

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

FENCING & AWNING, INC.

Employer

and

Case 19-RC-14588

TEAMSTERS LOCAL 760L, affiliated  
with the INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
AFL-CIO

Petitioner

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

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as 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<sup>1</sup> in this proceeding, the undersigned makes the following findings and conclusions.<sup>2</sup>

**SUMMARY**

On September 1, 2004, the Petitioner filed the instant petition seeking a unit of all crew leaders [Foremen],<sup>3</sup> laborers, shop personnel, installers and mechanics, excluding all supervisors [as defined by the Act], office staff and confidential employees (the "Unit"). The Employer raises two contentions in response to the petition. First, the Employer contends that the Foremen are statutory supervisors who should be excluded from the Unit. Secondly, the Employer contends that the Shop Supervisor stands in the same position to employees as the Foremen. Consequently, the Employer maintains

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<sup>1</sup> Neither the Employer nor Petitioner filed a brief in this matter.

<sup>2</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 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. The labor organization involved claims to represent certain employees of the Employer and 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.

<sup>3</sup> The record reveals that the accurate term is "Foremen" rather than "crew leader."

that any determination herein regarding the Foremen is dispositive of whether the Shop Supervisor should be included in the Unit.<sup>4</sup>

Based on the record, I find the Employer failed to meet its burden of satisfactorily demonstrating that its Foremen are statutory supervisors; thus, I find the Foremen are appropriately included in the Unit. With regard to the Shop Supervisor, however, I find the evidence insufficient to determine whether that individual possesses supervisory authority as defined in Section 2(11) of the Act. Accordingly, I shall permit the Shop Supervisor to vote subject to challenge.

Below, I have set forth a section dealing with the evidence, as revealed by the record in this matter, relating to (1) background information, (2) the operations at the Employer's facilities, and (3) the statutory supervisory status of the Foremen and Shop Supervisor. Following the Evidence section is a restatement of the parties' positions, my analysis of the applicable legal standards in this case, conclusion, and my decision and direction of election.

**I.) EVIDENCE**

**A.) Background Information**

The Employer is a State of Washington corporation with an office and place of business in Moxee, Washington, where it is engaged in the business of fabricating, furnishing and installing multiple types of fences and awnings. The Employer asserts there are 9 employees in the Unit, 5 of whom are Foremen. The Employer, however, submitted a list of 10 employees that it indicates are the petitioned-for employees: 3 of whom are Foremen, one is a Foreman trainee and one other is a "Shop Supervisor/Foreman."<sup>5</sup> The Employer's list also contains 3 "crew members," one welder and one shop helper.

**B.) The Employer's Operations**

The Employer furnishes and installs various types of fences. It also sells fences through the Internet to customers located all over the world. As far as its installation service is concerned, the Employer has installed fences as far south as Redding, California; as far east as Billings, Montana; and northward along the Pacific Ocean into Canada. The Employer is a family owned and operated business. Jeff Von Gohren is the Employer's owner and President; his wife, Carol Ann, is the Vice President; his daughter Jessica Hinkle, is the Personnel Manager/Bookkeeper; and Hinkle's husband, Josh Hinkle, is a Manager-in-training. The Employer also employs a Superintendent, Jim Johnson, for 3 days a week during its busy season, which is basically during the 5 warmest months of the year. The Parties stipulated to Johnson's 2(11) supervisory

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<sup>4</sup> The Employer refused to enter into a stipulation that the Shop Supervisor is a statutory supervisor.

<sup>5</sup> Although this document identifies the position as Shop Supervisor/Foreman, the position description for the Shop Supervisor/Foreman position is entitled only "Shop Supervisor."

status.<sup>6</sup> The Employer also employs a salesman, Jim Fleenor, whom the Parties do not contend should be included in the Unit.<sup>7</sup>

The Shop Supervisor, shop helper, and welder work in the same building where the Employer's office is located.<sup>8</sup> The Shop Supervisor, Ray Palmer, and his helper, Josemaria Alcazar, receive and store all fencing and awning material for the Employer. Palmer also prepares the materials to be used on the different installation jobs from information ("folders") that he receives at the beginning of each week from Josh Hinkle. That information describes the nature of the fencing job and details the amount and type of fencing material required for each installation. With the assistance of the shop helper, Palmer loads the materials onto trucks to be used by the installation crews at the various jobsites. When the crews arrive at the shop, Palmer directs them to their respective trucks containing the materials for each crew's specific job.

As for the welder, Monte Hewett, no information was presented concerning the duties of this position except that he is located in the shop with the Shop Supervisor and helper. Additionally, the record reveals no further information on the specific duties performed by the shop helper.

Josh Hinkle assigns employees to their respective crews. The number of crews varies from two to five during the warmer months. Josh Hinkle dispatches the crews to their respective sites, after the trucks are loaded and ready for transport.

Sometimes a Foreman will work alone at a jobsite or the Foreman may work with a couple of helpers. But, generally, each crew consists of a Foreman and a "helper."<sup>9</sup> The frequency with which Foremen work alone was not proffered into the record. However, Foreman Dennis Lee testified that most of the time he works alone. The record also does not reveal whether helpers ever work alone at a site.

A few days before the crew begins working on a jobsite, the Superintendent will "scout out" sites to ensure each site is staked out and ready for installation. He also stops off at sites within the local area of the office during the installations to train

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<sup>6</sup> Jeff Von Gohren, his daughter and son-in-law, as well as the Superintendent all testified at the hearing.

<sup>7</sup> The parties do not dispute the exclusion of Jeff Von Gohren, Carol Ann Von Gohren, Jessica Hinkle, Josh Hinkle, Jim Johnson, and their respective positions. Based on the record and these individuals' apparent supervisory and/or managerial status, I shall exclude these individuals and their respective positions from the Unit. Additionally, and in light of the parties' apparent agreement to exclude the salesman from the Unit, I shall exclude salespersons from the unit.

