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Arthur B. Morgenstern

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LABOR LAW—REPRESENTATION—SEASONAL SUPERVISORS INCLUDED IN EMPLOYEES' BARGAINING UNIT.

Great Western Sugar Co. (NLRB 1962).

The National Labor Relations Board was petitioned to make findings concerning the bargaining status of certain workers employed by the Great Western Sugar Company. The company's operations were seasonal, necessitating the expansion of the 46 man year-round, or "inter-campaign," work force to 206 men during the season or "campaign" which lasted 85 to 120 days. The Board found that certain foremen were supervisors under the Labor Management Relations Act,1 since it appeared that during the "campaign" they directed the employees on their respective shifts and had the power to discipline and discharge. Therefore, they were to be excluded from the unit of seasonal and year-round employees eligible to vote regarding a collective bargaining unit.2 On reconsideration, the Board held: (1) such seasonal supervisors were "employees" within the meaning of § 2 (3) of the Labor Management Relations Act (Taft-Hartley Act) and were entitled to bargain collectively with the other employees concerning the terms and conditions of their employment during the major part of the year when they had been rank-and-file employees; (2) such individuals had the right to vote in an election conducted by the National Labor Relations Board even though the election may have been conducted during the time they were performing supervisory duties. Two members dissented. Great Western Sugar Co., 137 N.L.R.B. No. 73 (1962).

The status of seasonal supervisors in collective bargaining units is a recent development in the field of labor law. When the National Labor Relations Act was passed the status of "supervisors" was not even considered. The Board went ahead to interpret the term "employee" to include such individuals, thereby giving them the right to organize, to select representatives, and to bargain collectively with their employer, not only in supervisory units but also in groups made up of rank-and-file employees.3 In 1947, Congress sought to reverse the effect of such decisions by expressly excluding supervisors from the definition of the term "employee" as it appeared in the Taft-Hartley Act.4 Underlying this


4. See supra note 1.
significant change was the fact that Congress was gravely concerned lest rank-and-file employees be interfered with or dominated by their supervisors, or employers lose the loyalty of, and control over, their supervisors. However, it was not until immediately before the passage of the Taft-Hartley Act, in the *Hunt Foods, Inc.* decision, that the Board was presented with the specific problem of seasonal supervisors. There, the Board initiated a trend which, although interrupted for a short period of years, laid the foundation for the decision in the present case. It was held that to the extent that employees were engaged in a non-supervisory capacity, subject to the same wage rate and working conditions as the ordinary year-round employee, they were properly a part of the production and maintenance unit of year-round employees. But, only those employees who spent at least 50% of their time in such non-supervisory employment had a sufficiently substantial interest in the terms and conditions of employment in the production and maintenance unit to entitle them to vote in the election. The Board was very impressed with an analogous line of cases involving part-time agricultural workers who were so employed only one-half of the year but were nevertheless, held eligible to vote in a representative election.

Subsequent to the *Hunt Food* decision and after the passage of the Taft-Hartley Act, a line of similar cases seemed to quiet completely the question of the status of seasonal supervisors in the area of bargaining units which included rank-and-file employees. In each case the *Hunt Food* rule was methodically applied, there were no dissenting voices. How-

6. *Hunt Foods, Inc.*, 68 N.L.R.B. 800 (1946), where the company engaged in processing fruits and vegetables during a season which normally extended from the middle of May to the middle of November. The company employed approximately seventeen permanent employees who were assigned to supervisory positions during the peak processing season which lasted from five to six months. Their duties included the authority to hire and fire employees under their supervision. They received higher pay only during this period.
8. *Bear Creek Orchards*, 87 N.L.R.B. 1348 (1949), where the company was engaged in the business of packaging, storing, and selling fresh fruit and gift packages. During the height of the seasonal operations, 700 to 800 workers were employed. There were approximately 78 permanent employees, twelve of whom were full-time supervisors; thirteen did supervisory work during a portion of the year, and 53 were non-seasonal, non-supervisory employees. *Libby*, McNeil, and *Libby*, 90 N.L.R.B. 279 (1950), where the company was engaged in canning operations. There were about thirty permanent employees who were engaged in maintenance work at the plant during the off-season. Most of these employees did supervisory work during the three month canning season. The part-time supervisors were given disciplinary powers and could discharge the crew members in the same manner as full-time supervisors. *Stokely Van Camp, Inc.*, 102 N.L.R.B. 1259 (1953), which also involved a processing and canning plant. Its operations were seasonal in nature, running from about June 15 to October 15 each year. Certain regular employers achieved supervisory status during the busy season.
9. However, there was one minor change. The *Libby* case adopted a more explicit formula than the *Bear Creek* decision which had allowed employees who spent more than 50% of their time as non-supervisors to vote. The formula was based on the number of weeks worked. However, the number of hours worked as a
ever, in 1955, in *Whitmoyer Laboratories, Inc.* the Board surprisingly overturned this firmly rooted precedent. The Board distinguished between workers who assume supervisory authority on a regular and substantial basis and those who are only occasionally and sporadically called upon to perform such functions. The Board reasoned:

We believe that the principles which prompted adoption of the policy of unit placement of the other categories of statutory exclusions described above are equally applicable to employees who divide their time between supervisory and non-supervisory duties on a seasonal basis.

When the present case was heard for the first time, the Board merely affirmed the *Whitmoyer* case, seeing “no compelling reason to vary from this established rule.” Upon reconsideration, however, the Board reversed and restored the original rule.

