

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

WILSON CONCRETE CONSTRUCTION, INC.

Employer

and

Case 19-RD-3789

MARK ANTHONY STARLL, an Individual

Petitioner

and

LABORERS UNION LOCAL 440 and  
WASHINGTON AND NORTHERN IDAHO  
DISTRICT COUNCIL OF LABORERS

Incumbent Union

and

OPERATIVE PLASTERERS' AND  
CEMENT MASONS INTERNATIONAL  
ASSOCIATION LOCAL 528, AFL-CIO

Intervenor

**DECISION AND ORDER**

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. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding,<sup>1</sup> the undersigned makes the following findings and conclusions.<sup>2</sup>

**I. SUMMARY**

Wilson Concrete Construction, Inc. ("the Employer"), a Washington corporation with its principal office in Pacific, Washington, is engaged in the construction business of pouring concrete curbs, sidewalks, and gutters for new roads, street improvements, and housing

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<sup>1</sup> The Incumbent Union and the Intervenor timely filed briefs, which were duly considered. Neither the Employer nor the Petitioner filed a brief.

<sup>2</sup> The hearing officer's rulings made at the hearing were free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

developments. The Employer generally performs subcontracting work for general contractors who contract with governmental entities such as counties and municipalities, as well as for contractors performing construction of private housing subdivisions.

The Petitioner filed the instant petition seeking an election to determine whether the Incumbent Union (hereinafter "Laborers") represents a majority of the employees of the Employer. However, the Laborers contend that its current labor agreement with the Employer bars further processing of the petition. On the other hand, the Intervenor contends the Laborers' current agreement does not bar the instant petition or an election in this case; rather, the Employer's voluntary recognition of the Laborers preceding the signing of the labor agreement was ineffective in that it was based on the Laborers' misrepresentation to the Employer of the Laborers' majority support.<sup>3</sup> In response to the Intervenor's contentions, the Laborers counter that the Intervenor's challenge to the Laborer's majority status is untimely, as is the petition itself.

An issue also arose at the hearing concerning whether one of the Employer's foremen, Kevin Armstrong, possesses indicia of supervisory authority as that term is defined in Section 2(11) of the Act. On the record, the parties did not state their respective positions concerning Armstrong's status. However, it was the Laborers who initially presented evidence at the hearing on this issue. Thus, it would appear that the Laborers initially were maintaining that Armstrong was a 2(11) supervisor and consequently should be excluded from the unit of eligible voters should this case proceed to an election. The Laborers have apparently reversed course, as in their brief they stated that the record evidence does not establish that Armstrong possesses indicia of supervisory authority.<sup>4</sup>

Based on the record as a whole and the parties' briefs, I find that the Laborers' current agreement with the Employer, pursuant to Employer's effective voluntary recognition of the Laborers, bars further processing of the petition. I also find that Armstrong does not possess indicia of supervisory authority as defined in Section 2(11) of the Act.<sup>5</sup>

Below, I have set forth a section dealing respectively with the record evidence and legal analysis for the issues noted above. Following that are my conclusions and order dismissing the petition, and finally the procedure for requesting review of my decision.

## **II. CONTRACT BAR PURSUANT TO VOLUNTARY RECOGNITION**

### **A. Record Evidence**

The Employer and the Laborers signed their initial and current labor agreement on July 9, 2007.<sup>6</sup> However, prior to that July 9 signing, the Employer and the Laborers met in June at a Shari's restaurant. Present at this June meeting were Dale Bright, a Laborers' organizer, Kim Williams, another Laborers' agent, and Ed Wilson, the Employer's owner. The purpose of the meeting was to discuss how to establish the Laborers as the 9(a) bargaining representative of

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<sup>3</sup> Neither the Employer nor Petitioner stated their respective positions at the hearing with regard to whether there is a bar to further processing of the petition.

<sup>4</sup> The Intervenor in its brief states that the record evidence "amply demonstrates that [Armstrong] is not a supervisor as defined by the Act."

