

**Blue Star Ready-Mix Concrete Corporation and International Union of Operating Engineers, Local 660, AFL-CIO, Petitioner.** Case 10-RC-14074

October 15, 1991

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered the determinative challenges in an election held on January 10, 1991, and the hearing officer's report recommending disposition of them. The tally of ballots shows 21 for and 19 against the Petitioner, with 11 challenged ballots<sup>1</sup> The challenged ballots are sufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings<sup>2</sup> and recommendations only to the extent consistent with this Decision, Direction, and Order.

For the reasons given in his report, we adopt the hearing officer's recommendation that the challenge to the ballot cast by Phillip Vinson be sustained. We find, however, contrary to the hearing officer, that the challenges to the ballots cast by Harold Oliver, Douglas Bohannon, and Jason Vinson should be overruled.

Harold Oliver and Douglas Bohannon

The Employer operates five facilities in Alabama, approximately 25 to 30 miles apart, at which concrete is produced. One of the facilities also produces cement blocks.

Harold Oliver and Douglas Bohannon are "batchers," who, following a laboratory prescribed formula, are responsible for mixing the materials together to make concrete. They also oversee the pouring of the concrete into the Employer's trucks for delivery to customers. Bohannon is a salaried employee and Oliver is paid on an hourly basis.

Drivers Harry Berryhill and Delane Franks testified that they considered Oliver to be their supervisor<sup>3</sup> According to them, Oliver gave radioed orders for drivers

<sup>1</sup> The Regional Director accepted the parties' stipulation that the challenges to the ballots cast by J. D. Bishop, David Bishop, and Michael Bishop be sustained.

<sup>2</sup> The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation that the challenge to the ballot cast by Raymond Holt be overruled, and that the challenges to the ballots cast by Wayne Borden, Donald Harben, and Roy McNutt be sustained.

<sup>3</sup> Neither Oliver nor Bohannon testified.

and requests for trucks without clearance from the Employer's president, Frank Guthrie, or other management officials. Franks testified that Guthrie "hardly ever" gave him orders and that he took his orders from Oliver<sup>4</sup> At the hearing Berryhill recounted an incident during which Oliver told him to work overtime and Berryhill refused. Berryhill testified that Oliver said, "Well, if you don't take [the load out] you're gonna be fired." Shortly thereafter, according to Berryhill, the Employer's secretary-treasurer Lisa Guthrie told him, "If you don't do what Harold wanted you to do that Daddy Frank Guthrie told me to tell you just don't come back." Berryhill stated that the next morning Frank Guthrie told him, "I was gonna have to do what Harold and them told me to do 'cause they was the ones that was running the plant."

Berryhill testified that he heard Bohannon request trucks from the Employer's various locations without first receiving clearance from Guthrie. Franks testified that when he worked for Bohannon he did not hear Guthrie give Bohannon instructions over the radio and that Franks took his orders directly from Bohannon.<sup>5</sup>

The hearing officer found Oliver and Bohannon to be supervisors under Section 2(11). He found that the employees had very little contact with Frank Guthrie and that their association with the batchers and dispatchers<sup>6</sup> was the employees' only day-to-day connection with management. The hearing officer further found that the incident between Berryhill and Oliver "clearly establishe[d] that employees are required to take their direction from the batchers, or be terminated for failing to follow instructions." We disagree.

We find the testimony of Berryhill and Franks insufficient to establish that Oliver and Bohannon are supervisors within the meaning of Section 2(11). Although their testimony establishes that they receive work assignments from the batchers, it fails to establish that these assignments require the exercise of independent judgment, a prerequisite for finding supervisory status. *Gem Urethane Corp.*, 284 NLRB 1349 (1987). The record evidence does not establish that the batchers' work assignments are anything other than routine in nature or reflective of policies and priorities set by Frank Guthrie. Given the fact that Oliver and Bohannon did not testify and that Berryhill and Franks were not privy to the relationship between the batchers and Guthrie, we find the fact that employees received

<sup>4</sup> Franks also testified that he could not remember if anyone had told him that Oliver was his supervisor.

<sup>5</sup> In addition to the testimony of Berryhill and Franks, the Petitioner introduced into evidence the Employer's 1984 application to the Veterans Administration for approval of its "Concrete-Batching & Mixing Plant Operator" training program. The application states, inter alia, that the batcher "may supervise assembling and dismantling of plants at construction sites."

