

Billows Electric Supply of Northfield, Inc. and International Brotherhood of Teamsters, Union Local 331, Petitioner. Case 4-RC-17812

May 28, 1993

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on April 10, 1992, and the hearing officer's report recommending disposition of them. The tally of ballots shows 10 for and 8 against the Petitioner with 2 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.¹

The Petitioner challenged the ballot of Robert Schooley (also referred to as George Schooley) on the basis that he is a supervisor within the meaning of Section 2(11) of the Act. The hearing officer concluded that Schooley was a statutory supervisor and recommended that the challenge to Schooley's ballot be sustained. Contrary to the hearing officer, we find that the record does not establish that Schooley is a statutory supervisor.

The Hearing Officer's Report

The Employer is engaged in the retail and wholesale sales, and distribution of electrical supplies. The employer has three owners—Bruce and Jeff Billows and Barry Levinson—an "operations manager," Charlie Marsh, who splits his time between the Employer's Northfield, New Jersey location and another at Haddon Heights, New Jersey, and a store manager for the Northfield facility, Mark Mazur, who reports to Marsh. Schooley is "Counter Manager" at the Employer's Northfield, New Jersey location, and shares duties with two counter employees, Tom Bradshaw and John Clifton. Counter duties include waiting on customers, taking phone orders, writing customer orders, giving price quotes, and straightening and stocking shelves.

Store Manager Mark Mazur testified that his duties include "overseeing the employees." Schooley and Mazur work on alternating Saturdays. According to Counterman Clifton, Schooley supervises the entire location in Mazur's absence and Schooley's job "is to see that we are doing our job, [and to] make sure everything is run right on the counter." Mazur stated that, to his knowledge, Schooley had never contacted the operations manager or the Employer's owners for

instruction or guidance when he substituted for the store manager. In addition, the hearing officer found no evidence indicating Schooley has contacted Mazur for this reason.

The hearing officer found supervisory status to exist because she concluded that Schooley possessed the following four categories of authority: (1) authority to discipline; (2) authority to deny time off; (3) authority to assign overtime; and (4) the exercise of independent judgment while "in charge" of the store on alternating Saturdays. The hearing officer found that Schooley possessed the authority to discipline employees based on Clifton's testimony concerning an incident in which Schooley warned fellow counter employee Bradshaw to correct an error in his paper work or "find himself another job." The hearing officer found Schooley possessed the authority to deny time off based on Clifton's testimony that Schooley had once revoked time off previously granted him by Store Manager Mazur. The hearing officer's finding of authority to assign overtime was similarly based on Clifton's testimony recounting an incident in which Schooley assigned him to work late one evening for the purpose of taking inventory. The hearing officer's final reason for finding supervisory status was that, on alternating Saturdays and certain other occasions when he substituted for Mazur, Schooley was in full charge of the Employer's entire operation. Based on the latter, the hearing officer concluded that Schooley exercised independent judgment, and that his duties were neither routine nor repetitive.

The hearing officer also relied on two secondary indicia to support her finding of supervisory status. First, if Schooley was found not to be a supervisor, the operation would be without one on at least every other Saturday. Second, unlike other counter employees who are paid hourly, Schooley is a salaried employee who did not begin punching the timeclock until recently.

Discussion

The Employer excepts to the hearing officer's finding that Schooley is a supervisor within the meaning of Section 2(11) of the Act. For the following reasons we agree that the evidence is insufficient to warrant that finding. An individual is a supervisor if he or she possesses authority in any one of a number of areas as set forth in the statute.² This means any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, is a supervisor under Section 2(11) of the

¹In the absence of exceptions, we adopt the hearing officer's recommendation that the challenge to the ballot of Stephen Weinberg be overruled and that the ballot be opened and counted.

²The secondary indicia of supervisory status noted by the hearing officer are not dispositive in the absence of evidence indicating the existence of any one of the primary indicia of such status. *McClatchy Newspapers*, 307 NLRB 773 (1992).

Act if, in connection with the foregoing, the exercise of such authority is not of a merely routine, clerical, perfunctory, or sporadic nature, but requires the use of independent judgment. *Bowne of Houston*, 280 NLRB 1222, 1223 (1986); *Clark Machine Corp.*, 308 NLRB 555 (1992). It is well established that the burden of proving supervisory status rests on the party asserting that such status exists. *Bowne of Houston*, supra.; *Clark Machine Corp.*, supra.

The hearing officer found that Schooley possessed the authority to discipline employees based on Clifton's testimony that Schooley once warned fellow counter employee Tom Bradshaw to correct an error in his paperwork or "find himself another job." Contrary to the hearing officer, we find this statement insufficient to establish Schooley's supervisory status. Clifton's testimony establishes neither that Schooley had the authority to discharge Bradshaw nor that Schooley had the authority to effectively recommend his discharge. *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991). At most it shows Schooley's self-proclaimed implied authority.