<sup>5</sup> The issue of Armstrong's status was fully litigated at hearing and, absent definitive positions by all parties that his status has now been mutually resolved, I have herein made a determination on his eligibility as such would become relevant should an election be ultimately directed in this case.

<sup>6</sup> All dates are 2007 unless specified.

the Employer's employees through a card check. Bright could not recall if a copy of the Union's collective bargaining contract had been shown to Wilson at this June meeting.

Wilson did not specifically refer in his testimony to a June meeting with Bright and Williams but Wilson did testify about discussions with the Laborers about a month before the signing of the parties' current labor agreement. Wilson testified that probably on July 6, a large number of his employees signed authorization cards with the Laborers' agents.<sup>7</sup> Specifically, Wilson recalled that on a day in July he observed many of his employees signing cards, just outside his office, early in the morning before they went out to work. Wilson testified that the Laborers and the Employer arranged a time for the Laborers to seek signatures on authorization cards from employees because at that point Wilson thought unionization of his company was inevitable, would allow him to retain his employees and, thereby, continue running his company.

Wilson also recalled that on the day when the Laborers obtained cards from a majority of his employees, he provided the Laborers' agents with a copy of one of the Employer's "day sheets" (a document which contains the first names of all employees). Wilson provided the day sheet to the Laborers because they wished to keep track of the employees who had signed authorization cards that day. A copy of a "day sheet" with 79 printed first names and handwritten last names and checkmarks to the right of many of those first names was admitted into the record without any objection from the parties to this case.<sup>8</sup> Although Wilson could not specifically identify the admitted "day sheet" as the one he had provided the Laborers on the card signing day, he did recall providing the Laborers' agents with the last names of some of his employees so that they could write them on the "day sheet." Wilson said that 5 of the 79 names on the admitted "day sheet" (Craig W., Dennis, Jeremy, Scott, and Oscar) were not in the unit, leaving the number of unit employees on that "day sheet" at 74.<sup>9</sup>

The authorization cards signed by the Employer's employees were also admitted into the record without any objection by the parties. In any event, forty<sup>10</sup> of those cards reveal an employee signature date of July 6.

Wilson further testified that the Laborers' representative probably showed Wilson on July 6, the stack of signed authorization cards that the Laborers had obtained on that day. Indeed, Wilson admitted on cross examination, that he actually had seen a stack of cards on that day. However, Wilson could not recall a specific offer from the Laborers' agents inviting him to inspect the cards and Wilson could not recall actually inspecting the cards one by one. Additionally, he could not recall any formal statements from Laborers' agents telling him that a

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<sup>7</sup> Wilson's initial testimony regarding the timing and/or sequence of events with respect to his June meeting with the Laborers, the date when the Laborers had obtained signatures on authorization cards from a majority of the Employer's employees on July 6, and the labor agreement signing on July 9, was imprecise until he was shown a number of authorized cards that bore signature dates of July 6 and the current labor agreement signature date of July 9. After looking at those documents, Wilson was able to more precisely sequence his recall of the events surrounding his recognition of the Laborers.

<sup>8</sup> Bright clearly authenticated the union authorization cards and the day sheet that the Laborers used on July 6, albeit after they were introduced and admitted through Ed Wilson's testimony.

<sup>9</sup> Craig and Jeremy are sons of Ed Wilson. Scott is also a relative of Ed Wilson. The record is not clear regarding the basis for Ed Wilson excluding Dennis and Oscar but the Laborers' apparently did not challenge Wilson's desire to exclude these five individuals who had signed authorization cards.

<sup>10</sup> The Intervenor raised concerns at the hearing regarding the date on the card of Francisco Benitez. Benitez dated his card "06-07-07", apparently following the Spanish convention of stating a date using a day/month/year format. I find no evidence to discredit the authenticity and validity of Benitez's card. Nonetheless, I also note that even if Benitez's card was not counted, the Laborers would still have a majority of cards signed on July 6, namely 39 out of 74 employees.

majority of his employees had chosen the Laborers as their exclusive bargaining representative. Yet, Wilson did recall the Laborers' agents asserting that they got "most of the guys signed up" and that he took their word for it. Similarly, Bright, one of the Laborers' agents collecting cards on July 6, testified that on that day, he told Wilson that they had signed up "well-over half" of his employees. Bright also testified that he physically showed the stack of signed cards to Wilson and that Wilson had access to review them, but he chose not to.

