

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

PUBLIC SERVICE COMPANY
OF COLORADO,

Employer

and

Case No. 27-RC-8220

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 111,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On December 18, 2002, International Brotherhood of Electrical Workers, Local 111 ("the Petitioner") filed a petition under Section 9(c) of the National Labor Relations Act, as amended ("the Act") seeking an election under the procedures established by the Board in *The Globe Machine and Stamping Co.*, 3 NLRB 294 (1937), to determine whether a single revenue protection analyst and two revenue protection investigators desire representation by the Petitioner as part of the existing operating, production and maintenance collective bargaining unit ("the OP&M unit." See also, *Armour & Co.*, 40 NLRB 1333 (1942). A hearing was held before a hearing officer of the National Labor Relations Board ("the Board").

The parties stipulated that the three revenue protection employees share a community of interest with the OP&M bargaining unit, however, the Employer maintains that these employees are supervisors within the meaning Section

2(11) of the Act or managerial employees, and, therefore, ineligible to vote on whether to be included for purposes of collective bargaining representation in the unit already represented by the Petitioner. As discussed below, I conclude that the revenue protection analyst and the two revenue protection investigators are not supervisors or managerial employees and that they may vote on whether or not they wish to be represented by the Petitioner in the existing unit.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that Public Service Company of Colorado is a Colorado corporation with a principal place of business in Denver, Colorado. Specifically, the parties stipulated, and I find, that the Employer is engaged in the retail and non-retail supply of electricity and gas. During the last calendar year, the Employer received gross revenues valued in excess of \$250,000 and purchased goods valued in excess of \$5,000 directly from suppliers located outside the State of Colorado.

3. The parties stipulated, and I find, that the International Brotherhood of Electrical Workers, Local 111 is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and

Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following group of employees:

INCLUDED: All revenue protection analysts and revenue protection investigators employed by the Employer

EXCLUDED: Professional employees, confidential employees, guards, supervisors as defined in the Act, and all other employees.

STATEMENT OF THE CASE

A. Background

The Employer, a wholly owned subsidiary of Xcel Energy, is a public utility providing gas and electric service to residential and commercial customers throughout the State of Colorado. Since 1946, the Petitioner has represented the Employer's OP&M unit of approximately 2, 600 employees. The collective bargaining agreement covering these employees has been amended numerous times over the years. The most recent addendum is effective until May 31, 2003. The Petitioner additionally represents the meter reader, order reader, field credit representative and collection contract representative employees under a separate collective bargaining agreement.

The Employer employs the revenue protection analyst and the revenue protection investigators at issue to determine if there is a revenue loss resulting from equipment problems or customer theft, to determine the amount of energy lost, to work with the Employer's billing department to have the customer properly

billed, and to administratively process a bonus for any employee covered by the collective bargaining units cited above who first finds and reports the problem.

B. Relevant Facts

The revenue protection employees at issue are salaried. Although salaried, they earn less money than some of the bargaining unit employees who receive hourly wages. The revenue protection analyst and the revenue protection investigators are supervised by Xcel Energy officials located in Minnesota

Both collective bargaining agreements referenced above contain provisions for rewards or bonuses to be paid to bargaining unit employees in the field who first find energy diversions such as customer theft or equipment failures. These bonuses are equal to 10% of a final negotiated settlement amount or \$10, whichever is greater. The reports from unit employees are entered into the computer system and reviewed daily by the revenue protection analyst, who determines if there is a potential loss of revenue.

Initially, the revenue protection analyst determines whether the energy diversion is authorized or is unauthorized. If the energy diversion has been authorized by the Employer, the analyst does not order an investigation, refer the account to billing, or record a bonus for the bargaining unit employee. If the customer has satisfied his responsibilities and the energy diversion was authorized, Employer policy prohibits the granting of a bonus.