<sup>8</sup> Presumably the positions of "Shop Supervisor," helper," and "welder" are the petitioned-for "shop personnel" positions. Although petitioned-for, there is no mention in the record of "laborers" or a "mechanic." Regardless of the title of the jobs, the parties do not dispute the inclusion of the employees working in the shop in the Unit, with the exception of the Shop Supervisor position.

<sup>9</sup> While the transcript refers to "helpers," and the petition refers to "installers," the Employer submitted a position description (PD) into the record for "crew members" which appears to apply to employees performing helper or installer work on the jobsites. Regardless of the precise title, the parties do not dispute the inclusion of helpers, installers, and/or crewmembers in the Unit. Herein, I shall refer to the helper/installer/crew member position(s) as "helper."

employees, to see if anyone needs help, to handle any problems, and to answer any questions that may arise.

With regard to the Employer's work on industrial job-sites, the record reveals that on the first morning of work, the crew assigned to the site will report at 7:00 A.M. to prepare for the installation. Because fence installation tends to create noise, residential installations are started later in deference to customers' neighbors. In either case, the Foreman will initially meet with the customer or customer representative to find out where and how the customer wants the fence installed. The Foreman on a site also has the customer show him where the customer's property line is located. During the Foreman's contact with the customer, the helper is on the truck preparing the cement mixer and laying out the tools to be used.

As for the actual installation work, the position description (PD) for "crew member," submitted by the Employer states that this person must have a minimum of 5 years experience working in a comparable construction/carpentry environment, preferably in fencing, concrete form setting, and the like, and carry a commercial driver's license and a current first aid card. The PD also states that crewmembers are "to take direction of the Foreman of all assigned jobs to ensure a quality work product that is completed efficiently and responsibly."

Testimony, though, is woefully lacking in any details in describing what work is actually performed at a site once installation begins or in describing the details on how this work is allocated between the foremen and helpers. One former helper, Adolfo (Ray) Rivera, stated that Foremen and helpers work side by side and a Foreman told him that they work as a team and not as "boss and employee." However, testimony does not elaborate on how such a "team" works in the field.

As for the Foremen's relation to management, according to Jeff Von Gohren, the Personnel Manager holds meetings with Foremen who are in town on Mondays and a meeting with the Shop Supervisor on Tuesdays or Wednesdays. The Personnel Manager states she passed this responsibility on to her husband, Josh Hinkle, who states that he no longer holds these meetings. Instead, he states he tries to talk to the Foremen individually. Josh Hinkle further testified that these meetings simply consist of an opportunity for the Foremen to "express their concerns."

The Employer submitted a document that shows the Shop Supervisor Palmer's "wage" as \$16.30. Presumably this is per hour. However, testimony reveals that Palmer is salaried while Foremen are paid on an hourly basis.<sup>10</sup> The same document shows that Foremen earn from \$12.50 to \$13.50, again, presumably on an hourly basis. Moreover, testimony reveals that these Foreman rates may rise if they work a government contract job that pays prevailing rates. Presumably this would also be the case for helpers who work a prevailing wage job. The list also shows the "Foreman trainee" wage as \$9.00; crewmember wages are listed as ranging from \$8.16 to \$9.00; the wage of the shop helper (Josemaria Alcazar) is listed as \$10.35; and the wage of the

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<sup>10</sup> The Employer contends that Palmer's pay is more than the Foremen's pay because of his seniority. Moreover, according to the Employer, Foremen have the opportunity to work government projects where the pay is greater, so Palmer is compensated by having, as a benefit, holiday pay, a benefit Foremen do not have.

welder (Monte Hewett) is listed as \$8.50; again, all presumably paid on an hourly basis. After a 6-month probationary period, all employees are eligible for medical insurance.

Foremen, as opposed to helpers, also have 2-weeks vacation, while helpers have a 1-week vacation after 800 hours. During the business lulls (generally in winter) helpers are laid-off while Foremen work in the shop performing mechanical maintenance on equipment, which work is overseen by Palmer.<sup>11</sup>

### **C. Foremen's 2(11) Supervisory Status**

The Employer relies heavily on its Foreman PDs in contending that they are 2(11) supervisors. The PDs state that “[t]he primary function of the Foreman is to supervise, coordinate and control the operation of all assigned jobs to ensure a quality work product that is completed on time and within established cost estimates.” According to the Foreman PDs, Foremen “recruit, train, discipline, evaluate and recommend changes in pay compensation for all positions within the positions’ scope of responsibility in accordance with company policies and procedures.”<sup>12</sup> The required experience required for the Foreman position is the same as that for “crew members” or helpers—5 years of working experience in a comparable construction/carpentry environment.

The PDs appear to have been recently prepared by the consulting firm of George S. May (the “firm”). According to owner Von Gorhen, the firm’s representative and former Employer Office Manager Don Hamett conducted individual meetings with each Foreman wherein the Foreman were informed of their duties and responsibilities, including their authority to “recruit, train, discipline, evaluate, and recommend changes in pay compensation.”<sup>13</sup> According to the Employer, the firm representative and Hamett emphasized the Foremen’s 2(11) authority and had the Foremen sign the PDs as having read them.<sup>14</sup> Neither the firm representative nor Hamett testified.

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<sup>11</sup> Palmer testified that he has the authority to discharge employees in the shop but he has not exercised his authority to do so because the employees are his friends. Palmer further testified that his authority is the same as that possessed by the Foremen. However, as noted herein, the record does not support Palmer’s testimony regarding a Foreman’s 2(11) authority.

<sup>12</sup> The Employer also submitted into evidence portions of the employee handbook, dated June 9, 2004. Under the handbook’s heading of “guidelines for supervisor/foreman” it states, in part (highlighted by the Employer), “Supervisor/Foreman (sic) are responsible for taking appropriate action whenever an employee’s observed behavior or performance raises any questions about the employee’s physical condition and fitness to perform he fob (sic) safely.” That same section of the employee handbook (not highlighted) also states “The Supervisor/Foreman should stick to a description of what he/she observes.”

