

Wal-Mart Stores, Inc. and United Food and Commercial Workers International Union. Case 16-CA-20578

September 25, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On February 7, 2001, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions and a supporting brief, the Charging Party and the Respondent filed answering briefs, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified.¹

We adopt the judge's finding that sporting goods department manager, Lewie Spearman, was a statutory supervisor. In finding that Spearman possessed the authority to effectively recommend rewards for employees at the Respondent's Lubbock, Texas store, we rely on the testimony of Spearman, and his predecessor in the position, Arturo Castillo, that they evaluated and effectively recommended rewarding department employees. Castillo testified that, with regard to performance appraisals, the sporting goods department manager makes the determination as to the appropriate rating on the appraisal and there is a direct link between this rating and the rate of pay increase, if any, for the appraised employee. See *Elmhurst Extended Care*, 329 NLRB 535 (1999). Although higher management (the assistant store manager) typically is present when the appraisal is completed and must sign the appraisal, the role of the sporting goods department manager at the Lubbock store is not "merely advisory and preliminary," but instead is an exercise of independent judgment that effectively determines a term and condition of employment. Compare, *Children's Farm Home*, 324 NLRB 61 (1997) (team leaders held not supervisors when their role in evaluating employees was merely advisory and preliminary and was subject to "independent investigation" by superiors). In finding that the sporting goods department manager at the Lubbock store exercised independent judgment in the appraisal

process, we note that the role of an assistant store manager in the evaluation process may, as a practical matter, vary from store to store. Thus, the Respondent's district manager, David Craig, testified that each assistant store manager "is going to be different on how they specifically handle" the evaluation process with department managers and, indeed, that he (Craig) did not know specifically the manner in which a performance evaluation is handled at the Lubbock store. Accordingly, our finding as to Spearman's supervisory status is limited to his authority to, at the least, effectively recommend pay raises in connection with the appraisal process at the Lubbock store. In light of this finding, we find it unnecessary to consider whether or not Spearman had authority to exercise any other supervisory indicia.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wal-Mart Stores, Inc., Lubbock, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit you to submit grievances to the Company in order to interfere with your rights guaranteed by the Act.

WE WILL NOT interrogate you about your union activities or desires.

¹ We shall modify the judge's recommended Order and notice to conform to Board practice.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WAL-MART STORES, INC.

Robert G. Levy II, Esq., for the Government.

J. Richard Hammett, Esq., for the Company.

George Wiszynski, Esq., for the Union.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an interfering with employee rights case. At the close of a 1-day trial in Lubbock, Texas, on January 18, 2001, and after hearing oral argument by the Government and the Company counsel,¹ I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations setting forth findings of fact and conclusions of law. This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (exceptions) to the Board.

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found Wal-Mart Stores, Inc. (the Company), violated Section 8(a)(1) of the National Labor Relations Act, (the Act), when on or about March 27, 2000, it, acting through one of its supervisors and agents, interrogated an employee about the employee's union activities; and, solicited an employee to submit grievances to the Company in order to interfere with employee rights guaranteed by the Act. I concluded the Government failed to establish by credible evidence that the Company, acting through one of its supervisors and agents, created the impression among its employees their activities on behalf of United Food and Commercial Workers Union (the Union) were under surveillance. Accordingly, I dismissed that complaint allegation. I also concluded the Company did not violate the Act when two of its supervisors and agents told an individual employed by the Company he could not be involved with the Union, could not attend union meetings, or support the Union. I concluded that the individual upon whom the supervisors and agents placed union restrictions was himself also a supervisor within the meaning of Section 2(11) of the Act.

I certify the accuracy of the portion of the transcript, as corrected,² pages 253 to 279, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSIONS OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and,

¹ Counsel for the Union adopted the Government counsel's argument and did not argue.

