

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 11

KANNAPOLIS ENERGY PARTNERS  
Employer

and

Case No. 11-RC-6519

INTERNATIONAL BROTHERHOOD OF  
BOILERMAKERS, IRON SHIP BUILDERS,  
BLACKSMITHS, FORGERS & HELPERS, AFL-CIO  
Petitioner<sup>1</sup>

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

The Employer, Kannapolis Energy Partners, operates an energy production facility in Kannapolis, North Carolina. The Petitioner, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, filed a petition with the National Labor Relations Board under section 9(c) of the National Labor Relations Act seeking to represent a unit of hourly maintenance and operations personnel at the Employer's Kannapolis facility.<sup>2</sup> A hearing officer of the Board held a hearing and the parties filed briefs with the undersigned.

As evidenced at the hearing and in the Employer's brief, the sole issue is whether the Operations Shift Supervisors (hereinafter referred to as "shift supervisors") should be excluded from the bargaining unit as statutory supervisors. The Employer contends that the shift supervisors are statutory supervisors, and therefore excluded from the unit. To the contrary, it appears that the Petitioner's position is that the shift supervisors are not statutory supervisors, and

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<sup>1</sup> The Petitioner's name appears as amended at hearing.

<sup>2</sup> There is no bargaining history between the Employer and Petitioner.

therefore should be included in the unit.<sup>3</sup> The unit sought by the Petitioner has approximately 21 employees, while the unit the Employer seeks would include approximately 17 employees.

I have considered the evidence and the arguments presented by the parties on the issue. As discussed below, I have concluded that the shift supervisors are statutory supervisors, and thus excluded from the unit. Accordingly, I have directed an election in a unit that consists of approximately 17 employees. To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. I will then present in detail, the facts and reasoning supporting my decision that shift supervisors are supervisors under the Act.

## **I. OVERVIEW OF THE EMPLOYER'S OPERATIONS**

The Employer has a long-term contract with Pillowtex, a textile facility located in Kannapolis, North Carolina, and Duke Power, a North Carolina power company, whereby it agrees to provide electricity to Pillowtex and Duke Power. The Employer operates in a 3-floor facility that houses managerial personnel offices, and multiple boilers and turbine generator units (hereinafter referred to as "turbines") used for production. The production area is divided into two main departments - operations and maintenance.

Below is a discussion of the managerial structure at the facility and an overview of the operations and maintenance departments.

### **1. Managerial Structure**

The upper level managerial positions at the facility include the following positions: Plant Manager, Environmental and Maintenance Planner, Business Manager, Operations Manager, and Operations and Maintenance Superintendent. The Plant Manager is responsible for the overall supervision of the facility. Directly reporting to the Plant Manager are the Environmental and Maintenance Planner, the Business Manager, and the Operations Manager. The Environmental and Maintenance Planner is responsible for documenting work order systems, compliance with

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<sup>3</sup> The Petitioner did not present any witnesses at hearing and did not file a brief.

emission regulations, testing, and obtaining State permits. The Business Manager handles payroll and accounting. The Operations Manager is responsible for the overall performance of the facility. The Operations Manager keeps track of the operating data and revenues generated from the boiler steam and electrical output. Reporting to the Operations Manager is the Operations and Maintenance Superintendent. The Operations and Maintenance Superintendent is responsible for overseeing the operations and maintenance departments. All of the managers generally work from 7:00 a.m. to 3:30 p.m., Monday through Friday. At hearing, neither party contested the supervisory status of the managerial positions listed above.

## **2. Operations Department**

The operations department functions 24 hours, 7 days a week. To accommodate continuous production, the department is divided into four, 12-hour shifts that rotate on a 27 day cycle. Each shift is designated as “A”, “B”, “C” or “D” shift. There are four job classifications in operations: shift supervisors, #1 boiler operators, #2 boiler operators, and #3 turbine operators. Each designated shift regularly consists of a “crew” that includes a shift supervisor, a #1 boiler operator and a #2 boiler operator. The #3 turbine operators are not assigned to a specific crew or designated shift.

