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

In the Matter of BMW OF WEST SPRINGFIELD Employer[1] and UNITED SERVICE WORKERS, LOCAL 355, IUJAT Petitioner	Case 1-RC-21908

DECISION AND DIRECTION OF ELECTION[2]

The Petitioner seeks to represent a craft unit of six service technicians employed in the service department of the Employer's auto dealership in West Springfield, Massachusetts.[3] The Employer contends that the service technicians do not constitute an appropriate unit and that the smallest appropriate unit must also include two service

[1] The name of the Employer appears as amended at the hearing.

[2] 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. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[3] The Petitioner has indicated its willingness to proceed to an election in any unit the Region finds appropriate.

advisors, a porter, and a porter/apprentice who work in its service department. The Employer asserts that, to the extent Board law regarding craft units in the automotive industry is to the contrary, it should be overturned. I find that the craft unit sought by the Petitioner is appropriate, although I shall include the apprentice in the unit as a dual function employee who works with the service technicians on a part-time basis.

The Employer also asserts that service technician Paul Grudgen is a statutory supervisor who should be excluded from the unit on that basis. I find that Grudgen is not a statutory supervisory and shall include him in the unit.

A. Appropriate unit

Background

George Menard, the general manager of the Employer's BMW dealership, oversees all departments at the dealership, including administration, sales, finance, parts, and service.[4] The service department is generally overseen by a service manager who reports to Menard. Because the service manager position has been vacant for a few weeks,[5] the service department employees currently report to Menard. The service department is comprised of the six service technicians at issue, as well as a dispatcher, two service advisors, one porter, one porter/apprentice, and three shuttle drivers.[6]

The service department is located in the rear of the dealership. It is composed of six bays with lifts that are used for car repairs and a bay for washing cars.

Service technicians

The dealership's six service technicians are responsible for diagnosing problems with vehicles and making repairs. The dispatcher in the service department, Jim Zehelski, receives repair orders from the two service advisors, who write up the repair orders after speaking to the customers. He distributes the repair orders to the service technicians by placing them in their mail slots. Zehelski decides which technicians will perform each repair based on their skill level and the time needed for the job, and he prioritizes the work.

Each repair order is entered into a computer system, and each technician has an identification code that he uses to indicate that he has performed the work for that repair order. There is a separate line for each repair on a car, such as brakes, oil change, and so

[4] Neither party seeks to include employees from any department other than the service department.

[5] The previous service manager, Jonathon Thompson, left the dealership two weeks prior to the hearing.

[6] Neither party seeks to include the dispatcher or the shuttle drivers in the unit.

forth. The technicians log in when they begin each job and log off when it is done, after typing in what work has been done. If a car requires more work than the customer has approved, the technician sends a request to the service advisor through the computer, and the service advisor tries to sell the extra work to the customer. The advisor reports to the dispatcher whether or not the customer has approved the additional work, and the dispatcher tells the technician. Once all repairs are completed, the technician road tests the car, parks it, turns the repair order in to the service advisor who wrote it, and puts the car keys in the bay for car washing. The technician then goes to the next repair order in his mail slot or sees the dispatcher for more work.

About 60 percent of customer vehicle complaints are diagnosed by means of a computer. The technicians attach a dealership computer to a computer within the vehicle, which transmits the problem to the dealership's computer and shows a code for each type of "fault." By using the computer, the technicians can then look for service bulletins that describe the method of repair for the various types of faults.[7]

BMW technicians are classified by their level of training and may progress to a higher classification with further training. There are five different classifications for service technicians: master technician, which is the highest level, followed by diagnostic technician, certified technician, BMW technician, and non-certified technician. The dealership currently has one master technician, Paul Grudgen, who has 20 years of experience and is also the shop foreman. BMW requires the dealership to employ at least one master technician. The dealership employs two diagnostic technicians, Steve Beckwith and Kirk Seetal, two certified technicians, Richard Boadway and Christopher Bowen, and one non-certified technician, Randy Cipriani. Three of the current service technicians have progressed to higher classifications while working for the Employer by receiving further training.