² I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attached Appendix C [omitted from publication].

unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees," copies of which are attached hereto as "Appendix B" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issue the following recommended³

ORDER

The Company, Wal-Mart Stores, Inc., Lubbock, Texas, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Soliciting employees to submit grievances to the Company in order to interfere with employee rights guaranteed by the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Regional Director of Region 16 of the National Labor Relations Board, post at its Lubbock, Texas, facility, copies of the attached notice marked "Appendix B."⁴ Copies of the notice, on forms provided by the Regional Director for Region 16 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees, to all employees employed by the Company on or at any time since March 27, 2000.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 16 of the National Labor Relations Board sworn certification of a responsible official on a

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

form provided by the Region attesting to the steps that the Company has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and hereby is, dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

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(CONTRACTOR'S NOTE: The following proceedings were held AFTER 6:00 p.m.):

JUDGE CATES: On the record. This is my decision in the matter of Wal-Mart Stores, Inc., Hereinafter Company, Case 16-CA-20578. First, I wish to thank the parties for the presentation of the evidence. Each of you are a credit to the party or interest you represent. It has been a pleasure being

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in Lubbock, Texas.

This is an unfair labor practice case prosecuted by the National Labor Relations Board, hereinafter Board, acting General Counsel, hereinafter Government Counsel, acting through the Regional Director for Region 16 of the Board, following an investigation by Region 16's staff.

The Regional Director for Region 16 of the Board issued a complaint and notice of hearing, hereinafter complaint, on October 30, 2000, based upon an unfair labor practice charge filed by the United Food & Commercial Workers International Union, hereinafter Union, on August 10, 2000.

Certain facts herein are admitted, stipulated or undisputed. It is essential that I set forth certain of those facts, which I shall now do. It is admitted the Company is a Delaware corporation with a store located in Lubbock, Texas, where it is engaged in the business of retail merchandising. During the twelve months preceding the issuance of the complaint herein, a representative period, the company purchased and received at its above referenced location goods and materials valued in excess of \$50,000.00 directly from suppliers located outside the State of Texas, and during the same period derived gross revenues in excess of \$500,000.00.

The parties admit the Company has been at all times material herein, and continues to be, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the

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National Labor Relations Act as amended, hereinafter Act. The parties admit the Union is a labor organization within the meaning of Section 2(5) of the Act.

The parties admit that district manager David Eugene Craig, hereinafter District Manager Craig or Craig, and Store Manager Barry Dales Hart, hereinafter Store Manager Hart or Hart, are supervisors within the meaning of Section 2(11) and agents of the Company within the meaning of Section 2(13) of the Act.

The specific contested complaint allegations are that on or about March 27, 2000, the Company, by District Manager Craig, created the impression among its employees that their Union activities were under surveillance, interrogated an employee about the employee's Union activities, and solicited an employee to submit grievances to the Company.

It is also alleged that on or about June 7, 2000, Craig interfered with an employee's right to engage in Union activities by advising the employee he could not be involved with the Union. It is also alleged that on or about June 7, 2000, Store Manager Hart interfered with an employee's right to engage in Union activities by advising that the employee could not attend Union meetings or support the Union. It is alleged that the Company's actions outlined violates Section 8(a)(1) of the Act.

The Company denies having violated the Act in any manner

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alleged in the complaint. However, the Company admits that the comments outlined in Paragraphs 7(b) and (c) of the complaint were stated to an employee on the date in question. And I use the term "employee" only to identify that it was made to an individual.

In other words, the Company admits that District Manager Craig advised that the employee could not be involved with the Union, and it admits that Store Manager Hart advised an employee that the employee could not attend Union meetings or support the Union.

The Company admits those allegations with this caveat: The person to whom District Manager Craig and Store Manager Hart was speaking, the Company contends, was a supervisor within the meaning of the Act.

The Government, on the other hand, along with the charging party, contend that the individual to whom the comments were made was an employee within the meaning of the Act and not a supervisor.

I only go to lengths to explain that because the outcome of Sections 7(b) and (c) of the complaint turn on whether or not an individual was a supervisor or not within the meaning of the Act, the individual being Mr. Spearman who was the sporting goods department manager for a limited period of time.

Before I get into that, let me state that this case, as in most cases, requires that I make credibility determinations.

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Stated differently, there are some conflicts in the testimony. Some are minor, while others are a little more substantial. I am not unmindful that when witnesses are recalling the same events, they will recall them in a slightly different manner, with each believing, and perhaps rightly so, that they are truthfully recalling what occurred.

In arriving at my credibility determinations, I carefully observed the witnesses as they testify and have utilized such in arriving at the facts herein. I have also considered each witness' testimony in relation to other witnesses' testimony and in light of the exhibits that were presented herein.

