

12/15/00

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

MARTIN MARIETTA MATERIALS, INC.

Employer

and

Case 9-RD-1958

JOHN BENTZ, AN INDIVIDUAL

Petitioner

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18C, AFL-CIO ^{1/}

Union

DECISION AND DIRECTION OF ELECTION

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

Pursuant to the provision 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, ^{2/} the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

^{1/} Although the Union stated on the record that its correct name was International Union of Operating Engineers, Local 18, 18A, 18B, 18C, 18RA, 18S, AFL-CIO, it conceded that the name listed on the petition, International Union of Operating Engineers, Local 18C, AFL-CIO, accurately identifies the Union. In addition, the record discloses that the certification and the applicable contracts with the Employer are in the name of International Union of Operating Engineers, Local 18C, AFL-CIO, herein called the Union.

^{2/} The Employer and the Union timely filed briefs which I have carefully considered in reaching my decision. Although given an opportunity to do so, the Petitioner elected not to file a brief.

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.

3. The labor organization involved claims to represent certain employees of the Employer.

4. The Petitioner, John Bentz, an individual, asserts that the Union, which is certified as the bargaining agent of certain employees of the Employer, who are currently covered under a contract between the Union and the Employer, is no longer the representative of such employees as defined in Section 9(a) of the Act.

5. The Employer, a corporation, is engaged in the manufacture of construction aggregates at its Applegrove, Ohio facility, where it employs approximately 16 employees in the unit found appropriate. On July 16, 1980, the Union was certified by the Board in the following unit:

All hourly-paid employees employed by the [Employer] at its Applegrove, Ohio facility, but excluding professional employees, guards and watchmen and all supervisors as defined in the Act.

Following the Union's certification, the Union and the Employer or its predecessor have entered into a series of collective-bargaining contracts covering the unit, the most recent of which is effective by its terms from February 1, 1998 until January 31, 2001.^{3/}

Bentz filed the instant petition on November 20, 2000 seeking an election among the employees in the unit to determine whether they desire to continue to be represented by the Union for the purposes of collective bargaining. All parties to this proceeding agree that the petition was timely filed. Moreover, the parties agree, and I find, that the unit described in the petition is the certified and contractual unit and is appropriate for a decertification election. However, the Union maintains that the Petitioner, John Bentz, is a statutory supervisor of the Employer and, therefore, the petition does not raise a valid question concerning representation and must be dismissed. On the other hand, the Employer and the Petitioner contend that Bentz is not a supervisor within the meaning of Section 2(11) of the Act but is merely a lead man who is properly included in the bargaining unit.

The Union is correct that the supervisory status of Bentz must be resolved in this proceeding. The Board has held that, "under the statute, a petition for decertification filed by a supervisor is invalid and must be dismissed." *Modern Hard Chrome Service Company*, 124 NLRB 1235, 1236 (1959) (cited by the Union in its brief). Thus, I must resolve Bentz' supervisory status in this proceeding. *Modern Hard Chrome Service Company*, supra. Accordingly, I have carefully reviewed the entire record as well as the arguments of the parties at the hearing and in the briefs of the Employer and the Union and for the following reasons find that Bentz is not a supervisor within the meaning of Section 2(11) of the Act.

^{3/} The Employer's predecessor employer at the time of the certification was Dravo Corporation. The Employer purchased the facility in 1995. The Employer continued to recognize the Union and is party to the current contract.

The Employer purchased the Applegrove, Ohio facility from Dravo Corporation in 1995. The Employer continued to operate the facility utilizing the same employees and apparently performing the same work. The Employer recognized the Union as the bargaining representative and, as previously noted, has entered into several contracts with the Union covering the bargaining unit, the most recent contract being effective from February 1, 1998 until January 31, 2001. The Employer's corporate offices over its West Virginia district, which includes the Applegrove, Ohio facility, are located at Mineral Wells, West Virginia. The Employer's vice-president and general manager of the West Virginia district, John Hayes, is located at Mineral Wells, West Virginia, as is the production manager for the West Virginia district, Roger Hite. Both Hayes and Hite have ultimate responsibility for the operation of the Applegrove, Ohio plant. However, Plant Manager Alfred Lyons is responsible for the day-to-day operations of the Applegrove, Ohio facility. Lyons is located at the Applegrove, Ohio plant but is directly responsible to Hite who is located in Mineral Wells, West Virginia.

