

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

**FIVE STAR PARKING**

Employer

and

**CASE 22-RC-12290**

**UNITED SERVICE WORKERS, TCU,  
LOCAL 1212, AFL-CIO<sup>1</sup>**

Petitioner

**DECISION AND DIRECTION OF ELECTION**

**1. Introduction**

The Petitioner filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act, amended at the hearing, seeking to represent Supervisors-in-Charge and Supervisors employed by the Employer at its parking facilities located at Newark Liberty International Airport in Newark, New Jersey. The Employer argues that the petitioned-for unit is inappropriate because the employees employed in these classifications are supervisors within the meaning of Section 2(11) of the Act. Based on the following facts and analysis, I find that Supervisors-in-Charge, but not Supervisors, are statutory supervisors and order an

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<sup>1</sup> The name of the Petitioner appears as amended at the hearing.

election as set forth below.

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,<sup>2</sup> the undersigned finds:

1. A hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board. 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.<sup>3</sup>
3. The labor organization involved claims to represent certain employees of the Employer.<sup>4</sup>
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 a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

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<sup>2</sup> Briefs filed by the parties have been fully considered.

<sup>3</sup> The Employer operates parking facilities throughout the United States including its operation at Newark Liberty International Airport in Newark, New Jersey, the only location involved herein.

<sup>4</sup> The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**All full-time and regular part-time Supervisors excluding all office clerical employees, cashiers, lot checkers, parking or traffic attendants, valet attendants, managers, Supervisors-in-Charge, guards and all other supervisors as defined by the Act, and all other employees.**

## **2. Facts**

The Employer operates parking facilities consisting of five garages and/or lots at Newark Liberty International Airport. The Port Authority of New York and New Jersey owns the parking facilities. The Employer took over operations at the facilities on or about July 31, 2002.

The Employer employs approximately 350 employees at Newark Liberty Airport, including a General Manager, an Operations Manager, a Customer Services Manager, a Human Resources Manager, Assistant Operations Managers, Supervisors-in-Charge, Supervisors, Cashiers, Lot Checkers, Parking or Traffic Attendants and Valet Attendants. The parties stipulated that the Operations Managers and Assistant Operations Managers, who are directly above the Supervisors-in-Charge and Supervisors in the Employer's hierarchy, are statutory supervisors. The Employer employs approximately 12 Supervisors-in-Charge and 60 Supervisors.

A labor organization other than the petitioning Union represents the Cashiers, Lot Checkers, Parking or Traffic Attendants and Valet Attendants, herein called represented employees. Lot Checkers take inventories of vehicles parked in the lots. Parking or Traffic Attendants direct traffic in the lots. Valet Attendants park vehicles.

During the work day, Supervisors-in-Charge and Supervisors spend some of their time in offices; the remainder is spent in the lots. They do not do the same work as the represented employees.

When Supervisors-in-Charge work in the office, they process paperwork. In the field, Supervisors-in-Charge inspect lots to see the extent to which the lots are full, traffic is moving and employees are in uniform. In the field, both Supervisors-in-Charge and Supervisors ensure that lots operate without incident, collect money from cashiers, replace tickets in ticket issuing machines and transport employees who relieve other employees for their lunch breaks. Both Supervisors-in-Charge and Supervisors also assist customers by, for example, helping them locate lost cars or assisting in jump-starting stalled cars.

Supervisors-in-Charge, Supervisors and represented employees work around the clock. Operations Managers do not work the night shift; Assistant Operations Managers work only during the morning and second shifts. From 10 PM until 6 AM, Supervisors in-Charge are the highest-ranking employees on duty.

### **3. Analysis**

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 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.

It is well established that an individual need possess only one of the enumerated indicia of authority in order to be encompassed by the definition, as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment. *Pratt Towers Inc.*, 338 NLRB No. 8 (2002). The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of

others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. *Somerset Welding & Steel*, 291 NLRB 913 (1988).

The Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Designation of an individual by title as a supervisor in a job description or other documents is insufficient to confer supervisory status. *Western Union Telegraph Company*, 242 NLRB 825, 826 (1979). The question is whether there is evidence that the individual actually possesses any of the powers enumerated in Section 2(11). *Western Union Telegraph Co.*, above at 826; *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court agreed with the Board that the burden of proving supervisory status rests on the party asserting that status. Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Sears Roebuck & Co.*, 304 NLRB 193 (1991). Whenever 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 not on the basis of those indicia. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989).

There is no contention that Supervisors-in-Charge or Supervisors hire, recall, promote or reward employees. The Employer contends that Supervisors-in-Charge and Supervisors have authority to terminate, discipline, assign and transfer employees and adjust their grievances. The Employer further contends that Supervisors possess the authority to lay off employees.

**a. Authority to Terminate**

The Employer's Regional Director, who is responsible for the Employer's operations in New York and New Jersey, testified that Supervisors-in-Charge and Supervisors have the authority to terminate employees who have committed serious misconduct, such as stealing, drinking on the job or fist fighting. However, there was no evidence of the exercise of such authority by the disputed employees. Additionally, the Employer's General Manager testified that no Supervisor-in-Charge or Supervisor has been told that they may terminate employees. Under these circumstances, I conclude that the Employer has failed to meet its burden of proof that Supervisors-in-Charge and Supervisors have the authority to terminate employees.

