

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

MID-ATLANTIC HOSE CENTER, LLC  
d/b/a PIRTEK SOUTH PHILA<sup>1</sup>

Employer

and

Case 4–RC–21390

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 542, AFL-CIO<sup>2</sup>

Petitioner

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

The Employer, Pirtek South Phila, is engaged in the sale, installation, and service of hoses and related products from its facility in Folcroft, Pennsylvania. The Petitioner, Operating Engineers Local 542, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer’s Mobile Sales and Service Technicians (MSSTs). The Employer does not contest the appropriateness of the unit, but the parties disagree as to the inclusion of three individuals. The Petitioner would exclude from the unit Operations Manager Phil Impriano as a supervisor and/or managerial employee, and MSST Pat Monahan Jr. because he is the son of General Manager Pat Monahan Sr. The Employer asserts that Impriano and Monahan Sr. should be included. Contrary to the Petitioner, the Employer would exclude the Petitioner’s organizer, MSST Frank Bankard, because he is a temporary employee and does not share a community of interest with other unit employees. The Petitioner’s proposed unit would consist of six employees, while the Employer’s proposed unit would include seven employees.

A Hearing Officer of the Board held a hearing, and the parties filed briefs. I have considered the evidence and the arguments presented by the parties concerning the issues described above, and I have concluded that MSSTs Pat Monahan Jr. and Frank Bankard should be included in the unit, but Operations Manager Phil Impriano should be excluded.

To provide a context for my discussion, I will first present an overview of the Employer’s operations. Then, I will review the factors that must be evaluated in determining whether the

---

<sup>1</sup> The Employer’s name appears as amended at the hearing.

<sup>2</sup> The Petitioner’s name appears as amended at the hearing.

disputed individuals should be included in the unit. Finally, I will present in detail the facts and reasoning that support my conclusion.

## **I. OVERVIEW OF OPERATIONS**

The Employer is a franchise of a nationwide company that sells hoses and fittings and provides related services, including installations and repairs. From its facility in Folcroft, Pennsylvania, the Employer dispatches seven MSSTs to work at its customers' locations. Each MSST is given a van with necessary equipment and assigned to a particular geographic territory. Customers typically place service calls by telephone, and their requests are transmitted to the MSSTs, who perform the work on-site and may sell additional products to the customers. Customers also purchase products directly at the Employer's facility. MSSTs work from about 8:00 a.m. to 5:00 p.m. Monday through Friday.

General Manager Pat Monahan Sr. is the highest-ranking official of the Employer, and Operations Manager Phil Impriano is the second-ranking official. In addition to the MSSTs, there is a bookkeeper at the Folcroft facility.

## **II. FACTORS RELEVANT TO DETERMINING WHETHER THE DISPUTED EMPLOYEES SHOULD BE INCLUDED IN THE UNIT**

### **A. Supervisory Status**

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Fleming Companies, Inc.*, 330 NLRB 237 fn. 1 (1999); *Bennett Industries*, 313 NLRB 1363 (1994). Supervisors are specifically excluded from coverage under the National Labor Relations Act. Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they have the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, above, 532 U.S. at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. See *Juniper Industries, Inc.* 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Juniper Industries, Inc.*, above at 110. The authority to effectively recommend an action means that the recommended action is taken without independent

investigation by superiors, not simply that the recommendation is ultimately followed. See *Children's Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the protection of the Act. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714, (1991), *enfd.* 961 F.2d 1578 (6<sup>th</sup> Cir. 1992).

In *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), the Board decided a series of cases clarifying the standards to be applied in determining whether individuals exercise sufficient discretion in assigning and directing work to be viewed as supervisors with the meaning of Section 2(11) of the Act. The term “assign” refers to the “act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, above, slip op. at 4. The assignment of work to other employees, pursuant to plans and schedules developed by an admitted statutory supervisor, fails to establish that the employee assigning the work is a statutory supervisor. See *Arlington Electric Inc.*, 332 NLRB 845, 845-846 (2000). As for responsible direction, the Board in *Oakwood* explained the term as follows: “If a person on the shop floor has ‘men under him’ that person is a supervisor, provided that the direction is both ‘responsible... and carried out with independent judgment.” “Responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. *Oakwood*, above, slip op. at 5-6.

