

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WOLF CREEK NUCLEAR OPERATING
CORP.,

Employer,

and

Case. No. 14-RC-160836

UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA INTERNATIONAL
UNION, AND ITS LOCAL 252,

Petitioner.

**BRIEF OF AMICUS CURIAE
THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL
UNION 225**

Respectfully Submitted

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March 9, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITES..... iii

INTRODUCTION..... 1

INTEREST OF THE AMICUS..... 1

STATEMENT OF FACTS..... 2

ARGUMENT..... 4

 THE SIs ARE NOT MANAGERIAL EMPLOYEES UNDER THE ACT..... 4

 A. The SIs are Training SOs on Technical Aspects of Their Job and, as such, are Relying on Technical Skills, Education and Training Which Does not Confer Managerial Status..... 4

 B. The SIs Duties are Governed by NRC Regulatory Guideline 5.75 and Wolf Creek Policy and are Only Allowed to Exercise Their Technical Expertise within Those Confines Which Does Not Confer Managerial Status 5

 C. The Board has Well-Established Precedent Finding that Employees Who Conduct Training are Non-Managerial Technical Trainers 7

CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

NLRB v. Yeshiva, Univ., 444 U.S. 672 (1980)..... 4

Case Corp., 304 NLRB 939, 948 (1991) 4

Connecticut Human Society, 358 NLRB No. 31, slip op. at 23 (2012)..... 4

Solartec, Inc. & Sekely Indus., 352 NLRB 331 (2008) 6

Retail Clerks International Assn v. NLRB, 366 F.2d 642 (D.C. Cir. 1966)..... 6

Eastern Camera & Photo Corp., 140 NLRB 569 (1963)..... 6

Iowa Southern Utilities Co., 207 NLRB 341 (1973)..... 6

Roofing, Metal & Heating Assoc., 304 NLRB 155 (1991)..... 7, 8

INTRODUCTION

The International Brotherhood of Electrical Workers, Local Union 225 (hereinafter “IBEW 225” or “*Amicus*”), represents approximately 400 employees at the Employer’s facility near Burlington, Kansas. In Case 14-RC-158769, IBEW 225 sought to represent the Security Instructors (hereinafter “SIs”) over the objection of the Employer that the SIs were guards under the Act and inappropriate to be represented by IBEW 225. On September 14, 2015, the Regional Director found the SIs to be guards under the Act and dismissed IBEW 225’s Petition. In the hearing in Case 14-RC-158769, the parties stipulated that, should the SIs be found to not be guards under the Act, they were appropriate for the unit – i.e., not managerial or supervisory in nature.

However, in the case now before the Board, the Employer raised an objection to the inclusion of the SIs in the United Government Security Officers of America, International Union and its Local 252’s (hereinafter “UGSOA” or “Petitioner”) unit at the Employer’s facility because the SIs are managerial. Ultimately, the Regional Director found the SIs to be managerial employees and dismissed UGSOA’s Petition. IBEW 225, as an organization intimately familiar with the duties and responsibilities of the SIs at the Employer’s facility, disagrees with the Regional Director’s findings. For the reasons stated herein, IBEW 225 asserts that the Regional Director was in error due to a misapplication of the law and that the SIs are not managerial employees under the Act.

INTEREST OF THE AMICUS

Inclusion of the approximately 400 employees represented by the *Amicus* at the Employer’s facility are a number of employees who coordinate, analyze and deliver training and instruction to other employees at the Employer’s facility. See *Exhibit A*¹. These bargaining unit employees have

¹ In the Regional Director’s Decision and Order in Case 14-RC-160836, it was noted in footnote 1 that the parties stipulated that the transcript, exhibits and Decision and Order in Case 14-RC-158769 may be considered in this matter as they accurately reflect the duties of the SIs and provide relevant background information. Board Exhibit 1(a) included the Original Petition filed August 26, 2015 which included a list of all of the represented classifications at the Employer’s facility by IBEW 225 as Attachment A.

been represented by *Amicus* for a number of years as employees under the Act. The misapplication of the law by the Regional Director to the SIs in the case before the Board threatens to create precedent that the Employer will no doubt use in an attempt to remove current bargaining unit employees who conduct training at the Employer's facility thus jeopardizing those bargaining unit employee's protections under the Act.

Additionally, as an organization who has represented employees who conduct and coordinate training at the Employer's facility, *Amicus* has a unique perspective as to how such employees interests do not align with those of management and such employees, including the SIs are not managerial employees as defined by Board case law. These employees are non-managerial training and instruction employees who are employees under the Act and appropriate for representation by a Union such as UGSOA. The Board will benefit from the *Amicus's* unique perspective as no party to this case represents non-managerial training employees and the *Amicus's* intimate familiarity with the SIs job duties and responsibilities renders its opinion relevant and persuasive in this matter.