The dealership trains its technicians by sending them to school at a BMW North America training center in New Jersey. Of the six service technicians, Grudgen and Beckwith already had training by BMW at the time they were hired, Seetal, Boadway, and Bowen were trained as BMW technicians after being hired, and Cipriani has not yet been trained by BMW. Although they were not certified as BMW technicians at the time they were hired, Seetal, Boadway, and Bowen had previous experience working as mechanics for Mercedes, Jaguar, and Honda. Cipriani also came to the dealership with some technical or automotive experience. The dealership intends to send Cipriani to the BMW school when there is an opening for him.

BMW offers a program called "Step," under which it recruits students from trade schools and trains them to become master technicians (Step 1) or diagnostic technicians (Step 2). The Step program consists mostly of classroom training, but also involves some hands-on training in car repair. Step 2 training takes 60 to 90 days. The record does not reveal how long the Step 1 training takes. BMW then sends the resumes of Step

[7] For example, there are service bulletins on chassis problems, engine problems, heating and air conditioning problems, and the like.

graduates to BMW dealerships, and the dealerships pay a fee to BMW when they hire a Step graduate. Beckwith was a Step graduate.

Service technicians are required to complete a certain amount of training on an ongoing basis in order to maintain their BMW certification. Grudgen, for example, attended classes at the New Jersey training center twice last year and twice so far this year on topics such as the new BMW engines. Technicians also meet training requirements by watching programs sent by a BMW satellite or on-line. Technicians who do not meet their requirement for ongoing training may be downgraded to the next lower classification, which commonly happens.[8]

The service technicians are required to have their own tools. Grudgen estimated that his set of tools would cost about $25,000 to $30,000, which is the low end, and that some of the other technicians have more tools than he does.[9] The service technicians use their own tools as well as dealership-supplied diagnostic equipment and specialized tools used in the repair of BMWs.

The service technicians generally work weekdays either from 7:30 a.m. to 5 p.m. or 8 a.m. to 5:30 p.m., except that they work until 6:30 or 7 p.m. on Thursday evenings. In addition, two technicians are on duty each Saturday from 8 a.m. to 4 p.m., so that each technician works every third Saturday.

Service advisors

The principle duty of the two service advisors,[10] Craig Mikulitz and Michael Haynes, is to make appointments for customers and to write up repair orders in which they describe the customers' complaints about their vehicles. They give the repair orders to the dispatcher. After a repair is completed, the service advisors code the repair orders and enter the amount of time for the job and the formula for the charges. They also help the service manager, when there is one, process paperwork for warranty work. Their job requires customer-facing skills, as they must explain to the customers what will be done to their vehicles. They work mostly with a computer, although they occasionally do a minor repair themselves, such as putting on wiper blades or fixing a tail light.

The record does not reveal the qualifications required for the job, although one of the service advisors, Mikulitz, had six years of previous experience as a Ford Motor Company technician. Menard testified that Mikulitz helps out by performing the

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[8] Menard testified that Beckwith, who is a diagnostic technician, graduated from the training program in New Jersey as a master technician but needed to attend certain classes to maintain his status as a master technician. This may explain why he is currently a diagnostic technician. Master technician Grudgen testified that he has been downgraded a notch for missing classes.

[9] Menard testified that, if he had to guess, each technician spends on average $6000 on tools.

[10] They are also referred to as assistant service managers.

technicians' work when they are in a jam. This happens about once a month, although Menard did not know how many hours Mikulitz has spent performing vehicle repairs.[11] The other service advisor, Haynes, does not perform vehicle repairs other than the minor repairs described above, and there is no evidence that the ability to do so is a job requirement. The service manager and the dispatcher fill in for the service advisors when necessary.[12] There have been no permanent transfers between the service advisor and technician classifications.

The service advisors are also required to meet BMW training requirements for their position. Along with the technicians, they read service bulletins that describe particular problems with BMWs and how to correct them. They also watch the "service roundtable" classes that BMW broadcasts monthly, which provide up-to-date training on BMW repair work. This helps the service advisors explain to customers what has been done to their vehicles. The service advisors also attend training in "people" skills, as well as in warranty processing.

The service advisors work from 7:30 a.m. to 5:30 p.m., Monday through Friday, and they alternate working until 7 p.m. on Thursday evenings. They each work every third Saturday from 8 a.m. to 4 p.m.