The Employer's Applegrove, Ohio facility operates a single shift with most employees reporting to work at 6 a.m. The employees generally work a 12-hour shift Monday through Friday and some work an additional 8 hours on Saturday. In addition to Lyons and the 16 bargaining unit employees, the Employer employs an office manager/secretary who works at the Applegrove, Ohio facility. Moreover, the record discloses that from time to time the Employer employs a lab technician at its Applegrove, Ohio plant. It is not clear from the record whether that position is filled at the current time. Neither the office manager/secretary nor the lab technicians are included in the unit. The majority of the unit employees are classified as various types of operators, welders/mechanics or helpers. All unit employees are entitled to the same fringe benefits provided for in the applicable contract and earn between \$9.22 and \$11.17 per hour. The applicable contract provides for a lead man (leader) classification which Bentz currently fills. Bentz and his predecessor always have been in the bargaining unit and apparently on dues check off. Bentz was made lead man approximately 3 years ago when his predecessor, Danny Shain, bid into an operator position. Prior to becoming the lead man, Bentz was employed as a master mechanic and was being paid according to the contractual wage scale for that position. Bentz did not receive a wage increase upon becoming lead man and currently receives \$11.17 per hour which is the current contractual rate for the "leader" and master mechanic classifications. Although not entirely clear from the record, it appears that the lead man classification is a bid position. However, none of the employees sought this job when Bentz's predecessor bid into an operator position. The record discloses that Bentz agreed to accept the position upon being asked by the plant manager.

Bentz has a "foreman's license" but so do, at least, two other employees. Bentz obtained his "foreman's license" upon successfully passing a test administered by the Department of Mines and Reclamation. It appears from the record that this department requires that a licensed foreman be on the premises whenever the plant is in operation. Bentz reports to the plant approximately 15 minutes before the other employees to check the answering machine to see if any employee has telephoned to advise that he will not be at work that day. After checking the answering machine, Bentz generally goes to the "cloak room," which serves as a break area for the employees, to make coffee. If an employee has advised that he will not be at work, it appears that Bentz will inform Lyons, or in his absence, determine whether there needs to be any adjustments in the work assignments.

Contrary to the assertions by the Union in its brief, which are based on selected portions of the record, the record evidence as a whole discloses little, if any, discretion or independent judgment used by Bentz in making work assignments or directing the work of employees. The record discloses that Bentz may direct an employee to assist or fill in as needed, particularly when Lyons is not at the facility. For example, Bentz directed an employee to fill in for a fellow employee who was scheduled to attend the instant hearing. However, Lyons had instructed Bentz on who to assign to the position. It appears from the record that this is true with respect to most employees who Bentz requests to fill vacant positions. Bentz occasionally works overtime or asks other employees to work overtime if the need dictates and Lyons is not at the facility. However, the record discloses that employees generally work overtime only in their own job classifications and when necessary to perform a job that needs to be completed in a short period of time. Moreover, overtime must be offered in accordance with the applicable contract. Finally, if employees need to leave work during their shift and Lyons is not present, they will notify Bentz. Although Bentz may give his consent, the record discloses that if employees are sick or need to leave work for other reasons, they could do so regardless of whether Bentz gave permission.

Bentz is required to fill out an operational report. However, the report is separate from the one completed by Lyons and Bentz does not complete Lyons' report even if Lyons is not at the facility. Bentz also has keys to the facility and may work on Saturdays when other supervision is not present. During his normal work day, Bentz makes coffee, delivers mail and transports other employees to job assignments. Bentz is also capable of performing most, if not all, jobs at the facility and does so on a regular basis.

Bentz does not play any role in the hiring of employees. Although he may give an individual an employment application, Bentz does not interview job applicants or make any recommendations with respect to the hiring of employees. Indeed, Bentz objected to a job applicant giving him as a reference. Bentz does not have the authority to discharge or otherwise discipline employees and does not make any recommendations with respect to potential discipline that may be imposed on employees. Moreover, Bentz does not evaluate employees and his recommendations are not sought with respect to promotions. Bentz does not have the authority to grant wage increases or to adjust employee grievances. Although he occasionally purchases parts needed in the day-to-day operation of the Employer's facility, such purchases are of small cost items within limited parameters established by management.

Section 2(11) of the Act defines a supervisor as a person:

. . . having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. . . .

It is noted, however, that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors and not, “straw bosses, lead men, set up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). See also, *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281 (1974). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). See also, *NLRB v. Budd Manufacturing Company*, 169 F.2d 571 (6th Cir. 1948) (cited by the Union in its brief as 169 F.2d 57). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Feralloy West Corp. and Pong Steel America*, 277 NLRB 1083, 1084 (1985); *Advance Mining Group*, 260 NLRB 486, 507 (1982). Moreover, “[W]henver the 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.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Under Board law, it is also well established that the burden of proving that an individual is a supervisor rests on the party asserting supervisory status. *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491 (1993); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Although I am constrained to follow extant Board law,^{4/} I recognize that the Sixth Circuit, within whose jurisdiction the Employer’s facility is located, holds that where an individual’s supervisory status is in dispute the burden of proof rests with the party taking the position that the individual is not a supervisor. *Integrated Health Service v. NLRB*, 191 F.3d 703 (1999).

Having carefully reviewed the entire record, I am of the opinion, regardless of which party has the burden of proof, that Bentz is not a supervisor within the meaning of Section 2(11) of the Act. The Petitioner maintains that he is not a supervisor and the Employer joins in this position. Conversely, the Union has not presented sufficient evidence to rebut the position taken by the Employer and the Petitioner that Bentz is not a supervisor. Although the Union points to selected portions of the record in its brief which tends to show that Bentz has certain duties not possessed by other employees, the record evidence as a whole is not sufficient to support a finding that he is a supervisor.