<sup>6</sup> The hearing officer found that the dispatchers were supervisors within the meaning of Sec. 2(11), and no exceptions were filed to this finding.

work assignments from the batchers insufficient to establish supervisory status.

Similarly, the encounter between Berryhill and Oliver regarding Berryhill's refusal to work overtime is insufficient to establish the batchers' supervisory status. Berryhill's testimony establishes neither that Oliver had the authority to discharge Berryhill for failing to work overtime nor that Oliver had the authority to effectively recommend his discharge. Berryhill's testimony is not necessarily inconsistent with a situation in which Frank Guthrie determines the discipline and discharge of employees rather than Oliver. Finally, to the extent that Berryhill's testimony indicates that Frank Guthrie held out the batchers to employees as supervisors, we note that an employer's holding out an individual to employees as a supervisor is not necessarily dispositive of supervisory status. *Polynesian Hospitality Tours*, 297 NLRB 228 (1989), *enfd.* 920 F.2d 71 (D.C. Cir. 1990).

In sum, we find the record devoid of evidence that the batchers exercised the independent judgment essential to a finding of supervisory status under the Act, or indeed that they possessed any of the primary indicia of supervisory status. Accordingly, we find that neither Oliver nor Bohannon is a supervisor within the meaning of Section 2(11) of the Act and we shall overrule the challenges to their ballots.

#### Jason Vinson

The Employer, a closely held corporation, originally was wholly owned by J. Frank Guthrie. The Company is currently owned in equal one-third shares by J. Frank Guthrie, his son and Employer President Frank L. Guthrie, and Rayburn Bishop, J. Frank Guthrie's son-in-law. Jason Vinson is the grandson of J. Frank Guthrie, the nephew of Frank L. Guthrie, and the son of Phillip Vinson,<sup>7</sup> another son-in-law of J. Frank Guthrie.<sup>8</sup>

Jason is a college student and is employed by the Employer as a block plant worker. He started work at \$6 an hour, which was 50 cents an hour more than the starting wage for other block plant workers<sup>9</sup> Jason receives the same benefits and is subject to the same time, attendance, and disciplinary procedures as the other hourly employees. Jason was twice docked for

<sup>7</sup>The hearing officer found, and we agree, that Phillip Vinson received his job and higher wages because he was a relative of the owners and that his interests were more closely aligned with management than with unit employees.

<sup>8</sup>Neither Phillip Vinson nor his wife, J. Frank Guthrie's daughter, has an ownership interest in the Employer. Phillip Vinson's wife, however, may inherit some ownership interest in the Employer on the deaths of her father and mother.

<sup>9</sup>Jason has not received a raise in his 1-1/2 years of employment at the Employer. The other employees in Jason's job classification received a raise to \$6 per hour after 60 days of employment.

insurance premiums when he was absent from work without an acceptable excuse.

Berryhill testified that one day at the worksite Jason was "goofing off" and the employees told him that they were being watched and had to be working. Jason responded, "I don't have to do a damn thing around here 'cause my uncle and grandpa owns the place."

Jason lives with his parents in a house deeded to them by J. Frank Guthrie and his wife, who are elderly, in exchange for which his parents provide care for the elderly Guthries. When asked at the hearing whether Jason helps care for his grandparents, Frank L. Guthrie responded, "He probably does some. I don't know for sure. I'm sure he has."

The hearing officer found that the only special benefit that Jason received as a result of his relationship with the Employer's owners was a starting wage that was 50 cents an hour higher than other new employees. He found, however, that Jason's living with his parents in the house that was deeded to them by the elder Guthries, his helping his father to care for the Guthries, his receiving a job with the Employer because of his relationship with the owners, and most importantly, his comment to Berryhill quoted above, "shows that in Jason's mind, his 'community of interest' clearly lies with his relatives the owners, and not with the concerns of the unit employees." Whatever Jason's subjective view of the matter may be, we do not agree that the circumstances of his employment establish that he lacks a community of interest with the other unit employees.

We find no evidence that Jason received any special benefits as result of his relationship with the Employer's owners. The higher wage he received as a starting employee was a negligible benefit in light of his failure to receive a wage increase after working for a year and a half, while other employees in his classification receive wage increases to their wage rates after working for 60 days. In addition, Jason receives the same benefits and is subject to the same time, attendance, and disciplinary procedures as the other hourly employees, and was twice docked for insurance premiums for being absent without an acceptable excuse.

