

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

JOHN GIORDANO AND
LISA FEIGENBUTZ d/b/a
REGENCY FLOORS¹

Employer

and

Case 4-RC-19629

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

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, 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.

5. The Employer, a partnership owned by John Giordano and Lisa Feigenbutz, is engaged in the installation of carpet and flooring, including, vinyl tile, hardwood floors and ceramic tile, from its West Berlin, New Jersey facility. The Petitioner seeks to represent a unit of approximately eight full-time and regular part-time carpet and floor installers, mechanics, installation apprentices and helpers employed by the Employer. The Petitioner would include mechanics **Robert Parker** and **Bill Arenz**, helpers **Scott Heller**, **Neal Houser**, **Jose Lafferty**, **Christopher DeMunguia**, **Joe Kennedy** and **Rick Leyland**, and

¹ The name of the Employer appears as corrected.

Tim Durasoff.² The Employer takes the position that it currently employs no employees, that it only uses independent contractors and casual employees, and that the petitioned-for individuals, except Durasoff, are independent contractors. Alternatively, the Employer contends that if Parker, Heller, Houser and Lafferty are found to be employees, then Parker should be excluded from the unit as a supervisor, and Heller, Houser and Lafferty should be excluded because they abandoned their employment. The Employer would exclude **Tim Durasoff** either as a casual employee or as an employee no longer working for the Employer who has no expectation of continued employment.

I take administrative notice of the fact that an unfair labor practice charge has been filed in Case 4-CA-27892 alleging that Robert Parker, Joseph Kennedy, Joseph Lafferty and Scott Heller were discharged in violation of Section 8(a)(3) of the Act. Although Counsel for the Petitioner asserted that Tim Durasoff is covered by the charge in Case 4-CA-27892, as amended, Durasoff is not specifically named in the charge.

John Giordano testified that at the time the Employer commenced operations in January 1999, either he (Giordano) performed the work himself or it was performed by subcontractors. According to Giordano, in January 1999, the Employer ran advertisements in a New Jersey newspaper for mechanics and helpers with their own tools and transportation. Giordano testified that if an individual was hired and worked directly under him, that person would work intermittently and earn relatively little money. If, however, an individual came to work for him with their own tools and transportation, that person would hire his or her own crews, be paid on a square foot, daily rate or time and materials basis, and be required to submit a certificate of liability insurance. The Employer has no written contracts with any of these individuals, does not pay them from its payroll account, and does not withhold taxes or make ordinary deductions from their pay. Some of these individuals pay their helpers out of the checks given to them by the Employer, while others have the Employer pay the helpers directly.

When installing carpets, the individuals who perform the installation pick up the carpeting at the Employer's facility about 7:30 a.m. and are told where they are to go to install the carpet. They do not return to the Employer's facility at the end of the day unless they are using one of the Employer's trucks. According to the Employer, when these individuals have work to do for other companies, they notify the Employer and they take their crews with them to those jobs. When these individuals cease performing services for the Employer, they take their crews with them.

Mechanic **Bill Arenz**, operating under the name of R&B Flooring, provided the Employer with a certificate of insurance and an Employer Identification Number when he began performing work for the Employer in January or February 1999. Arenz submits an invoice to the Employer for the work that R&B performs and Arenz then pays his helpers **Chris DeMunguia** and **Rick Leyland** out of his own pocket. Arenz is paid on a yardage basis regardless of the number of helpers he chooses to use on a job. He is sometimes unavailable to perform work for the Employer when he has other job commitments. Arenz's helpers always work with Arenz on jobs for the Employer except for one occasion where Arenz became ill and left Chris DeMunguia at a jobsite. While Arenz called the Employer to inform it of this fact, the Employer did not go out to the jobsite. Giordano "spot checks" the work that Arenz and other individuals perform to make sure that the Employer's customer is happy. If there is a problem on a job, Giordano testified that whoever did the job is responsible for making corrections.