I note that the handbook also provides that “if a person is terminated or quits and we decide you may return, he/she has to start all over again with the six-month waiting period.” However, Kenneth Wilson walked off the job and was terminated. Later, he returned to work and within 1 week of that return, Wilson was promoted from helper to Foreman.

<sup>13</sup> Jeff Von Gohren was not present during these meetings. Thus, his testimony in this regard appears to be hearsay.

<sup>14</sup> The record contains four PDs for the following Foremen: Armando Morales, signed January 30, 2003; Dennis Lee, signed January 31, 2003; David Carrillo-Perez, signed September 3, 2004; and Jim Jones, signed January 28, 2004. All the PDs are also signed on the last page by some of these Foremen as having read the PDs, except for Jim Jones’ PD. The only foremen

However, Foreman Lee testified that at his meeting with the firm representative and Hamett, neither individual told him he possessed any 2(11) supervisory authority. When the Employer's attorney confronted Lee with his signed PD, thus purportedly showing Lee knew of the delegated 2(11) authority, Lee testified that during this meeting he did not read the PD, was not told of any 2(11) authority, and was merely told to sign the PD, which he did. The record does not show whether the Employer supplied the Foremen or Shop Supervisor with copies of their PDs. The Employer also failed to show whether other Foremen besides those whose PDs were submitted, were presented with and asked to sign the Foreman PD.

Tony Zeigler, a purported ex-Foreman with the Employer,<sup>15</sup> states that he had not seen the Foreman PD the Employer submitted into evidence and was never told he had any of the 2(11) authority as contended by the Employer. He apparently did not attend a meeting with the consulting firm representative and Don Hamett.

Kenneth Wilson was employed by the Employer for one and one-half years until September 2004 and was a Foreman for the last week and a half of his employment. He states that he was never told of any 2(11) supervisory authority conferred on Foreman. He also, apparently, did not attend the meeting with the firm's representative and Don Hamett. No Foreman PD was submitted with Wilson's signature attached.

Only the Shop Supervisor, Palmer, acknowledges being told of his 2(11) supervisory authority. He states he was told of his supervisory authority by the owner, Jeff Von Gohren and other previous managers, and at his meeting with the firm representative and Don Hamett.

The owner, Jeff Von Gohren, asserts that the Foremen have hiring, evaluation, and disciplinary, termination, transfer authority or authority to effectively recommend such actions, and authority to assign, responsibly direct, grant overtime and days off. The evidence for and against such authority, though generally sparse, consists of the following:

**1. Hiring**

Jeff Von Gohren, the owner, asserts that Foremen, besides being told that they have the authority to hire, have hired helpers. As evidence of this authority, he states that 4 to 5 years ago, when the Superintendent, Jim Johnson, was a Foreman, he hired a helper on the jobsite at the McNary dam project. However, Von Gohren also admits that Johnson hired the helper because another helper, who had been assigned to Johnson, became sick and had to be taken to the hospital. The dam project had to be completed and, therefore, Johnson necessarily had to hire another temporary helper solely for the purpose of completing that project (2 to 3 months).

Jessica Hinkle testified that since she has been with the Employer, for the last 15 years, no Foreman hired anyone, and since February 2004, when she became a

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who testified at the hearing are current Foreman Dennis Lee and former Foremen Tony Zeigler and Kenneth Wilson.

<sup>15</sup> Zeigler states that he had been with the Employer for 3 years until April 20, 2004, and that Don Hamett promoted him to the Foreman position, which he held for the last year of his employment. Jeff Von Gohren denies Zeigler was ever a Foreman.

manager, she has performed all hiring. However, she asserts that Foremen have effectively recommended hiring helpers. As to her role in the hiring process, Jessica Hinkle testified that she observes prospective employees to see if they are cleanly dressed to see if they properly conduct themselves. She also states that she looks for experience, recommendations, and for a reference from one of the Employer's Foremen. She also admits that she alone performs all interviews of applicants. Hinkle does not elaborate on the weight each of these factors play in any of her hiring decisions.

As evidence that Foremen have authority to effectively recommend hiring, Hinkle proffers the following two examples. In the first example, Foreman Amando Morales recommended Jesus Acevedo for a helper position. Hinkle asserts that Morales' recommendation was relayed through Acevedo's resume, wherein Morales was listed as a recommendation. Hinkle further testified that she picked Acevedo because Morales was listed as a recommendation. However, she also disclosed that because a customer required an immediate installation, she had to hire a helper immediately. Hinkle further testified that no other applicant had experience in the nature of work performed by the Employer. Thus, she went with Morales' recommendation. The record does not reveal whether Hinkle interviewed Acevedo or questioned Morales on the résumé's listing him as a recommendation. She did not elaborate on whether Morales' "recommendation" would have prevailed over another applicant who had the requisite 5 years experience. In the second example, Foremen Jim Jones and Morales, as well as Superintendent Johnson, recommended that the Employer hire David Carrillo. However, Hinkle did not elaborate on the details of these recommendations. Although Jeff Von Gohren testified that Morales said that both Acevedo and Carrillo "are good people," Von Gohren was not involved in these the hiring decisions. Moreover, Jessica Hinkle did not expound on the weights she gave to the recommendations of the Foremen and the Superintendent or what would have happened if their recommendations had been in conflict.

As for the testimony of the Shop Supervisor, Palmer states, as noted above, he had been told he has hiring authority. However, the only role he has played in hiring concerned his recommendation, 3 to 4 months ago, that the current welder be hired. As for the details of his recommendation, Palmer testified that he conducted the welding test for the applicants for the welder position and gave Monte Hewett's score to Jessica Hinkle. Palmer did not indicate whether he submitted the scores of any of the other applicants or whether Hewett's score was the highest. He asserts that when Hewett submitted his application, Jessica Hinkle was not in the office at the time and he felt that Hewett was the only candidate who showed an interest in working in the shop. As for his recommendation, he simply states, "I recommended that she hire him and then she hired him." He did not testify as to what he based his recommendation and he did not elaborate further on his recommendation to Hinkle. Jessica Hinkle, in her testimony, did not testify with regard to Hewett's hire; thus, the record does not reveal what if any impact Palmer's recommendation had on Hinkle's decision to hire Hewett.