Assignment or responsible direction will produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Oakwood*, above, slip op. at 8. Independent judgment requires that the decision “rise above the merely routine or clerical.” *Ibid.*

## **B. Managerial Status**

Although not explicitly excluded from the protections of the Act, managerial employees are found by the Board to be implicitly outside the Act's protections. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). Managerial employees are defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. To be considered managerial, an individual must exercise discretion within, or even independently of, established employer policy. *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980). The determination of an employee's managerial status depends on the extent of his or her discretion, and an employee who exercises limited discretion, bordering on routine performance, will not be deemed managerial. *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963).

### C. Family Members of Management

Children of individuals owning 50 percent or more of closely-held corporations are categorically excluded from bargaining units. *Cerni Motor Sales, Inc.*, 201 NLRB 918 (1973). Where the individual in question is a close relative of a less-than-majority stockholder, the Board uses an “expanded community-of-interest” test, considering such factors as the amount of stock the relative owns, whether the individual in dispute is a dependent of the stockholder, and whether the individual receives any special job-related benefits. *NLRB v. Action Automotive*, 469 U.S. 490, 495 (1985); *R&D Trucking*, 327 NLRB 531 (1999). Generally, the unit placement of relatives of non-owner managers is analyzed using a similar expanded community-of-interest test, and the Board relies heavily on an analysis of whether such relatives have special status on the job or receive any special job-related benefits. *Peirce-Phelps, Inc.*, 341 NLRB 585, 586-587 (2004) (warehouse manager’s son included where he received no special job-related benefits); *Novi American, Inc.- Atlanta*, 234 NLRB 421, 422 (1978) (regional manager’s son excluded where he was paid as a contractor, with no deductions for taxes or Social Security, and permitted to adjust his working hours to his personal convenience).

### D. Union Organizers

In *NLRB v. Town and Country Electric*, 516 U.S. 85 (1985), the Supreme Court approved the Board’s determination that paid union organizers are employees under the Act when working at companies while intending to engage in organizing activities. The Board reiterated recently in *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (2007), that paid union organizers working as “salts”<sup>3</sup> are employees, though it reassigned the burdens of proof in such cases for purposes of backpay calculations.

In *Oil Capitol*, fn. 9, the Board further noted that it has frequently excluded paid union organizers from bargaining units either because their tenure was temporary or because their interests differed from those of other employees, citing *Sunland Construction*, 309 NLRB 1224 (1992), *299 Lincoln Street, Inc.*, 292 NLRB 172 (1988), and *Dee Knitting Mills*, 214 NLRB 1041 (1974), enfd. 538 F.2d 312 (2nd Cir. 1975). These cases hold that the expected tenure of organizers is the key factor in determining their proper inclusion or exclusion from the bargaining unit.

With respect to the voting eligibility of temporary employees generally, the Board examines the anticipated tenure of the disputed employee, and “as a general rule, a temporary employee hired for a finite, ascertainable term, likely will not have a community of interest with unit employees sufficient to qualify him to vote. A temporary employee hired for an indeterminate term, who is working during the voting eligibility period, is generally more likely to be a qualified voter.” *Marian Medical Center*, 339 NLRB 127, 128 (2003). In that case, the

---

<sup>3</sup> *Oil Capitol* at fn. 5 defines “salting” as “the act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees,” citing *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996).

Board found to be temporary, and thus ineligible, a voter who was hired only for the duration of a particular facility renovation, a readily determinable and finite period. By contrast, where at the time that voting eligibility is determined, the expected duration of employment is uncertain, the Board will generally find that the employee is eligible to vote. See *MJM Studios of New York*, 336 NLRB 1255 (2001) (though initially hired as temporaries, employees became eligible voters when the length of their tenure subsequently became uncertain); *WDAF Fox 4*, 328 NLRB 3, 3 (1999), *enfd.* 232 F.3d 943 (8th Cir. 2000) (employee was eligible, although hired for a temporary position, where employer postponed her termination date once and was considering her for permanent positions); *Horizon House 1, Inc.*, 151 NLRB 766, 769 (1965) (employee found eligible where he was hired only for a particular project, but the project was of indefinite duration).