### **a. Operations Shift Supervisor**

There are four shift supervisors at the facility. The shift supervisors are responsible for assigning and directing the activities of the #1 operator, #2 operator and #3 turbine operator on their shift. Their duties include, among other things: supervising the start-up/shut-down of boilers and turbines; supervising various tests; maintaining log sheets; preparing equipment for repairs; maintaining time records for their crew; guiding and counseling employees on quality

matters; assigning tasks; training new employees; conducting accident reports and preparing investigations; and maintaining the most effective use of personnel, materials and equipment, to insure proper production. The shift supervisor reports directly to the Operations and Maintenance Superintendent.<sup>4</sup>

**b. #1 Boiler Operator**

The #1 boiler operators are responsible for the primary boilers. They must maintain a high degree of proficiency with all boilers, turbines and auxiliary systems in the facility, such that they could run the facility if necessary. There are currently four #1 boiler operators, one for each designated shift. They report directly to the shift supervisors.

**c. #2 Boiler Operator**

The #2 boiler operator is an operator who is proficient in operating turbines, and operates one of the secondary/stand-by boilers and the associated auxiliary systems. Their job is to maintain efficient boiler operation of the secondary boilers. There are currently four #2 boiler operators, one for each designated shift, and they too report directly to the shift supervisors.

**d. #3 Turbine Operator**

Finally, the # 3 turbine operator position is an entry-level position at the facility. Their job is to operate the turbines, maintain various pumps and record data. There are two #3 turbine operators. They work 8-hour rotating shifts, Tuesday through Saturday, often covering night and weekend operations. As stated earlier, unlike the #1 and #2 operators, the #3 turbine operators do not have an assigned crew or designated shift. Although they report directly to shift supervisors, the supervisor to whom they report can vary on a daily basis.

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<sup>4</sup> The job description of the shift supervisor indicates that they report directly to the Plant Manager. However, the Plant Manager testified that shift supervisors report directly to the Operations and Maintenance Superintendent.

### 3. Maintenance Department

The maintenance department is supervised by the Operations and Maintenance Superintendent. There are currently seven maintenance employees, ranging from electricians to welders. Generally, the maintenance employees are responsible for diagnosing problems and making any necessary repairs and/or adjustments to all of the equipment in the plant. The maintenance employees work 8-hour shifts (generally mirroring the Operations and Maintenance Superintendent's schedule), Monday through Friday, and are on-call at night and on weekends. If a maintenance employee is called in outside of their regular work hours, they report to the shift supervisor on duty.

## II. STATUS OF SHIFT SUPERVISORS

Before examining the specific duties and authority of the shift supervisors, I will briefly review the requirements for establishing supervisory status.

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 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.*

It is well-settled that supervisory status is conferred by the possession of any one of the primary indicia listed above, as long as "the exercise of such authority is not routine but requires the use of independent judgment." Vencor Hospital-Los Angeles, 328 NLRB 1136, 1138 (1999). Secondary indicia (i.e. ratio of supervisors to employees or designation as supervisor) can be used as background evidence, but are insufficient by themselves to establish supervisory status when primary indicia are not present. See Baby Watson Cheesecake Inc., 320 NLRB 779, 784 (1996); North Jersey Newspapers Co., 322 NLRB 394, 395 (1996).

The burden of proving supervisory status lies with the party asserting that such status exists. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001); 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 at 1138. The 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 n. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See Michigan Masonic Home, supra, slip op. at 3; Chevron U.S.A., 308 NLRB 59, 61 (1992).

With regard to whether the shift supervisors possess any of the 12 criteria listed in Section 2(11), it is important to note that at the hearing, the Employer admitted that the shift supervisors do not possess the direct authority to transfer, layoff, or recall employees. In addition, there was no evidence presented that the shift supervisors possess the direct authority to hire, suspend, promote, discharge, reward, discipline or adjust employee grievances. In its' brief, the Employer's argument is predicated on the shift supervisors ability to effectively recommend certain employment actions and their direct authority to assign and responsibly direct employees. Accordingly, I will discuss the Employer's assertions below. In addition, I will discuss secondary indicia supporting my conclusion that the shift supervisors are supervisors under the Act.

1. **Authority to Effectively Recommend Employment Actions**

In regard to the authority to effectively recommend employment actions, I find that the Employer failed to meet its burden in establishing that shift supervisors can effectively recommend employment actions such as hiring, disciplining, suspending, terminating, promoting and rewarding employees. Though the testimony of Plant Manager, Richard P. Wrigglesworth, established that shift supervisors may make recommendations or make managerial personnel aware of various employee issues, it is clear that such recommendations are merely reportorial in nature. The ability to make recommendations or file reports, with management having final approval and decision authority, is not indicative of supervisory status under the Act. See PECO Energy Co., 322 NLRB 1074, 1083 (1997) (when employee has the authority to bring improper behavior and/or violation of work rules to management's attention, yet management ultimately decides the imposition of discipline, that employee's "authority with respect to discipline is merely reportorial" and does not constitute evidence of supervisory authority under the Act); George C. Foss Co., 270 NLRB 232, 234 (1984) (employee not a supervisor where his reports regarding personnel "were in nature of relaying information to [an admitted supervisor] from which the latter could make a determination...").

