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Rockspring Development, Inc. *and* United Mine Workers of America, Petitioner. Case 9–RC–17844

February 27, 2009

SUPPLEMENTAL DECISION, DIRECTION, AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The National Labor Relations Board has considered determinative challenges in an election held November 13, 2003, and the hearing officer's supplemental report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 110 for and 108 against the Petitioner, with 4 determinative challenged ballots.[2]

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's supplemental rulings, findings, and recommendations as modified below.

I.

As noted, the remaining issues in this case concern the determinative challenged ballots of chief electricians Charles Stollings, Andrew Jackson Sharp, and Bobby Lee Stowers, and safety coordinator Ernest Bartram. The hearing officer in his supplemental report recommended overruling the Petitioner's challenges to the ballots of Stollings, Sharp, and Stowers, finding them not to be supervisors under Section 2(11) of the Act, as interpreted in *Oakwood Healthcare*, supra. We agree with those findings for the reasons set forth in the hearing officer's supplemental report. We therefore shall direct that the ballots of Stollings, Sharp, and Stowers be opened and counted.

The hearing officer further recommended sustaining the Petitioner's challenge to the ballot of Ernest Bartram, finding him to be a 2(11) supervisor and a managerial employee. For the following reasons, we find Bartram to be neither a supervisor nor a managerial employee. We shall accordingly direct that his ballot be opened and counted.

II.

Ernest Bartram is the Employer's safety coordinator and serves as the assistant to the Employer's manager of safety. The safety manager is responsible for the safety of the entire mine, including training the mine rescue team, assisting with the implementation of the roof control plans, conducting safety audits, and setting up safety and HAZMAT training. Bartram serves in a subordinate role. He assists the mine engineer in preparing ventilation plans for the mine and directs employees where to position devices to ensure proper ventilation. He performs underground safety inspections, and prepares safety talks that are given weekly by foremen to employees. During production meetings, Bartram reviews the Employer's accident and safety statistics. He verifies that emergency breathing devices and other safety equipment worn by miners are operating properly. Bartram also maintains first aid equipment, helps conduct annual safety retraining, assists with employee drug testing, and prepares basic job safety analyses and submits them to the Employer's main office.

Bartram is also responsible for traveling the mine with Federal and State mine safety inspectors. Those inspectors may issue citations for safety violations, and Bartram is authorized to receive them on behalf of the Employer. He may also designate an employee to accompany inspectors. Bartram has the discretion to take steps to mollify inspectors to avoid citations and fines being levied on the Employer or individual employees.[3] Those methods include shutting down sections of the mine, directing employees to move equipment so inspectors will not see it, and appearing to threaten employees with discipline in front of the inspectors. Regarding that last method, Bartram admitted that he does not have disciplinary authority, although he intends for employees to assume that he does.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The initial tally of ballots showed 110 for and 103 against the Petitioner with 9 determinative challenged ballots. The hearing officer issued his initial report on February 3, 2004. On September 29, 2006, the Board issued a Decision, Direction, and Order adopting the hearing officer's recommendations in certain respects, and directing the Regional Director to open and count certain ballots and to prepare a revised tally of ballots. That revised tally, issued on October 11, 2006, showed 110 for and 108 against the Petitioner, with 4 determinative challenged ballots: those of chief electricians Charles Stollings, Andrew Jackson Sharp, Bobby Lee Stowers, and safety coordinator Ernest Bartram. On October 12, 2006, the Regional Director transferred this proceeding to the Board for further consideration. On November 15, 2006, the Board remanded the case to the hearing officer to resolve the supervisory status of Stollings, Sharp, Stowers, and Bartram under *Oakwood Healthcare*, 348 NLRB 686 (2006). The hearing officer issued his supplemental report on April 4, 2007.

[3] Inspectors may issue citations to employees individually as well as the Employer.

A. The Supervisory Issue

The burden of proving supervisory status rests on the party—here the Petitioner—asserting that such status exists. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001). The hearing officer concluded that Bartram is a supervisor under Section 2(11) of the Act, finding that the Petitioner established that Bartram responsibly directs employees in certain safety matters and assigns them significant overall duties using independent judgment. The record does not support those findings.

1. Responsible direction

In *Oakwood Healthcare*, supra, the Board interpreted the 2(11) language "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible . . . and carried out with independent judgment." 348 NLRB at 691 (internal quotations omitted). The Board further held that, for direction to be responsible under Section 2(11), the person directing the performance of a task must be accountable for its performance. Id. at 691–692. Contrary to the hearing officer, we find that the Petitioner has not established the requisite accountability here.[4]

To establish accountability for purposes of responsible direction, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. at 692. Evidence of actual accountability must be presented to prove responsible direction. See *Alstyle Apparel*, 351 NLRB 1287, 1287 (2007); *Golden Crest Healthcare Center*, 348 NLRB at 731.