### III. FACTS

#### A. Phil Impriano

##### *Duties and Responsibilities*

When requesting services, customers call in to a central location and speak with Operations Manager Phil Impriano. He takes the service call, writes up the order, and tells the MSST who is assigned to the relevant geographic territory to call on the customer. If the assigned MSST is otherwise occupied, or the work is especially complex, an alternate or additional MSST may be assigned to the job. Impriano will direct the MSSTs to assist each other where necessary, but he may first discuss these assignments with General Manager Pat Monahan Sr. Impriano also takes orders from customers who personally come to the Folcroft facility. One MSST is assigned to be “on-call” for after-hours service calls on a rotating basis, and Impriano occasionally serves in this capacity. MSSTs may only prepare hoses up to a one-inch diameter at the customers’ locations; where larger hoses are ordered, MSSTs notify Impriano, who prepares the larger hoses. In addition to these duties, Impriano keeps track of inventory and orders stock as needed. Because Monahan Sr. is on the road every morning making sales calls, on a day-to-day basis Impriano is often the highest-ranking official of the Employer at the Folcroft facility. Monahan Sr. is accessible by cell phone.

Impriano and Monahan Sr. are usually both present when discipline is administered, and both of them sign written disciplinary warnings. Monahan Sr. testified that he alone has authority to determine whether employees will be disciplined, but that he once instructed Impriano to discharge an employee in his absence, and Impriano did so. Impriano may also inform Monahan Sr. about employee “issues” in the field.<sup>4</sup> Impriano is also a conduit for MSSTs' time-off requests, which Monahan Sr. approves or disapproves. Impriano participates in monthly meetings with Monahan Sr. and the Employer’s Managing Member and majority shareholder, William Zetterlund.

---

<sup>4</sup> A former employee testified that on one occasion, Impriano required him to take an unpaid day off because he stopped work too early the previous day. However, Monahan Sr. testified that he, not Impriano, told the employee to take the day off.

Both Frank Bankard and Local 542 Organizer Sam Wolf testified that Impriano interviewed them for MSST jobs. Bankard testified that he received the job offer from Monahan Sr., who also interviewed him and described Impriano to Bankard as his “supervisor” to be. Monahan Sr. testified that he makes the final hiring decisions and that he once rejected an applicant that Impriano had recommended.

*Terms and Conditions of Employment*

Impriano is paid a salary<sup>5</sup> plus a bonus which is based on total sales at the Folcroft location, i.e., all of the MSSTs' sales and sales to walk-in customers. He is ineligible for overtime pay.

MSSTs, in contrast, are paid an hourly rate plus a commission based on their personal sales figures. They also receive overtime pay. Impriano’s other terms and conditions of employment, including profit sharing, a Christmas bonus, and a 401(k) plan, are identical to those of the MSSTs.

*Assignment to San Diego Facility*

During the approximately four weeks prior to the hearing, Impriano has worked at the Employer’s San Diego facility. He was assigned to this location by Managing Member Zetterlund, in order to assess that facility’s viability and determine whether to close it. While at San Diego, Impriano is expected to make sales calls, clean up and renovate the office, and “try to motivate the employees,” and he is directly supervised by Zetterlund's former partner, who is only at the facility for about two hours per week. The Employer anticipated that this assignment would last for an additional four weeks after the hearing.

MSST Mike Perry, who is currently on “light duty” status due to a job-related injury, is filling in for Impriano at the Folcroft facility. Impriano’s bonus will continue to be based on Folcroft’s sales figures though he is not presently working at that facility.

**B. Pat Monahan Jr.**

Pat Monahan Jr., the son of Pat Monahan Sr., was hired in late May 2007 as an MSST. Monahan Jr.'s pay rate is \$16 per hour; the other MSSTs are paid between \$15 and \$17 per hour.

Monahan Sr. is a 25 percent shareholder in the Employer, a closely-held corporation. He is directly responsible for the hiring, firing, and discipline of the MSSTs. Monahan Sr. changed the Christmas bonus policy in about July 2007, decreasing the tenure required to receive a bonus from one year to six months. Monahan Jr. and another newly-employed MSST, Tony DiMatteo, were the only employees affected by the policy change as all of the others were already eligible

---

<sup>5</sup> Zetterlund testified concerning the total annual compensation of Impriano and some of the MSSTs, but, as this information was based purely on hearsay rather than Zetterlund’s personal knowledge, I do not rely on it.

for the bonus. DiMatteo left the Employer's employ before Christmas and never actually received the bonus.

Monahan Sr. does not provide his son with any financial support but rents a house to him for \$650 per month, including utilities and taxes. The record does not indicate whether the price of the rental is at fair market value.

