Williamette Industries, Inc. *and* Pace International Union, Petitioner. Case 26–RC–8128

October 1, 2001

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections and determinative challenges to an election held on February 11, 2000, and the hearing officer's report recommending disposition of them. The tally of ballots shows 56 votes for, and 51 votes against the Petitioner with 5 challenged ballots, a sufficient number to affect the results.[1]

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings[2] and recommendations,[3] portions of which are attached, only to the extent consistent with this Decision, Direction, and Order. Specifically, we find that the challenges to the ballots cast by Darren Adams and Paul Moore should be overruled.

Adams and Moore are employed as leadmen in two of the Employer's production departments. Each department has a shift supervisor—an admitted supervisor—and a number of production and maintenance employees. Like the production and maintenance employees, Adams and Moore are hourly paid and punch a time clock, but they receive 70 cents an hour more than the next highest paid production and maintenance employees. Adams testified that his typical day consists of preparing the production machines, assisting the production and maintenance employees in running those machines when necessary, and attending safety meetings with other production and maintenance employees. Adams also fills in for production employees when they are absent and may also attend production meetings when the shift supervisor is on vacation. Moore testified that approximately 80 percent of his day is spent performing hands-on production work with the remainder of the day spent attending both rank-and-file employee meetings and supervisor meetings.

The hearing officer concluded that Adams and Moore are statutory supervisors based on their authority to evaluate both probationary and permanent production and maintenance employees and to discipline employees. The hearing officer also relied on a statement by shift supervisor Terry Cockrum that leadman Adams has "the same authority as I do."

We disagree with the hearing officer's conclusion that Adams and Moore are supervisors. The burden of proving supervisory status rests with the party alleging that an employee is a supervisor. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). To support a finding of supervisory status, an individual must possess one or more of the indicia set forth in Section 2(11) of the Act and exercise that authority in a manner which is not merely routine or clerical in nature. Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). Applying these principles to the facts of this case, we find that the Petitioner has not met its burden of proving that Adams and Moore possess supervisory authority within the meaning of Section 2(11) of the Act.

The hearing officer found that Adams and Moore complete weekly evaluations of probationary employees. These evaluations, however, serve primarily to identify which skills new employees need to improve or develop. Although the evaluations contain space for a recommendation as to whether the probationary employee should be retained, there is no evidence indicating what weight, if any, those recommendations carry in the Employer's personnel decisions. The hearing officer specifically cites to one instance in which Moore stated that a probationary employee must improve his performance "immediately to be continued in service." However, there is no evidence that the Employer took any action in response to Moore's recommendation or that the evaluation had any effect on that employee's status or tenure.

The Board has found that the authority to "evaluate" is not one of the indicia of supervisory status set out in Section 2(11) of the Act. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Accordingly, "when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." Id. In *Elmhurst*, as in this case, there is insufficient evidence that the evaluations have any direct effect on the evaluated employees' status or

[1] At the election, the Petitioner challenged the ballots of Troy Burkhart, Brian Fortner, Matt Gilliam, Darren Adams, and Paul Moore. At the hearing, the Petitioner withdrew its challenges to the ballots of Burkhart, Fortner, and Gilliam. In view of his recommendation to sustain the challenges to the ballots of Adams and Moore, the hearing officer found that the remaining three ballots were not determinative and that those ballots should remain unopened and uncounted.

[2] 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.

[3] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule Objection 1.

tenure.[4] The fact that Adams and Moore complete these evaluations, standing alone, is insufficient to support a finding of supervisory authority.[5]

Similarly, we find that there is insufficient evidence to show that Adams and Moore exercise supervisory authority in evaluating permanent employees. Adams and Moore complete evaluations, which consist largely of charts listing employees' production and hours worked on particular machines. Although the evaluations make recommendations specifying the skills employees should develop to improve the quality of their work, there is no evidence than the Employer has taken any action in response to an employee's failure to follow an evaluation's recommendation. Furthermore, evaluations have no effect on wages as employees in the same classifications earn the same wage regardless of the results of their evaluations. Accordingly, the Petitioner has not shown that evaluations have any impact on employees' wages or job status, as is required to support a finding that Adams and Moore exercise supervisory authority to evaluate permanent employees. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999).

We further find, contrary to the hearing officer, that Adams and Moore do not exercise supervisory authority to discipline employees. The hearing officer found that Adams had once issued a written warning to an employee for excessive absenteeism and, in another instance, shift supervisor Cockrum told an employee that he had not issued a written warning because Adams had recommended against doing so. However, there is no evidence that these warnings have any effect on employees' job status or tenure or that the warnings are part of a progressive disciplinary system. As such, it appears that Adams and Moore do little more than report employee infractions to management, which makes the final decision as to whether employee discipline is warranted. Where oral and written warnings simply bring to an employer's attention substandard performance by employees without recommendations for future discipline, the role of those delivering the warnings is nothing more than a reporting function, which is not supervisory authority. *Ohio Masonic Home*, 295 NLRB 390 (1989); *Waverly-Cedar Falls Health Care Center*, 297 NLRB 390, 392 (1989), enfd. 933 F.2d 626 (8th Cir. 1991).