Foreman Dennis Lee states that he once suggested someone be hired, but that person "never showed up." No further testimony was presented in this regard.

## **2. Evaluations/Raises**

As noted above, the Employer contends Foremen and the Shop Supervisor evaluate employees and effectively recommend raises. As for evaluations, the record contains evaluations of helpers Aaron Coffey, Ray Rivera, and "Pee Wee." These three evaluations contain 20 questions evaluating attendance and such areas of competency as knowledge in running various equipment; laying out job sites; setting posts; hanging gates; and the like. The evaluation rates these categories from one to five. The end of the evaluation asks the evaluator to "give a positive comment, give a constructive criticism, list areas that need improvement, Foreman comments, and supervisor comments." There also is a line at the end for the Foreman's signature and one for the "supervisor's" signature. Dennis Lee signed as Foreman for Coffey and Armando Morales signed as Foreman for Ray Rivera. There was no Foreman signature for Pee Wee. Jessica Hinkle signed as "supervisor" for all three evaluations.

A fourth evaluation, that was submitted into the record, for the welder Hewett, contains 14 categories such as knowledge; productivity; quality; decision-making; and the like (with one or more questions under each category). Scoring is also on a one to five scale. There is space for areas of strengths and improvements since the employee's last review and a space for employee comments. The evaluation has a space for the employee to sign (here unsigned), a line for "supervisor signature" which is signed by both Palmer and Jessica Hinkle, and a line for "president signature" which is unsigned. The record did not elaborate on the role played by the President, Jeff Von Gohren in this evaluation.

Also submitted into the record is a document, which states:

EFFECTIVE DATE: 2005 WAGE INCREASES

WAGE INCREASES WILL BE BASED PARTIALLY ON COST OF LIVING INCREASES AND PARTIALLY ON THE PREVIOUS YEARS PERFORMANCE EVALUTION.

THIS MEANS EVERYONE WILL RECEIVE THE SAME WAGE INCREASE FOR COST OF LIVING, BUT THE PERFORMANCE WAGE INCREASE WILL BE BASED INDIVIDUALLY.<sup>16</sup>

Jessica Hinkle testified that if a Foreman gives an employee a low number on an evaluation, she would call the Foreman about it and ask the Foreman to explain the score. Hinkle further testified that the Employer's evaluation process is new and that she intends to issue evaluations on a quarterly basis. Only one evaluation quarter has been completed so far and the next quarterly evaluation is scheduled for October. According to Jessica Hinkle, she will "base her decisions" concerning wage increases on these evaluations. However, she did not specify whether the merit raise portion of the wage increase is directly related to the final evaluation score, and if so, whether there is a direct correlation of the score with a specific increase. She also did not specify whether the comment sections are scored, and if so, by whom. She did state that if a

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<sup>16</sup> A similar policy is contained in an employee handbook, a portion of which was proffered into evidence by the Employer. Owner Von Gohren testified that the handbook is distributed to employees immediately upon their hire.

helper may have gone down on one score, but has improved on a previously low score, she would still give a merit raise of some sort; yet, Hinkle did not say how this would be determined. She also did not specify how any conflict between Foremen on a helper's score would be resolved in the evaluation. Significantly, she states that no raise has yet been issued based on an evaluation.

Helper Adolfo (Ray) Rivera states that Foreman Morales was the only Foreman to evaluate him and he does not know whether his raise was due to the evaluation. Again, Morales did not testify.

Foreman Lee stated that Jessica Hinkle asked him to evaluate helper Coffey. However, he was not told that his evaluation would be the basis of a "promotion."

As for the Employer's contention that Foremen can recommend a raise not based on an evaluation, Jessica Hinkle could not think of an instance where this has occurred. However, Palmer states that he told Jessica Hinkle that the welder, Monte Hewett, deserved a raise after he worked for only one month and that Hinkle gave Hewett a \$.50 raise. Josh Hinkle stated that Armando Morales recommended a raise for helper Frank Pimarentel after he had worked only 5 days for the Employer. Josh Hinkle testified that he told his wife about Morales' recommendation that his wife had not granted a raise to Pimarentel.

### **3. Discipline/Discharge/Transfer**

The Employer contends its Foremen have the authority to discipline, discharge and to transfer employees and may effectively recommend such action. The Employer submitted no disciplinary records into the record. Additionally, Jessica Hinkle testified that the Employer follows a progressive disciplinary procedure. While the Employer's employee handbook lists a section on discipline, the Employer did not submit that section or its progressive disciplinary procedure into the record. According to Jessica Hinkle, discipline progresses from "verbal, written, suspension, demotion, [to] termination." She further states that movement from one level of discipline to the next higher level depends on nature of the employee offense involved. Hinkle did not testify regarding who makes the determination about when a repeated offense requires the next level of discipline or what offenses require bypassing certain levels of discipline. However, Hinkle did testify that falsifying timecards requires immediate termination and tardiness does not lead to termination.

Although Jessica Hinkle described falsifying timecards as requiring discharge, she testified that when Foreman Dennis Lee falsified a time card, she took her father's advice and kept him on rather than discharging him. She also admits that when helper Rivera falsified a time card, she was only going to suspend him until she later learned that he was, once again, late to work; so, she discharged him. For his part, helper Rivera asserts he never saw a Foreman discipline anyone. He states that Jessica Hinkle disciplined him for tardiness and that she later terminated him for falsifying a time card. As for the time card issue, Rivera further testified that Jessica Hinkle told him that she sat across the street from where his crew was working and watched him engage in the conduct for which he was disciplined.