### C. Frank Bankard

Frank Bankard, the full-time Head Organizer for Local 542, began work as an MSST on January 21, 2008, about two to three weeks before the hearing. Neither Impriano nor Monahan Sr., both of whom interviewed him for the position, asked how long he intended to stay, but he advised them that he was "looking for steady work." Bankard testified that he intended to continue working for the Employer "as long as God gives me breath in my lungs, I don't really know."<sup>6</sup> Bankard has purchased about \$200 in tools necessary for his work at the Employer.

As Head Organizer, Bankard directs a staff of four or five employees. He negotiates first-time contracts, testifies before government agencies, and leads picket lines, and he has filed various unfair labor practice charges with the Board. He communicates with other organizers before and after his working hours for the Employer.

Bankard has previously held several other jobs while working as an Organizer for the Petitioner. He was employed by Brubacher Excavating for about two to three months pursuant to a settlement of a previous unfair labor practice case.<sup>7</sup> He also worked for Reilly Sweeping for an unspecified period. Bankard was employed by J.A. Taddei Corp. both before and, for "a bit," after that company signed a Project Labor Agreement. Finally, he was employed by Harrah's Racetrack Casino for six to seven months in 2007 and left because his work there was complete.

During the two years and one month that Monahan Sr. worked for the Employer, seven MSSTs have left the Employer's employ, voluntarily or involuntarily.

---

<sup>6</sup> I have not considered Zetterlund's testimony that Bankard told another employee that he would work for the Employer for only a short time, as Zetterlund testified that he heard about this conversation from Monahan Sr. While hearsay is not per se inadmissible, I find Zetterlund's testimony to be too remote from the participant in the purported conversation to be reliable. See, e.g., *Delphi/Delco East Local 651 UAW (General Motors Corp.)*, 331 NLRB 479, 481 (2000); *Ohmite Mfg.*, 290 NLRB 1036, 1037 (1988); *Georgetown Holiday Inn*, 235 NLRB 485 fn. 1 (1978).

<sup>7</sup> The resume Bankard submitted to the Employer states that he was employed by Brubacher from 2003 to 2005. He testified, however, that he did not become employed by the Brubacher until after February 28, 2005.

## IV. ANALYSIS

### A. Phil Impriano

I find that the record evidence is insufficient to demonstrate that Impriano is a supervisor as defined in Section 2(11) of the Act, as urged by the Petitioner. However, I find that Impriano is a managerial employee and must be excluded from the bargaining unit on that basis.

With respect to supervisory status, Impriano has reported on employee problems, signed off on employee discipline, and administered discipline as a conduit for Monahan Sr.'s decisions. There is no evidence, however, that he decides or effectively recommends disciplinary decisions, and his reportorial and administrative duties are insufficient to establish supervisory status. See *Willamette Industries, Inc.*, 336 NLRB 743, 744; *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1139 (1999). Impriano also does not have the authority to hire employees and is involved in the hiring process only to the extent of interviewing applicants. See *Bowne of Houston*, 280 NLRB 1222, 1225 (1986). The record does not show that he can effectively recommend hiring, as Monahan Sr. testified that he once rejected Impriano's recommendation of an applicant. Impriano provides the MSSTs with their work assignments, but such assignments are generally routine in nature, based on pre-assigned geographic territories. When an assignment may not be completed by the MSST in the relevant area, Monahan Sr. is involved in determining to whom the assignment should go. Certain types of complex assignments are routinely assigned to the one or two senior technicians who possess the ability to perform them, again with the oversight of Monahan Sr. Thus, Impriano does not have independent judgment with respect to work assignments. See *Croft Metals*, 348 NLRB No. 38 (2006); *Armstrong Machine Co.*, 343 NLRB 1149, 1150 (2004). Although MSST Bankard testified that he was told that Impriano would be his "supervisor," there was simply no evidence that Impriano exercises any supervisory authority, and the status of a supervisor under the Act is determined by an individual's duties, not by his or her title. See *Dole Fresh Vegetables*, 339 NLRB 785, 785 (2003), citing *T.K Harvin & Sons, Inc.*, 316 NLRB 510, 530 (1995). Thus, Impriano is not a supervisor within the meaning of Section 2(11) of the Act.