It is interesting to observe that in support of its initial rule the Board relied upon little more than an analogy drawn from the cases involving part-time agricultural workers who were so employed only one-half the year and were held eligible to vote in an employee election. The rule, however, is an eminently reasonable one. A seasonal business necessarily involves a great influx of generally unskilled workers for a relatively short period of time. Men familiar with the operation are needed to act in a training and supervisory capacity. The small core of permanent employees are especially suited for such duties. Further, such an arrangement accommodates employer and employee alike. The employer is acquainted with the ability of the selected persons and can be confident that the job will be effectively carried out during the critical season; the employee, on the other hand, receives a higher salary during this period and achieves a position of responsibility. In view of these circumstances, it would seem that the most logical rule would be to exclude workers acting in a supervisory position from participation in the bargaining unit of the ordinary employees, while permitting them to do so when they resume their normal employee status. As has been pointed out, supervisor is an inaccurate measure of the extent of supervisory duties, in view of the fact that overtime work occurs more frequently during the busy season than at other times during the year.

10. 114 N.L.R.B. 749 (1955). The employee who was excluded from the unit as a supervisor performed light maintenance duties during the off-season as did the other regular employees. During the busy season, he was regularly assigned as a foreman over eighteen employees. His duties included the assigning of employees to jobs, directing their work and recommending their hire and discharge.


such a standard had been applied by the Board until the Whitmoyer decision.

The full significance of this latter case was revealed by the dissenting member in the instant decision. He insisted that one of the primary changes intended by the Taft-Hartley amendment was the excepting of supervisors from the term "employees," thus completely separating them from the bargaining unit of the rank-and-file employees. However, reference to the committee reports reveals only the following information concerning the intent of the legislature in this regard:

1. Workers are assured freedom from domination or control by their supervisors in their organizing and bargaining activities;\(^ {16} \)

2. Management is free to manage American industry as in the past and to produce goods on which depend our strength in war and our standard of living;\(^ {16} \)

3. Supervisors are management people; they abandoned the "collective security" of the rank-and-file voluntarily, believing the opportunities thus opened to be more valuable;\(^ {17} \)

4. No one, whether employer or employee, need have as his agent, one who is obligated to those on the other side, or one whom, for any reason, he does not trust.\(^ {18} \)

Nevertheless, the dissent reasoned that the same problems would arise regarding seasonal supervisors as are present when full time supervisors are admitted within the employee bargaining unit: Therefore, in order to precisely carry out Congressional intent and to insure equitable treatment to employees, unions, and management, it was suggested that the Board exclude seasonal supervisors entirely from the employees' unit. It is submitted, however, that such a solution overlooks many important considerations. Since the first such case was presented to the Board in 1946,\(^ {19} \) there has been an attempt to strike a balance between the general legislative intention to exclude supervisors from the workers' bargaining unit and the employees' right to bargain collectively. It should be noted that the problem of seasonal supervisors occurs in industries which keep a small core of year-round employees who achieve supervisory status only during the industry's busy season — frequently a period of just a few months. During the remainder of the year they resume their roles as ordinary workers. In most instances, it can be assumed that such an employee will consider his temporary role as an exceptional position and will bear in mind the many months during which he labors as a common worker. Further, the seasonal foreman's duties are often those which involve less than managerial decisions. He can often be found in the midst of the laborers

\(^ {15} \) Supra note 5 at 14.
\(^ {16} \) Id. at 15.
\(^ {17} \) Id. at 16.
\(^ {18} \) Id. at 17.
\(^ {19} \) Supra note 6.
explaining tasks which he, himself, has so frequently performed. It should be remembered that any exclusion of a group of employees from the bargaining unit reduces the unit's influence and power. Such a step should not be taken unless the undermining of the employees' rights is seriously threatened. But, as the present opinion suggests, the solution to the problems in this area rests finally with the employer and the union. "Each must determine whether an employee who is for a part of the year in a status 'on the other side of the table' is one who will be '100% loyal,' in whom they can 'repose trust and confidence,' as to the functions and for the part of the year when such employee is on its side of the table."21

The Board also issued a warning to those with supervisory authority who might attempt to utilize their power to coerce other employees to vote for or against representation, stating:

[We deem it wiser to treat issues in this area, if, as, and when they arise, at which time our decision respecting the interplay between various policies can be decided on the basis of concrete factual situations and argument relating thereto, rather than on the basis of surmise and speculation. 22

What the Board has wisely done is to restore the rule which had been overturned seven years previously. Additionally, the present decision should serve as a warning to seasonal supervisors to act with great care and scrutiny if they desire to maintain both their supervisory status and their rights as employees.

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20. An analogy may be drawn from the Board's inclusion within the employees' bargaining unit of those temporary people who work within the unit only during certain periods and are employed elsewhere during the rest of the year. CCH Lab. L. Rep. 2640 (1961). Although there was no question of a possible relation with management because of the nature of the work, it does illustrate the Board's intention of allowing representation when the employee has participated in the unit for a sufficient length of time. However, it is not suggested that if the evidence shows that the seasonal supervisors have established peculiar ties with the employer they should still be allowed a voice in the employees' bargaining unit. For instance, if the temporary supervisors have contracted for a profit-sharing plan, this would certainly seem to prejudice their outlook regarding an application by the unit for higher wages.

21. 1962 CCH NLRB ¶ 11,271 at 17,581.
22. 1962 CCH NLRB ¶ 11,271, footnote 9 at 17,581.