As to tardiness, Jessica Hinkle testified that the offender's first instance of tardiness warrants a verbal warning. The next instance of tardiness warrants a written warning and "so on and so forth. You don't get terminated for tardiness." Hinkle also

testified that she has not gone “past a suspension.” It is unclear in the record whether she meant she has not issued any disciplines beyond a suspension or that she has not gone past a suspension in issuing disciplines for tardiness. She did assert that she terminated helper Rivera as noted above.

Hinkle testified that Foremen have reported to her incidents involving helpers and she had issued written warnings to those helpers based on those reports. Hinkle states that Foremen have not issued any written warnings on their own. Hinkle could only provide three examples of Foreman involvement in discipline. In one instance, Foreman Lee told her that helper Coffey was tardy; in another instance she discussed a written warning issued to Rivera for tardiness, and in the third instance, Foreman Morales “could have” recommended discharging someone.<sup>17</sup>

In the first instance involving Coffey, Jessica Hinkle testified that she knew this was Coffey’s second offense. She issued Coffey a written warning after asking her husband whether Foreman Lee was accurate in reporting that Coffey was again tardy. Her husband replied had no idea whether Lee was accurate. Foreman Lee stated that he merely told Jessica Hinkle that Coffey was late. He testified that he did not know until the hearing that Coffey had been disciplined because of his comment to Jessica Hinkle.

In the second instance, Jessica Hinkle states that Ray Rivera was issued a written warning for multiple tardies. However, Hinkle could not recall what role, if any, a Foreman played in the issuance of that warning. All she proffered was her speculation that she issued the warning and she could not have done so, absent a report from a Foreman or her husband about the tardies.

As for the third instance when Foreman Morales possibly recommended a discharge, Jessica Hinkle states that Morales told her that Ray Rivera was “not working out,” and Morales did not want to fire Rivera. She interpreted Morales’ comment to mean that he, personally, did not want to fire Rivera; so she transferred Rivera to another crew. She did not elaborate on why she interpreted Morales’ comment in this way. Indeed, shortly after this transfer, Morales’ evaluation of Rivera, signed by Morales in July, rated Rivera 3.7 out of possible 5.0. That same evaluation contained the positive comment that Rivera “is a good worker.” The record, moreover, reveals that the owner, Von Gohren, 4-6 months prior to the hearing --March to May -- transferred Rivera based on Morales’ complaint that he could not work with Rivera anymore.

As for transfers recommended by Foremen, Tony Zeigler states that he had recommended to Don Hamett, a former manager, that an unnamed helper be transferred out of his crew. He did not proffer the reason for his recommendation that the helper be transferred. In any event, he asserts that 2 months later, the helper was transferred. The record is silent as to whether the transfer was due to Zeigler’s recommendation or was the product of some other event—the manager involved did not testify as to his decision to transfer the helper. Notably, even if management’s decision to transfer the helper considered Zeigler’s recommendation, there is nothing in the record explaining

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<sup>17</sup> While not cited as an example, Jessica Hinkle also testified to issuing Foreman Lee a suspension for speeding and a written warning for falsifying a time card. I also note that Josh Hinkle, who was a welder for the Employer before his management job, states that he never saw a Foreman issue discipline.

why the transfer required 2 months to accomplish. Hence, there is nothing in the record showing any causal connection between Zeigler's recommendation and the helper's transfer.

Shop Supervisor Palmer testified that he complained to the Employer's office about a helper he had, R.L. Hudson. Immediately following this complaint, the Employer transferred Hudson. Palmer did not state when this occurred or any other specifics about the transfer or why he recommended a transfer.

Palmer further testified that 2-3 years ago, he sent Dave Finley, who was not identified in the record, home for intoxication. He further states that 3-4 years ago, when he was a Foreman working a jobsite, he discharged Prudential (no last name was given in the record). However, the record reveals that Palmer sent Prudential home and told him not to return to Palmer's jobsite again because Palmer refused/failed to show for work with his own tools and Palmer tired of lending his tools to Prudential.

In his present capacity of Shop Supervisor, Palmer states that he has not written anyone up "yet," but about 3 weeks before the hearing, he asked Jessica Hinkle to issue a warning to welder, Monte Hewett. Nothing has happened on his request as of the date of his testimony. Palmer further testified that he has the authority to discharge employees in the shop but he has not done so because the shop employees are his friends and that his authority is no different from the authority possessed by the Foremen.

#### **4. Assign and Responsibly Direct**

The record does not elaborate to any extent on the Foremen and Shop Supervisor's authority to assign and direct employees. With regard to responsibly directing employees, Jessica Hinkle testified that if a job is taking too long, the foreman need to explain why. According to Hinkle, a sick helper would constitute a good explanation for why a job is taking too long to complete. However, she also states that it is the Foreman's responsibility to make sure he has healthy helpers, and if he does not, he is to call the office to ask for another helper. In that regard, she states that, on one occasion, when Foreman Morales took Rivera to the hospital, Morales should have called the office to say he needed another helper. Yet, Hinkle admitted that Morales was not disciplined for failing to call into the office to request another helper. There is nothing in the record about the Employer disciplining or evaluating a Foreman with regard to the progress of work or lack thereof on a jobsite or with regard to a Foreman's failure/refusal to responsibly direct employees.

Palmer speculated that if a welder "screws up," he would "hear about it" and "I'm in trouble." However, there is no evidence an incident of this sort had ever occurred and no evidence that the Employer disciplined or evaluated with regard to a responsibility to direct employees. Indeed, there is nothing in the record to elaborate on what "in trouble" constitutes.

As stated earlier, the record lacks concrete evidence detailing whether Foreman or the Shop Supervisor assigns or responsibly directs employees.

#### **5. Overtime**

The Employer contends that Foremen and the Shop Supervisor assign overtime. As to any overtime authority possessed by Foremen, Josh Hinkle states that if

it is 3:30 p.m. and within an hour of completion of a project, and if the helpers on the crew agree to work overtime, then overtime is up to the Foreman. Jeff Von Gohren states, generally, that overtime is pretty much required. Ray Palmer states that he can offer overtime if his work is backed up, but he cannot require shop personnel to work overtime and he cannot require someone to come in. Former Foreman Lee also states that he had occasionally requested his helper to stay 15 to 20 minutes late, but that the office at times had also told him no overtime on certain occasions -- the record did not elaborate further in this regard.