The hearing officer also found Schooley possessed the authority to assign overtime and to deny time off. The evidence, however, with respect to such authority was limited to only one instance in each case over a 3-year period, and there is no evidence whether or not they involved independent judgment. This isolated exercise of authority is at most sporadic and thus also insufficient to establish supervisory status. *Bowne of Houston*, supra; *Clark Machine Corp.*, supra.³

Finally, the hearing officer places heavy reliance on Schooley's responsibilities while in charge of the operation of alternating Saturdays and in Mazur's absence. The record, however, is silent as to the specific authority Schooley exercises on these occasions. Without evidence that Schooley exercised authority requiring independent judgment as required by Section 2(11) of the

³With respect to the incident involving what the hearing officer described as Schooley's revocation of time off which Mazur had originally granted to Clifton, we note that the inference drawn by the hearing officer is not the only possible interpretation of that episode. Because Mazur could not recall any situation involving such a revocation, we have only Clifton's testimony. According to Clifton, he got oral approval from Mazur to take some time off over the Christmas holiday, and then when Schooley learned of it, he told Clifton this would not be possible because that was "inventory time," and all employees (presumably including Schooley himself) had to be there. When Clifton went back to Mazur, Mazur said he could not leave. While Clifton viewed this as a case in which "Schooley overrode the general manager of the store," and equally, if not more plausible view, is that when first approached by Clifton, Mazur gave an off-the-cuff response and had simply forgotten that the Respondent would be conducting its inventory on the days requested by Clifton. Schooley did not testify, and Clifton, of course, was not privy to any conversations Schooley might have had with higher management. In sum, we do not view this incident as indisputable evidence of final authority to grant time off.

Act, Schooley's Saturday responsibilities do not establish that he is a supervisor.

In sum, contrary to the hearing officer and our dissenting colleague, we conclude that the Petitioner failed to establish that Schooley is a supervisor within the meaning of the Act. We therefore reject the hearing officer's recommendation regarding Schooley's supervisory status, and we overrule the challenge to his ballot.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this decision, open and count the ballots of Robert Schooley and Stephen Weinberg, and prepare and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would adopt the hearing officer's finding that Robert Schooley is a statutory supervisor and her recommendation that the challenge to Schooley's ballot be sustained. Although I recognize the burden in this case falls on the party asserting supervisory status, I conclude that this burden has been met by the Petitioner here.

Regarding Schooley's authority to deny time off, it is undisputed that Mazur, the Employer's store manager and a conceded supervisor, had granted counter employee Clifton time off. When Schooley was informed of this, he notified Clifton that he would not be granted that leave because he was needed for inventory. Thus, Schooley overrode the authority of a conceded supervisor, a strong indication of his supervisory authority.¹ Likewise, as to Schooley's authority to assign overtime, the record indicates that Schooley instructed Clifton that he would be required to work late one evening, in addition to his regularly scheduled hours, in order to prepare for inventory. While the record establishes only that Schooley exercised this authority once in each case, in light of the hearing officer's further findings regarding Schooley's authority in Mazur's absence, I conclude, contrary to my colleagues, that Schooley possessed the authority to grant overtime and deny time off, and these instances were not simply sporadic exercises of such authority.

As noted by the majority, Section 2(11) of the Act requires independent judgment to be used in the exercise of supervisory authority. *Atlanta Newspapers*, 306 NLRB 751 (1992).² I conclude, consistent with the

¹ The majority engages in speculation as to the possible interpretations of this episode. I decline to engage in such speculation and interpret the evidence consistent with the hearing officer's findings.

²It is well settled that Sec. 2(11) of the Act is to be interpreted in the disjunctive. Thus, the possession of any one of the listed indi-

hearing officer and contrary to the majority, that the record demonstrates that Schooley exercised independent judgment on a regular basis. Schooley substituted for Mazur, a conceded supervisor, on alternating Saturdays, as well as any time Mazur was absent. As the hearing officer found, in substituting for Mazur, Schooley is in full charge of the Employer's entire operation. As further found by the hearing officer, the record contains affirmative evidence that Schooley has never contacted his superiors for guidance while substituting for Mazur. In these circumstances, I agree with the hearing officer's conclusion that Schooley's duties and responsibilities are not routine in nature and that they require the exercise of

cia is sufficient to place an individual within the statutory definition of supervisor. *Ohio River Co.*, 303 NLRB 696 (1991).

independent judgment. Furthermore, I found that the occasions on which he exercised this independent judgment occurred regularly and were therefore not sporadic in nature.³

Accordingly, contrary to my colleagues, I would find that the Petitioner has met its burden and has established that Schooley is a supervisor within the meaning of the Act.⁴ I therefore would sustain the challenge to Schooley's ballot.

³The hearing officer also finds support for her conclusion based on, inter alia, the fact that Schooley is a salaried employee. While this fact alone is not dispositive of supervisory status, it does lend support to such a finding. *McClatchy Newspapers*, 307 NLRB 773 (1992).

⁴However, I agree with my colleagues that the testimony of Clifton as to the alleged disciplining of counter employee Tom Bradshaw is too vague to establish that Schooley possessed the authority to discipline, and consequently I do not rely on it here.