

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

E.P. GUIDI, INC.¹

Employer

and

Case 4-RC-19617

METROPOLITAN REGIONAL COUNCIL OF
PHILADELPHIA & VICINITY, UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The Employer's name appears as amended at the hearing.

² The Petitioner's name appears as amended at the hearing.

³ The Employer, in Case 4-CP-496, filed a charge alleging that the Petitioner has been engaged in picketing in violation of Section 8(b)(7)(C) of the Act. The petition was filed herein, and the undersigned Regional Director determined that the proceeding raised questions which could not be decided without a hearing. Accordingly, a Revised Notice of Hearing issued on February 5, 1999, advising the parties that the hearing was being held pursuant to Section 8(b)(7)(C) of the Act and Section 102.77(b) of the Board's Rules and Regulations. Consistent with the Board's Rules, post-hearing briefs were not permitted and the parties instead were provided an opportunity to state their respective legal positions fully on the record. See *International Hod Carriers Local 840 (Blinne Construction)*, 135 NLRB 1153, 1165 (1962).

5. The Employer provides commercial and industrial construction services. The Petitioner seeks to represent a unit of seven of the Employer's project superintendents who are currently members of the Petitioner, excluding, inter alia, two project superintendents who are currently not Union members. The Employer takes the position that its superintendents are supervisory or managerial employees, and that it and Frank Lutter, Inc. are joint employers of the superintendents such that the petition should be dismissed because the Petitioner has not named Lutter as part of the employing entity.

The Employer typically functions as a construction manager or general contractor. Nearly all of the work on the Employer's projects is subcontracted and in most instances the Employer does not employ the craft employees who perform the work at the jobsite. Instead, the only individual at the jobsites employed by the Employer is the project superintendent.

The work subcontractors perform at a jobsite is dictated by project blueprints and the subcontractors' agreements with the Employer. The Employer's project managers are responsible for setting the schedules for the performance of work by subcontractors. The Employer's project superintendents report to project managers, and their function is to monitor the work of the subcontractors to make certain that it is performed according to specifications and on schedule.

Most subcontractors have their own on-site supervision, and the Employer's project superintendents deal primarily with subcontractor foremen. In most instances, project superintendents do not deal directly with subcontractor employees and have no authority to assign or direct their work. Occasionally, a subcontractor will send one or two employees to a site without supervision, and the project superintendent will be required to tell the employees what work needs to be done. The project superintendents all began their careers as carpenters and have no training in other crafts. They are, therefore, not in a position to monitor whether subcontractors' employees in other crafts are performing their work correctly. Because the Employer does not employ the subcontractors' employees, the project superintendents play no role in personnel actions involving such employees. If a superintendent notices a subcontractor employee engaging in inappropriate behavior, he can report the matter either to his project manager or to the subcontractor's supervision, and the report may include a recommendation that some action be taken vis-a-vis the employee. However, any decision regarding whether and what action will be taken rests with the subcontractor.

On some jobs, the Employer will refrain from subcontracting limited portions of the carpentry work and assign this work to be done by its own project superintendents. The seven superintendents who testified each reported that they spend about 10 percent of their time performing carpentry work. On rare occasions, one superintendent will be assigned to perform carpentry work on another superintendent's job. The record contains two such occasions. Superintendent Gary Ruch testified that he was recently assigned to do "punch list" work at the conclusion of a project assigned to another superintendent. On another recent job, the Employer did not subcontract the carpentry work because it did not have a sufficient number of jobs to keep all of its superintendents busy and wished to assign excess superintendents as carpenters rather than lay them off. The project superintendent in charge of the job, Richard Byrne, reported that two other superintendents were assigned to work for him as carpenters for a period of about two months and that a carpenter not classified as a project superintendent was hired by the Employer to assist the superintendents. Byrne informed the superintendents and the carpenter what work they should perform on a daily basis although the record does not show the criteria he used in making assignments. At some point during the job, Byrne informed his project manager that there was no longer sufficient work for the non-superintendent carpenter and the manager laid him off. Beyond this, the record contains no evidence of project superintendents playing any part in personnel decisions or the work assignments of employees on the Employer's payroll. The project superintendents also testified that they had never participated in hiring, discharging, disciplining, promoting, laying off, recalling, rewarding, assigning or directing other employees of the Employer.

The project superintendents are obliged to submit daily written reports to their project managers apprising the managers of jobsite activity. The reports indicate which subcontractors are working on site, how many employees each contractor has and what work the contractors are performing. They also catalogue unusual events or occurrences. For instance, one of the reports notes that the roofing contractor failed to appear; that the carpentry contractor departed in mid-day due to rain; and that a plumbing inspection determined a gas pipe was "OK."