#### **6. Granting Days Off**

The Employer contends that Foremen have authority to grant requests for days off. According to Josh Hinkle, helpers are to call the Foreman, unless they know ahead of time that they will need time off. In the latter case, helpers are to call Jessica or Josh Hinkle. Tony Ziegler and Dennis Lee state that when they were helpers, and Rivera states that when he was employed as a helper, they never asked a Foreman for a day off. Ziegler and Lee, as Foremen, state that helpers never asked them for days off.

### **II.) POSITIONS OF THE PARTIES**

The Petitioner has petitioned for a Unit of all crew leaders [Foremen], laborers, shop personnel, installers and mechanics, excluding all supervisors [as defined by the Act], office staff and confidential employees. The Employer does not allege that the Unit is an inappropriate unit. Rather, the Employer contends that Foremen are supervisors as that term is defined in Section 2(11) of the Act. Therefore, Foremen should be excluded from the Unit. Additionally, the Employer contends that Palmer, the Shop Supervisor, stands in the same position as Foremen and that whatever decision I reach with regard to Foremen should be equally applied to the Shop Supervisor.

### **III.) ANALYSIS**

#### **A. Foremen**

Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of 'employee.'" Section 2(11) of the Act defines "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.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *NLRB v. Kentucky River Community Care Inc.*, 121 S.Ct. 1861 (2001). The legislative history of Sec. 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). For this reason, 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). Thus, the burden of proving supervisory status is on the party alleging that such status exists. *Kentucky River*. That means that any lack of evidence in the record is construed against the party asserting supervisory status. *Freeman Decorating Co.*, 330 NLRB 1143 (2000). Moreover, 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. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989). Additionally, mere opinions or conclusory statements do not demonstrate supervisory status. *St. Alphonsus Hospital*, 261 NLRB 620 (1982), enf. 112 LRRM 3168 (9<sup>th</sup> Cir. 1983); *Chevron U.S.A.*, 309 NLRB 59 (1991).

The *Kentucky River* Court recognized that it is within the Board's discretion to determine what scope or degree of discretion meets the statutory requirement that a supervisor use independent judgment. *Id.* at 1867. The Court stated: "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of ... judgment or discretion ... as would warrant a finding' of supervisory status under the Act." *Id.*, citing *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949).

Here, the Employer contends that its Foremen hire; evaluate and recommend raises; discipline, discharge, transfer and/or effectively recommend these actions; assign; responsibly direct; and grant overtime and time off. Based on the following, I find that the record reveals insufficient evidence to establish that the Employer's Foremen have exercised the contended authority and reveals no corroborating testimony or evidence that they possessed the contended supervisory authority. See *Control Services*, 314 NLRB 421 (1994).

As noted above, the Employer relies heavily on the Foremen and Shop Supervisor PDs to establish 2(11) authority. I note that, although the PDs contain language purportedly delegating 2(11) supervisory authority to Foremen and are signed by some of the Foremen and the Shop Supervisor, the Foremen (and former Foremen) who testified at the hearing either denied they read the PD or stated that they never saw the PD. Although the Employer proffers hearsay evidence that a consulting firm representative and an Employer manager held meetings with Foremen where the firm representative and manager informed the Foremen their purported 2(11) supervisory authority, the testimony of the only Foreman witness to these meetings denied he was told of such authority. In sum, the Employer failed to proffer any supporting evidence from these meetings to warrant a conclusion that the Foreman PDs establish that Foremen possess 2(11) supervisory authority. Accordingly, the Employer's evidence of the meetings fails to establish that the PDs demonstrate anything more than that they are merely "paper authority" and "paper authority" which is not exercised does not establish supervisory status. *East Village Nursing & Rehabilitation Center v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999).

### **1. Hiring**

Notwithstanding the Foreman PDs, the Employer further contends that its Foremen have hired or have effectively recommended hiring helpers. The Employer's evidence, however, is insufficient to warrant such a finding. In that regard, the Employer contends that 4-5 years ago as a foreman, the Superintendent, now a stipulated 2(11) supervisor, hired a helper. Such evidence, 4 to 5 years old, does not demonstrate that

the instant Foremen possess such authority. See *Staco*, 244 NLRB 461, 461-462 (1970). Absent detailed, specific evidence of supervisory authority, mere inferences or conclusory statements without supporting evidence are insufficient to establish supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992).

The Employer's assertion that Foremen effectively recommend hiring also lacks sufficient evidence that would warrant such a finding. In that regard, Jessica Hinkle testified that as the hiring official, she relies on a number of factors in reaching her decision on whether to hire, including recommendations from Foremen. Moreover, there is no evidence as to what the Foremen ever communicated to Hinkle in any alleged recommendation. There is also no evidence on the weight Hinkle gives to the Foremen's recommendations in relation to other factors she takes into consideration in reaching a decision to hire. Indeed, she did not elaborate on whether those other factors would outweigh any Foreman recommendation.

Similarly, the Employer's evidence that one helper was hired on the recommendations of two Foremen, does not elaborate on the content of those recommendations or the weight Hinkle gave those recommendation in relation to the recommendation by the Superintendent; a stipulated 2(11) supervisor. Nor was there evidence on what would happen if there were a conflict between the Foremen and Superintendent recommendations. Based on the above and the record as a whole, I cannot conclude there is any causal connection between hiring and a Foreman's recommendation. See *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000); *Acme Markets, Inc.*, 328 NLRB 1208, 1213 (1999).