If there is any evidence that might seem to contradict credited facts or the facts that I specifically rely on, I have not ignored such evidence, but rather have discredited it or rejected it as not being reliable or trustworthy. I have considered the entire record in arriving at the facts herein.

I shall address the complaint allegations in the same order that they appear in the complaint. At Paragraph 7(a) of the complaint, it is alleged that District Manager Craig, on or about March 27, 2000, created the impression among its employees

that their Union activities were under surveillance, interrogated an employee about the employee's Union activities, and solicited an employee to submit grievances to the Company. The Government relies primarily on the testimony of Employee Gomez with respect to the March 27, 2000 allegations.

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Employee Gomez testified that when she came to work on March 27, 2000, that various associates in the store approached her and told her that they had been called in to a meeting with management at which the Union was discussed.

Employee Gomez testified that a short while after being at work, she was, in fact, called in to a meeting in one of the managers' offices, and she was certain with respect to two of the individuals that were present at the meeting, namely that District Manager Craig was present, as well as an individual named Rene Sosa, and she identified Sosa as being a regional area or district manager for shoes that were sold in the store.

Employee Gomez testified that after she came in and certain pleasantries were exchanged that District Manager Craig asked her if she had heard about anything going on in the store. Gomez testified she responded about the Union fliers and about the Union, or words to that effect, and she testified that she expressed what she knew about the fliers and the Union meetings.

She even stated that she had been invited to Union meetings that were being held at Mr. Spearman's house, but that she had not had an opportunity or had not availed herself of an opportunity to attend any of those meetings at that time. Gomez testified that in this same meeting she was asked by District Manager Craig how she was doing in her new job and if she liked her new job. She said that everything was fine and

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she was happy with her job. Gomez further testified that District Manager Craig asked her if she needed help with any problems in the store.

Gomez testified that she expressed with respect to the Union that she wanted to hear a little bit about the Union, but she wasn't too certain about whether or not she would be interested in having the Union speak on her behalf because she was kind of an independent, free spirit that spoke on her own behalf, and she wasn't certain whether she needed the assistance of anyone else to speak on her behalf.

District Manager Craig acknowledges that such a meeting took place on March 27, 2000, and that he had meetings not only with Gomez, but with other employees, and that he had meetings with other employees in the office before he met with Gomez and after he met with Gomez.

District Manager Craig denied that he asked if she had attended any Union meetings. He testified that the Union was mentioned first by Employee Gomez. District Manager Craig testified that the purpose of his visit with Gomez, as well as the meeting with other employees, was to ascertain if they had any concerns that needed to be addressed, and he explained that the reason he met in the office, in management's office, as opposed to just walking out on the floor and speaking with Gomez, was that he wanted to avoid any interruptions either by other associates or by customers that might be in the store.

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District Manager Craig acknowledged that he knew of Union activity going on in the store and that he believed he first learned of such activity perhaps as early as December of 1999.

Spearman testified that he also met with District Manager Craig in March of 2000, and that the subject matter of the fliers being distributed in the store was mentioned by District Manager Craig, even to the extent of the name of the individual distributing them. Mr. Spearman acknowledges that he was involved in the distribution of some of the fliers and of some of the Union activity that was taking place at the store.

The question then becomes, did the actions of District Manager Craig, in meeting with the employees and specifically with Gomez, overstep the bounds of what he may have done under Section 8(c) of the Act and move into an unlawful category?

I am persuaded that based on the credited testimony of Gomez, and I believed her to be a credible witness, that District Manager Craig overstepped the bounds of legality, specifically when he asked a question of Gomez if she had heard about anything going on in the store.

In the context of the time, the Union activity going on, the fliers and the other meetings, I don't think it is incumbent on him to have to ask, "Have you heard anything about the Union going on in the store," because as soon as he mentioned it, Gomez immediately responded about the Union fliers and about the meetings at Spearman's house.

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The test for determining the legality of employee interrogation regarding Union sympathy is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their statutory rights. *Mathews ReadyMix, Inc.*, 324 NLRB 1005 at 1007 (1997).