Project superintendents attend periodic job meetings where the progress of projects is reviewed. Project managers usually call and conduct these meetings which are attended by the Employer's project superintendents and

the supervision of subcontractors scheduled to perform work on the job. On rare occasions, a project superintendent will call or conduct a job meeting. The Employer maintains a safety list describing appropriate practices. Project superintendents monitor the activities of subcontractors to make certain they are performed in compliance with the list. If a project superintendent notices an unsafe practice, he brings it to the attention of the appropriate subcontractor's supervisors.

Project superintendents' believing that a job is falling behind schedule will report this to the project manager. The superintendent's report may identify what he believes are the reasons for the delay and recommend corrective action. For instance, a superintendent may indicate that a subcontractor does not have sufficient manpower to perform its portion of the job or recommend that subcontractor employees be permitted to work overtime to make up for some delay. Any overtime must be authorized by the project manager. Where staffing is the issue, the subcontractor controls the final decision, and the project manager and superintendent can do nothing except seek to persuade the contractor to augment its work force at the jobsite.

Project superintendents also report deficiencies in the quality of subcontractor work either to the project manager or to the subcontractor's supervisors. Superintendents can ask a subcontractor to redo work that does not conform to the project blueprints. On occasion, the owner of a building may request additional work in the midst of a project or it may become clear that a problem not anticipated by the architect makes some additional work necessary. When this occurs, the project superintendent will ask the project manager's permission to have a subcontractor perform the extra work. Project superintendents cannot authorize additional work on their own nor may they deviate from the project blueprints without approval. If a project manager authorizes additional work, the superintendent normally signs the written "change order" documenting the authorization.

Until 1995 or 1996, all of the project superintendents were paid directly by the Employer. The two non-Union superintendents continue to receive their paychecks from the Employer, but the seven Union superintendents are paid differently. The Employer decided that it wished to terminate its collective bargaining relationship with the Petitioner without depriving its project superintendents of their eligibility to receive certain benefits through the Petitioner's jointly administered benefit funds. To accomplish this result, the Employer entered into an arrangement with Frank Lutter, Inc., a carpentry subcontractor who has performed some work on the Employer's projects. Lutter continues to have a collective bargaining relationship with the Petitioner. Under the arrangement, the Employer submits weekly timesheets to Lutter indicating the hours worked by each superintendent. Lutter then prepares checks for the superintendents, making the necessary deductions for taxes and social security contributions. Lutter also makes any required payments to the Petitioner's benefit funds and maintains workers and unemployment compensation insurance coverage for the superintendents. The Employer reimburses Lutter for all expenses incurred in relation to the superintendents and, in addition, pays Lutter a fee for the payroll service it provides.

Aside from receiving their checks from the company, the project superintendents have almost no other contact with Lutter except in those instances where Lutter is employed as the carpentry subcontractor on one of their jobs. When Lutter is employed as the carpentry subcontractor, the superintendents deal with Lutter's employees and supervision as they do with other subcontractors. The Employer hires its project superintendents and deals directly with them in establishing their compensation package. In some instances, the Employer provides project superintendents with Company vehicles. They carry business cards identifying them as employees of the Employer, work from job trailers maintained by the Employer, carry pagers provided by the Employer and receive reimbursement from the Employer for any work calls made on their personal telephones. The Employer's project managers assign work to the project superintendents, and superintendents report any pay or injury problems to the Employer. Project superintendents submit their time sheets to the Employer and the Employer schedules their vacations. In the one instance involving the discharge of a project superintendent, the Employer made the decision. Lutter plays no role in setting the Employer's personnel policies, and there is no record evidence suggesting that Lutter has any part in establishing the personnel policies applied to the superintendents.

Only one of the superintendents has ever performed services for Lutter. In November 1998, Employer project manager Dan Beerhalter informed project superintendent Nicholas Liberato that the Employer had no work for him to perform and asked if Liberato would be willing to work for Lutter on a temporary basis as a journeyman carpenter. Liberato agreed and spent two weeks as a carpenter on a site where Lutter was performing work for a general contractor other than the Employer. On one occasion, Beerhalter asked Lutter if the Employer could utilize a superintendent who was employed by Lutter and who had not previously worked for the Employer. Lutter refused. As Beerhalter explained, "When they are not on my payroll and if they are working for Frank [Lutter] . . . then Frank can say 'you can't have him right now.'"

