In the Matter of SONOTONE CORPORATION, EMPLOYER *and* LOCAL 428, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, CIO, PETITIONER

Case No. 2–RC–1834.—Decided July 25, 1950

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed, a hearing [1] was held before Jack Davis, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act.

2. The labor organizations involved claim to represent employees of the Employer.

3. Local 428, United Electrical, Radio and Machine Workers of America and United Electrical, Radio and Machine Workers of America herein collectively referred to as the UE, have been allowed to intervene on the basis of a contract which they allegedly have with the Employer. They assert that this contract is currently in effect and constitutes a bar to this proceeding. We do not agree.

In April 1949, pursuant to the terms of a contract then in force between it and the Employer, the UE served notice upon the Employer of its desire to modify and amend the agreement. Subsequent to said notice, the UE and the Employer entered upon negotiations covering changes in wage rates, union security, and other terms for a new contract. On August 9, 1949, agreement was reached on all provisions for a proposed new contract with the exception of union security. On that date, the parties executed a memorandum confirming that such agreement had been reached and signed it "pending formal acceptance of the signed contract." [2] Thereafter, further meetings were held and

[1] A consolidated hearing was held in this case and in Case No. 2–RC–1897 involving the same parties. Since the hearing, however, the latter case has been severed from this one.

[2] The memorandum reads as follows:

> This is to certify that the Union Committee representing the Research Unit, Local 428, United Electrical, Radio, and Machine Workers of America, C. I. O., and the Committee representing management, have reached an agreement on all phases of the union contract to become effective as of June 30, 1949, with the exception of Section 3—"Union Security." This memorandum is to confirm this understanding pending the formal acceptance of the final contract.

union-security provisions were agreed upon. The Employer thereupon prepared a draft of a contract, including all the terms and conditions agreed upon, and in September 1949, turned over to the UE representatives an unsigned copy of the draft.

This draft contained a union-security clause as follows:

> Section III—Modified Union Shop
>
> This Section shall be operative to the extent permitted by law.
>
> All present members of the union shall remain members in good standing as a condition of employment.
>
> All new employees in Groups I through VII, inclusive, shall immediately upon their hiring make application for membership in the Union and upon completion of their trial period join the Union, pay their initiation fees and back dues covering their trial period and shall thereafter remain members of the Union in good standing as a term and condition of employment.
>
> New employees in Groups VIII and IX shall be required to join the Union as a condition of employment if the percentage of Union members in the bargaining unit shall be less than 65 percent at the time of hiring.

On November 9, 1949, the president of Local 428–UE, wrote a letter to the Employer requesting a meeting "for the purpose of signing said contract." The Employer did not respond to this letter. However, when the UE representatives subsequently called upon the Employer in person, they were advised that in view of the conflicting claims of the UE and the Petitioner, the Employer would not execute a contract with either union. The petition was filed on December 1, 1949.

The UE contends that the memorandum of August 9, 1949, together with the draft of the terms and conditions of employment handed to the representatives of the UE in September 1949, constitutes a valid contract, which is a bar to an election in this proceeding. The UE further contends that the effect of the memorandum of August 9, is to except the union-security provision from the final contract. It is the contention of the Employer and the Petitioner that the draft of September was nothing more than a proposal, that in any event it was not signed by the parties and therefore, under well-established rules of the Board does not constitute a contract which would be a bar to an election, and furthermore, that it contains an illegal union-security clause.

We do not believe it necessary to decide whether the memorandum and the later draft of the terms and provisions orally agreed upon can be taken together to establish a signed contract which will bar this proceeding. Even assuming that such could be the case, the contract would not be a bar, under well-established principles, inasmuch as it

contains a union-security clause without there having been a union-shop authorization election among the employees concerned pursuant to Section 9 (e) of the Act. The UE asserts, however, that it was the clear understanding of the parties to the contract that these clauses were to be inoperative until they could become legally effective, and that all the employees of the Employer understood this to be the case. The Board has held, and we reaffirm the holding here, that an understanding such as this one, oral in nature, does not remove the infirmity so as to constitute the contract a bar,[3] and that it is immaterial that no action in accordance with the union-security clause had in fact been taken.[4] Nor is this imperfection cured by the purported saving clause set forth above; for as we have already held, such a general severability clause does not defer application of the union-shop provision.[5]

We also do not agree with the assertion of the UE that the effect of the August memorandum was to except from any final agreement the union-security provisions. The memorandum merely states that at the time of its execution the parties had not agreed on a union-security clause. Subsequent negotiations apparently produced such agreement. For these reasons we find that there is no existing contract which is a bar to a present determination of representatives in the proposed unit.