The record reflects that Robert Parker saw the Employer's ad and contacted the Employer around the end of December 1998 seeking work as a subcontractor. According to Parker, Giordano told him that the Employer was looking for employees at that time. Parker testified that about one month later he called back and told the Employer he was interested in working for the Employer not as an independent contractor and the Employer agreed to hire him, informing him that the Employer paid anybody who worked for the Employer by the day. The Employer agreed to pay Parker \$125 per day and he began working for the Employer on January 20, 1999. Parker brought his cousin and Joe Lafferty in to work with him. Parker

² Heller, Houser and Lafferty are helpers of Robert Parker, while DeMunguia, Kennedy and Leyland are helpers of Bill Arenz.

and his cousin gave the same Employer Identification Number to the Employer on the first day they reported for work. Parker's cousin only worked one day and earned \$75. Lafferty also received \$75 per day. Parker also brought Heller and Houser to work. The record shows that Houser earned \$75 per day.

Parker worked for the Employer from January 20, 1999 to about February 11, 1999, approximately three weeks. Heller and Houser also worked for the Employer during this period although the record is unclear as to how much time they worked. Parker testified that when he worked for the Employer he reported at 7:30 a.m. and was then told by Giordano what work had to be done. Parker was responsible for getting himself to the Employer's facility, but after the first day when his cousin did not return to work, the Employer allowed Parker to use the Employer's truck to get to job sites. The truck was to be returned to the Employer's facility. Parker laid only carpet for the Employer, and would either work at the shop cutting carpeting and putting it on the truck or out in the field laying carpet and running jobs to make sure they were done properly. The record reflects that on one occasion Joe Kennedy worked on a job Parker was running as a mechanic with helpers Heller and Lafferty. Giordano testified that he visited job sites where Parker was working and if he saw something he did not like, he would bring it to Parker's attention. In addition, if he felt he could teach the men how to do something better, he would personally instruct them on the job. Giordano also testified that if Parker wanted to subcontract out a job Giordano had sent him to, Parker could have done this as long as he was responsible for the job. Parker testified that neither he nor Lafferty, Heller or Houser had ever worked with Arenz or DeMunguia on a job for the Employer.

The Employer testified that he told Parker where to perform jobs for the Employer and to do better work. Parker stated that the only way the Employer could really discipline him was to fire him, and the Employer had threatened to fire him on at least two occasions, once for taking the Employer's truck home over night and another time if he did not carpet a certain number of rooms in a day at a MacIntosh Inn.

Tim Durasoff responded to the Employer's newspaper advertisement and was hired by the Employer as a helper. However, after a couple of weeks, Durasoff's employment ended. It is not clear from the record whether the Employer discharged him or whether he quit.

Neal Houser began working on the Employer's projects as a helper for mechanic Robert Parker. Giordano testified that Houser was offered a job by the Employer and that he completed the required I-9 and W-4 forms and was scheduled to commence work on February 15, 1999. According to Giordano, Houser called on February 15, 1999 to tell Giordano that he did not wish to work for the Employer.

Under Section 2(3) of the Act, the term "employee" shall not include "any individual having the status of an independent contractor." Over 30 years ago, the Supreme Court, agreeing with the Board that "debit agents" of an insurance company were employees, held that the "common-law agency test" must be applied to determine whether the agents were independent contractors or employees. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256, 67 LRRM 2649, 2650 (1968). "[T]here is no short-hand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *Id.* at 258, 67 LRRM at 2651.

The Board recently emphasized that this original "common-law agency test" rather than what came to be known as a "right to control test" must be used to determine employee status, even though criteria in a "right-to-control" test are part of the common-law agency analysis. *Dial-A-Mattress Operating Corp.*, 326 NLRB No. 75, slip op. at 6-7 (Aug. 27, 1998); *Roadway Package System*, 326 NLRB No. 72, slip op. at 7-9, 11 fn. 37 (Aug. 27, 1998). In *Dial-A-Mattress*, the Board applied the common-law agency test and examined the following factors: the identities of the alleged independent contractors and their relationship with the employer, contracts between the alleged independent contractors and the employer, duties and equipment used by the alleged independent contractors in performing the work for the Employer, compensation and work schedules for the disputed individuals, the use of assistants, employer rules, personnel policies, and discipline of the alleged independent contractors, and entrepreneurial activities engaged in by the alleged independent contractors. 326 NLRB No. 75, slip op. at 1-6.