The burden of establishing supervisory or managerial status rests on the party asserting that such status exists. *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); see *Bennett Indus.*, 313 NLRB 1363 (1994). To establish supervisory status, a party must show that the purported supervisor possesses one or more of the indicia of supervisory authority set forth in Section 2(11) of the Act. *Providence Hospital*, 320 NLRB 717, 725 (1996), enfd. 121 F.3d 548, 156 LRRM 2001 (9th Cir. 1997). Paper titles or grants of authority are not determinative. *MJ Metal Products*, 325 NLRB No. 22, slip op. at 2 (1997); *Store Employees Local 347 v. NLRB*, 422 F.2d 685, 71 LRRM 2397, 2399–2400 (D.C. Cir. 1969); *NLRB v. Security Guard Services*, 384 F.2d 143, 66 LRRM 2247–2250 (5th Cir. 1969), enfg. 154 NLRB 8 (1965).

The Employer normally employs no craft workers on its projects. As a consequence, it is apparent that the project superintendents do not regularly exercise supervisory authority with respect to employees employed directly by the Employer. The only significant exception occurred on the recent job where superintendent Byrne had two other superintendents and a non-superintendent carpenter working under him. The record shows that Byrne distributed work to these other individuals while they were present on the jobsite, but it does not reflect the basis for the assignments or demonstrate that an exercise of independent judgment was involved. The assignment of work is an indicia of supervisory authority only where independent judgment is exercised in making the assignments, and the burden was on the Employer, as the proponent of supervisory status, to show that Byrne's assignments involved the exercise of such judgment. *Providence Hospital*, supra, 320 NLRB at 327. Given the absence of such evidence or of any evidence that Byrne exercised the other indicia of supervisory authority with respect to the carpenters assigned to his site, I find that the Employer has not carried its burden of establishing that Byrne functioned as a statutory supervisor with respect to the individuals assigned to work for him as carpenters. In any event, this single instance in which the Employer directly employed carpenters appears to have been an anomaly, and there is no evidence of any intention to do so again. Thus, even if Byrne had functioned as a statutory supervisor with respect to the carpenters assigned to his site, this incident could appropriately be characterized as isolated and insufficient to remove Byrne and the other superintendents from the Act's coverage. *Koronis Parts, Inc.*, 324 NLRB 675, 690–691 (1997).

The Employer also takes the position that project superintendents supervise the employees of the subcontractors assigned to their sites, but the record is clear that the superintendents have almost no contact with subcontractor employees and deal primarily with the subcontractors' supervisors. On occasion, a subcontractor may send one or two employees to a site without supervision, and the project superintendent will identify for the employees the work they are scheduled to perform. The work to be performed is dictated by the contractor's agreement with the Employer and the project schedule developed by the project manager. The project superintendents appear to do no more than point out what needs to be done, and the record is devoid of evidence suggesting that the superintendents' role in this situation requires the use of independent judgment. Thus, I find that these "work assignments" do not support a finding that the project superintendents are supervisors.

There is record testimony that the superintendents "direct" subcontractor supervisors but such conclusory statements, standing alone, do not establish supervisory status. *Oregon State Employees Assn.*, 242 NLRB 976, 978 fn.12, 979 (1979). When the actual tasks performed by the project superintendents are examined, there is little evidence of any exercise of supervisory authority. The work to be done on a project is determined by the project blueprints, the subcontractor agreements and the work schedules developed by the project manager. To the extent a superintendent may tell a subcontractor what needs to be done, he is simply relaying information contained in these documents. There is nothing in the record to suggest that the superintendents are free to alter the blueprints or project schedule, making their role little more than that of a conduit for instructions from upper level managers. This role is not sufficient to make them supervisors. See *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Westinghouse Broadcasting*, 215 NLRB 123, 124-25 (1974).

The superintendents do monitor the work of subcontractors to make certain it meets specifications and can ask to have work repeated if it is done improperly. However, the inspection of work is a quality control function and does not rise to the level of supervisory authority. *Control Services*, 314 NLRB 421, 431 (1994); *Somerset Welding*, 291 NLRB 913 (1988). Beyond this, the project superintendents have little authority to act without securing advance approval from project managers. They can report employee infractions and safety problems either to the project manager or a subcontractor supervisor, but they cannot take action against subcontractor employees on their own. Further, there is no evidence that any recommendations they make for disciplinary action are routinely followed, and it is settled that the ability to report employee infractions is not an indication of supervisory status absent evidence that accompanying recommendations are routinely followed without independent evaluation. *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). Similarly, the superintendents can recommend that a subcontractor

be prodded into increasing its workforce at the job site, be permitted to work overtime or be allowed to perform additional work. However, they cannot initiate such actions without project manager approval and it is not clear such approval is always forthcoming. In short, the evidence falls short of showing that the superintendents independently exercise any of the indicia of supervisory authority set out in Section 2(11) of the Act. Absent such evidence, their supervisor-like titles, attendance at management meetings and submission of regular reports, all secondary indicia of supervisory status, are not sufficient to make them into supervisors. *Northcrest Nursing Home*, 313 NLRB 491, 498–499 (1993); *First Western Building Services*, 309 NLRB 591, 603 (1992). In short, I find the Employer has failed to satisfy its burden of showing the superintendents to be statutory supervisors.⁴