STATEMENT OF FACTS

The SIs are not required to have any outside training or education to gain employment at the Employer's facility. However, they must be certified to provide firearm training and must pass instructor training, referred to as INPO certification, as required by NRC guidelines. (D&O, pg. 4). INPO Certification requires that the SIs go through this training on an annual basis. (*Alvin Ayers*, Tr. 105: 22-25; 106: 1-4, in Case No. 14-RC-158769). All of the current SI's have at least three years prior security guard ("SO") experience and previously served as SOs at the Employer's facility. *Id.* Additionally, every three years the SIs are required to obtain recertification on firearm usage in order to be able to complete their job training SOs on firearm usage. (D&O, pg. 8). The SIs are also

required to conduct “tabletop” drills simulating various real life security-related scenarios on 3D models of the Employer’s facility. (D&O, pg. 5).

The SIs are evaluating the SOs on these technical aspects of their jobs for which the SOs are being trained. Those evaluations are technical evaluations and must be certified by the Training Supervisor. (D&O, pg. 8). NRC Regulatory Guideline 5.75 requires the Employer to have a training program and SOs must be certified through this training program to perform their duties as SOs at the Employer’s facility. (D&O, pg. 4). Training subjects are extensive and dictated by NRC Guideline 5.75, Appendix B, and provide for training in 28 specific job functions, although additional training can be required by the Employer. (D&O, pg. 5). The SIs are responsible for creating new or updating existing lesson plans when dictated by new or changed NRC regulations, changes in past practice, and changes in management expectations. (D&O, pg. 7). Once an SI completes a lesson plan, they are sometimes reviewed by SOs for technical accuracy. *Id.* They are also submitted for review and approval by a management committee before being used by the SIs for training of SOs. *Id.*

The SIs are tasked with preparing the exams for the SOs. The exams are prepared by selecting pre-drafted questions from a question bank maintained in a database. All questions are approved by the training supervisor before being uploaded into the database that the SIs use to draw the questions from. (D&O, pg. 8). The SIs are responsible for watching SOs on the firing range and in the classroom. If there is any misconduct, the SIs cannot take disciplinary action against the SO. They must report the misconduct to the SOs direct supervisor. (D&O, pg. 9). When an SO fails attempt to gain firearm qualification, the SI is required to notify the training supervisor as well as the SO’s supervisor of record. *Id.*

ARGUMENT

THE SIs ARE NOT MANAGERIAL EMPLOYEES UNDER THE ACT

In *NLRB v. Yeshiva, Univ.*, 444 U.S. 672, 682-83; 100 S.Ct. 856, 862 (1980), the U.S. Supreme Court defined managerial employees and set forth the following test:

Managerial employees are defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *NLRB v. Bell Aerospace Co.*, supra, at 288, 94 S.Ct., at 1768 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323, n. 4 (1947)). . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. [citations omitted]. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial **only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.**

(Emphasis added). In *Yeshiva*, the Court explained that the concern justifying the exclusion of managerial employees from the Act is that “an employer is entitled to undivided loyalty of its representatives.” 444 U.S. at 682. Where employees do not align with management interests, or must operate within the confines of the employers established policy, there is no concern of divided loyalties.

A. The SIs are Training SOs on Technical Aspects of Their Job and, as such, are Relying on Technical Skills, Education and Training Which Does Not Confer Managerial Status

The Board has held that “technical expertise in administrative functions involving the exercise of judgment as discretion does not confer managerial status upon the performer.” *Case Corp.*, 304 NLRB 939, 948 (1991); *Connecticut Human Society*, 358 NLRB No. 31, slip op. at 23 (2012). The Regional Director’s Decision and Order (“D&O”) established that the Security Instructors (“SIs”) are not required to have any outside training or education to gain employment. However, they must be certified to provide firearms training and must pass instructor training, referred to as INPO certification, as required by NRC guidelines. (D&O, pg. 4). INPO Certification requires that the SIs go through this training on an annual basis. (*Alvin Ayers*, Tr. 105: 22-25; 106: 1-4, in Case

No. 14-RC-158769). All of the current SIs have at least three years prior security guard (“SO”) experience and previously served as SOs at the Employer’s facility. *Id.* Additionally, every three years the SIs are required to obtain recertification on firearm usage in order to be able to complete their job of training SOs on firearm usage. (D&O, pg. 8).

In order for the SIs to train the SOs, they must be trained and certified to complete such training. This is required by NRC guidelines and failure to comply with this requirement would jeopardize the Employer’s NRC compliance. The SIs are trained on how to use pepper spray and firearms every three years. On an annual basis they go through training to keep their instructor certification. When SIs are training SOs, they are training them on the technical aspects of their jobs, such as firearm and pepper spray use. The SIs also train SOs how to complete searches of persons and property, and how to subdue individuals. The SIs are also required to conduct “tabletop” drills simulating various real life security-related scenarios on 3D models of the Employer’s facility. (D&O, pg. 5).

It is true that the SIs are evaluating the SOs on these technical aspects of their jobs for which the SOs are being trained. However, those evaluations are technical evaluations and must be certified by the Training Supervisor. (D&O, pg. 8). Nothing that the SIs do in terms of evaluation or training of SOs requires the exercise of the type of discretion that confers managerial status. The SIs are using their technical skills acquired through their education, skills and training required by their position and NRC regulatory guidelines. Thus, the fact that the SIs use their own judgment in developing training, actually training and evaluating the SOs does not make them managerial employees.