The Board concluded that the mattress deliverers in *Dial-A-Mattress* were independent contractors for the following reasons: they could make an entrepreneurial profit beyond a return on their labor and capital investment; they hired and trained their own employees and had sole control and responsibility over them; they selected, acquired, owned, financed, inspected and maintained their own vehicles; they received no minimum guaranteed compensation; they could decline orders without penalty and were not required to work every day for the employer; they maintained their own identities, often using their own corporate names; they had their own business accounts, business tax identification numbers and insurance; they were held out as independent contractors to the public by the Employer; they had written contracts with the employer which provided, inter alia, that they had exclusive control over their own employees; they were not subject to the employer's work rules; they were required to have liability insurance and indemnify the employer for losses; and they expressed a clear intention to form an independent contractor relationship with the employer. *Dial-A-Mattress*, supra, 326 NLRB No. 75, slip op. at 1-6.

In *Roadway*, the Board applied the same common-law agency test and determined that pickup and delivery drivers were employees within the meaning of the Act, and not independent contractors, because, inter alia, the drivers were not permitted to refuse to accept merchandise for pickup or delivery in their primary service area; drivers by contract had to make themselves available to work for the employer nearly every day, which made outside work opportunities practically impossible; drivers had to wear a Roadway uniform; drivers had to input data into Roadway computers; drivers were given specific assistance in procuring only certain Roadway-approved vehicles for their work; drivers received a business-support package and other financial assistance from the employer, including loans and group insurance; and drivers had limited, if any, real entrepreneurial opportunities. *Roadway*, supra, 326 NLRB No. 72, slip op. at 7-9, 11 fn. 37.

Applying the common-law agency test to the disputed individuals herein, I find that R&B Flooring principal **Bill Arenz** and his helpers, **Chris DeMunguia** and **Rick Leyland** are independent contractors. Arenz owns his own business, called R&B Flooring, which performs carpet and vinyl installations not only for the Employer, but also for other entities. Arenz provided the Employer with a Certificate of Liability Insurance and an Employer Identification Number for tax purposes. Arenz is a skilled carpet and vinyl layer who employs his own employees and pays them out of his own pocket. He requires no training from the Employer for himself or his helpers and the Employer only spot checks his work to make sure its customers are satisfied. Arenz and his crew use their own vehicles and do not return to the Employer's facility at the end of the day. Arenz is paid on a yardage basis and is free to use as many helpers as he chooses. He uses his own tools and does not wear any uniform or insignia identifying the Employer. No taxes or other deductions are taken from the compensation he receives from the Employer and he enjoys no fringe benefits from the Employer. Also, if there is a problem on a job which Arenz' company performs for the Employer, Arenz is responsible to make it right. While he and the Employer do not have a written contract defining their relationship, the factors described above also indicate an intention by the parties to create an independent contractor relationship. Based on the foregoing, I find Arenz, DeMunguia and Leyland are independent contractors and not employees within the meaning of the Act. *Dial-A-Mattress*, supra, 326 NLRB No. 75, slip op. at 1-6. Accordingly, I shall exclude them from the unit. As to Robert Parker, Scott Heller, Neal Houser, and Joe Lafferty, I find that they are employees within the meaning of the Act. While Parker may have provided the Employer with an Employer Identification Number, the record does not reflect that he provided the Employer with a certificate of liability insurance when he began working for the Employer. Parker, Heller, Houser and Lafferty were hired by the Employer on a flat daily rate basis and each received individual checks from the Employer. Parker had his own tools, but lost the use of a vehicle as required by the Employer on the second day he was employed by the Employer. The Employer then agreed to allow Parker to use the Employer's vehicle to transport carpeting to the Employer's customers for installation. Parker was generally required to return the Employer's vehicle to the Employer at the end of the day. Parker, Heller, Houser and Lafferty installed only carpet for the Employer and worked together on jobs. The Employer threatened to fire Parker on several occasions, including one time if he did not carpet a certain number of rooms that day. Giordano testified that he visited jobsites where Parker was working, and on occasion personally instructed Parker's helpers on how to better perform the job. The record reflects that Parker, Heller, Houser and Lafferty worked quite