## **2. Evaluations/Raises**

The Employer proffered evaluations completed by the Foremen as evidence of supervisory authority. As for the evaluations, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. See *Harborside Healthcare, above, Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999); *Williamette Industries, Inc.*, 336 NLRB 743 (2001). Although Jessica Hinkle asserts that she has plans to base her wage determinations on Foreman evaluations, no wage increase has yet been issued based on an evaluation. In this regard, the Board has held that a determination of proper unit placement must be based on what an individual filling the classification actually does now, as opposed to what he or she speculatively may be doing some time in the future. See *Southwestern Bell Telephone*, 222 NLRB 407 (1976).

In any event, the evidence does not show that the evaluations will directly determine a wage increase. For example, the record does not show whether the comment sections of the evaluation are rated or what their weight would be. Nor does the record show who would determine the final rating, or whether Hinkle's "discussions" with Foremen on helpers' low scores affect those scores. Indeed, Hinkle's own testimony shows that she uses her own judgment in awarding increases to employees that may have fallen in their absolute rating but improved on an earlier low rating in a subcategory. Furthermore, the one Foreman who testified about his evaluation of a helper stated that he did not know that the evaluation was to be used for "promotions." The use of independent judgment in determining employee wages must, by nature, involve the evaluator's knowledge of what he is doing. Finally, there is no indication how any conflicts between Foremen evaluations of a helper would be resolved.

Based on the above and the record as a whole, I cannot find the evaluator's judgment directly affects an employee's pay. See *McAlester General Hospital*, 233 NLRB 589 (1977), overturned on other grounds.

The Employer further contends that Foremen may, independently of an evaluation, recommend raises. The testimony, however, does not describe the decision process that leads to wage increases for helpers. Were the recommendations of Foremen considered? If so, what weight was placed on those recommendations? There was no testimony on how often Foremen make such recommendations or how often they are granted. Indeed, there is no showing of the actual role Foremen recommendations play regarding pay increases. The limited testimony also does not make it possible to determine whether any recommendation actually affected Jennifer Hinkle's decisions or simply happened to coincide with her decisions; especially where she could not remember a Foreman recommending a raise. See *Custom Mattress Manufacturing, Inc.*, 327 NLRB 111 (1998).

Based on the above and the record as a whole, I find that Foremen do not possess supervisory authority with regard to the limited role that they play in conducting evaluations and that they do not possess the authority to effectively recommend wage increases.

### **3. Discipline/Discharge/Transfer**

The Employer contends that Foremen have the authority to discipline and terminate helpers and to effectively recommend discipline and termination. Again, however, the Employer has not demonstrated with sufficient evidence that Foremen possess the contended authority. Significantly, no discipline or termination document was submitted into the record. As for testimonial evidence on discipline, the testimony fails to show what specific comments Foremen made to Jessica Hinkle in connection with discipline that she later levied. As such, these comments do not evidence that the Foremen recommended discipline. Indeed, Foreman Dennis Lee testified that he had no idea, until the hearing in this matter, that discipline issued to a helper Rivera was purportedly due to Lee's report to Hinkle that Rivera had been tardy. In all of the Employer's examples of recommendations by Foremen for discipline, the evidence shows, at best, that the Foremen merely reported instances where a helper was doing a poor job or arrived late to work. See *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998), where the Board found no supervisory authority where purported supervisors would report instances where employees were doing a poor job or behaved badly, but did not make recommendations as to what should happen to employees. See also *Polynesian Hospitality Tours*, 297 NLRB 228, 234 (1989).

Jessica Hinkle asserted that the Employer employs a progressive disciplinary procedure but documents setting forth that procedure were not placed in the record. Moreover, the evidence shows that not all offenses are treated the same and no evidence was proffered to show whether particular offenses dictated certain discipline. Moreover, it appears that Hinkle has used her own judgment in determining whether to issue the discipline required by the disciplinary procedure. For example, she states that falsification of time cards is grounds for immediate dismissal; yet, Hinkle decided not to terminate Foreman Lee or helper Rivera solely for such an offense after she had performed her own investigations of Lee and Rivera's offenses. She observed Rivera and Lee at their work-site not working during the time they clocked in as working. As for

Lee's reporting Rivera's lateness to Hinkle, Hinkle appears to have investigated Lee's report—she asked Josh Hinkle whether he knew about it.

With respect to transfers, the record is again incomplete with regard to establishing the necessary causal effect/affect between Palmer's complaint and an eventual transfer. Indeed, Palmer merely complained, he did not recommend a transfer. With regard to Zeigler's purported recommendation to transfer an employee, the record reveals that the transfer did not occur until 2 months after the recommendation. Under these circumstances and in view of the record as a whole, I cannot conclude that sufficient evidence exists to establish that Foremen or the Shop Supervisor, for that matter, possess the authority to transfer employees.

On the basis of the foregoing and the record as a whole, I find insufficient evidence exists to establish that the foremen discipline, discharge and/or transfer employees or effectively recommend the same within the meaning of Section 2(11) of the Act. See, e.g., *Carlisle Engineered Products*, 330 NLRB 1359 (2000). See also *Illinois Veterans Home*, 323 NLRB 890 (1997).

#### **4. Assign & Responsibly Direct**

Since Section 2(11) explicitly requires a statutory supervisor to use independent judgment in assigning and responsibly directing employees, determining whether an individual's assignment or direction renders the employee a statutory supervisor requires deciding whether the assignments or directions given require independent judgment or whether such are merely routine. *Providence Hospital*, 320 NLRB 717, 729 (1996). 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 (1999); *Franklin Home Health Agency*, 337 NLRB 826 (2002).

In the instant case, the evidence contains no specific description of any Foreman's assignments or directions to helpers. Rather, the record contains only conclusory statements of such supervisory authority. While the Employer proffers that Foremen train helpers, the Board has held training employees, without more, is insufficient to constitute supervisory authority. See *Ohio River*, 308 NLRB 666, 716 (1991).