The record discloses that Bentz may occasionally direct employees to perform certain jobs and obtain employees to fill in when other employees are absent. However, such responsibilities do not make Bentz a supervisor, particularly where, as here, the evidence shows that the assignments and direction of work by Bentz are routine and are generally carried out with the specific approval of Lyons. The Board has consistently found that these are the typical duties of a lead person and are not sufficient to confer supervisory status. *Consolidated Services*, 321 NLRB 845 (1996); *Azusa Ranch Market, Inc.*, 221 NLRB 811 (1996); *Mid-State Fruit, Inc.*, 186 NLRB 51 (1970). Likewise, the fact that employees may inform Bentz of intended absences or that they have to leave work are not sufficient to confer supervisory status. This is particularly true since the evidence indicates that Bentz could not deny an employee permission to leave and only reports absences. See, *House of Mosaics, Inc.*, 215 NLRB 704, 712 (1994), cited with

^{4/} See, *Lenz Company*, 153 NLRB 1399 (1965); *Sierra Development Corp. d/b/a Club Cal-Neva*, 231 NLRB 22 (1977).

approval by the Board in *Ideal Macaroni Company*, 301 NLRB 507, 511 (1991). Similarly, the Union's argument, in its brief, that the assignment of overtime by Bentz confers supervisory status is without merit. The record discloses that Bentz may occasionally work overtime himself or authorize other employees to work overtime in their specific classification to complete a necessary job assigned by management. To occasionally permit overtime, absent evidence of the use of any independent discretion, is not sufficient to establish that Bentz is a statutory supervisor, particularly where, as here, overtime assignments must be made in accordance with the applicable contract. *Ideal Macaroni Company*, 507 NLRB at 511; *Bellows Electric Supply of Northfield, Inc.*, 311 NLRB 878 (1993). Moreover, Bentz is not a supervisor merely because he and other employees may work on Saturdays without the presence of a statutory supervisor. There is no evidence of any specific or additional authority Bentz exercises on such occasions. See, *Bellows Electric Supply of Northfield, Inc.*, supra. Finally, Bentz' authority to make small purchases from suppliers approved, and within parameters established by the Employer and the fact he has keys to the facility do not make him a supervisor. See, *Landmark Corporation*, 307 NLRB 1059 (1992).

There is no record evidence that Bentz hires employees, recommends the hire of employees or plays any other role in the hiring process. Bentz cannot discharge or otherwise discipline employees and his recommendations are not sought with respect to disciplinary problems. Bentz does not evaluate employees, grant or recommend wage increases, or adjust employee grievances. Bentz is a "licensed foreman" but so are, at least, two other hourly employees. Under such circumstances, the holding of a license or title of foreman does not make Bentz a statutory supervisor. *Jordan Marsh Stores Corporation*, 317 NLRB 460 (1995); *Hexacomb Corporation*, 313 NLRB 93 (1994). Although not controlling of his supervisory status, as correctly argued by the Union at the hearing and in its brief, I note that Bentz has always been in the bargaining unit and his classification (leader) is covered by the applicable collective-bargaining contract.^{5/}

Based on the foregoing, the entire record and careful consideration of the arguments of the parties at the hearing and in the briefs of the Employer and the Union, I find that the lead person, John Bentz, is not a supervisor within the meaning of Section 2(11) of the Act. Thus, Bentz is an employee within the meaning of Section 2(3) of the Act who is properly included in the unit and eligible to vote in the election. Inasmuch as Bentz is a bargaining unit employee rather than a supervisor, he is qualified to file the subject petition which raises a valid question concerning representation. *Modern Hard Chrome Service Company*, supra. Accordingly, I shall direct an election among the employees in the following certified and contractual unit to determine whether they desire to continue to be represented for the purposes of collective bargaining by the Union:

^{5/} In *Manhattan News Company*, 121 NLRB 1287 (1958), cited by the Union in its brief, the Board found that a union member serving as a foreman was an agent of the employer in carrying out his unlawful hiring practices. Here, there is no evidence that Bentz hires employees or possesses any other supervisory indicia.

All hourly paid employees employed by the Employer at its Applegate, Ohio facility, but excluding professional employees, guards and watchmen and all 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, subject to the Board's Rules and Regulations. Section 103.20 of the Board's Rules and Regulations requires that the Employer shall post copies of the Board's official notice of election in conspicuous places at least 3 full working days prior to 12:01 a.m. on the day of the election. The term "working day" shall mean an entire 24-hour period, excluding Saturdays, Sundays and holidays. 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 **International Union of Operating Engineers, Local 18C, AFL-CIO.**

LIST OF ELIGIBLE VOTERS

In order to insure 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 using full names, not initials, 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); *North Macon Health Care Facility*, 315 NLRB No. 359 (1994). 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 subject to the Petitioner's submission of an adequate showing of interest. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **December 22, 2000**. 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, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **December 29, 2000**.

Dated at Cincinnati, Ohio this 15th day of December 2000.

/s/ Richard L. Ahearn

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