VERMONT LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 300	)	
and	)	DOCKET NO. 02-53
CITY OF BURLINGTON ELECTRIC DEPARTMENT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 12, 2002, the International Brotherhood of Electrical Workers Local 300 ("Union") filed a unit clarification petition seeking to add shift supervisors at the Joseph C. McNeil Generating Station of the City of Burlington Electric Department ("Employer" or "BED") to the existing bargaining unit represented by the Union. On November 20, 2002, the Employer filed a response in opposition to the petition, contending that the shift supervisors are ineligible for inclusion in the bargaining unit because they are supervisory employees.

A hearing was held on March 6, 2003, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Chairperson; Carroll Comstock and Edward Zuccaro. Attorney James Dunn represented the Union. Attorney William Ellis represented the Employer. The parties filed post-hearing briefs on March 24, 2003.

FINDINGS OF FACT

1. In 1994, the Union filed a petition for election of collective bargaining representative with the Board seeking to represent BED employees. Among the employees the Union sought to represent were the shift supervisors at the McNeil Generating Station. On December 13, 1994, the Union and the Employer entered into a

written agreement on the composition of the bargaining unit. Among the items they agreed upon was to exclude the shift supervisors at the McNeil Generating Station from the bargaining unit as supervisory employees. The parties' agreement contained the following paragraph:

> The Board may issue an appropriate order on the basis of this Stipulation setting the date for a consent election on the question of whether a majority of the covered employees wish to designate Petitioner as their exclusive bargaining agent. The Board's order shall provide that the status of the positions referenced as both included and excluded from the proposed bargaining unit shall continue unless and until substantive evidence is submitted demonstrating that the facts and the job responsibilities of such included and excluded positions have substantially changed.

(Board Docket No. 94-63, Employer Exhibit 1)

2. On December 16, 1994, the Board issued an order providing that the Union and the Employer "having filed a Stipulation on December 14, 1994, regarding the appropriate bargaining unit and scheduling of a consent election in this matter, it is hereby ordered that the terms of the Stipulation are incorporated herein by reference and the parties directed to comply therewith, and the Labor Relations Board shall conduct a consent election in this matter." In the subsequent election conducted by the Board, the employees voted to be represented by the Union and the Board issued an order certifying the Union as the exclusive bargaining representative of the employees (Board Docket No. 94-63).

3. There has not been a significant change in the job responsibilities or job descriptions of the shift supervisors at the McNeil Generating Station in the past ten years (Employer Exhibits B, C, and D).

4. The McNeil Generating Station generates electricity through use of wood, natural gas or oil, or a combination of these three energy sources. It is capable of

operating on a 24 hours per day, 7 days a week, basis. It is the second largest generating station in Vermont, and plays an important role in maintaining the reliability of the electrical transmission network in northwestern Vermont. It is owned by BED, Central Vermont Public Service Corporation, Green Mountain Power Corporation and Vermont Public Power Supply Authority. The owners have over $70 million invested in the station. BED is the lead joint owner (Employer Exhibits I and K).

5. BED manages and operates the plant. It is required to do so according to prudent utility practice. The failure to do so exposes BED to claims for financial damages from the other owners. The financial consequences of an unplanned failure to operate at McNeil could be as much as $300,000 per hour.

6. BED General Manager Barbara Grimes has overall responsibility of the department. One of the BED divisions is Power Supply and Marketing. The Power Supply Division is headed by John Irving, Manager of Power Supply. He reports directly to the General Manager. The Supervisor of Plant Operations and Supervisor of Plant Maintenance report directly to Irving. Lucien "Pete" Brosseau is Supervisor of Plant Operations. He is responsible for the operation of the McNeil Generating Station (Union Exhibit 2, Employer Exhibit E).

7. The McNeil Generating Station is staffed continuously and is operated by five shifts of four-worker crews. Each crew consists of a shift supervisor, station operator, auxiliary operator and a yardworker. The station operator, auxiliary operator and yardworker report to the shift supervisor. The shift supervisors report to Brosseau. The shifts are 12 hours long and rotate every three months. Each crew works outside the plant doing maintenance work for three continuous months during a fifteen-month period.