As for any responsible direction, in *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2<sup>nd</sup> Cir. 2000) the Court held that "[in] determining whether 'direction' in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs." In *Franklin Home Health*, supra, there was no evidence that a nurse was held responsible for assessing whether a patient required immediate medical attention and for delegating the performance of the medical attention to other employees. It was also found relevant that the RN's performance appraisals did not rate RNs with respect to their supervisory ability.

Here, Jessica Hinkle states that Foremen are responsible for the efficiency of the job, which means if an employee is sick, Foremen are responsible for calling the office to request another helper. However, she admits that when a Foreman did not call the office for another helper in one particular instance, no discipline issued. Indeed, the record contains no discipline or evaluations relating to any Foreman's purported

responsibility to direct employees. In view of the above and the record as a whole, I find that the Foremen do not possess the authority to assign or to responsibly direct employees.

**6. Overtime**

The Employer contends that its Foremen have 2(11) authority to assign and grant overtime. The evidence establishes otherwise. The record merely shows that Foremen have limited authority in offering overtime to helpers in that it may be offered only to finish a project or goal set for that day. Foremen, however, have no authority to require overtime and on certain occasions have been informed no overtime will be granted. Under these circumstances, the limited and constrained overtime authority set forth in this case does not rise to the level of 2(11) supervisory authority. See *Harborside Healthcare*, supra; *Washington Nursing Home*, 321 NLRB 366 (1996).

**7. Grant of Time Off**

The Employer contends that Foremen can grant helpers time off from work. The record, however, contains no concrete evidence of a Foreman granting time off.

**8. Secondary Indicia**

Although not controlling, I note that if I were to find the Foremen and the Shop Supervisor were 2(11) supervisors, the ratio of supervisors to employees would be an unrealistic ratio of 8 supervisors to 6 employees. See *Harborside Healthcare*, 330 NLRB at 1336.

**9. Conclusion**

Based on the record evidence and analysis set forth above, I find that the Employer has failed to meet its burden of establishing that the Foremen possess any indicia of Section 2(11) authority. I, therefore, shall include the Foremen in the Unit found appropriate.

**B. Shop Supervisor**

As for whether the Shop Supervisor, Ray Palmer, possesses any of the indicia of 2(11) supervisory authority, I find the evidence insufficient to make that determination. The evidence shows that the Shop Supervisor attended a meeting with the same firm representative and Employer manager who purportedly held the meetings for the Foremen, as described above. Palmer testified that during his meeting with these individuals, he was told he had the 2(11) authority detailed in the PD. Yet, the record evidence establishing that he actually exercised such authority is sparse. Indeed, in his capacity as Shop Supervisor, there is no contention that Palmer actually exercised any 2(11) supervisory authority on his own. While the exercise of supervisory authority is not always necessary to establish that authority is possessed, the repeated failure to exercise putative authority in circumstances where such exercise would be appropriate can be evidence that the authority is more imagined than real. *East Village Nursing & Rehabilitation Center*, 165 F.3d 760 (D.C. Cir. 1999), enforcing 324 NLRB No. 93 (1999) (unpublished).

Here, the evidence is not sufficient to determine whether Palmer actually possesses supervisory authority, whether he has had an opportunity to exercise that authority, or whether Palmer has had numerous opportunities where he had repeatedly failed to exercise supervisory authority.

As for whether he can recommend such actions set forth in Section 2(11) of the Act, the evidence indicates he recommended hiring the welder and recommended a pay increase for him. However the evidence is not dispositive on the issues.<sup>18</sup>

There is evidence, however, that the Shop Supervisor's duties entail secondary indicia of supervisory authority. In that regard, unlike Foremen, Palmer is salaried and paid the highest rate of any of the petitioned-for employees. He is also the Foremen's "supervisor" during slow periods when Foremen are assigned to the shop. The evidence, however, taken as a whole in this regard, is inconclusive of supervisory authority.

The Employer further argues that the Shop Supervisor stands in the same relation to employees as the Foremen. Thus, argues the Employer, if I find the Foremen are 2(11) supervisors, then the Shop Supervisor should also be found to be a 2(11) supervisor. However, the Board in these circumstances has nevertheless required a showing of supervisory authority of individuals who allegedly stood in the same relation to employees as those found to be statutory supervisors. See *Staco*, 244 NLRB 461, 461-462 (1970). Thus, evidence of whether the Shop Supervisor is or is not a statutory supervisor must be independent of any finding I reach concerning the Foremen.

In sum, I find that the record raises a substantial issue regarding the Shop Supervisor's purported supervisory authority; yet, the record is insufficient for me to reach a finding on that issue. Accordingly, I shall permit Palmer, the Shop Supervisor, to vote subject to Challenge.

#### **IV.) CONCLUSION**

In view of the record evidence, I find that the Employer has failed to meet its burden of establishing that the Foremen possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act. Accordingly, I shall include the Foremen in the Unit. With respect to the Shop Supervisor, I find that the record has raised a substantial issue regarding the supervisory status of this position, which warrants my permitting the Shop Supervisor to vote subject to challenge. Therefore, I shall direct an election in the following appropriate Unit:

All full-time and regular part-time Foremen, helpers/installers/crew members, shop personnel including shop helper and welder employed by the Employer at or out of its Moxee, Washington facility; excluding office clerical employees, salespersons, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

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<sup>18</sup> Evidence was proffered that he terminated an employee for intoxication. However, authority to dismiss an employee in "extreme" situations has not evidenced supervisory authority. See, e.g., *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995); *Northcrest Nursing Home*, 313 NLRB 491 (1993)(authority to send employees home for behavior endangering the physical safety of employees and others is not an indicium of supervisory status); *Loffland Brothers Co.*, 243 NLRB 74, 75 fn.4 (1979)(authority to send employees home who arrive in a drunken or drugged condition does not require the use of independent judgment necessary for 2(11) supervisory authority).

There are approximately 9 employees in the Unit found appropriate.

**V.) 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 those 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. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike, which 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. 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, 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 shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local 760L, affiliated with the International Brotherhood of Teamsters, AFL-CIO.

**A.) 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 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*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before October 15, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

