

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

ACUITY SPECIALTY PRODUCTS GROUP, INC.,
ENFORCER PRODUCTS DIVISION¹

Employer

and

Cases 10-RC-15318
10-RC-15319

TEAMSTERS LOCAL 728, AFFILIATED WITH
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO²

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTIONS³

Acuity Specialty Products Group Inc., Enforcer Products Division, is a chemical manufacturing concern that produces consumer products, including lawn and garden pesticides and drain care products at its Emerson, Georgia facility. The Petitioner, Teamsters Local 728, filed two petitions with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to represent two separate units at the Employer's manufacturing facility. In case 10-RC-15118, the Petitioner seeks to represent "all full-time and regular part-time maintenance employees employed by the

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ By Order dated September 20, 2002, cases 10-RC-15398 and 10-RC-15319 were consolidated for purposes of hearing, decision, and review.

Employer at its Emerson, Georgia facility, excluding all other employees, including production employees, shipping and receiving employees, quality control employees, forklift drivers, temporary, salaried and professional employees, dispatchers, guards and supervisors as defined in the Act. The maintenance unit sought by the Petitioner is comprised of eight employees.

In case 10-RC-15819, the Petitioner seeks to represent “all full-time and regular part-time quality control technicians employed at the Employer’s Emerson, Georgia facility, but excluding all production and maintenance employees, temporary employees, salaried employees, professional employees, dispatchers, guards, and supervisors as defined in the Act. There are six quality control employees in the unit sought by the Petitioner. A hearing officer of the Board held a hearing and the Employer filed a brief with me.

As evidenced at the hearing and in the brief, the issues presented in each petition are as follows: (1) in 10-RC-15318, whether certain maintenance employees are supervisors within the meaning of Section 2(11) of the Act, and (2) in 10-RC-15319, whether all of the quality control employees are managers or supervisors within the meaning of Section 2(11) of the Act. Specifically, the Employer argues that four of the eight mechanics sought by the Petitioner in case 10-RC-15318 are Section 2(11) supervisors. In case 10-RC-15319, the Employer contends that the quality control unit is inappropriate because it is comprised of supervisory employees as defined in Section 2(11) of the Act or managerial employees as defined in applicable case law.

I have concluded the Employer’s arguments are without merit. Accordingly, I have directed elections in the petitioned-for units that consist of approximately eight

employees in the maintenance unit and six employees in the quality control unit. My findings and discussion of the supervisory/managerial issue in each unit is discussed below.

I. 10-RC-15318 – THE MAINTENANCE UNIT

Kim Sherman is the Employer's Maintenance Manager and the direct supervisor of all eight maintenance employees including the following four maintenance mechanics whose status and voter eligibility are at issue herein: senior mechanic Charles Shaw, mechanic Russ Castle, senior mechanic Stanley Carroll and mechanic Bobby Matthews. Sherman, who has been in his position for only two months, has a master's degree in machine building technology. Sherman was hired to evaluate the maintenance operation and to upgrade the Employer's machinery to the "next level of automation". All maintenance employees are hourly paid, punch the same time clock as all other hourly employees and enjoy the same benefits as all other hourly employees. Only Sherman has the authority to excuse the absences of the maintenance employees.

The only record evidence touching upon any purported Section 2(11) indicia of supervisory status was the testimony of Human Resource Manager Lamb that she would "take seriously" the recommendation of senior maintenance mechanics Carroll and Mathews regarding discipline. However, Lamb qualified her testimony by stating that her opinion was based only upon the personal credibility Carroll and Mathews had with her. There is no evidence that Carroll or Mathews or any other maintenance employee had made any recommendations on employee discipline. While the maintenance employees immediate supervisor, Kim Sherman, stated that he valued the opinion of the

four senior mechanics, trusted their judgment and would “take seriously” their recommendations, he emphasized that he was charged with making his own decisions. Indeed, when questioned as to whether he would trust senior mechanic Stanley Carroll’s recommendation on a work assignment, Sherman testified the he would advise Carroll that his opinion was valuable but that he, Sherman, would make his own decisions. Sherman added that he would only allow Carroll to exercise any judgment or discretion only after Carroll consulted with Sherman. To paraphrase Sherman’s testimony, the experienced, senior mechanics’ advice would be considered, but Sherman, after careful investigation, would exercise his own judgment and discretion in any personnel matter. There was no probative record evidence as to what specific recommendations on personnel Shaw, Castle, Carroll or Matthews would ever make or in what context. Sherman is present for both shifts of maintenance work except for a six hour period when only two maintenance mechanics, Jesus Rios and Mike Dawkins, are on duty. Their voter eligibility is not in dispute.