B. The SIs Duties are Governed by NRC Regulatory Guideline 5.75 and Wolf Creek Policy and are Only Allowed to Exercise Their Technical Expertise within Those Confines Which Does Not Confer Managerial Status

NRC Regulatory Guideline 5.75 requires the Employer to have a training program and SOs must be certified through this training program to perform their duties as SOs at the Employer's facility. (D&O, pg. 4). Training subjects are extensive and dictated by NRC Guideline 5.75, Appendix B, and provide for training in 28 specific job functions, although additional training can be required by the Employer. (D&O, pg. 5). The SIs are responsible for creating new or updating existing lesson plans when dictated by new or changed NRC regulations, changes in past practice, and changes in management expectations. (D&O, pg. 7). Once an SI completes a lesson plan, they are sometimes reviewed by SOs for technical accuracy. *Id.* However, they are also submitted for review and approval by a management committee before being used by the SIs for training of SOs. *Id.* Additionally, nothing indicates that the SIs play a role in any change in management expectations.

The SIs are tasked with preparing the exams for the SOs. The exams are prepared by selecting pre-drafted questions from a question bank maintained in a database. All questions are approved by the training supervisor before being uploaded into the database that the SIs use to draw the questions from. (D&O, pg. 8). The SIs are responsible for watching SOs on the firing range and in the classroom. If there is any misconduct, the SIs cannot take disciplinary action against the SO. They must report the misconduct to the SOs direct supervisor. (D&O, pg. 9). When an SO fails attempt to gain firearm qualification, the SI is required to notify the training supervisor as well as the SO's supervisor of record. *Id.*

It has been long recognized by the Board and the courts that an employee's exercise of discretion is not a touchstone of managerial authority if the employee's actions must conform to the employer's established policy. *Solartec, Inc. & Sekely Indus.*, 352 NLRB 331, 336 (2008); *Retail Clerks*

International Assn v. NLRB, 366 F.2d 642, 645 (D.C. Cir. 1966); *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963). Although an employee may have the authority to recommend various types of action, such authority does not always evidence the employee's discretion or authority independent of the employer's consideration and approval. *Iowa Southern Utilities Co.*, 207 NLRB 341, 345 (1973).

It is clear from the record that while the SIs train the SOs and are responsible for making decisions such as whether or not to show a video, or to invite an expert to address the SOs, and put together the exams from pre-approved questions, all of the decisions are being made within the confines of NRC regulations and pre-approval and review by the SIs superiors. There is very little, if anything, that can be pointed to in the record of either this case or 14-RC-158769 that the SIs do without pre-approval or review. Where they do, it is their technical expertise, not management interests, that dictate their actions.

The record reflects that the Security Department has routine meetings with each of the security training squads which are attended by the SIs. During the 45-60 day outages that occur at the facility every 18 months, SIs and SOs attend daily meetings. (D&O, pg. 4). However, nothing in the record reflects that the SIs are representing management in these meetings. They are simply attending such meetings along with other non-managerial employees. This is not indicative of interests aligned with management.

C. The Board has Well-Established Precedent Finding that Employees Who Conduct Training are Non-Managerial Technical Trainers.

The Petitioner cited, and discussed at length, the Board's well-established precedent finding that training employees who act within the confines of management policies are not managerial in nature. That is the case here. The SIs curriculum is dictated by federal law. They do not train employees on management issues such as discipline, scheduling or company policies. They strictly train SOs within pre-established and pre-approved curriculum. The SIs do not play a role in

establishing what constitutes a qualifying score. They do not determine who they train and who is qualified. That is all controlled by management. They further do not formulate or even enforce or apply any labor management policies. They only train SOs on the technical aspects of their job.

The Employer attempts to distinguish *Roofing, Metal & Heating Assoc.*, 304 NLRB 155, 161 (1991) indicating that the current situation is unlike the case in *Roofing* because the curriculum “was already in place” when he was hired and he “had virtually no power or authority to act autonomously in any meaningful sense.” However, the SIs case is not unlike *Roofing*. The curriculum is already well-established. The exam questions in the question bank were previously written by SIs and any new ones must be reviewed and pre-approved before use. The only time where the SIs have any “discretion” is in developing lesson plans. However, those plans are dictated by NRC Regulatory Guideline 5.75 and must be reviewed and pre-approved by management. Additionally, the SIs use their technical expertise to develop the lesson plans. Not discretion that would confer managerial status.

CONCLUSION

For all of the reasons above, and the reasons stated in the Petitioner’s Brief in Support of Request for Review, the Board should reverse the Regional Director’s conclusion that the SIs are managerial employees under the Act and direct an election for the SIs at the Employer’s facility.

Respectfully Submitted

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CERTIFICATE OF SERVICE

The foregoing, Brief of Amicus Curiae, filed by IBEW 225 in Case No. 14-RC-160836 was served upon the Employer, Petitioner and Region 14 by electronic mail on March 9, 2016, to the following:

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