I also find the evidence insufficient to establish that the superintendents are managerial employees. Managerial employees are those who formulate and effectuate management policy and who have discretion in the performance of their jobs independent of the Employer's established policies. *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974); *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1194 fn. 6 (1994). There is nothing in the record suggesting that the superintendents play any role in formulating Employer policies, and their role in effectuating those policies is severely circumscribed. The blueprints, subcontractor agreements and the schedule set by the project manager set the terms on which a project is to be performed. As noted above, the project superintendents cannot deviate from these terms without securing approval from their superiors. They therefore do not have discretion in the performance of their jobs independent of Employer policies and are not managerial employees. *Reading Eagle Co.*, 306 NLRB 871 (1992); *L & S Enterprises*, 245 NLRB 1123, 1126 (1979).

Two issues remain for consideration. The first is the Employer's contention that Frank Lutter, Inc. and the Employer jointly employ the project superintendents. A joint employer relationship exists where two separate business entities codetermine matters governing the essential terms of employment for a group of employees. *Martiki Coal*, 315 NLRB 476, 477 (1994). Here, the Employer retains complete control over all of the essential terms of the superintendents' employment. It is the Employer who hires and discharges the superintendents, assigns and directs their work and determines their wages and working conditions. Lutter serves only as a payroll service, providing paychecks for employees based on information obtained from the Employer, and paying for certain insurance coverage. The Employer fully reimburses Lutter for the expenses it incurs and adds a fee to compensate Lutter for the services it provides. There is no evidence that Lutter has been consulted about any of the personnel policies or practices which are applied to the superintendents and serving as a payroll service, standing alone, is insufficient to create an employment or joint employment relationship. *Storall Mfg.*, 275 NLRB 220 fn. 3 (1985). I find that the superintendents are employed solely by the Employer.

The only remaining issue is the status of the two non-Union superintendents. The Petitioner does not appear to seek their inclusion in the unit, although the reasons for its position on this point are not clear from the record. Since they hold the same title as the Union superintendents, it seems reasonable to infer that they perform the same functions in which case they would logically be included in the same bargaining unit. Unfortunately, there is almost no record evidence to support or contradict this inference. The only reference to the duties of the non-Union superintendents came during the testimony of Union superintendent Joseph Gaudio who was asked if his non-Union counterparts worked "the way you guys work." He replied, "It depends, depends on the project, but no, normally they are just strictly supervision." This lone response provides insufficient information to allow an intelligent determination of the non-Union superintendents' status. Accordingly, I shall permit them to vote subject to challenge.

Based on the foregoing, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

⁴ The three cases cited by the Employer at the hearing to support its position are clearly distinguishable. One of the cases, *Manhattan Construction*, 298 NLRB 501 (1990), did not involve a question of supervisory status. The individuals in the two remaining cases, *Zimmerman Plumbing*, 325 NLRB No. 5, slip op. at 4–5 (Nov. 8, 1997), and *Lott's Electric*, 293 NLRB 297, 300 (1989), had authority far exceeding anything possessed by the instant superintendents. In *Lott's*, the alleged supervisors hired on their own, assigned employees to job sites and issued written disciplinary warnings. In *Zimmerman*, the supposed supervisor made staffing changes, issued warnings and authorized time off.

All project superintendents⁵ employed by the Employer, excluding clerical employees, casual employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

Pursuant to Section 8(b)(7)(C) and Section 9(c) of the Act, and Section 102.77 of the Board's Rules and Regulations, an election by secret ballot shall be conducted promptly among the employees in the unit found appropriate.⁶ Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

METROPOLITAN REGIONAL COUNCIL OF PHILADELPHIA AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 and Section 102.77 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, NW, Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington **promptly after the issuance of this Decision.**

Dated February 26, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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⁵ Although the Petitioner maintains that the unit should include carpenters, carpenters helpers and apprentices, there is no record evidence that the Employer has such classifications of employees.

⁶ Your attention is directed of Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.