Porter and porter/apprentice

Michael Fontaine is a full-time employee who works Monday through Friday from 7:30 a.m. to 1 p.m. as a porter and from 1 p.m. to 5:30 p.m. as an apprentice to the service technicians. Alexander Perez is a part-time porter who works from 1 p.m. to 5:30 p.m. Monday through Friday, but stays until 7 p.m. on Thursday evenings.[13]

As porters, Perez and Fontaine check in, tag, and park the customers' cars when they arrive. They also wash and vacuum cars in the wash bay after repairs are completed.[14] The service advisors or dispatcher tell them which cars to wash first. When

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[11] Service technicians Paul Grudgen and Richard Boadway testified that they have never seen Mikulitz performing technicians' work.

[12] Zehelski acts as both service advisor and dispatcher when it is his turn to work every third Saturday. He did this every fourth Saturday when there was a service manager.

[13] Fontaine does not work on Saturdays. The record does not reveal whether Perez works Saturdays.

[14] The dealership also employs a detailer who is part of the show room and who does not appear to belong to the service department. The detailer works in a separate bay used for detailing cars, which involves cleaning and reconditioning new and used cars for display or delivery to customers. The detailer does more extensive cleaning than the porters, such as sanding defects, shampooing carpets, dying interiors, removing tar, and cleaning windshields with steel wool. If both porters are out, the detailer may perform the porters' duties, although Menard testified that everybody washes cars to get the job done. No party seeks to include the detailer in the unit.

they have finished repairing a vehicle, the service technicians either give the key to a porter or hang the key on a hook. The porters may ask the service technicians how much longer they will take with a given car. The porters use basic car wash supplies and were given no special training to learn their duties. The porters also perform housekeeping duties, such as sweeping, emptying trash, and cleaning drains.

Fontaine worked full-time as a porter for about a year until a month prior to the hearing. At that time, because Fontaine wants to become a mechanic, the former service manager, Jon Thompson, and master technician Paul Grudgen offered to let him work as an apprentice with the service technicians in the afternoon.[15] Fontaine performs tasks such as programming vehicles, changing oil, replacing filters, performing a mini-tune-up, removing insulation from dashboards and seats, and removing the components mounted on vehicle exhaust systems. He has assisted with brake jobs, with service inspections, and with removing drive train components. He works under the supervision of a technician who checks his work 99 percent of the time, although he can now mount and dismount tires independently. Fontaine does not log into the computer that he has performed a repair. The service technician with whom he is working enters any work that Fontaine has performed and gets paid for the work that Fontaine does under his supervision.

Fontaine attended vocational school in automotive repairs for two years before Menard hired him as a porter. Menard testified that vocational school was not a prerequisite for the job because Fontaine was hired as a porter. Menard took it into consideration, however, because he knew of Fontaine's aspirations to be a mechanic and told him that he might eventually get to assist the technicians. Menard testified that after an informal 90-day probationary period, he will decide whether to start training Fontaine through BMW.

Fontaine is not required to have his own tools. He bought a former service technician's tool box, but he does not keep the tool box at work because there is no room for another one.[16]

Working conditions

The service technicians, the porter, and the porter/apprentice wear a standard blue uniform,[17] while the service advisors wear a shirt and tie. The service technicians, porter,

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[15] Perez was hired about a month ago to work as a porter in the afternoon so that Fontaine could work as an apprentice in the afternoon. Menard testified that Perez would be allowed to be an apprentice or mechanic in the future if he desires, but there is no evidence that he has expressed such a desire.

[16] Tool boxes are four to five feet tall. The type of tool box that Fontaine bought used would cost almost $6300 if new.

[17] The detailer and lot manager in the sales department, as well as the driver and counter employees in the parts department, wear the same blue uniform.

and porter/apprentice all punch a time clock. The record does not reveal whether the service advisors, who are salaried, also punch the time clock. All employees at the dealership share a common break room.

Wages and benefits

The service technicians are paid based on a "flat rate" system under which they are paid for each job based on a formula. BMW publishes a guide which lists the time it takes to perform various types of repairs. In the case of work done under a BMW warranty, the technician is paid by multiplying the published time for the job, plus 25 percent, times his hourly rate.[18] The technician gets paid that amount regardless of how long it actually takes him to complete the job. Technicians do not receive overtime pay.