The station is shut down for scheduled maintenance every year for two to four weeks. During the scheduled shutdown, two crew members are left in the plant during a shift and all other crew members do maintenance work.

8. If the generating station is operating, there is always a shift supervisor on duty. When Brosseau and Irving are not working, the shift supervisor is the highest-level operations employee at the generating station. This is the case approximately 75 percent of the time.

9. The numerous systems that make up the generating station are under the control of the shift supervisors. Shift supervisors spend almost all of their time during a shift in the station control room that serves as the station's nerve center. Shift supervisors operate all control room equipment and monitor all of the plant's systems from the control room. Shift supervisor direct and oversee the startup and shutdown of all station operations, load changes and switching fuels (Union Exhibit 1, Employer Exhibit D).

10. Station operators travel around the station performing all local operating functions, including monitoring the operation of valves, instruments and equipment. Auxiliary operators remove all materials from ash hoppers, perform regular inspections and routine maintenance of ash handling equipment, and operate the fossil fuel burners on the main boilers at the station. Yardworkers oversee fuel deliveries by truck and railroad, ensure that wood chips are transported to the steam generator at the station, and operate and maintain fuel-handling equipment. Station operators assist auxiliary operators and yardworkers as needed. Auxiliary operators assist station operators and yardworkers as necessary. There have not been substantial changes in the job descriptions of station

operators, auxiliary operators and yardworkers during the past several years (Employer Exhibits F, G, H and K).

11. The four crew members on a shift often work alone performing routine and repetitive tasks. When a crew member relieves the crew member in the comparable position on the prior shift, they learn during the transition between shifts of any unusual events or concerns that may have occurred during the prior shift. This, along with the nature of the work being performed, allows the crew member often to perform duties without direction during the shift. Crew members carry radios and can communicate with each other if needed.

12. If an operating problem develops in the station, an alarm will sound in the control room informing the shift supervisor of the problem. The shift supervisor will radio one of the three other crew members to check on the problem. If the crew can resolve the problem, the shift supervisor will direct one or more of the crew to remedy the problem if possible. If the problem requires outside assistance, the shift supervisor consults a list posted in the control room of persons to contact depending on the particular situation. If necessary, the shift supervisor has the authority to call in maintenance or technical service employees to repair station systems and keep the station operating. If the problem occurs during the night, the shift supervisor makes a judgment whether to call in someone or wait until daytime to have the problem resolved (Union Exhibit 3, Employer Exhibit M).

13. In multiple alarm situations, the shift supervisor must prioritize the problems and direct the crew accordingly. There is a protocol for the shift supervisor to notify superiors if certain situations arise. At times though, it is necessary for the shift

supervisor to address the problem before contacting superiors, and then notify superiors after the fact.

14. Brosseau makes crew assignments. Once made, there is little movement between crews. If a question arises concerning transferring a crew member to another crew, Brosseau decides whether a transfer occurs. Shift supervisors have no authority to transfer employees to another crew.

15. There have been few vacancies in crew positions in recent years. On one occasion when there was a crew vacancy to be filled by a promotion, the shift supervisor on the crew with the vacancy made an informal recommendation concerning which employee to select to fill the vacancy. The recommendation was not followed.

16. Crew members who want scheduled time off work submit requests to Brosseau. Brosseau makes the decisions on those requests.

17. A crew member who is going to be absent from work due to illness contacts the shift supervisor. The Employer has a minimum staffing policy requiring all four positions on a crew to be filled when the station is operating. Established procedure calls for the shift supervisor to contact the next available name on the call-in overtime list to fill the crew vacancy. There is no discretion exercised by shift supervisors whether to call in another person to fill the vacancy, or who to call (Union Exhibit 4).