The UE moved to dismiss the petition on other grounds, as follows:

(a) That the Act and these proceedings thereunder are unconstitutional in various respects, especially Section 9 (f), (g), and (h) of the Act;

(b) That the Petitioner by fraud, deceit, misrepresentation, and coercion "vitiated consent" on the part of the employees and created such confusion in their minds that a free and untrammeled election cannot be held at this time;

(c) That by the Petitioner's use of a similar name and the same local number as the UE, the employees have been so confused that a free and fair election cannot be held at the present time;

(d) That if it ordered an election herein, the Board would be illegally depriving the UE of its name and other valuable assets and property rights.

We will discuss these *seriatim*:

(a) For the reasons stated in *Rite-Form Corset Company, Inc.*, 75 NLRB 174, we decline to pass upon the constitutional questions raised by the UE. In the absence of court decisions to the contrary,

[3] *Eagle Lock Company*, 88 NLRB 970.
[4] *Reading Hardware Corporation*, 85 NLRB 610.
[5] *Sperry Gyroscope Company*, 88 NLRB 907.

we assume the constitutionality of the Act and of the sections specifically challenged by the UE;[6]

(b) The allegations in this objection appear to be matter for unfair labor charges and in accord with our established policy, we do not consider such matter in a representation proceeding;

(c) We do not believe the use by the Petitioner of the same local number as the UE local concerned, in conjunction with the name of the Petitioner, will confuse the voters in the election hereinafter directed;[7]

(d) It is not the function of the Board in this proceeding to pass upon the property rights of the parties in any respect, and we do not purport to do so.[8]

We find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

4. The parties are in substantial agreement as to the composition of a research unit, differing only as to three classifications of employees.

Engineers

The UE contends, contrary to the Employer and the Petitioner, that the engineers are supervisors. The record shows that the engineers do not hire or discharge, do not have disciplinary or other powers included in the Act's definition of supervisors. The engineers direct the work of the associate and assistant engineers. We are of the opinion that the relationship of the engineer to the associate and assistant engineer is primarily that of the more skilled to the lesser skilled employee and not that of supervisor to subordinate. Accordingly, we find that the engineers are not supervisors within the meaning of the Act, and we shall include them in the unit.[9]

Assistant Engineers

The Petitioner and the Employer contend that the assistant engineers are not professional employees; the UE asserts that they qualify as professional employees under the Act. The assistant engineers are required by the Employer to be graduates of a technical high school or have the equivalent training by experience. The Employer prefers that they have some college training in technical subjects. They must

[6] Some of the questions raised by the UE were recently dealt with by the Supreme Court in *American Communications Association* v. *Douds*, 339 U. S. 382, where the Court held that the non-Communist affidavit requirements of Section 9 (f), (g), and (h) of the Act are constitutional.

[7] *General Motors Corporation*, 88 NLRB 450.

[8] *General Motors Corporation, supra.*

[9] *Gold Medal Dairies, Inc.*, 84 NLRB 426.

be able to read charts and graphs, and do blueprint work as well as basic electrical work. They must know how to use engineering instruments such as meters, oscillographs, etc., and must record technical data. On the other hand, the job of the assistant engineers does not require knowledge of an advanced type in a field of science or learning. Their work is primarily routine testing and checking. They work under the close direction of an engineer or associate engineer who is in charge of the project. They do not do work involving the consistent exercise of discretion and judgment. It is possible for an assistant engineer to advance through application to work, schooling, and self-education, to the position of engineer, but such advancement is a rare occurrence. On the basis of these facts and on the record as a whole, we find that the assistant engineers are not professional employees within the meaning of the Act.