If the energy diversion is not authorized, but an investigation is not necessary, the revenue protection analyst then must determine whether to send

the account to the billing department. The analyst reviews customer accounts on the computer, which will disclose the estimated amount of diverted energy while the meter was not properly registering. If a significant difference between the metered and unmetered periods is present, the revenue protection analyst submits the account to the billing department, as a revenue loss has likely occurred.

The billing department receives the referred account, reviews it, and decides whether to estimate or prorate the account or not. In either event, billing returns the account to the revenue protection analyst with its decision. If billing decides not to prorate the account, the analyst records a \$10 fee payable as a bonus to the first finder. If billing does prorate the account, the analyst records a bonus of 10% of the prorated amount or \$10, whichever is greater. The revenue protection analyst does not determine the amount of the revenue loss. The billing department performs that function.

If the energy diversion was unauthorized, the matter has not yet been corrected, and the revenue protection analyst determines that an investigation is necessary, the analyst will refer the tip to one of the two revenue protection investigators to verify the report. The analyst ascertains all the above information by consulting the computer.

The revenue protection investigators work both in the field and in the office analyzing energy diversion situations and taking the necessary steps to correct the account. Revenue protection investigators spend 70% of their work time in the field. While working in the field, they ride in Employer trucks with bargaining

unit employees. Utilizing the information provided by the analyst, the revenue protection investigators determine if the tip is correct. Specifically, the investigator gathers and preserves evidence of theft or other unauthorized diversion and then completes a report. If the investigator determines that an unauthorized energy diversion has taken place, he calculates the amount of kilowatt hours or gas that was unmetered. The revenue protection investigator also recommends whether the billing department should prorate the account and if so, whether a bargaining unit employee, who may have first reported the diversion, should receive a bonus. As part of this process, the investigator reviews the account's billing history in the same manner as done by the analyst. If the records indicate a revenue loss, the investigator estimates the amount of energy diverted using methods taught by Employer supervisors and learned at training conferences. This investigation process may involve customer contact. Based upon additional information from the customer and/or the customer's electrician, the revenue protection investigator may adjust the amount of energy diversion found. The revenue protection analyst forwards the revenue protection investigator's report along with the analyst's own report to the Employer's billing department. Billing can adopt or decline to follow the recommendations made in these reports. Billing communicates its decision back to the analyst who then records the appropriate bonus.

Bargaining unit employees have filed grievances over the amounts of such bonuses and over whether a bonus was to be awarded at all. To resolve such grievances, supervisors of bargaining unit employees frequently communicate

with the revenue protection analyst to learn the procedure by which a bonus was determined or why a bonus may not have been due. The revenue protection analyst otherwise does not participate in grievance proceedings, and the Employer supervisor may accept, reject, or modify the findings of the revenue protection analyst and revenue protection investigators in ultimately resolving a grievance filed by a unit employee over a bonus sought under his or her collective bargaining agreement.

ANALYSIS AND CONCLUSION

As noted above, the Employer asserts that the three revenue protection employees are not eligible for inclusion in the bargaining unit, as they are statutory supervisors and/or managerial employees. With respect to the issue of supervisory status, Section 2(3) of the Act excludes "any individual employed as a supervisor" from the Act's definition of "employee", thereby excluding supervisors from the Act's protections. Section 2 (11) of the Act defines a "supervisor" as:

Any individual having authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively 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) has been interpreted to set forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but

requires the use of independent judgment and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001).

The burden of proving supervisory status rests with the party asserting such status. *NLRB v. Kentucky River Community Care, Inc.*, supra. The Board has been careful not to construe the language of the statute relating to supervisory status too broadly, because once an individual is found to be a supervisor, that individual is denied the rights of employees protected by the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). When the evidence is in conflict or inconclusive with regard to particular indicia of supervisory status, the Board will not find supervisory status based on those indicia. *Davis Memorial Goodwill Industries*, 318 NLRB 1044 (1995).