Finally, the hearing officer cited an instance in which shift supervisor Cockrum reprimanded an employee for not heeding Adam's instruction to "get to work." Specifically, the hearing officer relied upon Cockrum's statement that "when Darren [Adams] talks to you, tells you to do anything, directs you to do any work, you listen to him, he's got the same authority as I do" as evidence of Adams' supervisory authority.[6] It is well established 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). As in *Polynesian Hospitality*, there is no evidence that Adams exercises any authority beyond "routine direction of simple tasks or the issuance of low level orders that the Board has found does not constitute supervisory authority." Id. at 229. Absent evidence that Adams and Moore exercise any of the primary indicia of supervisory status as defined by Section 2(11) of the Act, this statement alone is insufficient to confer supervisory status. *See also Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991).

DIRECTION

It is directed that the Regional Director for Region 26 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Darren Adams and Paul Moore, as well as the ballots of the 3 employees whose challenges were withdrawn during the

[4] Chairman Hurtgen did not participate in *Elmhurst Extended Care Facilities*, and he does not pass on the majority's finding in that case that the charge nurses were not supervisors based on their authority to evaluate employees. The Chairman agrees with his colleagues, however, that in order for individuals to be supervisors based on their authority to evaluate employees, their evaluations must be shown to directly affect and effectively recommend changes in the rated employees' job status, e.g., wage increases, extended probationary periods, or termination. See, e.g., his dissenting opinions in *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336–1338 (2000); *Coventry Health Center*, 332 NLRB 52, 55 (2000); *Mount Sinai Hospital*, 325 NLRB 1136, 1138 (1998). Here, Chairman Hurtgen finds that the evidence fails to establish that the evaluations prepared by Moore or Adams directly affect or effectively recommend changes in the employment status of the rated employees.

[5] The cases cited by the hearing officer are distinguishable. In *Harbor City Volunteer Ambulance*, 318 NLRB 764 (1994), the Board found that assistant shift supervisors and assistant NEMT supervisors were statutory supervisors because their evaluations led to automatic wage increases for the evaluated employees. Such is not the case here. Indeed, the evaluations Adams and Moore prepare are similar to those completed by the field training officers in *Harbor City* who the Board found were not statutory supervisors because there was insufficient evidence that their evaluations had any impact on the evaluated employees' job status. In *General Telephone Co. of Michigan*, 112 NLRB 46 (1955), the Board found that the evaluations prepared by the service assistants were given "substantial weight" in determining whether changes in job status should be made. Here, however, there is no evidence that management relies on evaluations in any way in making personnel decisions.

[6] We find the hearing officer's reliance on *Babcock & Wilcox Construction Co.*, 288 NLRB 620 (1988), misplaced. In that case, the Board adopted the judge's unexcepted finding that an individual who occupied the position of foreman was a 2(11) supervisor because of uncontradicted testimony that he possessed the same authority and performed the same duties as the other foreman who the respondent admitted was a statutory supervisor.

hearing in the instant matter. The Regional Director shall then serve on the parties a revised tally of ballots and issue appropriate certification.

ORDER

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

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS AND EMPLOYER'S OBJECTIONS

Based upon a petition filed on October 8, 1999, by the PACE International Union (Petitioner), and pursuant to an Order approving agreement to set aside election, dated January 12, 2000, an election was conducted on February 11, 2000, among certain employees of Williamette Industries, Inc. (Employer), at its Fort Smith, Arkansas facility.[1] The tally of ballots revealed that of approximately 116 eligible voters, 56 votes were cast for Petitioner, 51 votes were cast against Petitioner, and 3 were void ballots. Furthermore, there were five challenged ballots, which were sufficient to affect the results of the election.

On February 18, 2000, the Employer filed three objections to conduct affecting the results of the election. On February 25, 2000, the Acting Regional Director of Region 26, pursuant to Section 102.69 (d) of the Board's Rules and Regulations, issued a notice of hearing on challenged ballots and objections based upon the fact that these matters raised substantial and material factual issues which may be best resolved on the basis of record testimony.

On March 25, 2000, a hearing was held in Fort Smith, Arkansas, before me. At the opening of the hearing, the Petitioner withdrew its challenges to Troy Burkhart, Brian Fortner, and Matt Gilliam. Furthermore, the Employer withdrew Objections 2 and 3. Thus, the remaining issues were whether Darren Adams and Paul Moore were eligible voters or statutory supervisors and whether the Petitioner "committed acts of threats and intimidation to supporters of the Company, resulting in the destruction of laboratory conditions required for a fair and uncoerced election."