However, because Impriano has been invested by the Zetterlund with a high degree of managerial discretion, I find that he is a managerial employee. Impriano has recently been assigned to work in San Diego performing a task which goes to the heart of management prerogative: assessing the facility to determine whether it is a viable business concern or should be closed. Zetterlund indicated that he intends to rely on Impriano's assessment, and that while in San Diego, Impriano's work will be minimally overseen by Zetterlund's former partner, who is present at the facility for only two hours per week. This assignment is ongoing; at the time of hearing, it was expected that Impriano would be in San Diego at least another month, during which time Impriano will be geographically removed from the bargaining unit.

Impriano's managerial status is further confirmed by his regular participation in monthly meetings with Zetterlund and Monahan Sr. when working at the Folcroft facility, and by his method of compensation. Unlike the MSSTs, Impriano is a salaried employee and is paid a bonus based on the overall sales for the entire facility. He continues to receive a bonus based on

sales for the entire Folcroft facility while he works in San Diego. Additionally, Impriano is in charge of the facility for much of every day.

In view of the significant discretion vested in Impriano, as demonstrated by his assignment in San Diego, his attendance at management meetings, and his distinctly differing pay structure, which suggests an expectation that he will be responsible for the overall performance of the facility, I find that he is a managerial employee who should not be included in the bargaining unit of MSSTs. See *Washington Post Co.*, 254 NLRB 168, 199 (1981) (research consultants held managerial where they investigate and make recommendations in support of the employer's long-term planning projects); *Sutter Community Hospitals of Sacramento*, 227 NLRB 181, 192-193 (1976) (clinical specialist in neonatology held managerial where she evaluates nursing care and develops improved methods and procedures). Cf. *Allstate Insurance*, 332 NLRB 759, 762-763 (2000), (insurance agent responsible for determining, inter alia, where office would be located, whether to hire assistants, and what business expenses should be incurred, found not to be a managerial employee, because she made these decisions in her own self-interest rather than on behalf of the employer).

**B. Pat Monahan Jr.**

The evidence is insufficient to show that Monahan Jr., as an immediate family member of General Manager Pat Monahan Sr., does not share a community of interest with his fellow MSSTs, and I shall include him in the bargaining unit.

Monahan Sr. is a minority shareholder of the Employer, and, as General Manager, a member of its senior management. There was no evidence that Monahan Jr. is his dependent, and the sole evidence of any special job-related privilege was the change in the Christmas bonus policy in July 2007. His terms and conditions of employment are identical to those of the other MSSTs, including his hourly pay rate; at \$16 per hour, he is in the middle of the \$15 to \$17 per hour range of his co-workers. He is paid via the same bonus program as the others and enjoys no other special benefits.

The Board has generally relied on a finding of significant job-related privileges which are unique to a non-majority shareholder or manager's relative in finding that they did not share a significant community of interest with their fellow employees. Thus, in *R&D Trucking*, 327 NLRB 531, 533 (1999), the Board excluded the owner's son-in-law from the unit, relying on the fact that he received a higher salary than the other employees, had more favorable job duties, was not required to use a timecard, and had other special privileges. Similarly, in *Luce & Sons*, 313 NLRB 1355, 1358 (1994), the Board, in finding that the owner's sister did not share a community of interest with other employees, relied on her unique \$200 car allowance, additional paid time off to care for her sister (the company's principal owner), and a higher pay rate than any other employee. In *Novi American*, above, the regional manager's son was excluded because unlike other unit employees, taxes were not deducted from his wages, and his schedule was arranged to his convenience.

By contrast, in *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429, 430 (1991), the Board, in including a company owner's grandson in the unit, relied on the absence of special job-

related privileges, although the grandson's wage rate was fifty cents higher per hour than other starting employees' wage rates and he lived with his parents in a house deeded to them by his grandparents in exchange for providing care to them. In *Peirce-Phelps*, above, the warehouse manager's son was also included, although he lived with and was dependent upon his father and was prohibited by law from operating the same heavy machinery as other employees.

The Christmas bonus policy change described above is insufficient to find "special privileges" within the meaning of the cited cases. Although it accrued to the benefit of only Monahan Jr. and one other employee (who did not remain employed long enough to enjoy the benefit), I do not believe that this one-time policy change, which will now apply to all newly-hired employees, is sufficient to show that Monahan Jr. no longer shares a community of interest with the others. Accordingly, I find that Pat Monahan Jr. is properly included in the bargaining unit.

