

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5

In the Matter of

KERNEY SERVICE GROUP, INC.

Employer

and

Case 5-RC-15377

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,  
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND  
HELPERS, 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, 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 provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record, the Regional Director 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
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(5) and 2(7) of the Act.

5. Kerney Service Group, Inc. (the Employer), a New Jersey corporation with an office and place of business in Norfolk, Virginia is engaged in the business of repairing ships, ship equipment and industrial equipment for commercial and U.S. government customers. During the past 12 months, a representative period, the Employer has provided services valued in excess of \$50,000 in states other than the Commonwealth of Virginia. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act.

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (the Petitioner) filed a petition seeking to represent a unit of all full-time and regular part-time production and maintenance employees, employed by the Employer at its Norfolk, Virginia facility, but excluding all office clericals, guards, professional employees and supervisors as defined in the Act. The parties stipulated that the petitioned-for unit is appropriate. There is no history of collective bargaining between the parties for these employees.

The parties stipulated that Bennie Cerka, David Wilkinson, Harold Gibbs, John Warren, Martin Boylston, Tom Sullivan and Ralph Arnold exercise all or some of the following indicia of supervisory status: effectively recommend discipline, grant time off, hire, fire, transfer, suspend, lay off, recall, promote, assign work, reward or discipline employees or responsibly direct them or effectively recommend such actions. The parties stipulated, and I find that Bennie Cerka, David Wilkinson, Harold Gibbs, John Warren, Martin Boylston, Tom Sullivan and Ralph Arnold are supervisors as defined by Section 2(11) of the Act and are excluded from the petitioned-for unit.

The Employer presented as its witness David Wilkinson, production manager for the Employer. The Union presented as its witnesses Daniel Wendell, a machinist for the Employer who is currently laid off, Harold Schupska, a former boilermaker for the Employer, and Billy Butler, a former estimator for the Employer.

## **ISSUES**

Whether the following individuals are supervisors within the meaning of the Act: (1) James Sawyer; (2) Dan Berry; and (3) Dave Brinkman. Whether Dave Brinkman should be excluded from the unit as a quality assurance employee.

## **POSITIONS OF THE PARTIES**

The Petitioner contends that James Sawyer, Dan Berry, and Dave Brinkman are not supervisors within the meaning of Section 2(11) of the Act and should be included in the petitioned-for unit. The Employer believes that these three individuals are statutory supervisors and should not be included in the petitioned-for unit. The Employer further contends that David Brinkman should not be included in the unit because he is a Quality Assurance employee with a community of interest separate from that of the petitioned-for employees.

For the reasons set forth below, I find that James Sawyer, Dan Berry and Dave Brinkman are not supervisors within the meaning of the Act. As to the contention that Dave Brinkman should be excluded from the unit because he is a quality assurance employee, I find that Brinkman shares a sufficient community of interest with the petitioned-for employees to be included in the unit.

## THE EMPLOYER'S OPERATION

The Employer repairs ships for the U.S. government and commercial customers at its Norfolk, Virginia facility where it employs 20-30 employees during full operation. The Employer also has a repair facility and corporate office in Linden, New Jersey. The Employer is currently not at full operation as its business is dependent on successful bids for ship repair contracts and, according to the Employer, the volume of bid requests has decreased dramatically since September 11, 2001. As a result, in the last two months the Employer has laid off all but 5 of its employees at the Norfolk facility. All of the laid off employees' names have remained on the payroll, and the Employer plans to recall all laid off employees when it successfully bids on a repair contract, perhaps as soon as within the next few weeks.

## SUPERVISORY ISSUE

Section 2(11) of the Act, 29 U.S.C. Section 152 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.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. *Mississippi Power Co.*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of a Section 2(11) authority in a merely routine, clerical or perfunctory manner does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985). As pointed-out in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in *Hydro Conduit Corp.*: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." See also *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). In this regard, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. *Bowne of Houston*, 280 NLRB 1222, 1224 (1986).

The party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. *Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment,"

does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Similarly, it is an individual's duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. *New Fern Restorium Co.*, 175 NLRB 871 (1969).