18. Each shift supervisor conducts performance evaluations of the three other crew members. These evaluations include evaluating job performance, establishing goals for the employee, and recommending salary changes if the employee is not at the maximum pay rate. If the employee is not at the maximum rate, the shift supervisor recommends whether an employee is entitled to a merit pay increase based on

performance and recommends the amount of the increase. Merit pay recommendations of shift supervisors have been followed in most instances by their superiors. There are some crew members who are at their maximum pay rate. In these cases, the shift supervisor does not make a recommendation concerning a merit pay increase as part of the performance evaluation process.

19. Shift supervisors have the authority to orally reprimand employees on their crews. The evidence does not indicate any instances where shift supervisors have issued oral reprimands. Shift supervisors do not have authority to issue written reprimands to employees on their crew or suspend or dismiss them. There is no evidence that they have recommended the suspension or dismissal of employees.

20. Brosseau decides whether to approve crew members' requests for vacations. Shift supervisors have no role in granting vacations. There is no evidence indicating that shift supervisors are involved in resolving employees' grievances.

MAJORITY OPINION

The Employer moves to dismiss this unit clarification petition on the ground that the Union has failed to establish a substantial change in the shift supervisor's job responsibilities since the Board approved the parties' agreement in 1994 that shift supervisors were supervisory employees and thus properly excluded from the bargaining unit represented by the Union. In opposing the motion to dismiss the petition, the Union relies on the fact that the Board previously has not made findings of fact and conclusions of law on the supervisory status of the shift supervisors.

The Union asserts that when it filed its petition in 1994 to represent BED employees the shift supervisors did not seek representation by the Union, and the Union

had insufficient information to contest the Employer's contention that the positions were supervisory. The Union contends that a ruling adopting the Employer's position is inconsistent with the policy of the State granting employees the right to representation, unnecessary to protect the precedential weight of prior Board decisions, and would result in discouraging parties from reaching informal settlements on the initial composition of proposed bargaining units.

We disagree with the Union. In South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995), the Association sought to add the criminal investigation sergeant to the bargaining unit of police department employees represented by the Association. In a previous case, the Association had sought to add the criminal investigation sergeant to the bargaining unit, but the parties had ultimately agreed to exclude the sergeant from the unit as a supervisory employee. Id. Given the parties' previous agreement that the criminal investigation sergeant was a supervisor, the Board determined that the burden was on the Association to demonstrate that circumstances have changed with respect to the supervisory duties of the sergeant since the parties' agreement and convince the Board by a preponderance of the evidence that the sergeants are no longer supervisory employees. Id. at 126.

The facts of the case now before us are similar to the South Burlington case. In the original petition for election of collective bargaining representative filed by this Union in 1994 to represent BED employees, this Union sought to represent the shift supervisors, but these parties ultimately agreed to exclude them from the bargaining unit as supervisory employees. The parties further agreed that the "status of the positions . . . excluded from the . . . unit shall continue unless and until substantive evidence is

submitted demonstrating that the facts and the job responsibilities of such . . . excluded positions have substantially changed". The Board incorporated the parties' agreement into a Board order. Given these facts, and based on the precedent established in South Burlington, we conclude that the burden is on the Union to demonstrate there has been a sufficient change in circumstances with respect to the supervisory duties of the shift supervisors since the parties' 1994 agreement and convince the Board by a preponderance of the evidence that the sergeants are no longer supervisory employees. Id. at 126. Burlington Firefighters Association and City of Burlington, 18 VLRB 137, 145 (1995).

Contrary to the Union's contention, this ruling is not inconsistent with state policy. A ruling consistent with the Union's position would be contrary to state policy that an agreement of parties incorporated into a Board order is binding and should be enforced. We further disagree that this ruling will result in discouraging parties from reaching informal settlements on the initial composition of proposed bargaining units. When parties reach an agreement on the exclusion of positions from a bargaining unit as supervisory and further agree to the incorporation of that agreement into a Board order, as occurred here, the Board would discourage settlements if it did not require changed circumstances before the Board would examine the supervisory status of the involved positions. If unions are able to contest the supervisory status of positions previously agreed to as supervisory without changed circumstances, employers would have less incentive to enter into agreements with unions on the initial composition of proposed bargaining units. Such agreements would be less binding and more easily subject to change, thereby promoting the undesirable effect of less stable labor relations.

