

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**VETERINARY RESEARCH LABORATORY LLC
d/b/a ANTECH DIAGNOSTICS**

Employer

and

DAVID GIFFELS, AN INDIVIDUAL

Case No. 29-RD-959

Petitioner

and

**LOCAL 813, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO**

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Noemi Wasserstrom, a Hearing Officer of the National Labor Relations Board, herein called 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 hereby are affirmed.
2. The parties stipulated that Veterinary Research Laboratory LLC d/b/a/ Antech Diagnostics, herein called the Employer, is a New York corporation, with its

principal office and place of business located at 10 Executive Boulevard, Farmingdale, New York, and that it provides diagnostic services for veterinary hospitals and doctors. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, provided services valued in excess of \$50,000 directly to entities located outside the State of New York.

Based on the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

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

4. The Union claims that the Petitioner, David Giffels, is a statutory supervisor within the meaning of Section 2(11) of the Act. The Employer and Petitioner take the position that Giffels is not a supervisor. It is well settled that under Section 9(c)(1)(A) of the Act, a decertification petition filed by a supervisor does not raise a question concerning representation and must be dismissed. *Custom Bronze and Aluminum Corp.*, 197 NLRB 397 (1972); *Modern Hard Chrome Service Company*, 124 NLRB 1235 (1959). However, for the reasons set forth below, I find that Giffels is not a 2(11) supervisor.

The burden of proving that an employee is a statutory supervisor is on the party alleging such status, and the burden is a heavy one in light of the exclusion of supervisors from the protection of the Act. *See Chicago Metallic*, 273 NLRB 1677, 1688, 1689 (1985); *see also Boston Medical Center Corporation*, 330 NLRB No. 30 at 83 (1999). Section 2(11) of the Act provides:

The term “supervisor” means any individual 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 to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The possession of any one of these indicia is sufficient to confer supervisory status, but only if the exercise thereof involves independent judgment. *See Chicago Metallic Corp.*, 273 NLRB at 1689 (1985); *see also Children’s Farm Home*, 324 NLRB 61, 65 (1997). An individual does not become a supervisor through the exercise of “some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner,” or through giving “some instructions or minor orders to other employees.” *Chicago Metallic*, 273 NLRB at 1689. Serving as a conduit for management’s instructions or for the assignment of predetermined tasks, without more, does not confer supervisory status. *See McCollough Environmental Services*, 306 NLRB 1565, 1566 (1992); *see also Quadrex Environmental Co.*, 308 NLRB 101 (1992). The Board will not find an employee to be a supervisor solely because s/he occasionally assigns work to other employees on an emergency basis, even if the assignment is made without consulting with upper management. *See Quadrex*, 308 NLRB at 101 (emergency assignment of overtime). An employee who inspects the work of others and either reports on improper work performance, or orders employees with performance problems to leave a work-site, is not a supervisor unless s/he has the authority to effectuate ultimate personnel decisions. *See Somerset Welding and Steel*, 291 NLRB 913, 914 (1988); *see also Quadrex*, 308 NLRB at 101.

The Board has held that the performance of dispatching duties in conformity with an employer’s instructions, practice, and set pattern, within parameters set by the

employer, does “not require a sufficient exercise of independent judgment to satisfy” the statutory definition of a supervisor. *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *see also B.P. Oil, Inc.*, 256 NLRB 1107 (1981). A dispatcher lacks statutory supervisory discretion if his “direction of ...drivers consist[s] of nothing more than relaying information from the customers to the drivers,” in accordance with such set factors as the proximity of a driver to a customer, the size of the driver’s truck, and prearranged route assignments. *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075-76 (1985). Even if a dispatcher occasionally deviates from his employer’s standard operating procedure in filling vacant slots, his direction of employees may still be found to be merely routine or ministerial if he relies on such non-discretionary factors as whether a driver’s workload is light, whether he knows the route, and whether he is driving the right type of truck. *Bay Area*, 275 NLRB at 1075. Evidence that a dispatcher’s “meager duties” include making up drivers’ schedules, giving them the schedules, posting the schedules, and granting time off, has also been found to be insufficient to establish that such an employee is a statutory supervisor. *National Livery Service*, 281 NLRB 698, 702(1986). The “essential simplicity” and lack of discretion involved in a dispatcher’s responsibilities may be “most strongly indicated by the fact that [unit employees with] no training as dispatchers filled in for them...during their lunchbreaks, and...when the dispatcher on duty became ill.” *Spector Freight System, Inc.*, 216 NLRB 551, 552 (1975).

In the instant case, there is little or no evidence that the Petitioner is a statutory supervisor. The Union called as its witness on the supervisory issue the Petitioner himself, David Giffels. The Employer’s witness was Michael Napolitano, the

Employer's Regional Vice President for the Eastern Region and General Manager for the Farmingdale facility.

Giffels testified that he has been working for the Employer for three years, as a dispatcher. He reports to Jack Buckley, the manager of the Traffic Department, who supervises both the drivers and the dispatchers. Most of the time, Giffels can be found in the Employer's Farmingdale dispatch office, which he shares with Buckley and the two other dispatchers. When Buckley is out of the office, Jeff Rubinstein, the most senior dispatcher, is left in charge. The record reflects that Giffels's job duties include answering telephone calls from the Employer's clients and dispatching calls to drivers. For slightly over eight hours per month, Giffels fills in as a driver. In addition, Giffels carries mail to the executive offices and processes "paperwork" such as supply requisition slips. He then brings these slips to the warehouse himself. Each Tuesday, when Giffels takes his day off, a driver names Jose Talanzano substitutes for him. There is no evidence that Talanzano has been trained to be a dispatcher. Further, Giffels receives the same benefits as the drivers, and a comparable hourly wage rate.