The hourly rate for master technician Paul Grudgen is $23.50, and he also receives a shop foreman bonus of $.25 to $.30 per hour. The diagnostic technicians earn between $19 and $19.50 per hour. The certified technicians earn between $15.50 and $22 per hour, and the non-certified technician, Cipriani, earns $16.50 per hour.

In addition to being paid pursuant to the flat rate system, Cipriani is guaranteed to be paid for at least the number of hours he is on the clock. That is, if he physically works for 40 hours but produces 60 hours of work under the flat rate system, he is paid for 60 hours. However, if he physically works for 40 hours, but produces only 30 hours of work under the flat rate system, he is paid for 40 hours. Menard testified that Cipriani has been given this "clock guaranty" because he has not yet had the opportunity to be trained by BMW, so he may not be as efficient and it may take him longer to perform a job than the published time.

The service advisors are paid a salary in the "mid fives" or "mid sixes." They also receive a commission check at the end of each month based on the number of hours of repair work they have "sold."[19]

The porter and porter/apprentice are paid hourly, by the clock, rather than by the flat rate system. Perez is paid $8 per hour and Fontaine is paid $9 per hour. Fontaine gets the same rate of pay for his work as a porter and as an apprentice. Both employees are eligible for and have received overtime pay.[20]

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[18] For example, if the published time for a certain repair is one hour, the technician is paid for one hour and fifteen minutes of work times his hourly rate for warranty work. A different formula is used for repairs not under warranty, where the customer is paying the bill.

[19] The commission is based on the total number of hours of repair work generated by the technicians under the flat rate system times a certain amount per hour.

[20] It is not common for Perez, who is a part-time employee, to work overtime, but he has done so.

All full-time employees at the dealership receive the same benefits, including vacation and personal days, disability insurance, a 401(k) plan, and uniforms, if applicable. Part-time employees such as Perez receive only a uniform.

Analysis

Appropriateness of a craft unit

The Board has held that service technicians in automotive dealerships constitute a craft unit that is appropriate for collective bargaining. In this regard, the Board will approve such units where the record shows that the mechanics are a distinct and homogenous group of highly trained and skilled craftsmen who are primarily engaged in the performance of tasks that are not only different from the work performed by other service department employees, but that require the use of substantial craft skills, as well as specialized tools and equipment. Extensive training or prior experience, a requirement to attend periodic training on a regular basis, and a separate community of interest from other employees in the service department are also factors considered in determining the appropriateness of a craft unit of mechanics. Dodge City of Wauwatosa.[21]

The Employer maintains that the Board's holding in Dodge City of Wauwatosa is outdated in that, with the advancement of computer programs that walk technicians through repairs, the non-certified technician, the apprentice, and one of the service advisors can perform mechanical work as well as the BMW technicians. The Employer urges the Board to return to pre-Dodge city of Wauwatosa precedent in which the Board applied the traditional community of interest standard to such cases. I have no authority to overturn Board precedent and, accordingly, shall apply current Board law in making my unit determination.

I find that the service technicians are a distinct and homogenous group composed of highly skilled craftsmen that is appropriate for bargaining. The service technicians are the only employees in the service department who are primarily engaged in the repair of vehicles. The job requires specialized schooling at BMW's school in New Jersey, as well as ongoing training in order to maintain certification.[22] At the time of hire, all of the technicians were either already certified by BMW or had prior automotive experience. The service technicians alone are required to purchase expensive tools, and they use specialized BMW tools. They are the only employees paid according to the flat rate system.

The porters and service advisors do not share a community of interest with the service technicians sufficient to negate the appropriateness of the petitioned-for craft unit. While it is true that the service technicians, porters, and service advisors all share

[21] 282 NLRB 459 (1986).