The Petitioner and Employer, through counsel, appeared and participated in the hearing. The parties were afforded full opportunity to be heard, to cross-examine witnesses, and adduce evidence bearing on the issues at bar. After the hearing, both parties filed briefs, which have been duly considered. Upon careful consideration of the entire record, including the demeanor of the witnesses,[2] I hereby make the following findings of fact, conclusions of law and recommendations:

I. BACKGROUND

The Employer manufactures corrugated boxes at its Fort Smith facility. The plant hierarchy is as follows: Rick Davis-general manager, Rick Hicks-Plant Manager, Steve Layes-Plant superintendent, and eight first-line supervisors: Jerry Nehus-maintenance, Laurel Thomas-shipping, Terry Cockrum-corrugating department (lst shift), Wes White-corrugating department (2d shift), Robert Attee-finishing (1st shift), David Monroe-finishing (3d shift), James Crowley short order (1st shift) and Jim Fredrick, supervisor (2d shift). Of the eight first-line supervisors, all but two have one or two leadmen under them. Specifically, they are Nehus-Brink and Netherton; Thomas-Gilliam and Miller; Cockrum-Adams; White-Fortner; Crowley-Burkhart; and Fredrick-Moore.

The Employer also has corrugated box manufacturing facilities in West Memphis, Arkansas, and Grand Prairie, Texas. Each of the plants' employees are represented by PACE and have current collective-bargaining agreements (CBAs). The bargaining units include leadmen.[3]

II. CHALLENGED BALLOTS

A. Introduction

Leadmen at the Fort Smith facility, such as Adams and Moore, are hourly paid employees, punch a timeclock, and are eligible for overtime after 40 hours of work in a week. Leadmen receive the same fringe benefits as production and maintenance employees. Salaried employees receive different fringe benefits, which are better than the fringe benefits for production and maintenance employees. Leadmen are paid 70 cents an hour more than the next highest paid employee in the department.

B. Darren Adams

Darren Adams is leadman in the corrugated department on 1st shift. Adams has been a leadman for approximately 2-1/2 years. Overall, the Employer has employed Adams for 10-1/2 years. There are eight employees in the corrugated pipe department on 1st shift. As leadman, Adams arrives at 4:30 a.m., rather than 5 a.m., when the other employees begin the shift.

Adams does not regularly attend the daily production meetings for supervisors or the weekly safety meetings for supervisors. But, when Supervisor Cockrum is absent, including 4 weeks of vacation time, Adams attends these meetings for Cockrum.

According to employee Henry Blasingame, Adams has requested him to work overtime on 10 to 12 occasions. According to Adams, it is Cockrum's decision as the necessity for overtime and then employees are chosen for overtime based upon their seniority.

It is undisputed that leadmen, including Adams, evaluate probationary employees during their first 12 weeks of employ-

[1] Included: All full-time and regular part-time production, maintenance and shipping employees and truck drivers employed by Williamette Industries, Inc. at its Fort Smith facility.

Excluded: All office clerical employees, professional employees, technical employees, guards, and supervisors as defined in the Act.

[2] In evaluating the credibility of witnesses, the undersigned has considered their demeanor, partisan interests, indirect answers, self-serving answers, conclusionary answers, specificity of answers, and self-contradictory answers. Other criteria concerning credibility may be discussed with respect to particular witnesses. Concerning witnesses testifying in contradiction the findings herein, their testimony has been discredited into because it conflicts with credible testimony or it was, in and of itself, unworthy of belief.

[3] The inclusion of leadmen in these units does not mean leadmen at the Fort Smith facility are production and maintenance employees because each plant is separate and distinct. It is common for an employer to include leadmen in a unit at one facility and not in another facility because of different authority.

ment. Furthermore, these evaluations determine whether employees are retained by the Employer. Thus, these evaluations are clear indicia of statutory supervisory status. *Harbor City Volunteer Ambulance*, 318 NLRB 764 (1995); *General Telephone Co. of Michigan*, 112 NLRB 46, 50 (1955).

Blasingame also testified that in June 1999 Cockrum issued him a written warning and, in so doing, stated it was Adams who initiated the action and then Layes and Adams made the decision. Neither Cockrum, Layes, nor Adams testified concerning this matter.