As noted above, the Employer and Laborers' current collective bargaining agreement<sup>11</sup> was signed on July 9. Wilson testified that as of the date when the Laborers obtained cards from a majority of his employees, he understood that the Laborers represented a majority of his employees. He also testified that at the time he signed the current labor agreement, he understood the Laborers represented a majority of his employees.

The recognition section of the Laborers' current labor agreement with the Employer states:

*The Employer hereby voluntarily recognizes the Union as the exclusive bargaining agent of all employees performing bargaining unit work covered by this Agreement, and agrees that a majority of those employees have designated the Union as their collective bargaining representative.*

The process of obtaining additional representation cards from employees continued after July 6. Dale Bright testified being at the Employer's premises on July 9 (the day on which the bargaining agreement was signed) to sign up a few more employees. Bright testified that he took the additional cards he collected that day to Wilson's office, although it is unclear whether Wilson actually saw these additional cards. Wilson could not recall whether he reviewed these additional cards, or any other ones arriving at a later date, because he sent many of these cards directly to the desk of Angela Wilson, his daughter and office manager, to keep track of them.

## **B. Legal Analysis**

### **1. The Employer Voluntarily Recognized the Laborers as the 9(a) Representative of its Employees<sup>12</sup>**

In the construction industry, parties may create a relationship pursuant to either Section 9(a) or Section 8(f) of the Act. In the absence of evidence to the contrary, the Board presumes that the parties intended their relationship to be governed by Section 8(f). *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987). The party asserting a 9(a) relationship has the burden of proving such relationship exists. *Id.* at fn. 41. This can be done by showing that a construction industry employer voluntarily recognized a Union "based on a clear showing of majority support among the unit employees, e.g. a valid card majority." *Id.* at fn. 53.

The Board has found that a recognition agreement or contract provision alone is sufficient to establish 9(a) status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the

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<sup>11</sup> The whole of the labor agreement, which by its terms is effective from June 1, 2007 through May 31, 2012, includes a Compliance Agreement and a Memorandum of Understanding.

<sup>12</sup> The Agreement was signed on July 9 and therefore the procedures established by the Board in *Dana Corp*, 351 NLRB No. 28 (2007), a decision issued on September 29, 2007, do not apply to this case, as the Board held that *Dana Corp* would apply only prospectively.

employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union having shown, or having offered to show, evidence of its majority support. *Staunton Fuel & Material, Inc. d/b/a Central Illinois Construction*, 335 NLRB 717 (2001). If the agreement does so indicate, the presumption of 8(f) status has been rebutted. If not, the Board considers any relevant extrinsic evidence bearing on the parties' intent as to the nature of their relationship. *Id.* at fn. 15.

Regarding the type of extrinsic evidence that may establish 9(a) status pursuant to voluntary recognition, the Board has found that if both parties were in accord that the union was seeking recognition as the unit employee's majority representative and that the employer was granting such recognition on that basis, 9(a) status would be granted, regardless of conflicting testimony as to whether the Employer did in fact see the authorization cards. *Pierson Electric, Inc. d/b/a Golden West Electric*, 307 NLRB 1494 (1992).<sup>13</sup> See also *Allied Mechanical Services, Inc.*, 351 NLRB No. 5 (2007). The Board in *Pierson Electric* also observed that the authorization cards introduced as evidence established that, in fact, the union had majority support at the time of recognition. *Id.* at fn. 6.

Here, the language of the current labor agreement between the Employer and the Laborers does not satisfy the requirements of *Staunton Fuel*. Specifically, the recognition section of the agreement fails to indicate whether voluntary recognition was based on a contemporaneous showing of, or an offer to show, majority support.

