

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**THE TOLEDO BLADE CO.**

**Employer/ Petitioner**

**and**

**CASE NO. 8-UC-365**

**TOLEDO NEWSPAPER GUILD/CWA LOCAL NO. 34043**

**Union**

**DECISION AND ORDER**

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, (the Act), a hearing was held before a hearing officer of the National Labor Relations Board (the Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.<sup>1</sup>

The Employer publishes The Blade, a daily newspaper with regional circulation in Northwest Ohio and Southeast Michigan. The Union and Employer are parties to a collective bargaining agreement (Agreement), effective March 22, 1998 through March 21, 2003. The Employer/Petitioner seeks to exclude from the bargaining unit those employees classified as retail sales supervisors because the Employer asserts they are statutory supervisors. The Union

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<sup>1</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The parties stipulated, and I find, that 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 Union is a labor organization within the meaning of the Act and represents certain employees of the Employer. The Employer and the Union filed post-hearing briefs which I have carefully considered.

The Employer and the Union filed a Joint Motion to Substitute Exhibits and I grant that motion. The new Petitioner Exhibits 6, 10, 11, 12 and 13 have been redacted to remove the names of the individuals involved, in order to maintain their anonymity.

takes the position that the retail sales supervisors are not supervisors within the meaning of the Act and should remain in the bargaining unit.

For the reasons set forth below, I will not exclude the retail sales supervisors from the existing contractually agreed upon unit. Accordingly, I will order that this petition be dismissed. I find that the retail sales supervisors are not Section 2(11) supervisors but instead are employees within the meaning of the Act.

### **BACKGROUND**

The Agreement defines the Guild Shop unit in the Preamble and in Article I. It includes all employees in the editorial, advertising, circulation, marketing and business departments of the Employer, excluding the Circulation Promotion Manager, Payroll Department Supervisor, Region Editor, Executive Editor of the Sports Department, Features Editor, Head of the Photographic Department, Confidential secretaries [not to exceed nine (9)], employees of European, Washington, New York and Columbus offices and no more than nine (9) persons to be designated by the publisher.

The retail sales supervisors work in the Advertising Department. Director of Advertising David Thiemann heads the department. Four managers, including the Display Advertising Manager Susan Cantrell, report to Thiemann. Three retail sales supervisors report to Cantrell. They are Paula Fortney (Majors/National Accounts Supervisor), Jay Kowalski (Outside Sales Supervisor) and Jeanne Prater (Outside Sales Supervisor). Each of the retail sales supervisors works with a group of five to seven customer sales representatives. The retail sales supervisors occupy the "A-1" wage grade. The customer sales representatives are at the "A-3" level. The duties of all A-3's are similar and include visiting and presenting "spec" ads to clients, collecting

money from clients, doing ad layouts, reserving ads, and handling customer complaints. Many of these duties are performed off-premises and away from the retail sales supervisor.

The position of retail sales supervisor is currently a unit position. Record evidence shows that retail sales supervisors receive the same benefit package as other unit members by virtue of their unit membership and participate in the health and welfare trust as well as the pension and 401(k) plan.

In 1999 the Employer hired a consulting firm, the Alliant Group, to analyze its work procedures and to recommend how the Employer could improve advertiser and customer services. As a result of the Alliant report, the retail sales supervisor position underwent various changes. Retail sales supervisors now accompany representatives on some sales calls, make suggestions to improve performance, offer praise when warranted and assist with advertiser problems.

### **SUPERVISORY CRITERIA**

In deciding cases involving the alleged supervisory status of individuals, it is necessary to examine carefully the evidence regarding the statutory indicia of supervisory authority. The record in this case establishes the following.

### **DISCIPLINE**

The Employer's witness, Mike Nelson, testified that he was a retail sales supervisor from April 2000 until November 2001, when he was promoted into an acknowledged management position. Nelson testified that during this period he had several conversations with Judi Csomos, a sales representative, concerning her tardiness. Nelson later sent a memo to Cantrell reporting the conversations that he had with Csomos. However, no written discipline was ever issued to Csomos.

Paula Fortney testified that she has never issued any written discipline. While Fortney testified she had the authority to issue written discipline, she did not provide any foundation for the source of her authority.

Jay Kowalski, another Employer witness, testified that he has not disciplined any employees since assuming his retail sales supervisor position in March 2002. While Kowalski stated that he has the authority to “write somebody up,” he gave no indication of any source for that authority. Furthermore, on cross-examination, Kowalski could not recall anyone in management conferring disciplinary authority on him.

Manager Thiemann testified that those holding the retail sales supervisor’s position have the authority to discipline employees. Thiemann stated that he had informed “folks” that they had the authority, but did not specifically identify whom he told.