[22] Although one of the service technicians has not yet been certified by BMW, the dealership intends to send him for training as soon as a slot is available.

common supervision with the service manager, I note that the unit sought by the Employer does not constitute a discrete administrative grouping, as it does not include all of the service department employees.[23] Although the two porters[24] wear the same uniform as the service technicians, in all other respects they are dissimilar to the service technicians. Thus, they are unskilled employees who do not require specialized experience, training, or tools, they are paid hourly rather than pursuant to the flat rate system, they are eligible for overtime pay, and they do not work on Saturdays.

The primary function of the service advisors, unlike that of the service technicians, is to interface with customers and to work at a desk with a computer performing paperwork related to repair orders. The service advisors wear a shirt and tie rather than a uniform. Although they attend some of the same in-house training as the service technicians, they are not required to be BMW-certified technicians and do not attend the training program in New Jersey. They are not required to use or purchase specialized tools as part of their job duties. Although one of the service advisors, Mikulitz, has previous experience as a technician, there is no evidence that such experience is a job requirement. While Mikulitz helps out the service technicians with actual vehicle repair work about once a month, I find that to be an insubstantial amount of temporary interchange. The other service advisor, Haynes, performs only minor vehicle repair work such as replacing wiper blades and light bulbs. There is no evidence of any permanent transfers between the two positions. The service advisors receive a salary and commission, unlike the service technicians on the flat rate system.[25]

The Employer's cites R.H. Peters Chevrolet[26] for the proposition that the service technicians do not constitute a distinct and homogenous group which could constitute a separate craft unit and that the service advisors share a community of interest sufficient to

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[23] The Employer does not seek to include three shuttle drivers who also report to the service manager, nor does it seek to include the position of dispatcher in the service department.

In its post-hearing brief, the Employer asserted for the first time that the dispatcher, Zehelski, should be included in the unit as a dual function employee, because he performs the work of service advisors on Saturdays on a rotating basis and when one of the two service advisors is absent. Since I find it inappropriate to include the service advisors in the unit, I need not consider the issue of whether Zehelski is a dual function employee with respect to service advisor work.

[24] I refer here to Fontaine in his capacity as porter; I shall address the inclusion of Fontaine in his capacity as an apprentice below.

[25] The Employer argues that the earnings of both classifications are based to a large extent on the number of flat rate hours sold by the advisors and completed by the technicians. I find that the methods of compensation of the two classifications are very different. The service advisors are paid primarily a salary and it is only their monthly commission that is affected by the flat rate hours sold. Only the service technicians are paid pursuant to a system under which the faster they work and the more jobs they do, the higher their pay.

[26] 303 NLRB 791 (1991).

warrant their inclusion in the unit. I find that case inapposite, however, because there the union did not seek a craft unit limited to service technicians (referred to as mechanics in that case); rather, the issue was whether service advisors should be included in a stipulated unit composed of all mechanics, helpers, body-shop employees, and parts department employees.

Inclusion of the apprentice

His status as an apprentice –

The Board has defined craft units as a distinct and homogenous unit of journeymen, apprentices, and helpers. Schaus Roofing and Mechanical Contractors.[27] Craft units of automotive mechanics typically include helpers or trainees, such as lube workers, who are not as skilled as the other automotive mechanics, but who are engaged in mechanical work and sometimes work closely with other technicians in the unit. Dodge City of Wauwatosa, Inc.;[28] Fletcher Jones Chevrolet;[29] Country Ford Trucks, Inc.[30] I find that in the afternoons Fontaine performs the type of work that qualifies as apprentice-type work. In this regard, he works under the close supervision of the other service technicians learning how to perform vehicle repairs. He has had vocational school training in automotive repairs. Although not required to provide his own tools, Fontaine has purchased some expensive tools, evidencing his intent to eventually become a service technician. He wears the same uniform as the service technicians. Contrary to the Petitioner's assertion, I find that his inclusion as an apprentice is not defeated by the fact that the Employer has no formal apprenticeship program and that his pay and hours are different from those of the service technicians. See, Fletcher Jones Chevrolet[31] and Country Ford Trucks[32] (quick service technicians and lube workers included as helpers or trainees, notwithstanding the lack of a formal apprenticeship program).

His status as a dual function employee –

There remains the question of whether Fontaine, who works both as a porter and as an apprentice to the service technicians, works with sufficient regularity as an apprentice to be included in the unit. The test for determining whether a dual-function employee should be included in a unit is whether the employee performs unit work for

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[27] 323 NLRB 781 (1997).