We further find insufficient evidence to support the hearing officer's finding that Jason's interests are aligned with management and that he lacks a community of interest with the unit employees. Unlike Phillip Vinson, Jason's job with the Employer is not connected with caring for his grandparents, nor is any portion of his wages from the Employer payment for services on his grandparents' behalf. Although Jason might at times assist his parents in caring for his grandparents, such assistance is voluntary and not job related. Further, although it is likely that Jason's relationship with the Employer's owners was instrumental in getting him his job, there is no evidence, apart from

starting wage, that once he began working, he was treated differently from the other employees. Finally, we find the hearing officer's reliance on Jason's comment to Berryhill to be misplaced. In the absence of any evidence establishing that Jason in fact received special treatment or in any way lacked a community of interest with unit employees, we find that this comment was "off-the-cuff" and insufficient, by itself, to establish that Jason's interests are more closely aligned with management than with the unit employees. Accordingly, we find that Jason shares a community of interest with the unit employees and thus we overrule the challenge to his ballot.

#### DIRECTION

IT IS DIRECTED that the Regional Director shall, within 10 days from the date of this Decision, Direction, and Order, open and count the ballots of Harold Oliver, Douglas Bohannon, Jason Vinson, and Raymond Holt and prepare and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

#### ORDER

It is ordered that the proceeding is remanded to the Regional Director.

MEMBER DEVANEY, dissenting in part.

I agree with the hearing officer, for the reasons cited in his report, that Jason Vinson does not share a community of interest with the unit employees and thus the challenge to his ballot should be sustained. I particularly note that his residing with his father, Phillip, whom the majority agrees should be excluded from the unit because of his relationship to the Respondent's owners, could easily create a situation in which Jason's presence at union meetings "could tend to inhibit free expression of views and threaten the confidentiality of union attitudes and voting," and that his inclusion in the unit could well be "viewed with suspicion by other employees." *NLRB v. Action Automotive*, 469 U.S. 490, 496 (1985).

#### APPENDIX

##### *Phillip Vinson & Jason Vinson*

Phillip and Jason Vinson, father and son, were challenged on the grounds that they are relatives of management. Phillip, the father, was additionally challenged by the Petitioner as being a supervisor and having no community of interest with the unit employees.

First, with regard to Phillip Vinson's supervisory status, the Petitioner presented Franks and Berryhill as witnesses. Their evidence indicates that Phillip has filled in as a dispatcher on occasion. Specifically, Franks points to a six week period where Phillip replaced Harbin, who in turn was substituting for an injured dispatcher at another plant. Phil-

lip's regular job is as a yardman, forklift operator, sometime truck driver and block plant worker.

The above evidence is insufficient to establish that Phillip Vinson is a supervisor within the meaning of the Act. At most, he on a sporadic, occasional basis fills in as a dispatcher. No evidence was presented of his disciplining employees on those limited occasions where he was the acting dispatcher. Accordingly, I do not recommend that the challenge to Phillip Vinson's ballot be sustained on the basis of his being a supervisor.

Blue Star is a closely held corporation originally wholly owned by J. Frank Guthrie. Ownership is currently in equal 1/3 portions held by J. Frank Guthrie, his son president Frank L. Guthrie, and J. Frank's son-in-law Rayburn Bishop. Phillip Vinson is married to J. Frank's daughter. While Vinson's wife has no current ownership interest in Blue Star, she stands to inherit 1/5 of J. Frank's share upon the death of himself and his wife. At that point, Phillip's wife will own a 1/15 share of the corporation (J. Frank's 1/3 share divided between his 5 children).

With those exceptions discussed below, no witness provided any probative evidence that either Phillip or Jason Vinson received any special benefit as a result of their relationship. However, in a closely held family corporation an employee-relative may be excluded if his interests are aligned with management, even though he enjoys no special job-related benefits. *NLRB v. Action Automotive, Inc.*, 118 LRRM 2577 (1985).

##### *Phillip Vinson*

Frank Guthrie states that Phillip Vinson is paid a \$325 per week salary, while the average employee in his classification, all of whom are hourly paid, earns about \$240–250 per week.

The reason Vinson is paid a premium is that among his responsibilities, for which he is paid by Blue Star, is the personal care of J. Frank Guthrie and his wife. The evidence indicates that the elder Guthries are to some extent infirm and require the attention of others to care for their personal needs. J. Frank is 80 years old. That attention is provided by Phillip Vinson and his wife.