However, extrinsic evidence establishes that the Laborers and the Employer intended to enter into a 9(a) relationship. In this regard, the record discloses that at the time the Employer and Laborers signed their labor agreement on July 9, there was an understanding between the Employer and the Laborers that the latter was seeking to be recognized as the collective bargaining representative because it had the support of a majority of the Employer's employees as demonstrated by the signed authorization cards, and that the Employer was granting such recognition based on that support. I find that Ed Wilson actually observed a large number of his employees signing authorization cards probably on July 6, that he had access to the signed cards on that day, but chose not to review them because he trusted the Laborers' agents and their claim that they had signed a majority of his employees to union authorization cards on that day. Therefore, when Wilson signed the collective bargaining agreement 3 days later on July 9, he was well aware that he was signing based on a claim that the Laborers had obtained executed authorization cards from a majority of employees. Indeed, documentary evidence supports Wilson and Bright's testimony in this regard, as the July 6 authorization cards and day sheet, together, reveal that 40 out of 74 of the Employer's employees listed on the July 6 day sheet actually signed union authorization cards on July 6.

In its brief, the Intervenor asserted that the Laborers' demand for recognition was tainted because it was accompanied by a misrepresentation, namely that the Laborers falsely told Wilson that the Laborers had signed up "well-over half" of his employees on authorization cards. The Intervenor relied on *Checker Taxi, Co.*, 228 NLRB 639 (1977), where the Board found that an employer's misunderstanding of crucial facts during the signing of a successor agreement was induced by active misrepresentations by union agents, thereby rendering the successor agreement void. However, the Intervenor's reliance on *Checker Taxi, Co.* is misplaced for three essential reasons. First, *Checker Taxi, Co.* involved a successor agreement and a different legal analysis. Here, in the circumstances of this case, the Board applies a different analytical framework noted above in the *Pierson Electric* and *Allied Mechanical Services* cases. Second,

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<sup>13</sup> The employer in *Pierson Electric* denied ever seeing the authorization cards

the instant record establishes that the Laborers had in fact signed a majority of Wilson's employees to union authorization cards on July 6. Thus, the Laborers' assertion that they had signed a majority of the Employer's employees was based on true facts. Third, the Intervenor's assertion that Wilson was misled by the Laborers' purported misrepresentation is based on mere speculation as nothing in the record indicates that Wilson was operating under a misunderstanding when he recognized the Laborers as the bargaining representative of his employees or signed the current labor agreement. Wilson clearly testified his voluntary recognition and signing were based on his belief, which turned out to be accurate, that the Union had obtained signed authorization cards from a majority of his employees. Furthermore, I find that Wilson's declination to inspect the authorization cards on July 6, most likely emanated from a trust and confidence in the overall process given that he had actually observed some of the signing process outside his office window and had been presented with a stack of signed authorization cards on that day.

Thus, the Laborers have met their burden of proving that a 9(a) relationship exists between it and the Employer. Indeed, the extrinsic evidence produced by the Laborers in this regard is superior to that produced by the union in *Pierson Electric*, where the employer denied ever seeing any cards. Here, Wilson did not deny seeing the cards or having access to them had he chosen to inspect them.

## **2. Because the Petition was untimely filed the Laborers' Contract Bars Further Processing of the Petition**

The Laborers contended in their brief that as a threshold matter, the Intervenor could not challenge the Laborers' majority status as the voluntary recognition and execution of the current labor agreement occurred more than 6 months prior to the filing of the instant petition. The Laborers cite *Casale Industries*, 311 NLRB 951 (1993), where the Board held that if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition. In this case, the petition was filed on April 10, 2008, that is about 10 months after the Employer granted Section 9(a) voluntary recognition to the Laborers and signed the current labor agreement. Thus, the teachings of *Casale* dictate that the petition be found untimely and, as a consequence, the petition should be dismissed. I shall, therefore, dismiss the petition on the basis of untimeliness. *Cf. H.Y. Floors*, 331 NLRB 304 at 305 (2000).