[28] Supra at 282 NLRB.

[29] 300 NLRB 875 (1990).

[30] 229 F.3d 1184 (2000).

[31] Supra.

[32] Supra.

sufficient periods of time to demonstrate that he has a substantial interest in the unit's wages, hours, and conditions of employment. The Board has no bright line rule as to the amount of time required to be spent performing unit work, but rather, makes this determination according to the facts of each case. Harold J. Becker Co.[33] Dual function employees may be included in the unit even though they spend less than a majority of their time on unit work. Martin Enterprises, Inc.[34] See, e.g., Medlar Electric (two employees who spent, respectively, 30 to 40 percent and 25 to 30 percent of their time performing unit work included as dual-function employees). I conclude that Fontaine, who spends 50 percent of his time working as an apprentice, performs unit work for sufficient periods of time to warrant his inclusion in the unit.

B. Supervisory status of service technician Paul Grudgen[35]

The Employer contends that Grudgen is a statutory supervisor on the basis of his authority to responsibly direct employees, assign work, and relay information from management, and on the basis of his authority to effectively recommend hiring, promotions, and discipline.

As noted above, Grudgen is certified by BMW as a master technician, and he has 20 years of experience as a technician. He described himself as a working shop foreman. In that capacity, he meets with customers with particular complaints about their cars, helps the other technicians when they are having difficulty diagnosing or repairing cars, and relays information from management to the other technicians about matters such as attending training and taking tests. Menard testified that Grudgen does not assign work, although he also testified that the dispatcher, who decides for the most part who gets what job, sometimes asks Grudgen who should get a job. Grudgen has no authority to grant time off or to allow employees to leave early.

Grudgen testified that he has no authority to hire, although he did recommend the hire of technician Randy Cipriani. Grudgen and the former service manager, Jon Thompson, together interviewed Cipriani and another candidate. After the interviews, Thompson asked Grudgen for his thoughts on both applicants. Grudgen testified that they kind of agreed that Cipriani would be the better candidate and that he recommended him.

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[33] 343 NLRB No. 11 (September 29, 2004).

[34] 325 NLRB 714 (1998).

[35] At the outset of the hearing, the parties stipulated that Grudgen is a nonsupervisory employee. Later in the hearing, the Employer apparently withdrew from that stipulation by declining to stipulate that Grudgen is a nonsupervisory employee and asserting that it would review the record. In its post-hearing brief, the Employer asserted for the first time that Grudgen is a statutory supervisor.

Grudgen testified that it was his idea to give Fontaine a chance to work as an apprentice. The service technicians were getting behind at times, and Fontaine had expressed an interest in working on cars. Grudgen recommended the arrangement to former service manager Thompson, based on his observations and judgment, and Thompson decided to give him a chance. Grudgen was not part of any discussion about a probationary period for Fontaine. He just said that Fontaine could work along side him and he would start showing him what to do.[36] As noted above, Menard testified that he knew Fontaine had aspirations to be a mechanic when he hired him and he told Fontaine that he might eventually get to assist the technicians.

Grudgen testified that he would pass along any negative observations about Fontaine to the service manager, since it is part of his job to assess Fontaine's performance as he learns. Apart from the case of Fontaine, he testified that he has never been asked to assess an employee's performance and cannot approve pay.

When asked whether he has authority to effectively recommend that somebody be disciplined, Grudgen testified that he thinks he does, in that he could say there is a problem. However, he has never recommended termination or discipline of any kind. He himself has no authority to fire or discipline.

Grudgen wears the same uniform as the other employees and does not attend management meetings. As noted above, his hourly rate as a master technician is the highest of all the technicians, and he also receives a shop foreman bonus of $.25 to $.30 per hour.[37]

Analysis

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp.[38] The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. New Fern Restorium Co.[39] The burden of proving

[36] Fontaine usually works with Grudgen, Beckwith, or Boadway.

[37] Grudgen testified that he loses time by going to help the other technicians, so the dealership makes up for it by giving him a bump in pay.

[38] 273 NLRB 1677, 1689 (1985).