The parties stipulated that with the possible exception of rewarding employees and adjusting grievances, the revenue protection analyst and the two revenue protection investigators at issue possess none of the supervisory indicia set forth in Section 2 (11) of the Act. The Employer asserts that the three employees are supervisors, because they use independent judgment to determine or effectively recommend rewards for bargaining unit employees. The Petitioner argues that the revenue protection employees are not statutory supervisors, even assuming that they exercise independent judgment in performing their jobs.

The three revenue protection employees under consideration arguably exercise some independent judgment in determining whether to submit an

account to billing, in determining whether to conduct an investigation, in determining the amount of energy lost, and in dealing with customers. The decisions made by the revenue protection employees potentially affect the amount of bonus a bargaining unit employee may receive.

However, the mere fact that an individual has a role in the ultimate rewarding of other employees does not end the inquiry regarding supervisory status. The duties and responsibilities of the revenue protection employees are concerned with determining the existence of and the amount of energy diversion, correcting customer accounts, and assisting in the process of collecting money for improper energy diversion, and none of these duties is performed with a goal of rewarding bargaining unit employees. Thus, while the revenue protection employees' gathering and analysis of factual information related to a reported energy diversion may eventually impact whether the employee reporting the energy diversion receives a bonus and the amount of such bonus, these duties are incidental to and do not originate from the exercise of a bonafide supervisory power to "reward" within the intent of the Act. *Brown and Sharpe Mfg. Co.*, 87 NLRB 1031 (1949). Thus, the revenue protection employees are neither authorized to, nor do they, make their determinations with an intent to provide bargaining unit employees "rewards." As stated in *Brown and Sharpe*, "The reward that enures to a production employee flows from the negotiated base rate, the operation of the established wage incentive plan itself, and such extra effort as the production employee may apply in the performance of his own work."

Finally, the fact that these employees may exercise independent judgment in the performance of their duties is not dispositive. To be a true supervisor, the employee must exercise independent judgment with respect to supervisory indicia, in this case, the rewarding of employees. The independent judgment exercised by the revenue protection employees in the instant matter is exercised in deciding whether an investigation is warranted, in determining the existence of and the amount of energy diversion, and in deciding whether to submit the account to the billing department. As they do not reward or recommend rewards within the meaning of Section 2(11) of the Act, the revenue protection employees exercise no independent judgment in that connection. See *Brown and Sharpe*, supra. Based on all the above, I find that the revenue protection employees do not possess the authority to reward employees and, thus, cannot be found to be supervisors on this basis.¹

The Employer additionally argues the revenue protection employees are supervisors because they assertedly adjust employee grievances. As noted above, a bargaining unit employee may file a grievance over the failure of the

¹ Cases cited by the Employer are inapposite. In *Grandcare, Inc. v. NLRB*, 157 LRRM 2513, 137 F.3d 372 (6th Cir. 1998), and *Gino Morena, d/b/a Gino Morena Enterprises*, 287 NLRB 1327 (1988), individuals whom the Board and Court found to be supervisors, possessed several of the supervisory indicia set forth in Section 2(11) of the Act. Specifically, in *Grandcare*, the Circuit Court in refusing to affirm the Board's finding of nonsupervisory status, found that charge nurses were statutory supervisors as they exercised independent judgment in assigning work tasks and personnel in authorizing lunch and rest breaks. These supervisory indicia are not present in the instant case. In *Gino Morena Enterprises*, the Board found supervisory status as the individual used independent judgment in hiring, recommending rehiring, and directing and reviewing the work of other employees. The revenue protection employees in the case under consideration do not possess any of these authorities. In *NLRB v. Security Guard Services*, 66 LRRM 2247, 384 F.2d 143 (5th Cir., 1967), a security guard was found to have none of the indicia of a supervisor, notwithstanding his title, badges, and minor decision making authority, as his work was identical to nonsupervisory guards and was, at most, that of a leadman.