At the same time, however, there exists a separate, additional basis on which I am dismissing the petition. This follows as even in situations where the Board deems a petition timely, it continues the analysis by evaluating whether the party asserting 9(a) status has met a burden to show the union actually represented a majority of employees at the time voluntary recognition was granted. *H.Y. Floors*, 331 NLRB 304 (2000) (*decertification petition found timely but case remanded for evidence as to whether majority of employees supported the union when voluntary recognition granted*). Here, the Laborers have met such burden. Indeed, I have found above that a majority of the Employer's employees actually supported the Laborers at the time voluntary recognition was granted and the current labor agreement was signed. Consequently, I shall dismiss the petition for the additional and separate reason that as of July 6, the date of voluntary recognition, the Laborers enjoyed majority support from unit employees and, as a result, the current labor agreement between the Laborers and the Employer serves to bar

further processing of the instant petition. *Pierson Electric*, supra and *Allied Mechanical Services*, supra.<sup>14</sup>

### III. SUPERVISORY STATUS OF KEVIN ARMSTRONG

#### A. Record Evidence

##### 1. Background

Kevin Armstrong started working for the Employer in April 2004 as a finisher, and became a foreman in August 2006. Armstrong directly reports to Ed Wilson, the Employer's owner, and to Craig and Jeremy Wilson, the sons of the Employer. Craig Wilson, formerly a foreman, currently does not have an official title but he is primarily in charge of the morning crew dispatches. Jeremy Wilson, also a former foreman, mainly assesses and measures jobs and projects for bidding and billing purposes.

The record is unclear as to the number of foremen employed by the Employer, although Armstrong testified that it was nine or ten.<sup>15</sup> While foremen are not directly supervised by anyone at the job sites, Ed Wilson visits all jobsites on a daily basis, checking on performance. Butch Hall, the Employer's Quality Control person, also shows up frequently at job sites to review and inspect the quality of the work.

Every weekday morning, around 7:00 a.m., each foreman (including Armstrong) is handed a piece of paper (a "day sheet") containing information such as the names of the people in his crew for the day, their job assignment, and the amount of concrete that they are expected to pour on that day. A usual crew is composed of three specialists (lead concrete finishers) and two laborers. The members of each crew vary from day to day. Day sheets are prepared by Ed Wilson, Craig Wilson or Jeremy Wilson. Ed Wilson testified that he prepares these day sheets based on his opinion of who would be the most appropriate individuals for a particular job. Wilson said that he formed these opinions regarding the skills of his employees based on his own personal experience because he was a regular member of his crews until about a year ago. Wilson testified that he also relies on the opinion of his son, Craig.

##### 2. Assign

Armstrong testified that occasionally, after looking at his day sheet and before leaving with his crew to his assigned job site, he requests additional crew members for his assignment. Armstrong bases these requests on the amount of work he is assigned to perform that day.

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<sup>14</sup> In making my determinations herein, I am cognizant of the Board's *dicta* in *H.Y. Floors*, *id* at fn. 8, which suggests that strict enforcement of the 6 month rule against a non-contracting party (e.g. the Petitioner) may be in some doubt, and consequently a petition filed more than 6 months after recognition would still be timely. Notwithstanding questions that such *dicta* may raise regarding the continued viability and/or applicability of the Board's holding in *Casale Industries* to all situations, it is significant that- -even when timeliness is clear- -the Board, as noted above, will not conclude a labor contract blocks a petition in the construction industry unless the party asserting a 9(a) relationship meets its burden of establishing a 9(a) relationship. Here, I have found that the Laborers have met that burden. In summary, I conclude that regardless of whether the petition was timely filed, the Laborers' contract ultimately would serve as a bar to the petition.

<sup>15</sup> The parties stipulated at the hearing that all of the Employer's other foremen, excluding Armstrong, were not statutory supervisors because they did not possess any of the indicia set forth in Section 2(11) of the Act.