The Applicable Standard-Supervisory Status:⁴

Section 2(11) of the Act defines the term supervisor as “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.” In effect, as held by the Supreme Court, the Act establishes a three-part test for determining supervisory status:

Employees are statutory supervisors if (1) they hold the authority

⁴ This legal analysis applies to the disposition of both Case 10-RC-15318 and Case 10-RC-15319.

to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.”

NLRB v. Kentucky River Community Care, Inc., 121 S. Ct. 1861, 1867 (2001) (quoting NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994).

The burden of proving supervisory status lies with the party asserting that such status exists. Kentucky River Community Care, Inc., *supra*; Michigan Masonic Home, 332 NLRB No. 150, slip. op. at 1 (2000).

The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, *supra*, slip op. at 1. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status even if this authority has not yet been exercised. See, e.g., Pepsi-Cola Co., 327 NLRB 1062, 1063 (1999); Fred Meyer Alaska, 334 NLRB No. 34, slip op. at 4 fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority indeed exists. See Michigan Masonic Home, *supra*, slip op. at 3; Chevron U.S.A., 308 NLRB 59, 61 (1992). Likewise, independent investigation by higher supervision belies the existence of real

supervisory authority. Brown & Root, Inc., 314 NLRB 19 (1994); Ball Plastics Division, 228 NLRB 633, 634 (1977).

Secondary indicia such as supervisory ratio, method of pay calculation, and pay differential alone are insufficient to establish supervisory status. North Jersey Newspapers Co., 322 NLRB 394 (1996); Billows Electric Supply of Northfield, Inc., 311 NLRB 878 (1993); McClatchy Newspapers, Inc., 307 NLRB 773 (1992).

Applying the foregoing rationale to the maintenance mechanics, there is insufficient evidence that they possess any of the indicia of Section 2(11) of the Act, or can effectively recommend such actions. Accordingly, the record in this case does not support a finding that the four individuals at issue are supervisors within the meaning of Section 2(11) of the Act. I find that the Employer, as the party asserting supervisory status, has not met its burden in proving that the maintenance mechanics in question have the authority to carry out any of the functions set forth in Section 2(11) of the Act, or to effectively recommend such functions and utilize independent judgment in the execution of such functions. It is clear from the testimony of Maintenance Supervisor Kim Sherman that the exercise of any independent judgment and authority as regards personnel matters and direction of work among the maintenance mechanics lies solely with him. Therefore, I find that Charles Shaw, Russ Castle, Stanley Carroll and Bobby Mathews are not statutory supervisors but rather are employees eligible for union representation.

II. 10-RC-15319 – THE QUALITY CONTROL UNIT

Edward Pienta⁵, quality control manager, directly supervises the quality control technicians at issue in case 10-RC-15319: Pamela Grimes, Lucas Bordenalli,

⁵ The parties are in apparent agreement that Pienta is a supervisor within the meaning of Section 2(11) of the Act, and based upon the record, I so find.

Nicole Hightower, Maria Rios, Kirk Callahan and Blanco Merlo. The quality control technicians are responsible for ensuring that the Employer's operation and products meet certain guidelines, in order to insure that a uniform product is shipped to retailers. When a product does not meet specifications, a product overflows from a container or product seals or labels are defective, the quality control technician can request that the production line be shut down. If the production line is shut down, it is the production supervisor, not the quality control technicians, who reassign or direct employees to other work or send them home. The quality control technicians are hourly paid, punch a time clock and have the same holiday and vacation benefits as do non-supervisory employees. There are no special educational requirement for quality control technicians.

The Employer contends that the quality control technicians are supervisors because each has the authority to responsibly assign work, to direct the work of other employees at the facility, or effectively recommend discipline. In the alternative, the Employer argues that the quality control technicians exercise managerial control by virtue of their authority to stop production at the facility should a quality control issue arise. I will discuss first the Employer's contention that these employees are supervisors, and then turn to the Employer's contention that the quality control technicians are managerial employees.

Supervisory Status:

Consistent with my findings in the maintenance unit, and the legal analysis set both, supra, I find that the quality control technicians do not possess any of the Section 2(11) indicia of supervisory authority, nor do they possess or exercise the authority to effectively recommend such actions.

Assignment of work, as contemplated in the Act, is more than just creating work, or making more work necessary. Assignment of work also involves more than stopping a production line when non-conforming items are identified or quality control issues arise. The Employer's quality control technicians appear to make routine judgments, dictated by extant guidelines or well know quality control criteria as to whether or not a product or its packaging conforms to standards. In Chevron Shipping Co., 320 NLRB 717, 729 (1996) the Board found that if an employer constrains the degree of judgment by, for example, detailed orders or regulations, the individual does not rise to the level of a statutory supervisor. Therefore, I conclude, that the quality control technicians do not assign work or responsibly direct the work of others using independent judgment.