Plant Manager Wrigglesworth testified that with regard to disciplinary matters (i.e. written warnings, suspensions and/or termination), it is the shift supervisor's responsibility to conduct an investigation of the conduct at issue, and then make a report to upper management. Upper management then tries to speak with all of the shift supervisors, conducts its own independent investigation of the incident and makes a final decision as to whether action will be taken. For example, in June 2001, one of the shift supervisors was having problems with an employee continuously calling-in, stating various reasons as to why he was unable to report for work. The shift supervisor reported the problem to upper management, and upper management

determined the form of corrective action. This is the very type of reporting that the Board has found to be insufficient to establish supervisory status.

Though there was evidence that shift supervisors have the authority to verbally counsel employees on work performance issues, I find the evidence insufficient to establish supervisory status. Specifically, Plant Manager Wriggelsworth testified that whether or not a verbal counseling results in formal disciplinary action depends on the nature of the incident. If the counseling results in disciplinary action as opposed to a "verbal conversation," it is reduced to writing and the discipline imposed depends on the severity of the conduct. Upper management makes the final decision as to whether or not a verbal counseling is converted to formal discipline and determines the level of discipline. As the verbal counseling in and of itself is not disciplinary action, I find that the shift supervisors authority to verbally counsel employees is insufficient to establish supervisory status.

With regard to the ability of shift supervisors to effectively recommend the hire of new employees, Wriggelsworth testified that management has relied on shift supervisors' recommendations when hiring new employees. However, the testimony in the record contradicts this assertion. Initially, Wriggelsworth testified that he relied on the recommendation of a shift supervisor to hire one of the three employees hired during his tenure. The other new hires were through the North Carolina Employment Commission. However, later in his testimony Wriggelsworth indicates that the recommendation for the new hire came "through David Rhodes", the Operations and Maintenance Superintendent. Thus, the record is unclear as to who in fact made the recommendation. Furthermore, the record is devoid of evidence as to whether or not a unit employee's recommendation would be given any credence. Therefore, I find that there is insufficient evidence to conclude that shift supervisors effectively recommend new hires.

In regard to employee promotions, Wriggelsworth testified that the Employer does not conduct annual appraisals. However, when a position becomes available, upper management

confers with and solicits input from shift supervisors regarding qualified employees. The mere suggestion by a shift supervisor that an employee is suitable for a promotion is insufficient to establish that the shift supervisor effectively recommends promotions. Brown & Root, Inc., 314 NLRB 19, 21 (1994). Furthermore, there was no specific evidence of promotions resulting from a shift supervisor's recommendation.

Finally, there was insufficient evidence to establish that shift supervisors reward or effectively recommend rewards for employees. In this regard, the only evidence of rewards was the company-wide incentive/bonus program that equally applies to all employees, including upper management, and is based on a standard calculation.

Accordingly, I find insufficient evidence that shift supervisors effectively recommend employment actions.

## **2. Authority to Assign and/or Responsibly Direct**

In regard to the authority to assign and/or responsibly direct employees, I find that the shift supervisors exercise independent judgment when assigning and directing employees in their tasks, and therefore they are supervisors under the Act. The Board has found that where an individual does not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline and or adjust grievances, they may nonetheless be statutory supervisors based on their overall direction of work. Custom Bronze & Aluminum Corp., 197 NLRB 397 (1972). Similar to the facts in Custom Bronze, the record shows that the shift supervisors responsibly assign and direct the work of employees and exercise independent judgment in so doing. Wigglesworth testified that there is no routine day at the facility, as tasks and needs can vary at any given time. Management depends on the judgment of the shift supervisor to address issues that may arise during the course of the shift and to appropriately assign and prioritize tasks to maintain quality production. For example, prior to each weekend, shift supervisors are given a form showing the different operating times for Pillowtex. The shift

supervisor must then independently determine the start and shut down times for the boilers and turbines, so as to maintain production based on the load demands of Pillowtex, and must assign employees to assist in carrying-out the various associated tasks. In the event that an unexpected change occurs during the weekend, Pillowtex personnel call shift supervisors directly and relay the necessary information. This has happened at least a couple of times in the last year. The shift supervisor's decisions to make adjustments, specifically with respect to personnel, are made without input or approval from managerial personnel. For example, if the shift supervisor independently determines that an operator needs to blow soot from one of the boilers, he can remove the operator from their boiler or generator and assign them to that task. In making that decision, the shift supervisor considers the overall conditions and productivity of the boilers at that time and the capability of the assigned employee.