I am persuaded that the interrogation violated the Act because it took place in the management office by a very high official of the company. There was no valid purpose explained for seeking out the information and the truthfulness of Employee Gomez's response, that sure, she knew about fliers from the Union and she knew about meetings at Spearman's house; she just hadn't had an opportunity to attend any such meetings.

So I find as alleged in Paragraph 7(a) in the complaint that the Company, through District Manager Craig, unlawfully interrogated an employee about the employee's Union activities.

Secondly, did the Company, through District Manager Craig, solicit an employee to submit grievances to the Company? I am persuaded he did, again in the context of the meeting taking place where it did, during the time when Union activity was going on at the store, and I base that on Gomez's testimony that District Manager Craig asked her if she needed any help with any problems in the store, and did she like her job, and was everything going fine.

This appears to have been the first occasion when

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District Manager Craig had the employees into a management office, one at a time, to ask them about any problems they

might have with the Company and whether they needed help with those problems.

As the Board noted in *Embassy Suites Resort*, 309 NLRB 1313 at 1316, it is well established that when an employer institutes a new practice of soliciting employee grievances during a Union organizational campaign, which is what was happening here, there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries, and, likewise, urging on his employees that the combined inquiry and correction will make Union representation unnecessary.

So I am persuaded that the Company, through District Manager Craig, unlawfully solicited an employee to submit grievances to the Company.

It is also alleged in that same complaint paragraph that the Company, through District Manager Craig, created the impression among its employees that their Union activities were under surveillance.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement or statements made that his or her Union activities have been or had been placed under surveillance.

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In that regard, the Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. Further, the Board does not require that an employer's words, on their face, reveal that the employer acquired its knowledge of the employee's activities by unlawful means.

The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is that the employee should be free to participate in Union organizing campaigns without the fear that members of management are peering over their shoulders taking note of who is involved in the Union activities and in what particular ways.

The case citing that proposition is *Tres*, T-R-E-S, *Estrellas*, E-S-T-R-E-L-L-A-S, another word, D-E O-R-O, 329 NLRB [50] No. 3, decided September 3, 1999. That is the standard that the Government has to meet to prove an impression of surveillance, and I am not persuaded the Government carried its burden in this case.

I am not persuaded that anything that Gomez testified to would constitute an impression of surveillance by the Company through District Manager Craig. I decline to rely on the testimony of Spearman to the extent that his testimony might support any such creation of an impression of surveillance. So I shall dismiss Paragraph 7(a)(i) of the complaint.

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I now move to Paragraphs 7(b) and (c) of the complaint, and as I indicated earlier in my bench decision, the outcome of these two complaint paragraphs depend on whether or not Spearman was a supervisor within the meaning of the Act.

The Company contends that Spearman was a supervisor within the meaning of the Act when he served in the function and in the capacity as the department manager of the sporting goods department in the Lubbock, Texas store.

The Government and the Union, as charging party, contend that Spearman was not a supervisor within the meaning of the Act, that he did not exercise or have any of the authorities enumerated in the Act that would indicate an individual was a supervisor within the meaning of the Act.

Before I address the facts and apply the law with respect to whether Spearman was a supervisor within the meaning of the Act during the six weeks' time frame that he was the department manager in the sporting goods department, let me briefly outline the burdens that are present with respect to supervisory status.

First, let me briefly allude to two sections of the Act. Section 2(3) of the Act excludes, "any individual employed as a supervisor from the definition of employee," Section 2(11) of the Act defines, "supervisor," as—and I am quoting now—any individual having authority, in the interest of the employer, to hire,

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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, 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, close quote. That is the statutory definition of a supervisor.

I note that in enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with, quote, genuine management prerogatives, quote close, should be considered supervisors and not, quote, straw bosses, leadmen, set-up men and other minor supervisory employees, close quote. S. Rep. No. 105, 80 Cong., 1st Sess. (1947).

With respect to the burdens, it is well settled that the burden of proving supervisory status rests on the party asserting that such supervisory status exists. *Ohio Masonic Home*, 295 NLRB 373 (1989). Thus, any lack of evidence in the record is construed against the party asserting supervisory status. For that principle, see *Elmhurst*, E-L-M-H-U-R-S-T, *Extended Care Facilities, Inc.*, 329 NLRB [535] No. 55, Slip Opinion at Page 2, Footnote 8 (1999).