### C. Frank Bankard

I find the record evidence insufficient to demonstrate that Frank Bankard is a temporary employee or that he does not share a community of interest with other employees. Accordingly, I find that he is a regular full-time employee and is eligible to vote.

As discussed above, in *Oil Capitol Sheet Metal*, 349 NLRB No. 118, fn. 9 (2007), the Board stated that paid union organizers may be properly excluded from bargaining units either because they are temporary employees or because their interests differ from those of other employees. In this connection, the Board cited *Sunland Construction*, 309 NLRB 1224, 1229 (1992), *299 Lincoln Street, Inc.*, 292 NLRB 172, 180 (1988), and *Dee Knitting Mills*, 214 NLRB 1041 (1974). In *Dee Knitting Mills*, the Board stated that an employee does not lose his status because he is paid to organize, but that the real question is whether the employment was *solely* to organize, so that the employment is really only temporary. In that case, the Board included a paid union organizer in the unit where there was no evidence that she took the job solely to organize or that she was not a bona fide full-time employee. In *299 Lincoln Street*, above at 180, a paid organizer's authorization card was not counted in ascertaining whether the union had majority status, because the organizer testified that he never intended to remain employed following an organizing campaign, and he had actually resigned on the day he demanded union recognition. In *Sunland*, the Board noted that paid organizers are frequently excluded as temporary employees or on community-of-interest grounds, but further indicated that they are not automatically singled out as temporary employees in determining their employee status.<sup>8</sup>

Here, there was no evidence that Bankard was hired for other than a regular, permanent position and no evidence that he has any plan to leave by a date certain. In fact, he testified that he planned to continue working for the Employer, and the question of his expected tenure was not addressed during his interview process. The record does not show that Bankard has a history of immediately departing employment from employers he organizes or that he intends to leave the Employer on any particular timetable. Rather, the evidence indicates that he worked for six

---

<sup>8</sup> *Sunland*, above at 1229, fn. 33. *Sunland* did not involve the issue of whether the salts were eligible to vote but only dealt with whether they were employees within the meaning of the Act.

to seven months for Harrah's before leaving because his work was complete; that he has accepted work pursuant to Board settlements and Board Orders involving unfair labor practice charges; and that he remained at J.A. Taddei for an unspecified, albeit brief, period of time after the employer signed a Project Labor Agreement. While Bankard has a full-time job with the Petitioner, the record does not show that his responsibilities for that job would preclude him from fulfilling his responsibilities to the Employer, and he previously held full-time jobs while maintaining his organizing position. Moreover, there is significant turnover among the Employer's employees, as seven employees have left the Employer during the last 25 months. Although Bankard's tenure of employment with the Employer as with any other employee, may be uncertain, the record simply does not indicate any specific limitations, and the Board has not found that union organizers should be deemed temporary employees absent such evidence.

In these circumstances, I find that Bankard is not a temporary employee. As his job duties and terms and conditions of employment are the same as the duties of the other MSSTs, I find that he shares a community of interest with them, and I shall therefore include him in the unit. *Dee Knitting Mills*, above.

## V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

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 case.
3. The Petitioner claims to represent certain employees of the Employer.
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.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Mobile Sales and Service Technicians employed by the Employer at its Folcroft, Pennsylvania facility, **excluding** the Operations Manager, office clerical employees, guards, and supervisors as defined by the Act.

## **VI. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542, AFL-CIO**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Eligible Voters**

The eligible voters shall be unit employees employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or were 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, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; 2) 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 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

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

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **March 18, 2008**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list.

Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at [www.nlr.gov](http://www.nlr.gov). Guidance for electronic filing can be found under the **E-Gov** heading on the Agency's website. Since the list will be made available to all parties to the election, please furnish a total of two (2) copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

**C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

**VII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by electronic filing through the Agency's website at [www.nlr.gov](http://www.nlr.gov). A copy of the request for review must be served on each of the other parties to the proceeding, and with the Regional Director either by mail or by electronic filing. Guidance for electronic filing can be found under the **E-Gov** heading on the Agency's website. This request must be received by the Board in Washington by 5:00 p.m., EDT on **March 25, 2008**.

Signed: March 11, 2008

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]  
\_\_\_\_\_  
DOROTHY L. MOORE-DUNCAN  
Regional Director, Region Four