Accordingly, the Union is required to demonstrate that there has been a sufficient change of circumstances with respect to the supervisory duties of the shift supervisors at the McNeil Generating Station since the parties' 1994 agreement and convince the Board by a preponderance of the evidence that the sergeants are no longer supervisory employees. The Union has not made this showing. There has not been a significant change in the job responsibilities of the shift supervisors at the McNeil Generating Station in the past ten years.

Where the parties voluntarily agreed that the shift supervisors were supervisory employees within the meaning of the Municipal Employee Relations Act and that the shift supervisors would remain excluded from the bargaining unit unless there was a showing of changed circumstances, the Board would only go behind the parties' agreement if there was a showing of changed circumstances. That showing has not been made here. Thus, we dismiss the petition filed by the Union and it is not necessary to engage in further examination of the statutory criteria on supervisory employees.

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Richard W. Park, Chairperson

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Edward R. Zuccaro

DISSENTING OPINION

I dissent from the view of my colleagues that the Union is required to demonstrate that there has been a sufficient change of circumstances with respect to the supervisory duties of the shift supervisors at the McNeil Generating Station since the parties' 1994 agreement and convince the Board by a preponderance of the evidence that the sergeants are no longer supervisory employees. Under the circumstances of this case, I believe

application of such a standard results in the inappropriate denial of the shift supervisors' rights to a Board hearing on the eligibility of their positions for representation by the Union.

The testimony presented by the Union in this case indicates that the shift supervisors were not interested in being represented by the Union in 1994 when the Union initially campaigned to represent BED employees. Given this lack of interest by the shift supervisors in 1994, the fact that the Union agreed to the exclusion of the shift supervisors from the unit then should not preclude the Board from taking a fresh look at the issue of their supervisory status more than eight years later when the shift supervisors have expressed interest in being represented by the Union. This would allow a determination by the Board on the supervisory status of employees for the first time under circumstances where the involved employees have expressed an interest in the issue for the first time.

Thus, contrary to the majority opinion, I conclude it is appropriate to engage in examination of the statutory criteria on supervisory employees to determine whether the shift supervisors are supervisory employees. Supervisor is defined in 21 V.S.A. Section 1502(13) as:

> "an 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 responsibility 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".

In order to be considered a supervisor, an employee must pass two tests: 1) the possession of any <u>one</u> of the listed powers in the statutory definition; and 2) the exercise of such powers "not of a merely routine or clerical nature but requiring the use of

independent judgment". Firefighters of Brattleboro, Local 2628 v. Brattleboro Fire Department, 138 Vt. 347 (1980). The statutory test is whether or not an individual can effectively exercise the authority granted him or her; theoretical or paper power will not make one a supervisor. Rare or infrequent supervisory acts do not change the status of an employee to a supervisor. Brattleboro, 138 Vt. at 351.

The existence of actual power, rather than the frequency of its use, determines supervisory status. AFSCME Local 490 and Town of Bennington, 153 Vt. 318, 320 (1989). However infrequently used, the power exercised must be genuine. Id. Also, the Board has discretion to conclude supervisory status does not exist although some technically supervisory duties are performed, if such duties are insignificant in comparison with overall duties. Id. at 321-23.

Many of the listed powers in the statutory definition can be quickly addressed. In the areas of hiring, promoting, laying off, recalling and transferring employees, it must be demonstrated an employee actually has taken the action or effectively recommended the action. Local 1369, AFSCME, AFL-CIO and Kellogg-Hubbard Library, 15 VLRB 205, 213 (1992). Colchester Education Association, Vermont-NEA and Colchester Supervisory District Board of School Directors, 12 VLRB 60, 80-81 (1989). Local 1201, AFSCME and City of Rutland, 10 VLRB 141, 149 (1987). The evidence does not indicate that shift supervisors have ever taken, or effectively recommended, the actions of hiring, promoting, laying off, recalling or transferring employees. Thus, we cannot conclude that they have supervisory authority in these areas.