Giffels indicated that if a driver were to ask him for permission to leave early or come in late, he would immediately convey the request to Buckley. No driver has ever asked him for a day off. When drivers call in sick, he passes the telephone to either Buckley or Rubinstein. On the two occasions when Giffels had to handle such a telephone call by himself, he first contacted Buckley, who told him which drivers knew the absent employee's route, and then he telephoned these potential substitute drivers to fill the vacant slot.

There is no evidence that Giffels exercises supervisory discretion in either dispatching calls to drivers, or contacting substitute drivers. Moreover, the uncontroverted evidence establishes that Giffels has never hired, discharged, or disciplined employees, nor has he ever been told he has the authority to do so. Giffels conceded that when “somebody is screwing up,” he is required to report it to Buckley. However, Buckley has never asked Giffels’ advice about what (if any) kind of punishment should be meted out, and Giffels has never recommended disciplinary action. As noted above, Talanzano, a driver, regularly substitutes for Giffels but has never been afforded any training to perform dispatching duties. This further indicates the “essential simplicity” of Giffels’ position, and his lack of supervisory authority. *Spector Freight System*, 216 NLRB at 552.

Accordingly, as the record reveals that Giffels neither possesses nor exercises any of the enumerated indicia of supervisory authority, I find that he is not a statutory supervisor within the meaning of Section 2(11) of the Act.¹

In view of the foregoing, I find that as a non-supervisory employee Giffels was entitled to file the instant petition. Accordingly, the petition raises a question affecting

¹ The cases cited by the Intervenor in support of its contention that Giffels is a statutory supervisor are factually inapposite and, therefore, do not warrant such a finding. For example, in *New Britain Transportation Co.*, 330 NLRB 57 (1999), a case cited by the Intervenor as being dispositive of this issue, the petitioner there sought a unit limited to a single facility. The employer argued that the only appropriate unit must include two additional facilities located six and twelve miles away, respectively. In adopting the regional director’s conclusion that the appropriateness of a single location presumption had not been rebutted, the Board noted that facility managers and dispatchers at each location played an important role in performing labor relations functions. In this regard, the Board relied on the **undisputed** evidence that dispatchers determine the need for and make decisions regarding employee schedules and assignments, including making temporary transfers. Further, they handle problems encountered by drivers during their routes and approve time off, short term vacations, and sick leave. They also address minor disciplinary problems and are responsible for carrying out the employer’s decisions involving formal discipline. Finally, prior to the commencement of a new school year, dispatchers are responsible for contacting employees who work at their facilities and arrange for their return to work. It is clear from the record here, that Giffels does not possess or exercise the authority and responsibilities attributed to dispatchers in *New Britain*. I further note that the Board did not conclude in that decision that those dispatchers were or were

commerce 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 parties stipulated that the following unit is appropriate for the purposes of collective bargaining:

All full-time and regular part-time drivers, warehousemen and cleaning employees, employed by the Employer at its 10 Executive Boulevard, Farmingdale, New York, location, excluding office clerical employees, guards and supervisors as defined in the Act.²

In addition, the parties stipulated that dispatcher Jeff Rubinstein is a supervisor within the meaning of Section 2(11) of the Act. Therefore, he shall be excluded from the unit on that ground. The Union also took the position that the Petitioner, David Giffels, should be found ineligible to vote in any decertification election, because dispatchers are not included in the unit description. The Employer argued that Giffels is a member of the bargaining unit, because the Union did not challenge his ballot in the representation election. However, the past failure to challenge a ballot does not bind the Union, the Employer, or the Board to a determination that the voter is, or was, a unit member. Giffels testified that he spends nearly all his time in the dispatch office, not on the road. His driving responsibilities require slightly over eight hours of driving per month. Based on the insignificant percentage of his time which is devoted to driving, I am unable to conclude that Giffels is a full-time or regular part-time driver, or that he is a dual-function employee. *Martin Enterprises, Inc.*, 325 NLRB 714, 715 (1998). Since Giffels is neither

not supervisors within the meaning of Section 2(11) of the Act. In light thereof, the Intervenor's reliance on this case appears unwarranted.

²The petitioned-for unit, which was stipulated to by all parties to this proceeding, is the same bargaining unit that the Union was certified to represent on May 26, 2000, in Case No. 29-RC-9439. Therefore, the stipulated unit meets the well-settled requirement that the bargaining unit in which a decertification election is conducted must be coextensive with the recognized or certified unit. *Arrow Uniform Rental*, 300 NLRB 246, 247 (1990); *Mo's West*, 283 NLRB 130 (1987).

a driver, a warehouseman, nor a cleaning employee, he, as all other dispatchers, shall be excluded from the bargaining unit.

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. Eligible to vote are employees 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 that 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 who are employed in the unit may vote if they appear in person or 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 to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 813, International Brotherhood of Teamsters, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon*

Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) 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 No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before July 3, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

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 July 10, 2001.

Dated at Brooklyn, New York, June 26, 2001.

/s/ Alvin Blyer

Alvin P. Blyer

Regional Director, Region 29

National Labor Relations Board

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