While, Director of Quality Control Kathy Gallant testified she “would take seriously”, the recommendation of a quality control technician regarding discipline, there was no evidence that any such recommendations were ever made nor does the record provide any context upon which to assess the effectiveness of such hypothetical recommendations once made.

Again, I find that the Employer, as the party asserting supervisory status, has not met its burden in proving that these employees have the authority to carry out any of the functions set forth in Section 2(11) of the Act, or to effectively recommend such functions and utilize independent judgment in the execution of such functions. Therefore, I find that Pamela Grimes, Lucas Bordenalli, Nicole Hightower, Maria Rios,

Kirk Callahan and Blanco Merlo are not statutory supervisors but rather are employees appropriately included within a bargaining unit⁶.

Managerial Status:

A. The Applicable Standard:

Managerial employees “formulate and effectuate management policies by expressing and making operative the decision of their employer and who have discretion in the performance of their jobs independent of their employer’s established policies.” S.S. Joachin and Anne Residence, 314 NLRB 1191, 1194 fn.6 (1994). They hold executive positions and have authority to formulate, determine or effectuate policies with respect to employee relations matters. North Arkansas Electric Cooperative, 185 NLRB 550 (1970).

In asserting that the quality control technicians are managerial employees, the Employer relies primarily upon the technicians’ role in enforcing the Employers’ policies and their ability to stop production should quality standards not be met.

B). Formulation of Policy

The record is clear that quality control technicians do not participate in the formulation of personnel policies, nor do they enforce or administer personnel functions. They are responsible for ensuring that the products conform to all applicable formulas and specifications. There is no evidence that they have participated in the formulation of

⁶ There was evidence, that at some unidentified point in time, Pam Grimes “supervised” employees at the warehouse. However, the record is clear that she no longer has any supervisory responsibilities either at the warehouse or the Emerson, Georgia facility.

any product guidelines or product specifications or that they are free to deviate from them. I conclude that the quality control technicians merely follow established policies and ensure that others follow those policies as well. Accordingly, they have not been shown to have discretion independent of these policies so as to imbue them with management status. See Case Corp., 304 NLRB 939 (1991) (Engineers not managerial employees where they have no discretion to deviate from employer's policies); Bil-Mar Foods, 286 NLRB 786, 792 (1987) (Quality control employees not managerial employees where no evidence that they participate in the formulation or implementation of company policy; QC employees are guided by strict company standards, which they follow).

Conclusion

The Employer has not shown that the quality control employees meet the criteria for managerial employees status. See Alco-Gravure, Inc., *supra*. Therefore, I find the six disputed technicians are not managers but are statutory employees.

II. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

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 in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer employed at the Employer's facility located at Emerson, Georgia.

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 following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

10-RC-15318

All full-time and regular part-time maintenance employees employed at the Employer's Emerson, Georgia facility, excluding all other employees, including production employees, shipping and receiving employees, quality control employees, forklift drivers, temporary, salaried and professional employees, dispatchers guards and supervisors as defined by the Act.

10-RC-15319

All full-time and regular part-time quality control technicians employed by the Employer at its Emerson, Georgia facility, but excluding all production and maintenance employees, temporary employees, salaried employees, professional employees, dispatchers, guards, and supervisors as defined in the Act.

III. DIRECTION OF ELECTIONS

The National Labor Relations Board will conduct secret ballot elections among the employees in the units found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local 728. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the elections are those in the units who are employed during the payroll period ending immediately before 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 began less than 12 months before the election date and who retained their status as such during the eligibility period and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began; and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voter

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 seven (7) days of the date of this Decision, the Employer must submit to the Regional Office election eligibility lists, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). These lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). Upon receipt of the lists, I will make them available to all parties to the elections.

To be timely filed, the lists must be received in the Regional Office, Suite 1000, Harris Tower, 233 Peachtree Street, N.E., Atlanta, Georgia 30303, on or before **October 11, 2002**. No extension of time to file these lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. These lists may be submitted by facsimile transmission at (404) 331-2858. Since the lists will be made available to all parties to the election, please furnish a total of **two** copies, of each, unless the lists are submitted by facsimile in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to

the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non posting of the election notice.

IV. 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, NW, Washington, DC 20570-0001. This request

must be received by the Board in Washington by 5:00 P.M., (EST) on **October 18, 2002**.

The request may **not** be filed by facsimile.

Dated at Atlanta, Georgia, on this 4th day of October 2002.



/s/ Kenneth D. Meadows

Kenneth D. Meadows, Acting Regional Director
National Labor Relations Board
Harris Tower – Suite 1000
233 Peachtree St., N.E.
Atlanta, Georgia 30303-1531

177-8520-0100
177-8550-2000