition at an appropriate time covering the 3000 represented employees, or, alternatively, for a competing labor organization to seek representation for all 6000 unrepresented employees in single residual unit. While such events are theoretically possible, neither of these alternatives appear likely, nor do they constitute a basis for indefinitely forestalling the stautory rights of representation afforded to the Palo Verde employees. The issue, then, is whether the Board's residual unit principles are nevertheless applicable here even though the Petitioner is seeking a residual unit limited to Palo Verde. In this regard, I note that Palo Verde is the only one of the Employer's seven generating plants whose production and maintenance employees are unrepresented. Ordinarily, a single-plant unit is presumptively appropriate. *National Cash Register Co.*, 166 NLRB 173 (1967). However, in the public utility industry, the Board has found that the optimal unit is one that is systemwide. *Baltimore Gas*, supra. Since Local 387 IBEW represents approximately 3000 employees out of 9000 employees, it could scarcely be claimed that Local 387 IBEW currently represents the Employer's production and maintenance employees in the most optimal unit. Based upon Local 387 IBEW's limited representation within the overall system, it would be incongruous and somewhat anomalous to conclude that petitions filed by rival unions for otherwise appropriate units must be dismissed because they were in conflict with the optimal public utility standard, where, as here, the incumbent union, though representing certain employees in a systemwide unit, only represents a small proportion of the employees in the system. In so doing, the Board would be conferring upon the incumbent union, here Local 387 IBEW, a special status effectively denying any rival union from seeking to represent the unrepresented employees of the Employer despite the incumbent union's lack of representative status among the unrepresented employees who constitute two-thirds of the Employer's statewide work force. Moreover, and equally relevant, the record demonstrates that the Employer herein has time and time again stipulated to elections in segments of its unrepresented employees contrary to its claim herein that all unrepresented residual employees should be required to vote in any residual election. It is somewhat significant to note in this regard that the Employer in its brief states that:

> In addition to the two previous self-determination elections conducted among the petitioned-for group, and consistent with the system-wide unit doctrine, *Baltimore Gas*, infra, the Employer and Local 387 have had an extensive history of self-determination elections, conducted under the supervision of the Regional Director for Region 28, for inclusions into the existing systemwide unit (See E. Exh. 3 at p. 3). As early as 1956, the Company and Local 387 entered into stipulations for elections to detemine whether certain groups of employees desired to be included in the existing systemwide unit. Those stipulations included cases: 21–RC–4242 (1956) (meter readers); 28–RC–1944 (warehousemen); 28–RC–3213 (1976) (cathodic protection testers); 28–RC–3221 (1976) (fuel specialists at Four Corners

Plant); and 28–RC–3587 (1979) (auto parts specialists).[4]

[4] Each of the groups which selected the Union through such elections became part of the system-wide unit as reflected in the current collective bargaining agreement (''Agreement''), E. IExh. 1. (See Wage Schedules.)

Employer's brief, pages 5–6. Thus, the historical record before me establishes that the Employer has voluntarily consented to representation elections in segments of the residual or unrepresented employees employed by it systemwide. And, in the DDE in Case 28–RC–4459 issuing on January 8, 1988, where there was no stipulation covering the Palo Verde employees because Local 387 IBEW sought a separate unit for Palo Verde, the Employer nonetheless successfully prevailed in is argument that the Palo Verde employees should vote in a self-determination election to be included in the Local 387 IBEW systemwide unit. The Employer made no claim then, as it does now, that all of its unrepresented residual employees had to participate in the election. In addition to the foregoing, the record further establishes that the Employer has also entered into a separate collective-bargaining agreement with the Carpenters Union for a systemwide unit of carpenters, while the most recently expired and current collective-bargaining agreements with Local 387 IBEW cover the classification of carpenter helper.