### **James Sawyer**

James Sawyer was hired as a welder but promoted to shop foreman approximately six weeks before he was laid off on April 17, 2002, the day before the hearing. During his six weeks as shop foreman, Sawyer was responsible for setting up the shop at the Employer's new facility in Norfolk. He did not oversee any production projects during this six-week period. Although Sawyer is a foreman by title, there is no evidence that he has hired, fired or disciplined any employees, participated in any lay off decisions, completed any job evaluations, participated in deciding who receives bonuses or pay increases, permitted employees to leave early, or directed the work of any employees, or that he possesses the authority to do any of the above. In fact, even if Sawyer returns as shop foreman when there is sufficient production work, the Employer admits that Sawyer will simply be relaying the job specifications to the shop employees and ensuring that they complete the work as required by the specifications. No evidence was proffered with respect to how Sawyer will ensure the work is completed properly. Based upon the uncontested testimony of the Employer's sole witness, I find the record insufficient to establish that Sawyer possesses the requisite independent judgment to be considered a supervisor within the meaning of Section 2(11). Accordingly, James Sawyer is included in the petitioned-for unit and is eligible to vote in the election.

### **Dan Berry**

Dan Berry is a quality assurance employee and an electrician.<sup>1</sup> As a quality assurance employee, Berry inspects repair jobs on government ships to ensure that the work is being done properly. As an electrician, Berry is responsible for all of the electrical repair work that arises. It is undisputed that Berry does not supervise any employees while doing quality assurance work. While doing electrical work, however, Berry works with two other electricians whom the Employer claims are supervised by Berry. There is no evidence that Berry is involved in the hiring or firing of employees, the evaluation of employees, or the decisions surrounding the recent lay offs. Nonetheless, the Employer argues that Berry is a supervisor because he directs the work of the other two electricians. The evidence shows that Berry reads the specifications for a particular electrical job and conveys these to the other two electricians. There is no evidence regarding how Berry determines which electrician does which portion of the work or if he even assigns specific tasks to the electricians. Moreover, Berry often works side by side with the other electricians completing the work with them. Without additional evidence of the use of independent judgment in assigning tasks to the electricians, the Employer has not established that Berry is a supervisor within the meaning of Section 2(11). Accordingly, Dan Berry is included in the petitioned-for unit and is eligible to vote in the election.<sup>2</sup>

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<sup>1</sup> It is unclear from the record how much time Berry spends in either role.

<sup>2</sup> The Employer did not assert that Berry should be excluded from the unit because of his duties as a quality assurance employee.

### **Dave Brinkman**

Dave Brinkman is a quality assurance employee responsible for inspecting repair work on government ships and completing the accompanying paper work. He spends approximately 50% of his time in the office and the remainder doing work on the ships, either quality assurance work or work as a "lead man." It is uncontested that in his role as a quality assurance employee, Brinkman does not supervise any employees. Even while working as a lead man, it is uncontested that Brinkman does not have the authority to hire employees, fire employees, discipline employees, decide who is laid off, or effectively recommend such actions. The Employer contends, however, that when he is in the capacity of lead man, Brinkman assigns work to employees based on the specifications for the repair work. The Employer does not indicate how Brinkman determines which employee to assign work to or whether such assignments require the use of independent judgment. Moreover, one of the Union's witnesses testified to working side by side with Brinkman, both under the supervision of another individual. As with Sawyer and Berry, the record is insufficient to establish that Brinkman possesses the requisite independent judgment to be considered a supervisor under Section 2(11) of the Act.

At the end of the hearing, the Employer stated for the first time that Brinkman should not be included in the petitioned-for unit because he is a quality assurance employee. It is well settled that quality assurance employees may, if sought, be included in a unit of production and maintenance employees if they share a sufficient community of interest with the employees in the unit. *Blue Grass Industries*, 287 NLRB 274 (1987). Although Brinkman has an office where he completes quality assurance paper work, he works side by side with the production and maintenance employees approximately 75% of his day, has the same benefits, works the same hours, and punches in on the same time clock. Therefore, I find that Brinkman shares a sufficient community of interest with the petitioned-for employees. Accordingly, Dave Brinkman is included in the petitioned-for unit and is eligible to vote in the election.

### **CONCLUSION**

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing, I find the following employees of the Employer to constitute a unit appropriate for the purposes of collective bargaining:

All full-time and regular part-time production and maintenance employees, including quality assurance employees, employed by the employer at its Norfolk, Virginia facility, but excluding office clericals, guards, professional employees and supervisors as defined by the Act.

### **DIRECTION OF ELECTION**

An Election by secret ballot shall be conducted by the undersigned among the employees in the voting group 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 those in the voting group who were employed during the payroll period .... , 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 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, 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 employees engaged in an economic strike that began 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 the INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO.

### **LIST OF VOTERS**

To insure that all eligible voters 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 that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to 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.

**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, D.C. 20570-0001. The request must be received by the Board in Washington by **May 15, 2002**.

Dated May 1, 2002

at Baltimore, Maryland

/s/ WAYNE R. GOLD  
Regional Director, Region 5



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