Employer to grant a bonus or over the amount of a bonus. When such grievances have been filed, management has communicated with the analyst or the investigator to learn the basis of a bonus denial or bonus amount. However, the revenue protection employees have no authority to grant, deny or compromise grievances, and they have never participated in a grievance meeting. Employer supervisors, not the revenue protection employees, then determine the Employer's response to the grievance. While it appears that the Employer relies upon and gives substantial weight to the revenue protection employees' determinations, it does not follow that these employees effectively recommend the adjustment of grievances. Based on the above, I find that the revenue protection employees do not possess authority to adjust grievances. I further find that the revenue protection analyst and the two revenue protection investigators are not supervisors within the meaning of by the Act.

Alternatively, the Employer asserts that the revenue protection employees should be excluded from the bargaining unit on the basis of their alleged managerial employee status. While the Act does not specifically define managerial employees, in *NLRB V. Yeshiva University, 444 U.S. 672 (1980)*, the Supreme Court defined them as follows:

Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress which "regarded (them) as so clearly outside the Act that no specific exclusionary provision was found necessary." Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. 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.

The party urging the existence of managerial employee status has the burden of proof. *Midland Transportation Co.*, 304 NLRB 4 (1991). The Employer asserts that, because the revenue protection employees have a role in the dispensing of thousands of dollars in bonuses, they are managers. Aside from the fact that the revenue protection employees have a role in the awarding of bonuses to bargaining unit employees, no evidence was introduced to support the Employer's position that they are managers or are aligned with management. In that regard, the revenue protection analyst and revenue protection investigators do not attend management meetings, and the Employer admits that they supervise no employees, other than their roles discussed above in connection with the energy diversion reporting bonuses. The revenue protection employees earn less than any level of management and, as noted above, less than some bargaining unit employees.

The record evidence establishes that the revenue protection employees do not "formulate and effectuate management policies by expressing and making operative the decisions of their employer." The Employer's established policies and the collective bargaining agreements have formulated the guidelines relating to the granting of bonuses to employees that report energy diversions. The revenue protection analyst and the revenue protection investigators' work in implementing the established policies relating to energy diversion merely has the coincidental effect of impacting whether an employee first reporting an energy diversion receives a bonus and the amount of such a bonus. Based on the

above, I find that the Employer has failed to carry its burden of proving that the revenue protection employees at issue are managerial employees under the Act.²

Based upon the foregoing and the record as a whole, I find that the petitioned-for unit employees are not supervisors or managerial employees. In agreement with the parties and particularly noting that the fact that revenue protection investigators regularly drive in vehicles with OP&M employees while working in the field, I find that the revenue protection analyst and revenue protection investigators share a sufficient community of interest with employees in the OP&M unit to be able to vote on whether to be represented by the Petitioner as part of the OP&M bargaining unit.

Accordingly, I direct an election in the following unit:

All revenue protection analysts and revenue protection investigators employed by the Employer; excluding all professional employees, confidential employees, guards, supervisors as defined in the Act, and all other employees.

If a majority of the valid ballots in the election are cast for the Petitioner, the employees will be deemed to have indicated their desire to be included in the existing OP&M bargaining unit currently represented by Petitioner and that labor organization may bargain for the employees as part of that unit. If a majority of ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented. In that event, a certification of

² *Ithaca College*, 261 NLRB 577 (1982), cited by the Employer does not compel a finding of managerial status. In that case in which the Employer accepted virtually all faculties' hire and tenure recommendations, it was overwhelmingly clear that the faculty members were managers under *Yeshiva*, supra. Additionally, the faculty employees at issue in that matter had extensive authority to formulate and effectuate school policy, absolute authority as to the curriculum and

results reflecting that no labor organization represents the petitioned-for employees will be issued. See *The Globe Machine and Stamping Co.*, supra.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.³ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof

determined school policy regarding admissions, graduation requirements and teaching assignments.

³ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, which provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 111**

LIST OF VOTERS

In order to ensure 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 in 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 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the *full* names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433 on or before January 29, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, not shall the filing of a request for review operated to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. This request must be received by the Board in Washington by **February 5, 2003**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 22st day of January 2003.



B. Allan Benson, Regional Director
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