The Operations and Maintenance Superintendent will give shift supervisors general directives as to what needs to happen during the shift. These directives intentionally lack detail because things change from shift to shift and upper management relies on the shift supervisors' judgment to get the job done efficiently. Additional information may be extended to the shift supervisors in those cases where there is a major change in procedure (i.e. Pillowtex changes a particular operation). Even then, the information provided is still very general. When all is said and done, shift supervisors are held accountable for the events that take place on their shift.

In addition to assigning tasks, shift supervisors are responsible for verifying data input of employees on their shift, approving various log sheets, and recording employee work time. Shift supervisors have the authority to grant overtime without prior approval from management.<sup>5</sup> The shift supervisors' authority to grant overtime includes the authority to select the employee who will perform the overtime. For example, if an employee calls in, the shift supervisor can ask another employee on his shift to stay or call in an employee from the following shift without

approval from management. If an employee becomes sick during the course of the shift, the shift supervisor determines whether to allow the person to go home, without any input or clearance from upper management. If the employee goes home, it is within the shift supervisor's discretion as to whether or not coverage is needed for the remaining part of the shift. If coverage is needed, the shift supervisor can ask one of the shift operators to remain or call-in an operator from another shift.

The record also established that shift supervisors have the discretion to call-in maintenance employees and outside contractors when needed. Specifically, if there are small maintenance problems during the shift, shift supervisors have the authority to call-in the appropriate maintenance employee without obtaining approval from the Operations and Maintenance Superintendent. This happened at least six times in the last year. A shift supervisor can also call in an outside mechanical contractor if a maintenance employees is not qualified to handle the repair. Though upper management determines which contractor to use and shift supervisors normally try to consult with management before making the call, shift supervisors do have the authority to call an outside contractors without prior approval. For example, sometime in December 2002, there was a major failure and the shift supervisor called in an outside contractor without prior discussions with upper management.

Based on the foregoing and the record as a whole, I find that shift supervisors assign and responsibly direct work.

### **3. Secondary Indicia of Supervisory Status**

As indicated earlier, secondary indicia can be used as background evidence to establish supervisory status, but are not in and of themselves sufficient to establish supervisory status without the existence of one of the primary indicia. Baby Watson Cheesecake Inc., 320 NLRB at

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<sup>5</sup> It is important to note that although shift supervisors can grant overtime, it does not happen often.

784. In the instant matter, there are several secondary factors that support a supervisory finding. Those factors include: approving unit employee time off requests; conducting employee safety meetings; delivering employee paychecks; maintaining individual mailboxes in which they receive distributions from management that are not given to unit employees; maintaining individual desks in an office area separated from the work floor; possessing keys to various offices; parking in a separate lot from unit employees; and their designation as supervisors. In addition, shift supervisors earn \$3 to \$5 more per hour than unit employees. Moreover, if shift supervisors are not found to be supervisors, the facility would be without supervision after 3:30 p.m. Monday through Friday, on weekends and on many holidays.

### **III. CONCLUSION 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 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 claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employee 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:

All full-time maintenance employees and operations employees employed by the Employer at its facility located in Kannapolis, North Carolina; excluding all office clerical employees, confidential employees, guards, professional employees and supervisors as defined in the Act.

#### IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO. 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 the Decision.

##### 1. Voting Eligibility

Eligibility 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. 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) employee 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.

##### 2. Employer to Submit List of Eligible Voters

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 12367 (1966); NLRB v. Wyman-Gordon Company, 395 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting processes, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 4035 E. University Parkway, Suite 200, P.O. Box 11467, Winston-Salem, North Carolina, 27116-1467, on or before **March 26, 2003**. No extension of time to file this list 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. The list may be submitted by facsimile transmission at (336) 631-5210. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **3. Notice of 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.

## V. 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 14<sup>th</sup> Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **April 2, 2003**.

Dated at Winston-Salem, North Carolina, on the 19th day of March 2003.

/s/ Willie L. Clark, Jr.

Willie L. Clark, Jr., Regional Director

National Labor Relations Board

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