Armstrong testified that these requests for additional labor are always granted; however, he noted that he never asks for specific individuals to be in his crew. The record does not detail whether Employer management grants Armstrong's requests for additional help without an independent investigation of the circumstances. However, the record appears to indicate that management is generally aware of the nature and extent of assigned work and crew staffing, which would allow management to readily determine the merits of Armstrong's request.

Dale Bright, the Laborers' organizer, testified that sometime in February 2008, he was at the Employer's office in the early morning, when he overheard a conversation between Kevin Armstrong and Ed Wilson, in which Armstrong asked Wilson to remove somebody from his day sheet/crew. The record is silent as to the reasons for this removal request and as to whether following Armstrong's request, Wilson did in fact remove such individual from Armstrong's day sheet/crew. Wilson testified that he could not recall this conversation with Armstrong.

Once at the job site, Armstrong may assign employees to specific roles for the pouring of concrete. However, according to Armstrong, each member of his crew knows what to do and what they are good at and, therefore, Armstrong never has the need to assign members of his crew to specific roles. The record was unclear on the nature and extent of those specific roles. Armstrong testified that he spends at least 85 percent of his time working alongside the members of his crew, and about 15 percent of his time inspecting the quality of the work and working on his time sheet.

If members of Armstrong's crew need to work past their shift, Armstrong calls Ed, Craig or Jeremy Wilson to explain the needs and to ask for the approval of the overtime. Butch Hall, the Quality Control person, can also approve these additional hours of labor, but not before checking with Ed Wilson.

Armstrong does not approve or recommend the approval of sick time for employees. Rather, whenever a member of his crew appears to be sick, he calls Ed Wilson to ask for permission to send the sick employee home. Time off for personal reasons (e.g., a noontime doctor's appointment) is only approved by Ed Wilson and noted in Armstrong's time sheet.

### **3. Responsibly Direct & Discipline**

Armstrong is responsible for regularly inspecting the quality of his crew's work. For example if joints are not straight, he would tell his crew to stop pouring concrete in order to go back and fix the joints. The finished product should match the standards of the plan design prepared by the project's architect. Armstrong testified that he is also held responsible if his crew does not finish the project specified in his day sheet. However, Armstrong testified that he has never been given a written warning or any other form of discipline of consequence. Wilson testified that at least on one occasion, a few months ago, he had a talk with Armstrong regarding the substandard quality of the work executed by his crew. Wilson further testified that he considered this one occasion an oral warning. However, no documents were produced at the hearing in this matter with respect to the discipline of any foreman for any reason or with respect to the evaluation of any foreman.

Armstrong is in charge of some aspects of safety control. For example, he makes sure that members of his crew wear hard hats in projects that require them. However, the requirement of whether hard hats need to be worn on a particular project is noted in Armstrong's morning day sheet.

Armstrong testified that he does not decide or make any recommendations regarding adjustments in the materials or labor necessary for the completion of a project. For example, if a sidewalk requires pouring more concrete than initially planned, Armstrong calls Ed, Craig or Jeremy Wilson to explain the situation and to ask for permission to pour additional concrete, considering that such decision would increase the cost of the project. Hall may also approve additional materials for a job but only after checking with Ed Wilson.

According to the testimony of Ed Wilson, Armstrong is responsible for pouring the concrete and making sure the final product meets certain standards. Wilson also said that Armstrong has the ability to give informal reprimands to members of his crew if work is not up to standards. The record does not reveal what significance, if any, an informal reprimand may have with respect to an employees' job status.

Wilson testified that occasionally, a foreman would tell him that a member of his crew did not have a good work day. The record is unclear as to whether such an informal report would be used to discipline or adversely impact the employee's job tenure or status. Wilson testified that Armstrong has never complained about anyone in his crew. Moreover, the Employers' disciplinary procedure or system, if any, was not presented at the hearing in this matter and no documentary evidence was presented with respect to discipline of any nature by a foreman of any employee.