Senior Draftsmen

The Petitioner and the Employer contend that senior draftsmen are professional employees; the UE asserts that they are not. The Employer does not require that senior draftsmen have a college degree. They must have had a high school education and preferably should have had additional technical education, especially along lines of mechanical or civil engineering as related to general structural design problems. They must have had a minimum of 8 years' practical experience as draftsmen. They make drawings on the basis of design specifications supplied by engineers and calculate proposed structures for strength, critical speed, wear, friction losses, and thermal changes. They are responsible for standard practices, both as to drafting and as to suggested use of materials and structures. Their work is predominantly intellectual and varied in character, involving the consistent exercise of discretion and judgment. Its performance requires knowledge of an advanced type in engineering and drafting. We find that the senior draftsmen are professional employees within the meaning of the Act.

We find in this case that the following employees *may* constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act:

All the employees in the research and engineering departments of the Employer at Elmsford, New York, excluding confidential employees and supervisors as defined in the Act.

As a result of our findings as to the professional status of the employees in the disputed classifications, it appears that the unit as set out above includes 9 professional employees and 15 nonprofessional

employees. However, the Board is prohibited by Section 9 (b) (1) [10] of the Act from including professional employees in a unit with employees who are not professional unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, we must ascertain the desires of the professional employees as to inclusion in a unit with nonprofessional employees. We shall therefore direct separate elections in the following voting groups: (a) All the employees in the research and engineering departments of the Employer at Elmsford, New York, excluding professional employees, confidential employees, and supervisors as defined in the Act; and (b) all professional employees (engineers, associate engineers, and senior draftsmen) in the research and engineering departments of the Employer at Elmsford, New York, excluding confidential employees and supervisors as defined in the Act. The employees in the nonprofessional voting group (a) will be polled as to which, if either, of the competing unions they wish to represent them.

The employees in the professional voting group (b) will be asked two questions on their ballot: (1) Do you desire the professional employees to be included with the clerical and technical employees in a unit composed of all employees in the research and engineering departments of the Employer at Elmsford, New York, for the purposes of collective bargaining? (2) Do you desire to be represented for the purposes of collective bargaining by the IUE, the UE, or by neither? If a majority of the professional employees in voting group (b) vote "Yes" to the first question, indicating their wish to be included in a unit with the nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessional voting group (a) to decide the representative for the whole research unit. If, on the other hand, a majority of the professional employees in voting group (b) vote against inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will then be separately counted to decide which union, if either, they want to represent them in a separate professional unit. There is no indication in the record that either union would be unwilling to represent the professional employees separately, if those employees vote for separate representation. However, if either union does not desire to represent the professional employees in a separate unit even if those employees vote for such representation, that union may notify the Regional Director

[10] Section 9 (b) (1) states that the Board shall not "decide that any unit is appropriate [for the purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

to that effect within ten (10) days of the date of this Decision and Direction of Elections.

Our unit determination is based, in part, then, upon the results of the election among the professional employees. However, we now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in the research unit with the nonprofessional employees, we find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act;

All the employees in the research and engineering departments of the Employer at Elmsford, New York, excluding confidential employees and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in the research unit with the nonprofessional employees, we find that the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

(a) All the employees in the research and engineering departments of the Employer at Elmsford, New York, excluding professional employees, confidential employees, and supervisors as defined in the Act.

(b) All professional employees in the research and engineering departments of the Employer at Elmsford, New York, excluding confidential employees and supervisors as defined in the Act.

DIRECTION OF ELECTIONS [11]

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, elections by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations, among the employees in the two voting groups set out in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Elections, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, but excluding those employees who have since quit or been discharged for cause and have not been rehired or rein-

[11] Either participant in the election directed herein may, upon its prompt request to, and approval thereof by, the Regional Director, have its name removed from the ballot.

stated prior to the date of the elections, and also excluding employees on strike who are not entitled to reinstatement, to determine whether they desire to be represented, for purposes of collective bargaining, by Local 428, International Union of Electrical, Radio and Machine Workers, CIO, or by Local 428, United Electrical Radio and Machine Workers, or by neither, and also to determine whether or not the professional employees in voting group (b) desire to be included with nonprofessional employees.