In making determinations regarding supervisory status under Section 2(11) of the Act, the Board has a duty not to construe the statutory language too broadly because the

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individual found to be a supervisor is denied employee rights protected under the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

Section 2(11) is to be read in the disjunctive and the possession of any one of the authorities listed in that section places the employee invested with this authority in the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385 at 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949).

The status of supervisor under the Act is determined by an individual's duties, not by his or her title or job classification. *New Fern Restorium Co.*, 175 NLRB 142 (1969). It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section

2(11) of the Act. *Advanced Mining Group*, 260 NLRB 483 (1982).

Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor.

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The mere fact that an employees complain to a specific employee about working conditions is not an indicia of supervisory status if there is no evidence the employee complained to was empowered to act on behalf of management in resolving such complaints.

Neither is it significant that employees report to a specific employee when they are going to be absent, since the receipt of such reports is in and of itself no more than a clerical function. The scheduling of overtime, vacations and absences may be a supervisory function if it involves the use of independent judgment.

The rule is quite clearly established in Board precedent that possession of authority consistent with any indicia of Section 2(11), not the exercise of that authority, is the evidentiary touchstone. And that principle is pointed out very clearly to me in *Allstate Insurance Co.*, 332 NLRB [759] No. 66, at Slip Opinion Page 2 [760], September 29, 2000, which was a case of mine.

The question now becomes was Spearman a supervisor, within the meaning of the Act, in the sporting goods department as sporting goods department manager from May 13, 2000 to mid June of 2000.

Store Manager Hart described the duties of the department manager, and more specifically the sporting goods department manager, as follows: He said that the department manager had

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authority to take disciplinary action against employees, to recommend commendations for employees, to evaluate employees at the end of 90 days or to provide them their yearly evaluation, and that the yearly evaluation would determine what, if any, raise in pay the employees would receive. Store Manager Hart testified that the department manager, specifically in the sporting goods department, ordered merchandise, that he guided the direction of those who worked under him, that the department manager met with the other managers in management meetings, that he dealt with the assistant manager pertinent to his department as to staffing levels, and that he could report whether or not an employee was doing a satisfactory job in the department. I think employees in this particular store are referred to as associates.

Spearman testified that a typical day in his life as a department manager in the sporting goods department consisted of the following actions. He would come in in the morning and check to see what freight was on the floor that would need to be shelved or placed in some manner so that the floors would be clear and clean for customers to proceed through the store.

He estimated that checking the freight and cleaning the floor would take approximately two to three hours of his time, that he also would proceed to the back of the store to ascertain what paperwork might be there that needed to be processed by the sporting department manager, that he would

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meet with Hart and other department managers, that he would review out-of-stock reports, as well as check the computer to see if there had been any price changes sent down by corporate headquarters.

He would also review such other reports as out-of-stock reports, and he would estimate that his time spent on the paperwork would run somewhere between an eighth and a quarter of his workday.

Spearman testified that he also coordinated the assignments of the employees in his department, that he made assignments to them and instructed them on how things were to be done. He noted, however, that the employees in his department were older, long-term employees that required little instruction, but that he did provide such. He also testified that the department supervisor before him, an individual Castillo, told him that he was responsible for evaluating employees.

Spearman denied that he had the authority to grant time off or to change schedules or hours of work or the reduction of hours that had taken place at the store during his tenure as the department manager.

Sporting Goods Department Manager Castillo testified that he was the department manager before Spearman became the manager; that, in fact, he recommended that Spearman become the manager of that department when he, Castillo, left the

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department and went on to other responsibilities with the Company.

Castillo testified that he was present with Spearman for the first two weeks of Spearman's six weeks' tour as the department manager, and he testified that he tried to convey to Spearman what his duties were and what needed to be accomplished as the department manager; he explained items such as making sure the aisles were filled properly, seasonal merchandise was displayed, to order merchandise for the department, matters of that type.

He explained certain of his own duties also, that he had evaluated employees, "he" being Castillo, that he had functioned in that department sort of as a store within a store, with the department being responsible for its merchandise and for the profit that was generated from the particular department.