The Palo Verde facility has reached the point, after almost a decade of litigation before this Agency, at which it has established its own unique status as the only power generating station in the Employer's system where the production and maintenance employees are unrepresented. Two elections have already been conducted there, notwithstanding the Board's finding those employees had accreted to the Local 387 IBEW bargaining unit, and on both occasions the employees rejected representation by Local 387 IBEW. That labor organization has declined to take part in the instant proceeding. The Employer has on numerous occasions agreed to self-determination elections for inclusion in the systemwide unit of segments of the unrepresented employees, and it has also permitted the fragmentation of the systemwide unit by entering into a collective-bargaining agreement with the Carpenters Union for a unit of carpenters even though the Local 387 IBEW agreements have included carpenter helpers in the recognized bargaining unit. To maintain that only a residual systemwide unit is appropriate in the circumstances where only one-third of the Employer's employees are represented by Local 387 IBEW would be tantamount to elevating a general rule applied to units in the public utility industry to a rigid, inflexible rule which has no application to the special set of facts and circumstances herein, and which would effectively deny to these Palo Verde employees the right of ever obtaining representation rights under the Act. I am not persuaded that the Act requires that the Palo Verde employees remain unrepresented until such time, if ever, that a labor organization other than Local 387 IBEW seeks to represent the Palo Verde employees in a systemwide unit or seeks to represent all the remaining 6000 unrepresented employees in one residual unit. Section 9(b) of the Act, with limited restrictions, permits the Board to decide ''in each case'' the appropriate unit ''in order to assure the employees the fullest freedom in expressing the rights guranteed by the Act.'' As the Supreme Court held in *NLRB v. Hearst Corp.*, 322 U.S. 111, 134 (1944) (a Wagner Act case):

> Wide variations in the forums of employee self-organizations and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter.

The Board has in appropriate circumstances modified its requirement that all unrepresented employees must be included in a residual unit election. As noted previously, in *Eastern Container* the rule was modified by virtue of the parties' stipulation to exclude other unrepresented employees. Another deviation from the rule appears in *Mosler Safe Co.*, 188 NLRB 650 (1971). In *Mosler*, the Safe Workers Union was certified bargaining representative for over 1000 hourly paid production and maintenance employees, including plant clericals, and it had an existing contract with the employer covering those employees. The Petitioner sought to represent a unit of plant clericals not covered by the collective-bargaining contracts in three employer plants, excluding other represented salaried office and technical employees. The Safe Workers Union intervened, but it made no showing of interest and indicated that it did not want to participate in any election which might be directed. The employer claimed that because of the functional integration of its various operations that the only appropriate unit involving its salaried employees should also include all the unrepresented salaried employees. Additionally, the employer argued that the petitioned-for plant clericals should be given the opportunity of voting to become part of the existing production and maintenance unit. The Board noted at the outset that simply because the incumbent Safe Workers Union did not wish to represent the remaining plant clericals such circumstance was not, without more, an adequate reason to deny those employees the opportunity to vote for representation apart from the production and maintenance unit. After excluding office clericals from the unit based upon the Board's longstanding policy of not combining office and plant clericals in the same unit, the Board in *Mosler* next considered whether the remaining unrepresented employees, salaried technical employees, should be included in the appropriate unit. The Board concluded that they should be included in the appropriate unit, but only, as it found thereafter, where there was evidence of a demonstrated community of interest between those technical employees with the petitioned-for plant clericals. Upon an analysis of the duties of various classifications of the remaining unrepresented employees, the Board excluded from the appropriate unit data processing employees, bank and commercial engineering department employees, bank engineering and design employees, timestudy employees, process routers, and tool designers and draftsmen because of their lack of community of interest with plant clericals. Thus, not all unrepresented residual employees were included by the Board in the appropriate unit; rather, the Board included only those with a demonstrated community of interest with the petitioned-for unit of plant clericals. Those unrepresented employees with ''only a remote com-

munity of interest with plant clericals'' were excluded. *Mosler* at 652.