[39] 175 NLRB 871 (1969).

supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care[40] The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co.[41]

As indicated above, the Employer contends that Grudgen is a statutory supervisor on the basis of his authority to responsibly direct employees, assign work, and relay information from management, and on the basis of his authority to effectively recommend hiring, promotions, and discipline. The record, however, does not support these contentions.

Evidence that Grudgen sometimes oversees the work of the other technicians and the apprentice[42] and that the dispatcher sometimes asks Grudgen who should get a job is insufficient to establish authority responsibly to direct or authority to effectively recommend the assignment of work, where there is no evidence as to the nature of Grudgen's direction, no evidence that the dispatcher usually follows his recommendations in assigning work, and no evidence as to the basis for Grudgen's recommendation that a job should be assigned to one technician versus another. North Shore Weeklies[43] (no showing that any independent judgment is involved in making assignments or in directing the work of crews, where the record does not reveal the press supervisors' particular acts and judgments that make up their direction of work). His role in assisting the other technicians with difficult jobs appears to be that of a typical, experienced lead person. Nor does Grudgen's role in relaying information from management to the technicians about matters such as training confer supervisory status. Bowne of Houston[44] (assistant foreman's conduct in relaying instructions from the front office to employees does not constitute responsible direction; he merely serves as a conduit for management instructions).

As for Grudgen's authority to effectively recommend hiring, promotion, and discipline, the Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. Children's Farm Home.[45] Thus, Grudgen's role in recommending the hire of Cipriani does not confer supervisory status, since he interviewed the candidates along with the

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[40] 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

[41] 308 NLRB 101, 102 (1992).

[42] I note that the apprentice works under the direction of two other technicians in addition to Grudgen.

[43] 317 NLRB 1128 (1995).

[44] 280 NLRB 1222, 1224 (1986).

[45] 324 NLRB 61 (1997).

service manager, who could independently evaluate their suitability. Ryder Truck Rental[46] His role in recommending the promotion of Fontaine to part-time apprentice does not demonstrate supervisory status, in the absence of evidence that Thompson, who was Fontaine's direct supervisor, approved the idea without the opportunity to evaluate Fontaine's suitability himself.[47] In addition, Menard had already told Fontaine at the time he was hired that he might eventually get to assist the technicians. Consolidated Services[48] (no evidence that the facility manager follows senior cooks' recommendations without making an independent investigation); Brown & Root[49] (foreman who makes informal suggestions about the promotion of crew members is not a supervisor).

Grudgen's testimony that he would pass along any negative observations about Fontaine to the service manager or that he could say that there is a problem with other technicians does not demonstrate statutory power to effectively recommend discipline or evaluate employees, where there is no evidence he has ever done so, nor any evidence that such reports would include a recommendation for discipline or other action and that his superiors would follow it without independent investigation.

The Employer also argues that Grudgen is a supervisor because he is the highest ranking employee in the department and he receives premium pay due to his status as a working foreman. These are merely secondary indicia, which are insufficient by themselves to establish supervisory status when there is no evidence presented that an individual possesses any one of the several primary Section 2(11) indicia. Ken-Crest Services.[50]

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act

> All full-time and regular part-time service technicians and service technician apprentices employed by the Employer at its West Springfield facility, but excluding porters, service advisors, dispatcher, shuttle drivers, clerical employees, all other employees, guards, and supervisors as defined in the Act.

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[46] 326 NLRB 1386, 1387-1389 fn. 9 (1998).

[47] I also note that Thompson approved the promotion only on a trial basis.

[48] 321 NLRB 845 (1996).

[49] 314 NLRB 19, 21 (1994).

[50] 335 NRLB 777, 779 (2001).

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director 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 an 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 purposes of collective bargaining by United Service Workers, Local 355, IUJAT.

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 the 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.;[51] NLRB v. Wyman-Gordon Co.[52] Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility.[53] In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before May 31, 2005. 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 requirement here imposed.

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[51] 156 NLRB 1236 (1966).

[52] 394 U.S. 759 (1969).

[53] 315 NLRB 359 (1994).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election 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 by received by the Board in Washington by June 7, 2005. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: www.nlrb.gov.

/s/ Rosemary Pye
Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 24th day of May, 2005.

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