Castillo testified that one of the specific things that he did with respect to training Spearman for his duties as the sporting goods department manager was the preparation of evaluations, and that he filled out the written portion of an evaluation and had Spearman sign it.

The evaluation in question was the yearly evaluation of an employee named Jesse Roa, R-O-A, that is set forth in Respondent's Exhibit 30. The Strengths and Areas for Improvement set forth in that performance appraisal were

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written in by Department Manager Castillo, but Mr. Spearman signed as the supervisor for Jesse Roa. Spearman acknowledge that he was the one who signed the performance appraisal of the individual in question.

Castillo did a performance appraisal for employee Cox as reflected in Respondent's Four. In that, he rated Cox met expectations. Castillo signed off on it as well as a supervisor above him and by Store Manager Hart. Castillo testified that he also provided a Coaching for Improvement to Employee Boswell, which was a written coaching, and that he, as well as Boswell, signed off on it, and in addition the next level of supervision, Supervisor Wildcat also signed off on it.

Among other things that Castillo told Spearman about his functions and duties as the department manager in the sporting goods department was that he needed to interact with the associates in the department to ascertain what people were good at so that he could best utilize his associates, and to keep an eye out for price changes and other paper matters that needed to be done.

District Manager Craig testified that he specifically told Department Manager Spearman, along with other department managers in a meeting of department managers, that among other responsibilities they had, they were responsible for the training of associates, assisting in the coaching for improvement process by making recommendations, conducting

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research and participating in coachings, to follow-up on all assigned work activities, to assist the salaried managers in completing performance appraisals, and recognizing associates; that is, recognizing them for good performances that they may have done.

Craig testified that certain training requirements were mandatory and indicated that after Spearman became the department manager in the sporting department that Spearman completed training in Diversity Awareness, Hourly Supervisory Labor Relations testing, and Team Building.

Based on the outline of what Spearman testified he performed as his functions and the performance functions he was told he was required to perform and his training by Castillo, was Spearman a supervisor within the meaning of the Act in his short tenure as sporting goods department manager?

The evidence persuades me that the Company has met its burden of establishing that Spearman was a supervisor within the meaning of the Act for the following reasons, among others: If you take a comparison of the ratio of employees to supervisors, you find that the company at this location has approximately 450 employees, but only 150 to 200 of them are present in the store at any one time. Dividing down that for supervisory purposes, you have one manager, two co-managers, six assistant store managers. You have approximately 40 departments, with each assistant store manager being in charge

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of approximately six departments.

If you take the 150 to 200 employees in the store at any given time, and assume for the sake of discussion that all assistant store managers are present at all times, you have a ratio of 33 employees to each assistant store manager, if there is no one

beneath them, such as the department managers, that are supervisors within the meaning of the Act.

The sporting goods department had approximately six to eight employees. Assume the lower number six and you have the department manager also included, that is seven employees that an assistant store manager would be required to manage in addition to all of the other employees in the other five or six departments, ever how many each one has. Then the ratio would indicate that each assistant store manager is managing about 33 employees.

So I am persuaded that the ratio of employees to management mitigates in favor of the finding that the store manager at this particular store in the sporting department, Mr. Spearman, was a supervisor within the meaning of the Act. The authority that Mr. Spearman acknowledges having and having been trained in the evaluation of employees was a very strong factor in my determining that he was a supervisor within the meaning of the Act. He made an evaluation on an employee as part of the training by the previous department manager for Mr. Spearman becoming a department manager, specifically the

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performance appraisal of Jesse Roa.

The Government contends that his input was always overruled or subject to someone else overruling it, that someone else always signed each performance appraisal, and that, hence, Spearman should not be considered a supervisor within the meaning of the Act.

The mere fact that another higher level management person must be present when these performance appraisals are given and that the higher level management must also sign-off on the appraisal does not detract, in my opinion, from the clear fact that the department manager is having a substantial and effective input into the evaluation performance that an employee is given and that performance evaluation determines the amount, if any, pay raise that the associate or employee will get.

I am fully persuaded that the department manager, specifically in the sports department at the store in question, directed the work of the employees who worked for him.

Much was made by the Government and the charging party that other managers walked through the area and could correct or point out matters that might need to be corrected or changed in the department. Again, I don't find that to distract from the conclusion that the department manager directed the work of those six to eight employees who performed work for him in the sports department.