### **HIRING**

The record evidence shows that retail sales supervisors participate in the hiring process on a limited basis. They review resumes, applications and cover letters. Both Prater and Fortney testified that they screen the pool of applicants until six to eight remain. However, from that point onward the applicants are always interviewed by Display Advertising Manager Cantrell. Employer witness Mike Nelson testified that Cantrell will sometimes conduct the first interview and has also decided who will be granted second interviews. The record indicates that Cantrell and the retail sales supervisors have never disagreed over which applicant to hire but this is so because one applicant has always been clearly superior to the others. There is no evidence that the retail sales supervisors have any input into the initial decision to hire an additional employee. And, as Outside Sales Supervisor Prater testified, it is Cantrell, not the retail sales supervisors, who has the final say regarding who to hire.

Finally, retail sales supervisors have no authority to make the initial decision to hire an additional A-3. At the time of the hearing there had been a hiring freeze at the Employer for some time. Accordingly, even if a retail sales supervisor believed that additional personnel were necessary they would be powerless to make a hiring decision.

### **TRANSFERS AND ASSIGNMENT OF WORK**

Majors/National Accounts Supervisor Fortney testified that while a retail sales supervisor may make territorial assignments for her team members, Cantrell has the authority to overrule those decisions. Record testimony shows that at least once, when Prater objected to the assignment of an account, she was overruled by Cantrell. The record also demonstrates that Cantrell decides non-routine matters, such as whether an account belongs in a zip code-oriented territory group, or in the "Majors group," where businesses are divided into categories.

### **RESPONSIBLE DIRECTION**

Retail sales supervisors operate under production deadlines which are set by the advertising department. Fortney testified she routinely communicates deadlines for sales presentations to her team. These presentations are generally done 60 to 90 days prior to a contract's expiration date.

The record shows that team members typically receive advice on how to improve their sales presentations. Record evidence indicates, however, that such advice is the natural byproduct of the greater experience and knowledge of the retail sales supervisors.

Outside Sales Supervisor Prater's testimony shows that a retail sales supervisor can resolve customer complaints involving a few hundred dollars but Prater testified she must obtain Cantrell's approval for resolutions involving higher amounts. Fortney's testimony regarding her team member's resolution of customer grievances indicates that a set of standard resolutions

exist for a set of common situations. And Fortney must obtain approval from Cantrell to resolve customer complaints that fall outside the routine.

### **EVALUATIONS**

While the authority to evaluate others is not, in and of itself, indicative of supervisory status, if such evaluations directly impact wage increases, promotions or discipline, this authority may satisfy the statutory criteria. Employer witnesses Prater and Nelson both testified that after writing their evaluations, they show them to Cantrell for possible revisions. Both Prater and Nelson modified their evaluations after receiving input from Cantrell. Fortney's testimony indicates that Cantrell reviews the evaluations completed by the retail sales supervisors in order to ensure consistency in assigning grades to the A3. The record does not demonstrate that these evaluations have any direct bearing on the job status of the A-3. In its post-hearing brief, the Employer does not argue that these evaluations affect the job status of A3 with regard to salary, promotions or discipline.

### **AUTHORITY TO REWARD**

The Retail Sales Supervisors collect information to calculate sales goals for the A3's on their team. Bonuses are distributed to the A3s for reaching or exceeding their goal. The record reflects, however, the routine nature of this goal-setting activity. Prater's testimony indicates that all of the entries on the goal-setting form come from sources other than herself. Cantrell and Thiemann determine whether the budget will be increased or decreased for the Advertising Department. In addition to the normal sales goal for each A3, the Retail Sales Supervisor will consult with the A-3 to formulate a challenge goal. The record indicates that these challenge goals are always the result of a collaborative consensus between the A-1 and the A-3.

The Retail Sales Supervisors have the authority to determine whether the A3's goals are set on a monthly or quarterly basis. The record also shows that the choice of making goals monthly or quarterly is discussed beforehand with the A-3.

### **ANALYSIS**

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

[A]ny 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 responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet this definition, an individual need only possess the authority to perform any one of the indicia listed, provided that the authority is exercised using independent judgment on behalf of management and not in a routine manner. **Clark Machine Corp., 208 NLRB 555 (1992); Browne of Houston, Inc., 280 NLRB 1222, 1223 (1986).** Persons with the power "effectively to recommend" the actions described in Section 2(11) are supervisors within the statutory definition. See, **Energy Systems & Service, 328 NLRB 902 (1999).** The burden of proving supervisory status rests on the party asserting the status. **NLRB v. Kentucky River Community Care, Inc.**, 121 S. Ct. 1861, 1866-67 (2001); **Bennett Industries, Inc., 313 NLRB 1363 (1994).**

The Board has noted that the legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not perceived as management, from those supervisors truly vested with genuine management prerogatives. **George C. Foss Co., 270 NLRB 232, 234 (1984).** The