Armstrong testified that he does not discipline employees or recommend discipline. Rather, Armstrong would call Ed Wilson, Jeremy Wilson, or Craig Wilson if he had any problems with the conduct of his crew; however he added that he has not had any problems with his any crew members since becoming a foreman.

### **3. Evaluate**

The Employer's day sheets contain a column for "Effort." In this column, the job performance of each crew member may be rated from 1 to 4. Armstrong testified that although he understood that he was required to fill out this column daily, he had not done it in a very long time. Moreover, Armstrong has not been disciplined in any fashion for not filling out this column in his day sheets. Armstrong also asserted that he does not pass on evaluations of his crew to management in any form, except when a new employee is hired, in which case management may informally ask about the performance of the new employee.

Ed Wilson testified that he could not recall an occasion when Armstrong had given an appraisal of an employee although Wilson has asked his foremen to fill out the "Effort" column in the day sheets. However, Wilson also testified that his foremen rarely complete the column and significantly he could not recall any time when an "Effort" rating led to any discipline.

### **4. Additional Criteria**

Each foreman gets a truck allowance of \$189.00 per month which is to be used to keep company trucks clean because foremen take those trucks home. Foremen are also paid an additional \$2.00 per hour above regular crew members. The record further reveals that Armstrong does not promote employees or recommend promotions. Armstrong also testified that he does not have any input in the Christmas bonuses that employees receive every year from the Employer. Moreover, the record reveals no evidence showing whether Armstrong and/or his crew were informed that Armstrong possesses supervisory authority.

## B. Legal Analysis

While not clear in the record, it would appear that the Laborers initially took the position at hearing that Armstrong possesses indicia of supervisory authority as that term is defined in Section 2(11) of the Act and, as a supervisor, should be excluded from any voting unit found appropriate herein. However, in the Laborers' brief, it is clear that their position is that the instant record does not support finding Armstrong a 2(11) supervisor.

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

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *NLRB v. Kentucky River Community Care Inc.*, 121 S.Ct. 1861 (2001). The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). For this reason, the Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Thus, the burden of proving supervisory status rests on the party (*i.e.*, the Laborers herein) asserting that such status exists. *Oakwood Healthcare*, 348 NLRB No. 37, slip op. at 9 (2006) (citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)). This means that any lack of evidence in the record is construed against the party asserting supervisory status. *Freeman Decorating Co.*, 330 NLRB 1143 (2000).

Moreover, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989). Additionally, mere opinions or conclusory statements do not demonstrate supervisory status. *Chevron U.S.A.*, 309 NLRB 59 (1991); *St. Alphonsus Hospital*, 261 NLRB 620 (1982), *enfd.*; 703 F.2d 577 (9<sup>th</sup> Cir. 1983). Rather, proof of independent judgment in the assignment or direction of employees entails the submission of concrete evidence showing how such decisions are made. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999).

Based on the analysis of the record evidence as set forth below, I find that the Laborers failed to meet its burden of demonstrating that Kevin Armstrong possesses any indicia of supervisory authority as defined in Section 2(11) of the Act.

## 1. Assign

In *Oakwood Healthcare*, 348 NLRB No. 37 (2006), the Board interpreted the Section 2(11) term “assign” to mean the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks to an employee.” 348 NLRB No. 37 slip op. at 4. To “assign” for the purposes of Section 2(11) “refers to the ... designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.” *Id.*

In this case, the record shows that the assignment of employees to specific places, e.g. the job sites, and specific shifts, including the approval of sick or personal leave time, is done by Ed, Craig, or Jeremy Wilson through the morning day sheets. Moreover, the particular individuals assigned to each crew are based on the Wilsons’ assessment of the particular skill set of their available pool of employees in relation to the needs of each job; it is clear that Armstrong is not involved in this process.

The record also shows that Armstrong requires the approval of Employer management before asking his crew to work overtime. The record also shows no clear evidence that Armstrong assigns significant overall duties to members of his crew. Rather, at the most, Armstrong may assign employees on an ad hoc basis by occasionally assigning crew members to discrete tasks but such assignments, as noted above, do not fall within the Board’s interpretation of “assign.” In sum, I find that insufficient evidence exists to establish that Armstrong possesses authority to assign employees.