**b. Authority to Discipline**

A Supervisor-in-Charge testified at the hearing that she has the authority to discipline employees. She recounted suspending a Supervisor for failing to complete paperwork that the Supervisor was required to complete when a vehicle was stolen from one of the Employer's lots. This Supervisor-in-Charge further testified that she

independently determined the length of the employee's suspension. Although the specific evidence as to the exercise of authority to discipline consisted of no more than this incident, given the fact that the Employer has operated these facilities only since July 31, 2002, I conclude that the record supports the conclusion that Supervisors-in-Charge have supervisory authority in this regard.

However, the evidence as to the authority of Supervisors to discipline employees, as opposed to Supervisors-in-Charge, is insufficient to establish their supervisory authority on this basis. The Employer's General Manager conceded that he could not specify the role played by Supervisors in a disciplinary decision. A Supervisor who testified at the hearing stated that he can report misconduct to a superior but does not determine whether discipline is warranted. The Supervisor-in-Charge testified that Supervisors do not recommend discipline. In the absence of specific evidence of the exercise of disciplinary authority, I find that there is insufficient evidence to find that Supervisors possess such authority.

**c. Authority to Assign or Transfer**

In support of its contention that Supervisors-in-Charge and Supervisors can assign or transfer work, the Employer asserts that they assign employees to different lots, locations, posts and classifications. A Supervisor testified that he can make routine assignments such as moving cashiers between exit lanes. He also testified that Supervisors-in-Charge assign Supervisors to different lots by rotation. The Employer asserts that the disputed employees reassign represented employees to fill in to cover for absent workers or in the event of an emergency. A Supervisor contradicted this testimony, testifying that Supervisors-in-Charge, not Supervisors, reassign employees

to different locations. Both a Supervisor and a Supervisor-in-Charge testified that Supervisors-in-Charge, not Supervisors, assign overtime. The Supervisor-in-Charge further testified that overtime hours are usually worked by volunteers.

Proof of independent judgment in the assignment or direction of employees entails the submission of concrete evidence showing how such decisions are made. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000); *Crittenton Hospital*, 328 NLRB 879 (1991), *Quadrex Environmental Co.*, above; *Sears Roebuck & Co.*, above. The assignment of tasks in accordance with an Employer's set practice, pattern, parameters or protocol does not require the exercise of independent judgment to satisfy the statutory definition. *Kentucky River*, 532 U.S. at 713-14; *Chevron Shipping Co.*, 317 NLRB at 381; *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985).

The case chiefly relied upon by the Employer, *Superior Bakery, Inc. v. NLRB*, 893 F.2d 493, 496 (2d Cir. 1993), is distinguishable because in that case a supervisor used independent judgment to select employees necessary to complete certain tasks. Similarly, in *N.L.R.B. v. Prime Energy Ltd.*, 224 F.3d 206, 211 (3<sup>rd</sup> Cir. 2000), also cited by the Employer, there was evidence that the supervisor “weighed the relative urgency of immediate and unforeseen problems and directed Plant Operators to undertake necessary tasks.”

Here, by contrast, there was no evidence that Supervisors-in-Charge or Supervisors assign or transfer employees using independent judgment, other than in a routine manner.

**d. Authority to Adjust Grievances**

The Employer's evidence as to this alleged authority consisted of the General Manager's testimony regarding the hypothetical ability of Supervisors-in-Charge or Supervisors to change a schedule to accommodate an employee. There was no evidence offered of the actual exercise of such authority using independent judgment. Accordingly, I cannot conclude that the disputed employees adjust grievances.

**e. Authority to Lay Off**

The General's Manager testified that the Supervisors-in-Charge or Supervisors send employees home if there is "more than enough staff." Based on this evidence, the Employer contends that they have authority to lay off employees. However, this testimony is insufficient to conclude, without more specificity from the witness, that Supervisors-in-Charge and Supervisors lay off employees using their own independent judgment.

**f. Secondary Indicia**

It is undisputed that Supervisors-in-Charge and Supervisors are paid higher compensation than and wear different uniforms from represented employees. However, unless employees also exhibit primary indicia of supervisory authority, secondary indicia such as these are not determinative. *Central Plumbing Specialties*, 337 NLRB No. 153 (2002).

**4. Conclusions**

Because of the authority of Supervisors-in-Charge to discipline employees, as well as their higher compensation and the facts that they wear different uniforms from

represented employees and are the highest ranking employees on duty from 10 PM to 6 AM, I conclude that they are statutory supervisors.

As to Supervisors, I find that the Employer has not met its burden of proof in adducing evidence that they are statutory supervisors. Insufficient evidence was presented that they have the requisite authority to use independent judgment to terminate, discipline, lay off, assign or discipline employees or to determine employees' grievances. Although the Employer also relies upon the fact that Supervisors are paid higher compensation than and wear different uniforms from represented employees, Supervisors exhibit no primary indicia of supervisory authority. Accordingly, such secondary indicia cannot support a determination of supervisory status. *Id.*

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were 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. Employees engaged in an economic strike, who have retained their status as strikers and have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well

as their replacements, are eligible to vote. 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. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **UNITED SERVICE WORKERS, TCU, LOCAL 1212, AFL-CIO.**

#### **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 in 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, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above 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 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **December 23, 2002.** 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 Acting Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **December 30, 2002.**

Signed at Newark, New Jersey this 16<sup>th</sup> day of December 2002.

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