I further conclude that the sergeants do not possess effective authority to discipline, or effectively recommend the discipline, of employees. The authority to take a

specific disciplinary action or effectively recommend a specific disciplinary action must be demonstrated for supervisory status to be found. Teamsters, Local 597 and Burlington Housing Authority, 9 VLRB 126,131 (1986). The evidence does not indicate any instances where shift supervisors have issued oral reprimands. Shift supervisors do not have authority to issue written reprimands to employees on their crew or suspend or dismiss them. There is no evidence that they have recommended the suspension or dismissal of employees. This evidence indicates that the Employer has not demonstrated that shift supervisors possess effective disciplinary authority.

The sergeants also possess no supervisory authority with respect to rewarding employees. Conducting of performance evaluations on employees possibly could lead to rewarding employees through merit wage increases. Burlington Firefighters Association and City of Burlington, 18 VLRB 137, 147-148 (1995). Department of Public Safety Personnel Designation Dispute (State Police Sergeants) , 14 VLRB 176, 186 (1991). City of Montpelier and Local 2287, IAFF, 18 VLRB 374, 389-90 (1995).

The shift supervisor that testified in this case stated that he has not had to decide whether to recommend the granting of a merit pay increase because all employees in his crew are at the maximum of their pay scale and have been since the merit wage increase system has been adopted. Although there was general testimony that other shift supervisors had made such recommendations, and that they generally were followed, more specific and detailed evidence on these recommendations needed to be offered by the Employer before I would be able to conclude whether the shift supervisors' responsibilities in this regard rise to the level of constituting rewarding employees within the statutory definition of supervisory employee.

In the area of adjusting grievances, the employee must not only have the authority to hear grievances, but it also must be demonstrated the employee can actually settle or resolve a grievance for that employee to be considered a supervisor. AFSCME and Town of Windsor, 6 VLRB 197, 202 (1983). There is no such evidence in this case.

The remaining area to be examined is whether the assigning and directing responsibilities of the shift supervisors make them supervisory employees. In cases where the assigning and directing responsibilities of employees is at issue, the key determination is whether the employee is exercising independent judgment or is simply ensuring that standard operating procedures are followed. If an employee is relaying instructions from a supervisor or ensuring that subordinates adhere to established procedures, the employee is not a supervisor. South Burlington, 18 VLRB at 130. However, if an employee's duties go beyond simply ensuring established policies and procedures are followed, and require use of independent judgment in directing and assigning employees, then the employee meets the statutory definition of supervisor. South Burlington Police Officers' Association and City of South Burlington, 11 VLRB 332, 340 (1988).

In applying these standards here, I conclude that the occasions in which the shift supervisors have to exercise independent judgment in assigning and directing employees is too infrequent to be significant in comparison with overall duties. AFSCME Local 490 and Town of Bennington, 153 Vt. 318, 321-23 (1989). The three crew members on a shift with a shift supervisor often work alone performing routine and repetitive tasks. When a crew member relieves the crew member in the comparable position on the prior shift, they learn during the transition between shifts of any unusual events or concerns that may

have occurred during the prior shift. This, along with the nature of the work being performed, allows the crew member often to perform duties without direction during the shift. Although there are occasions when a shift supervisor has to exercise independent judgment due to problems that arise in the generating station's systems, these occasions are too infrequent to warrant a supervisory designation for them.

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Carroll P. Comstock

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the unit clarification petition filed by the International Brotherhood of Electrical Workers Local 300 ("Union") to add the shift supervisors at the McNeil Generating Station to the bargaining unit represented by the Union is dismissed.

Dated this ____ day of May, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Richard W. Park, Chairperson

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Edward R. Zuccaro