## 2. Responsibly Direct & Discipline

With regard to whether an individual “responsibly directs,” the analysis is whether this individual decides what job shall be undertaken next or who shall do it. Further, pursuant to *Oakwood Healthcare*, the direction must be both “responsible’ and carried out with independent judgment. *Id.*, slip op. at 6. For direction to be responsible, the person directing the performance of a task must be accountable for its performance. *Id.* slip op. at 6-7.

The record evidence does not disclose concrete examples of Armstrong responsibly directing his crew. Rather, the record evidence discloses that Armstrong’s direction is of a routine nature because his crew readily determines their functions on each job and is self-directing in their work. Indeed, Armstrong testified that his work-time is consumed primarily by working alongside his crew with the balance of his time limited to checking the quality of work and performing paperwork. Further, Armstrong must contact Employer management prior to using additional materials in order to finish a project. Similarly, on the issue of safety control, the record shows that Armstrong does not exercise discretion in the selecting or executing of safety measures as the day sheet specifies what control measures should take place.

The record also reveals insufficient evidence to establish that Armstrong is held accountable for the performance of his crew, or evidence showing that the alleged “oral warning” given by Ed Wilson to Armstrong on one occasion had any impact whatsoever on Armstrong’s terms and conditions of employment. Indeed, no concrete examples or documentary evidence exists in the record with respect to evaluations or impactful discipline of

Armstrong by the Employer to establish that it truly holds Armstrong accountable or responsible for the direction of his crew.

In light of the above and the record as a whole, I find that Armstrong does not possess the authority to responsibly direct the members of his crew. Rather, the evidence establishes that Armstrong gives minor orders in a routine fashion, merely oversees the work of others, and is truly not vested with genuine management prerogatives or supervisory authority. In particular, I note no record evidence showing whether Armstrong and/or his crew were informed that Armstrong possesses supervisory authority. See *Jackson's Liquors*, 208 NLRB 807 (1974).

With respect to the authority to discipline, the Board in *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999), declined to find that issuance of verbal or oral warnings, which were subsequently reduced to writing and placed in the offending employee's personnel file, establish supervisory authority to effectively recommend discipline. In reaching that conclusion, the Board relied on several factors: the absence of evidence that the purported supervisors "make any recommendations as to discipline when making such reports," much less specific recommendations as to discipline; evidence indicating that upper management would not act on reported incidents without conducting an independent investigation; and the absence of evidence "as to what role these reports play in any discipline that may be imposed," i.e., that they affect job tenure or status. *Supra* at 1139.

Here, at most, Armstrong may issue "informal reprimands." However, it is unclear what if any recommendations Armstrong may make as to the discipline that should follow as a result of the informal reprimand. There is also no evidence in the record whether any management official conducts an independent investigation following an informal reprimand. Finally, there is no evidence to establish what impact, if any, an informal reprimand will have on the job tenure or status of the offending employee(s). In sum, the record does not support finding that Armstrong possesses the authority to discipline or to recommend the same.

### **3. Evaluate**

Section 2(11) of the Act "does not include 'evaluate' in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employees being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." *Harborside Healthcare*, 330 NLRB 1334, at 1334 (2000). See also *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999).

In this case, the record shows that Armstrong has not filled out the "Effort" column of his day sheet in a long time, thereby undermining contentions that he "evaluates" employees. Assuming, arguendo, he possesses such authority, as opposed to exercising such, the record still does not show whether Armstrong's evaluations would be used by the Employer to affect the wages and/or job status of evaluated crew members. Similarly, the record does not disclose whether Armstrong's comments to management on new employees' performance may have any effect on those employees' wages and or job status.

In light of the above and the record as a whole, I find that Armstrong's role in evaluations does not rise to the level of supervisory authority as that term is defined in Section 2(11) of the Act.

### **4. Secondary Indicia**