To facilitate caring for the Guthries, the Vinson's, who lived in another part of the State, were deeded a house by J. Frank for "\$10 and love and affection" (TR 128) and Phillip was given the job with Blue Star. Frank Guthrie explicitly testified that Phillip, in return for his Blue Star compensation, is required to care for the elder Guthrie's personal needs and also to maintain the grounds around their house. The Vinson's home is about 300 yards away from the elder Guthries. (TR 89–91) Frank Guthrie stated that he and his father made the decision to give Vinson his Blue Star job and the house specifically so that he could care for the elder Guthries. (TR 146)

The above evidence establishes that Phillip Vinson received his job, and gets higher wages for it, specifically because he is a relative of the ownership. Under the circumstances of this case, it is clear that Vinson's interests are more closely aligned with those of management than with unit employees. Accordingly, he has no community of interest with the bargaining unit employees. (*Action Automotive*, supra.)

*Jason Vinson*

Jason Vinson is a college student who works for Blue Star. He lives with his parents in the house deeded to them by the Guthries. (TR 104)

Jason is a block plant worker. His starting pay was \$6.00 per hour, he has had no raise in his 1-1/2 years of employment. Frank Guthrie stated that he started Jason at \$6 while others started at \$5.50. Guthrie states that he did this because he knew that Jason was "quick to learn." The other workers in that classification were raised to \$6 per hour after 60 days of employment. (TR 217, 219, 221, Petitioners Exhibit 8, & 237)

Petitioner witness Franks testified that it took the Employer only 2 hours to train another employee to work the machine that Jason used. Franks also states that Jason had another employee helping him on the machine for 3 weeks to a month. (TR 297-8) From Frank's testimony. I find it could have taken the other employee 2 hours to train on the machine. I find it inherently incredible that it took Jason 3-4 weeks to learn the same task.

A close analysis of Franks testimony reveals that he may not have known how long Jason Vinson was actually trained on that machine. Nonetheless, Franks' evidence is credited for establishing that an employee can be trained on the machine in a very short period of time. Therefore, being "quick to learn" is not a bona fide occupational characteristic that would justify starting a new, inexperienced, employee at \$0.50 per hour higher than the normal starting pay.

No probative evidence was presented that Jason Vinson received any other benefit by virtue of his relationship to the owners. The evidence is that he is subject to the same time, attendance and disciplinary procedures as other employees. Jason has no authority to discipline any employees. Jason was twice docked for insurance premiums when he was absent without an acceptable excuse. (TR 47, 156-8 & 338)

Frank Guthrie testified that Jason Vinson, as opposed to the situation with his father, has no responsibility to care for his grandparents, and that his compensation is solely for working at Blue Star. There was no agreement, as there was

with Phillip, that in moving to the area with his parents he would be provided job with Blue Star. (TR 149 & 236)

When Guthrie was asked if Jason helped care for Guthrie's father, he responded "He probably does some. I don't know for sure. I'm sure he has." (TR 225)

Petitioner witness Berryhill testified credibly about an incident which bears on the issue of whether Jason Vinson had a community of interest with unit employees or with management. Berryhill states that he was stacking some blocks when Jason came around. Jason was "goofing off" so the employees told him that Donald (Harbin?) was watching them all and they had to be at work. Jason responded "I don't have to do a damn thing around here 'cause my uncle and grandpa owns the place." (TR 247)

*Analysis*

A relative of an Employer's ownership is an ineligible voter if he enjoys special benefits as a result of that relationship or if his community of interest is with the ownership and not with the unit employees. (*Action Automotive supra*)

Jason may have started at \$0.50 per hour higher than other new employees because of his relationship with the Guthries, but this is the only direct special benefit of which there is probative evidence. Nonetheless, I do find that the evidence supports the conclusion that he lacked a community of interest with the unit employees.

The evidence establishes that Jason lives with his parents, who were essentially given their house to care for the elder Guthries, and that Jason helps his father care for the Guthries. While there may have been no explicit promise to hire Jason before his family moved to the area, it is clear that he got his job with Blue Star because of his relationship. Most importantly, Jason's comment to Berryhill, discussed above, shows that in Jason's mind, his "community of interest" clearly lies with his relatives the owners, and not with the concerns of unit employees.

I therefore recommend that the challenge to the ballot of Jason Vinson be sustained.