In October 1999, an incident occurred involving Blasingame. According to Blasingame, Adams told him to "get (his) big fat ass out of there, to get to work, and it was bad for morale to be sitting in there." Blasingame responded by telling Adams, "what's bad for morale is when we all come in here in the mornings, and we're sitting up front waiting to clock in, and you've already clocked in and drawing overtime, and you're sitting out front talking to another supervisor about cars and boats and fishing or whatever, and you're drawing overtime, and you're supposed to be inside threading up the machine. That's what's bad for morale." Adams responded by cussing out Blasingame and stating he could not be spoken to that way because he was a leadman and "the leadman was just like a supervisor." Shortly thereafter, a meeting was held between Blasingame, Adams, Cockrum, and employee Wayne Christian. During this meeting, according to Blasingame, Cockrum stated "when Darren talks to you, tells you to do anything, directs you to do any work, you listen to him, he's got the same authority as I do. When he talks to you, its just like myself telling you to do something, or Steve Layes, your foreman or any other supervisor . . . . The only reason we weren't in the foreman's office getting wrote up is Darren didn't want to write you up at this time, but he had the authority." Christian corroborated Blasingame's testimony that Cockrum stated that when Adams tells an employee to do something, its like a supervisor telling him to do so. Later that day, Layes spoke to Blasingame and repeated what Cockrum had said, that Adams had the same authority as Cockrum.

Neither Cockrum nor Layes testified about these conversations. Adams testified that Cockrum stated if Adams told him to do something, that it was like Cockrum telling him himself.

Employee Clifton Battles testified that after this incident Cockrum said, "If Adams told us to do something or made a decision, that he was speaking for him." Cockrum did not testify about this conversation.

Based on Blasingame's testimony, as corroborated by Christian, and Battles' uncontradicted conversation with Cockrum, I find the Employer, through Cockrum and Layes, stated leadmen, such as Adams, have the same authority as supervisors and have the authority to discipline employees.[4] This finding, when coupled with the findings that leadmen evaluate probationary employees and Adams recommended the issuance of a warning to Blasingame, support the conclusion that Adams is a statutory supervisor and ineligible to vote in the election. See *Babcock & Wilcox Construction Co.,* 288 NLRB 620, 621 (1988).[5] Thus, I recommend upholding the Petitioner's challenge.

C. Paul Moore

The Employer has employed Paul Moore for the past 8 years, with the last 3 years as leadman in the finishing department on 2d shift. Moore works from 2:15 until 11:30 p.m. The four other employees in the finishing department work from 3 to 11 p.m. Between 2:15 and 5 p.m., Moore reports to Layes, the plant superintendent. After 5 p.m., 2d Shift Supervisor Frederick reports to work and Moore reports to him for the remainder of the shift. Moore attends a daily production meeting at 2:15 p.m., which is conducted by Layes and Ken Swearingen and attended by all supervisors and leadmen, except Adams. Moore also attends a weekly safety meeting for all supervisors.

According to the undisputed testimony, Moore evaluates both probationary employees and operators on a regular basis. Concerning probationary employees, Moore, as well as the other leadman, evaluate these employees on a weekly basis. Employees Mark Kelly and Randy Fuller specifically testified about being evaluated by Moore on a weekly basis during the beginning of their employment. Furthermore, Moore conducted an evaluation of employee Matthew Cupp, dated September 6, 1999, in which he stated that the performance was marginal and "must improve immediately to be continued in service." Moore testified that he spoke with Layes prior to finishing this evaluation, but I find this explanation to be unworthy of belief based upon the fact that only Moore signed the evaluation, not Moore and Layes. Moreover, Layes stated Moore evaluates many new employees. Employee Chris Aspinwall, a 4-year employee, testified that Moore evaluated him as well as the other operators on a quarterly basis. Moore did not dispute this.

The Petitioner asserted that the leadmen's issuance of red cards to employees proves they have the authority to discipline. But, the evidence is clear that these red cards are utilized for attendance purposes and the leadmen do not have any discretion in their issuance.[6] Thus, this fails to prove supervisory status. *Fleming Cos.,* 330 NLRB 277 (1999).

Based on these evaluations and the statements by Cockrum and Layes that leadmen have the same authority as supervisors, as well as the secondary indicia of regular attendance at supervisory meetings, I find Moore is a statutory supervisor and I recommend the Union's challenge to his vote be upheld.[7]

[4] I do not base this finding on the testimony of employee Ed White, who testified trainer Rick Frazee, a maintenance employee, stated leadmen and supervisors could override a lockout on a machine because they are agents of the company. I find this testimony incredible; furthermore, the Petitioner failed to establish Frezee as an agent of the Employer.

[5] In making this finding, I have considered all of the evidence presented, including Moore and Adams moving employees from one machine to another, approving the quality of print, and changing the order of runs. I find this evidence does not establish supervisory authority because of the lack of independent judgement and/or the lack of affect on employees.

[6] I specifically discredit the testimony of employee Steve Tyler that Moore threatened him with the issuance of a red card if he did not clean up his area. As previously stated, red cards are for attendance not failure to do a job.

[7] See fn. 5, supra.