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It is clear to me that Mr. Spearman, in this particular case, had the authority to have effective input into the evaluation of employees, that he directed the work of others, that he was held out to the associates in the department to be a supervisor. The Board places a degree of reliance on whether the individual is held out to the employees to be a supervisor as a consideration to be reviewed in determining whether an individual meets any of the criteria outlined in the Act that would constitute a supervisor.

The Government also contends that even if Spearman had supervisory authority, some indicia of it as outlined in the Act,

he was never told that and that he can't have any authority if he doesn't know about it.

The evidence in this case refutes such an argument, because Castillo and Spearman both acknowledge that he was given instruction on performance appraisal evaluations and, as Castillo testified, it was done as a training tool between he and Spearman so that Spearman would know how to prepare and evaluate employees in the future.

Also, I am persuaded that District Manager Craig outlined duties to Spearman, some of which duties would constitute a supervisor within the meaning of the Act, and that is again in disciplining employees—this company chooses to call it coaching—coaching in the form of verbal coaching as well as written coaching, and in the follow-up and direction of work

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assigned to the individuals or associates in the sporting goods department.

Further indication that Spearman knew that he was a supervisor within the meaning of the Act and that such was conveyed to him was the training that he was required to take, which, among other things, involved the Labor Relations Supervisory Test as well as the Diversity Awareness and Team Building training which supervisors, including department managers, were required to take.

I am persuaded that the Company has met its burden of establishing that at the applicable time herein Spearman was a supervisor within the meaning of the Act in his assigning of the work to the employees in his department as well as his evaluating of those employees.

Much was made of the fact that he had not hired or fired any employees, but the evidence indicates that very few employees had been hired in that department in an extended period of time and that Spearman was on the job as a department manager for only six weeks.

Further, the Government makes much of the fact that some of the recommendations that Mr. Spearman made were overruled by higher management, and specifically that he made the recommendation that an Employee Cosby, I believe it was, be moved out of the sporting goods department and that an employee from the grocery department be moved in.

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First, I am unpersuaded that the fact that a recommendation made by a supervisor is, in some instances, rejected, that that somehow makes them less than a supervisor. I am persuaded that there would be very few supervisors that will always make a decision that 100 percent of the time will be upheld by higher management, specifically in the Spearman case because what Mr. Spearman wanted to do was to remove from his department

an employee who had sought the department manager position unsuccessfully and to replace him with an employee that Mr. Spearman felt would be more favorable to him in the department.

The Company gave a valid explanation for the overruling of Spearman's recommendation on that because they said the employee was a very capable employee, just hadn't been chosen for that particular job, and that he knew the sporting department, and that his overall benefit to the store would be that he remain there, and that the employee from the grocery department could not be transferred in because the employee from the grocery department had to have consecutive hours; he couldn't take a break in his hours on the days that he worked.

So the Company gave explanations for their declining to follow Spearman's recommendations that, in my opinion, do not reflect on whether or not he was a supervisor within the meaning of the Act, but rather that the store's overall

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management indicated, in this particular case, Department Manager Spearman's recommendations should be overruled or not followed.

Having concluded that Department Manager Spearman was a supervisor within the meaning of Section 2(11) of the Act, I shall then accordingly dismiss Paragraphs 7(b) and (c) of the complaint.

The Court Reporter is required within ten days to provide me a copy of the transcript and exhibits in this matter, and when I am provided that, I will certify my decision to the Board, outlining the pages of the transcript that constitute my decision.

It is my understanding that the appeal period runs from that time forward, but I urge you to follow the Board's rules and regulations rather than rely on my understanding of them.

When I certify the decision to the Board, I will attach thereto a notice that I shall order the Company to post for the specified period involving the violations of the Act that I found with respect to the Company's unlawfully interrogating employees and unlawfully soliciting employees to submit grievances to the Company.

That notice will be attached thereto with the recommendation to the Board that you be required to post it so that employees may know of your violations of the Act and your requirement to remedy those.

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Let me say that it has been a pleasure to be in Lubbock, Texas, and this trial is closed.

(Proceedings adjourned at 8:00 p.m., this date.)