regularly over the three weeks or so that they were employed by the Employer, and it does not appear that Parker had any other employment at that time. Also, Parker not only installed carpeting at jobsites, but also worked at the Employer's facility cutting carpet and loading it on to vehicles for the Employer.

While the record also contains facts which might support an independent contracting finding such as the Employer paying Parker, Heller, Houser and Lafferty checks without any taxes or other withholdings, the fact that they did not wear uniforms and had their own tools, and the absence of any contract between them and the Employer, the record reflects that these conditions were common to all individuals who had any kind of relationship with the Employer. I do not find dispositive, the Employer's statement that Parker could have used his own substitute to perform work for the Employer as long as Parker was responsible for the job, as the record does not reflect this having ever occurred. Based on all of the above, I find that Parker, Heller, Houser, and Lafferty were employees of the Employer rather than independent contractors. *Roadway Package System*, supra, 326 NLRB No. 75.

With respect to the Employer's contention that Parker is a supervisor within the meaning of Section 2(11) of the Act, the burden of establishing supervisory status rests on the party asserting that such status exists. *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 Alaska Medical Center*, 320 NLRB 717, 725 (1996), enf. 121 F.3d 548, 156 LRRM 2001 (9th Cir. 1997). The Board has stated that the supervisory exemption is not to be construed too broadly because the inevitable consequence would be to remove individuals from the protection of the Act. *Providence Alaska Medical Center*, supra, 320 NLRB at 725. The legislative history of Section 2(11) of the Act makes it clear that Congress considered supervisors who responsibly direct employees to be different from lead employees or straw bosses who merely provide routine direction to other employees as a result of superior training or experience. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 Legis. Hist. at 410 (LMRA 1947). Where evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *The Door*, 297 NLRB 601, 601, fn. 5 (1990).

I find that the record does not establish that Robert Parker is a supervisor within the meaning of Section 2(11) of the Act. While the Employer contends that Parker hired Scott Heller, Neal Houser, and Joe Lafferty, and responsibly directed them on jobs for the Employer, the record evidence is in conflict on the circumstances surrounding the hiring of these individuals and also fails to establish that Parker responsibly directed these men rather than acted in a lead man capacity over them. *Id.*

Based on the foregoing, I find that the Employer has not met its burden of establishing the supervisory status of Robert Parker, and that Parker, Scott Heller, Neal Houser and Joe Lafferty are employees and not independent contractors as asserted by the Employer. However, as their current employment status is the subject of a pending unfair labor practice charge, I shall permit them to vote subject to challenge.

With respect to **Tim Durasoff**, the uncontradicted record evidence established that Durasoff's employment with the Employer ended and that notwithstanding the Petitioner's assertions, he is currently not the subject of an unfair labor practice charge. Accordingly, I find that Durasoff is no longer employed by the Employer and thus ineligible to vote.

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

All full-time and regular part-time carpet and floor installers, mechanics, installation apprentices and helpers employed by the Employer at its West Berlin, New Jersey facility, excluding independent contractors, clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,³ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

**METROPOLITAN REGIONAL COUNCIL OF PHILADELPHIA
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LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the **full** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before April 5, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 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 by April 12, 1999.

³ 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.

Dated March 29, 1999

at Philadelphia, PA

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

177-2484-5000

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