The production and maintenance employees at Palo Verde encompass all of the unrepresented production and maintenance employees of the Employer at its seven power generating plants. Based upon this factor alone, I would conclude that the production and maintenance employees at Palo Verde constitute an appropriate residual unit of power plant employees failing within the parameters of the Board's residual unit holdings. In this regard, the Employer has not presented any evidence or otherwise established that the unrepresented employees employed outside of the Palo Verde facility have any meaningful community of interest with the Palo Verde employees, except for the fact that they are all performance review employees whose terms and conditions of employment are unilaterally established by the employer. Cf. *Mosler Safe Co.*, supra. By contrast, the Palo Verde production and maintenance employees have a clear community of interest among themselves with respect to their terms and conditions of employment.

Accordingly, in the circumstance of this particular case, and in view of the foregoing history of the representation proceedings at Palo Verde, I am convinced, and so conclude, that the unique circumstances herein warrant a finding that the Palo Verde production and maintenance employees constitute an appropriate residual unit. Since Local 387 IBEW does not seek to represent the petitioned-for unit of employees, and, since the Petitioner is the only labor organization seeking to represent the Palo Verde employees on a system-wide basis, and since no other labor organization seeks any broader representation among the unrepresented employees of the Employer, and there is no showing of a substantial community of interest between the Palo Verde employees and the remaining 5000 unrepresented employees throughout the system, I find that the petitioned-for unit is appropriate for the purposes of conducting an election therein. To conclude otherwise would be to disregard the provisions of Section 9(b) of the Act.

I shall therefore direct that an election be conducted in a unit comprised of all production and maintenance employees employed by Arizona Public Service Company at its Palo Verde Nuclear Generating Station. The parties agreed that in any election directed at Palo Verde the following classifications of employees would be eligible to vote: Chemist P.V.N. W.R.F. II, Chemist P.V.N. W.R.F. III, Chemist P.V.N. W.R.F., Sr., Aide Radiation Prot., Tech Chemistry BL, Tech Chemistry, Tech Chemistry Sr., Tech Metrology, Tech Metrology Sr., Tech Radiation Prot. BL, Tech Radiation Prot., Tech Radiation Prot. Sr., Helper Radiation Prot., Tech Rad Waste BL, Tech Rad Waste, Helper Rad Waste, Oper Nuclear I, Oper Nuclear II, Oper Nuclear III, Nuclear Oper Tech, Tech I/C, Tech I/C BL, Tech I/C Sr., Electrician Plt. P.V.N., Electrician Plt. Sr. P.V.N., Electrician W.R.F., Vibration Techs, Helper P.P.M. P.V.N. I, Helper P.P.M. P.V.M. II, Helper P.P.M. P.V.N. III, I-C Repairman W.R.F., Mechanic Auto P.V.N., Mechanic Plant P.V.N., Mechanic Plant W.R.F. I Step 1, Oper W.R.F. I Step 2, Oper W.R.F., Oper W.R.F I Step 3, Oper W.R.F. II, Oper W.R.F. III, Storekeeper, Storekeeper A, Utility Worker Nuclear, Warehouseman P.V.N. I, Warehouseman P.V.N. II, Warehouseman P.V.N. Sr., Carpenters PV, Tech Fire Systems, Refrigeration Tech, Refrigeration Sr., Technician Sr., Welding Tech, Helpers, Apprentices, Equipment Oper A, Equipment Oper B, Yardworker, Plumber, Tool Crib Attendant, I & C Lead Techs, Computer Techs, H-vac Tech, H-vac Tech Sr. and Utility Worker Sr. The parties are in agreement that the following job classifications should be excluded: all professional employees, clerical employees, guards, and supervisors as defined in the Act. Additionally, the parties agreed that the individuals in the I & C Rework Tech and P.P.M. Sr. classifications may vote subject to challenge since there was some question at the time of the hearing as to their status.

There are approximately 930 eligible voters in the voting unit.