Board has further explained that “[i]n enacting Section 2(11) congress emphasized its intention that only truly supervisory personnel...should be considered supervisors and not ‘straw bosses, lead men, set-up men, and other minor supervisory employees.’” **Chicago Metallic Corp., 273 NLRB 1677, 1688-89 (1985) enfd. in relevant part 794 F.2d. 527 (9<sup>th</sup> Cir. 1986).**

The Board has noted its duty not to construe the statutory language of Section 2(11) too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. **Hydro Conduit Corp., 254 NLRB 433, 437 (1981); St. Francis Medical Center-West, 323 NLRB 1046 (1997).**

In **Kentucky River, supra**, the Supreme Court ruled that the Board may not exclude from the independent judgment required in Section 2(11) the professional or technical judgment used in directing less-skilled employees to deliver services. The Court recognized, however, that it is within the Board’s provisions to determine what scope or degree of discretion meets the statutory requirement of “independent judgment.” The Court stated, “[m]any nominally supervisory functions may be performed without the exercise[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).** The Court also agreed with the Board that if the Employer limits the degree of independent judgment by, for example, detailed orders, an individual acting under such orders may be found not to be a statutory supervisor. **Kentucky River at 167, citing Chevron Shipping Co., 317 NLRB 379, 381 (1995).**

I have reviewed the facts of this unit clarification case in light of the Supreme Court’s teachings in **Kentucky River**, and I have concluded that there is insufficient evidence of independent judgment in the assignment and direction of work, hiring, discipline, evaluations

and the authority to reward employees to compel a finding that retail sales supervisors are statutory supervisors.

In reaching this conclusion, I initially note that the retail sales supervisors do not have independent authority to hire sales representatives. The record clearly demonstrates that Display Advertising Manager Cantrell always interviews serious candidates and has the final authority as to whom to hire. There is no evidence of a retail sales supervisor successfully recommending an applicant whom Cantrell did not wish to hire.

Retail sales supervisors also lack independent authority to assign work or to transfer the sales representatives. The A-3s in the Majors group cover businesses by category. Accordingly, new customers automatically go to whichever A-3 is responsible for that category of business. An A-3 in the territory group covers work by zip code. The record reflects that Cantrell must approve any non-routine assignment of work or transfer of employee from one sales group to another. On one occasion when Prater objected to the assignment of an account she was overruled by Cantrell.

There is no record evidence of a retail sales supervisor disciplining a sales representative nor is there any evidence that a retail sales supervisor has effectively recommended discipline. I do not find that Nelson's memos to Cantrell regarding a sales representative's tardiness for meetings was discipline, since it had no effect on the employee. A verbal or written warning that has no effect on the employee's job status is not sufficient to confer supervisory status. **Williamette Industries, Inc., 236 NLRB 743 (2001); Vencor Hospital, Los Angeles, 328 NLRB 1136 (1999).**

Record evidence shows that Thiemann, not the retail sales supervisors, approves issuing bonuses to sales representatives. Additionally, Thiemann alone has the power to adjust the

individual goals prescribed by the retail sales supervisors. Finally, the amount received by sales representatives for meeting or exceeding their goals is formulated by management, not the retail sales supervisors. Because the retail sales supervisors have no independent authority to reward the sales representatives within the meaning of Section 2(11) I find their involvement in the bonus process insufficient to confer supervisory status.

The evaluations performed by the retail sales supervisors are not effective because the evaluations have no direct impact on the job status of the sales representatives. The Board has found supervisory status only when the evaluations are not subject to prior approval, and the evaluations are effective in affecting the job status of the employees being evaluated. For example, when the evaluations directly determine the amount of the employee's salary increase.

**Harbor City Volunteer Ambulance Squad, Inc., 318 NLRB 764 (1995).**

The Employer has not demonstrated that the evaluations conducted by the retail sales supervisors directly affect the salary, transfer, promotion or discipline of the sales representatives. Accordingly, the evaluations are an insufficient basis for concluding that the retail sales supervisors are supervisors within the meaning of the Act.

The attendance of A-1s at supervisory meetings does not confer supervisory status under the Act. Attendance at management meetings is not one of the supervisory criteria enumerated in Section 2(11), and attendance at management meetings alone will not establish supervisory authority. **Chicago Metallic Corp., 273 NLRB 1677, 1691 (1985).** I further note that there is a weekly management meeting which Cantrell and Thiemann attend, but from which the retail sales supervisors are excluded.

Based upon all the foregoing, and the entire record, I find that the retail sales supervisors are not Section 2(11) supervisors but are employees within the meaning of the Act.

**ORDER**

It is ordered that the petition be dismissed.

**RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **March 17, 2004**.

Dated at Cleveland, Ohio this 3rd day of March, 2004.

/s/ Frederick Calatrello  
Frederick J. Calatrello  
Regional Director  
National Labor Relations Board  
Region 8