The Petitioner has not carried its burden of establishing that Bartram is accountable for his actions in directing employees in safety matters. Bartram testified that, in the event the Employer or individual employees received a citation or fine from the mine safety inspectors, it "would reflect poorly" on Bartram and he was sure he would "hear about it." The hearing officer relied on this testimony to find the accountability requirement satisfied. That testimony, however, is too vague to establish that there is an actual prospect of adverse consequences for Bartram. There is no evidence, moreover, that Bartram has ever suffered, or been informed by the Employer of the prospect of, such consequences. We are thus left with Bartram's assumption that he is accountable. That assumption does not constitute the requisite evidence of actual accountability. See *Loyalhanna Care Center*, 352 NLRB 863 fn. 3 (2008) (accountability must be shown by record evidence).

2. Assignment

The hearing officer found that Bartram's designation of an employee to accompany a mine safety inspector constitutes assignment of employees with independent judgment sufficient to establish supervisory status. We disagree with that finding, as well.

In *Oakwood Healthcare*, supra, the Board held that "assign," for purposes of Section 2(11), means the "designation of significant overall tasks to an employee, not . . . ad hoc instruction that the employee perform a discrete task." 348 NLRB at 689. To establish the authority to assign, moreover, it must be shown "that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken." *Golden Crest Healthcare Center*, 348 NLRB at 729 (emphasis in original).

Applying this standard, the Petitioner has not met its burden of establishing the requisite authority to assign. Bartram testified, and the hearing officer found, that Bartram does not, in fact, know if he has the authority to order someone to accompany a mine inspector. Bartram further testified that he puts the matter in terms of a request, although he does not specifically advise the employee that accompanying an inspector is optional. In those circumstances, we find that the Petitioner has not presented sufficient evidence that Bartram has the authority to require that an employee accompany an inspector. Consequently, the Petitioner has not established that Bartram "actually possesses the Section 2(11) authority at issue." *Golden Crest Healthcare Center,* supra, 348 NLRB at 731.

But, even assuming that Bartram does have such authority, the Petitioner has not shown that Bartram's designation of an employee to accompany a safety inspector requires the use of independent judgment. See *Oakwood Healthcare*, supra, 348 NLRB at 687. Bartram's own testimony shows, in essence, that he simply selects an employee who works in the area that is being inspected. Such a selection method does not involve a degree of discretion that rises above the routine or clerical, contrary to the hearing officer's finding. Id. at 693; see also *Network Dynamics Cabling*, 351 NLRB 1423, 1425 (2007) (no independent judgment proved absent evidence that

[4] As a result, we need not pass on the hearing officer's finding that Bartram "directs" employees within the meaning of Sec. 2(11). See *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 11 (2006).

putative supervisor assessed the relative skills of employees in shifting them from one crew to another).

For those reasons, we find that the Petitioner has not established that Bartram is a supervisor within the meaning of Section 2(11) of the Act.

B. The Managerial Employee Issue

The hearing officer also found that Bartram is a managerial employee, and thus ineligible to vote in the election, based primarily on Bartram's interaction with mine safety inspectors. Specifically, the hearing officer relied on Bartram's discretion to devise tactics to mollify inspectors to prevent the issuance of citations or fines. Here, too, we disagree with the hearing officer's finding.

Employees properly classified as "managerial" are excluded from the protections of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). The Board, with Supreme Court approval, defines managerial employees as those "who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." *Solartec, Inc.*, 352 NLRB 331, 333 (2008), quoting *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). Accord *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). The party seeking to exclude an individual as a managerial employee has the burden of establishing that exclusion. See *Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn. 17 (1982).

Contrary to the hearing officer's finding, the Petitioner has not established that Bartram formulates the Employer's safety policy or exercises discretion in the performance of his job independent of that established policy. There is no evidence that Bartram formulated the Employer's policy of trying to mollify safety inspectors to avoid fines. Although Bartram may devise his tactics to achieve that immediate goal under the particular circumstances that confront him, there is no evidence that he may act independently of that policy. For example, he does not have the authority to enter into agreements with inspectors or their agencies binding the Employer to take remedial action. Cf. *NLRB v. Bell Aerospace Co.*, supra, 416 U.S. at 285–287 (finding managerial employee status where individuals were authorized to make binding financial commitments on the employer's behalf). The Petitioner therefore has failed to establish that Bartram's interactions with mine inspectors suffice to make him a managerial employee.

Nor do Bartram's other job duties establish managerial employee status. When Bartram prepares safety talks to be given by foremen, he merely uses materials suggested to him by inspectors or taken from Federal or State safety agencies' websites. He does not independently compose materials for those talks. Similarly, there is no evidence that Bartram exercises any independent discretion in developing ventilation plans: he merely assists the mine engineer. Finally, Bartram's preparation of basic job safety analyses for the Employer's consideration is a routine part of his safety responsibilities and does not show the exercise of managerial discretion. See *Solartec, Inc.*, supra at 336–337.

For all of the foregoing reasons, we find that the Petitioner has not shown that Bartram is a managerial employee ineligible to vote in the election. We shall accordingly direct that his ballot be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 9 shall, within 14 days from the date of this supplemental decision, open and count the ballots of Charles Stollings, Andrew Jackson Sharp, Bobby Lee Stowers, and Ernest Bartram. The Regional Director shall then prepare and serve upon the parties a second revised tally of ballots, and issue the appropriate certification.

ORDER

It is ordered that this proceeding is remanded to the Regional Director for further processing.

Dated, Washington, D.C. February 27, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD