

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

Madison, WI

WOODMAN'S FOOD MARKET
Employer

and

RICH RAHN,
Petitioner

and

Case 30-RD-1488

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 1473
Union

DECISION AND DIRECTION OF ELECTION¹

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held over twenty-two days between January 4 and March 12, 2008, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.²

¹ Pursuant to the Agency's interregional assistance program, this matter was transferred to Region 25 only for the purpose of drafting this decision. Specific references to the Region or Regional Office shall mean Region 30.

² Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. 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.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. 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.

I. ISSUES

The Petitioner, Rich Rahn,³ seeks an election among certain employees of Woodman's Food Market (hereafter referred to as the Employer), in order for the employees to determine whether they wish to continue to be represented for purposes of collective bargaining by United Food and Commercial Workers Local 1473 (hereafter referred to as the "Union"). It is the Union's position that certain employees who have traditionally been included in the bargaining unit represented by the Union are supervisors within the meaning of Section 2(11) of the Act and/or managers under the Act and are thus ineligible to vote in the election in this matter. More specifically, the Union alleges that the individuals holding the following positions at the Employer's stores are ineligible to vote in the election due to their supervisory and/or managerial status: Assistant Store Manager; Second Shift Supervisor; Third shift Supervisor; Front-End Supervisor; Dairy Manager; Produce Manager; Grocery Manager; Gas and Lube Manager; Photo Manager; Bakery Manager; Health and Beauty Aid (HABA) Manager; Frozen Food Manager; Warehouse Manager; Maintenance Manager; and Liquor Manager. The Employer contends that the Assistant Store Managers are supervisors within the meaning of Section 2(11) of the Act but that the remaining classifications challenged by the Union do not possess supervisory and/or managerial authority and that employees holding those classifications are eligible to vote. The Petitioner has expressed no position with respect to these issues, but has reasserted his desire that an election be conducted among the employees of the Employer.

II. DECISION

The evidence produced at the hearing shows that Assistant Store Managers do possess the authority to discipline employees and adjust their grievances and they are, therefore, supervisors within the meaning of Section 2(11) of the Act. The evidence produced at the hearing establishes that Second Shift Supervisors and Third Shift Supervisors also have the authority to discipline employees, adjust their grievances and to responsibly direct other employees. Second

³ In its post-hearing brief in this matter, the Union again renewed its motion to dismiss the petition in this matter on the grounds that the Petitioner was not present for large parts of the hearing. This motion was previously denied by the Regional Director of Region 30 on February 8, 2008. I take official notice of that previous denial. I again deny the Union's motion to dismiss the petition for the reasons therein stated, including the Union's failure to establish that it was prejudiced by the Petitioner's absence since he testified at the hearing and was questioned at length under oath by Union counsel. The Union further contends that the petition should be dismissed because the Petitioner, Rich Rahn, at material times held the position of Produce Manager at the Employer's Madison East store and was thus a supervisor within the meaning of Section 2(11) of the Act and/or a managerial employee. The Union argues that given Rahn's status as a supervisor and/or manager of the Employer, the petition was impermissibly tainted. This question has been resolved herein by my determination more fully discussed in Section IV. A.5 and B. that department managers including Rahn are neither supervisors under the Act nor managerial employees.

Shift Supervisors and Third Shift Supervisors are, thus, supervisors within the meaning of Section 2(11) of the Act. As to the remaining classifications challenged by the Union, the so-called front-end supervisors and the managers of the various departments, the evidence produced at the hearing was insufficient to demonstrate that those individuals had the regular authority to discipline employees, responsibly direct their work, adjust their grievances or assign them. The hearing produced no evidence of any other supervisory authority on the part of those individuals. The hearing also produced no evidence that employees holding the position of front-end supervisor or department manager were managerial employees within the meaning of *NLRB v. Bell Aerospace Co. Division*, 416 U.S. 267 (1974).

The following employees of the Employer at its Madison East, Madison West, Beloit and Janesville stores located in Dane and Rock County, Wisconsin constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Employer at its stores located in Dane and Rock County, Wisconsin, including all employees in those stores who are actively engaged in the handling or selling of merchandise; BUT EXCLUDING all meat department employees, Store Managers, Assistant Store Managers, Second Shift Supervisors, Third Shift Supervisors, Pharmacists, stock auditors, specialty men and demonstrators employed by outside vendors, and all guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 885 employees for whom a history of collective bargaining exists.

III. STATEMENT OF FACTS

The Employer owns and operates 12 grocery stores located in Wisconsin and Illinois. In addition to various food items, the twelve stores offer a variety of other goods and services including alcohol, health and beauty aids, photo processing, and automobile-related services such as oil changes. Four of the Employer's stores are located in Dane and Rock County, Wisconsin. Of the four stores, one store is located in Beloit, one store in Janesville, and two stores in Madison. The two Madison stores are known as Madison East and Madison West.

The employees at the Madison East, Madison West, Beloit, and Janesville stores are members of a single bargaining unit. The employees in that unit are represented for purposes of collective bargaining by the Union. The collective bargaining relationship between the Union and the Employer in the consolidated bargaining unit is a long-standing one that has continued for approximately 30 years. The Employer's recognition of the Union as the sole and exclusive collective-bargaining representative of the employees in the unit has been embodied in successive collective-bargaining agreements, the most recent of which was effective from March 14, 2005 to March 18, 2008. The bargaining unit set forth in that contract is as follows:

All employees employed by the Employer at its stores located in Dane and Rock County, Wisconsin, including all employees in those stores who are actively engaged in the handling or selling of merchandise; BUT EXCLUDING employees working in the meat department, one (1) store managers per store, Pharmacists, Store Maintenance (as of April 28, 2005, third shift only, may be excluded if the company decides to use an outside agency. If such occurs the union representative and the employee shall meet for placement into another job), stock auditors, specialty men and demonstrators employed by outside vendors

All of the employees the Union now asserts to be supervisory have traditionally been included in the bargaining unit.

Phil Woodman is the Employer's President. Mr. Woodman's grandfather was the Employer's founder. The Employer's two Vice-Presidents are Phil Woodman's sons, Clint Woodman and John Adams. The Employer's Secretary/Treasurer is Donna Rusch. These four corporate officers work at the Employer's corporate office in Janesville, Wisconsin. It is the corporate office that determines the Employer's labor policy and handles all significant discipline, sets all employee schedules including start and finish time and break time, and generally determines what products the Employer will carry at each of its stores.

Each of the four stores at issue in the instant case, along with the Employer's eight other stores, has a store manager. The Store Manager at the Madison West store is Dale Martinson. The Madison East Store Manager is Dan Fredrickson. The Store Managers at the Janesville and Beloit stores are Steve Smith and Peter Mentele, respectively. Each of these four Store Managers report to the four corporate officers described above. Phil Woodman frequently visits each of the stores to confer with the Store Managers and other employees. Each Store Manager is responsible for directing the work force at his respective store. The Store Manager is also primarily responsible for creating that workforce by hiring employees when necessary. The Store Managers also discipline employees and represent the Employer in grievance meetings with the Union. The Store Managers have never been part of the bargaining unit set forth above.

Each of the four stores in this case also has an Assistant Store Manager. The Assistant Store Manager at the Madison West Store is Doug Adler. The Assistant Store Manager at Madison East is Frank Shelhamer. The Assistant Store Manager at the Janesville store is Cindy Olver. Beloit's Assistant Store Manager is Mary Decker. The Assistant Store Managers report to the Store Manager of their respective stores. As their title indicates, the function of the Assistant Store Manager is to assist the Store Manager in his or her duties. Assistant Store Managers participate in the hiring process, discipline employees, and adjust employee work schedules. The four Assistant Store Managers have traditionally been part of the above-described bargaining unit.

All of the Store Managers and Assistant Store Managers work the 1st shift of their respective stores, but all four stores are open 24 hours a day and have three shifts of employees. The stores, therefore, also have second and third shift supervisors who are responsible for the

stores when the Store Manager and Assistant Store Manager are not present. The second shift supervisors at the Madison West store are Ken Runde and Kevin O'Connell. The third shift supervisor at the Madison West store is Robert Disch. The second shift supervisor at the Madison East store is William Hurst, and the third shift supervisors are Jeff Nichols and Rodney Kellerhuis. At the Janesville store the second shift supervisors are Dave Thobe and Tom Strunz, and the third shift supervisor is Dean Haney. The Beloit store's second shift supervisors are Mark Swanson and Roger Sloss, and the third shift supervisor is Gene Schuur. The shift supervisors are the top official in a store when the Store Manager and Assistant Store Manager are not present. During those times there can be up to 25-30 employees in the store.

The duties of the second and third shift supervisors are the same in each store. The shift supervisors have the authority to discipline employees if they violate the Employer's policies. Shift supervisors also have the authority to alter employees' work schedules by letting them leave early and can authorize overtime. Shift supervisors make work assignments to the clerks on their shift. Shift supervisors also may participate in grievance meetings as a representative of the Employer. Shift supervisors are evaluated, in part, on how well they manage the workforce during their particular shift. Second and third shift supervisors have traditionally been included in the above-described bargaining unit.

Each of the four stores also has employees designated as front-end supervisors. The front-end supervisor oversees the front of the store where the registers are located and customers' purchases are scanned and totaled. If checkout activity is slow, the front-end supervisor can release checkers and baggers to the back of the store to assist in stocking the shelves. If checkout activity increases the front-end supervisor can call for checkers and baggers to come from the back to the front of the store and open additional check-out lanes. Front-end supervisors also monitor the speed at which a checker scans items. The rate at which items should be scanned, 30 items per minute, is set by the Employer's corporate offices, and the front-end supervisor has no authority to alter the rates set by corporate policy. Each front-end supervisor typically spends 90% of their time checking or bagging groceries. In addition front-end supervisors assist in stocking shelves, gathering carts from the parking lot and keeping the store clean.

The front-end supervisors at the Madison West store are Gabe Ouroru and Richard Althaus with Tammy Shortreed and Frank Popp assuming their duties on an as-needed basis. The front-end supervisors at the Madison East store are Paul Lust, Donna Johll, Cheryl Davidson, and Janice Walhovd. Patrick Root and Jesus Vivanco also regularly exercise the duties of front-end supervisor at the Madison East store. Jeff Cunningham, Nikki Dobson, and Janice Inman are the front-end supervisors at the Janesville store. Employee Kathie Schachtschneid also occasionally performs the duties of front-end supervisor at the Janesville store. The front-end supervisors at the Beloit store are Sue Warden, Katie Hunter and Vickie Sievert. Dairy manager Adam Kilday also occasionally performs the duties of front-end supervisor at the Beloit store.

Each of the four stores in the bargaining unit is divided into various departments involving a specific type of product or service provided by the Employer. The departments are

dairy, produce, grocery, gas and lube,⁴ photo, bakery, health and beauty aids (HABA), frozen food, warehouse, maintenance, and liquor.⁵ Each of the departments has a department manager who functions as the lead employee in that department. The department managers receive a raise in pay for serving as department manager. This amount varies by department and by store but usually amounts to \$1.00 to \$2.00 an hour. The department managers spend the large majority of their time doing the same work as the other employees in the same department. This usually involves stocking shelves and rotating product. Department managers do some product ordering for their respective departments, but other employees in the department also do product ordering. Before any new product can be ordered by a department manager, it must be approved by the buyer located in the corporate office in Janesville responsible for that department. All pricing is set by the corporate office in Janesville as well.

The current department managers at the four unit stores are as follows: Madison West – Dale Bavery in dairy, Steve Freischmidt in produce, Mark Deutsch in grocery, Ann Brown in bakery, Jackie Rawls in HABA, Tim Troia in frozen food, Ed Augustine in the warehouse, Ray Brunner in maintenance, and Mark Okey in liquor;⁶ Madison East – John Hansen in dairy, Rich Rahn in produce, Greg Davis in grocery, Brad Kendall in Gas and Lube, Jim Arcand in photo, Mary Steele in bakery, Mark Kastner in HABA, Dan Olson in frozen food, Jerry Krad in the warehouse, Rod Kellerhuis⁷ in maintenance, and William Gosda in liquor; Janesville – Patrick Porter in dairy, Chad Easton in produce, Dan Wright in grocery, Denise Casteel in Gas, Wendy Weberpal in photo, Helen Van Horn in bakery, Dan Powell in HABA, Mike Roherty in frozen food, Richard Roach in the warehouse, Tim Dorsey in maintenance, and Jeff Bouton in liquor; Beloit – Adam Kilday in dairy, Jason Planke in produce, Leon Anderson in grocery, Mark Joyner in Gas and Lube, Kathy Morehouse in photo, Joyce Burton in bakery, Deb Sutter in HABA, Larry Kothe in frozen food, Randy Alberti in the warehouse, Joe McMillian in maintenance, and Phyllis Dunn in liquor.

⁴ The Madison West and Janesville stores do not have gas and lube departments, but the Janesville store does have a gas department manager.

⁵ In addition the Madison East store has a video department, but it is scheduled to close and the video department manager, Larry Korb, will be moving to the photo department.

⁶ There was no evidence at hearing as to the identity of the photo department manager at the Madison West store.

⁷ Kellerhuis is also the 3rd shift supervisor.

IV. DISCUSSION

A. Supervisory Issue

1. The Law

To determine whether an individual is a supervisor within the meaning of Section 2(11) of the Act, the Board examines: (1) whether the individual has the authority to engage in any 1 of the 12 enumerated powers listed in Section 2(11) of the Act; and (2) whether the exercise of such authority requires the use of independent judgment. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994); NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 707 (2001). Section 2(11) of the Act defines the term 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.

The Board recently revisited the issue of supervisory status in Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006), in light of the Supreme Court's findings in Kentucky River. See also, Croft Metals, Inc., 348 NLRB No. 38 (September 29, 2006) and Goldencrest Healthcare Center, 348 NLRB No. 39 (September 29, 2006), issued at the same time as Oakwood. In Oakwood, the Board adopted "definitions for the terms 'independent judgment,' 'assign,' and 'responsibly to direct,' as those terms are used in Section 2(11) of the Act." Oakwood, supra, slip op. at 3.

In Kentucky River, the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." NLRB v. Kentucky River Community Care, Inc., 532 U.S. at 713. Therefore, in Oakwood, the Board adopted an interpretation of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. In short professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." Supra, slip op. at 7. The Board noted that "Section 2(11) contrasts the term independent judgment with actions that are of a merely routine or clerical nature." Id. slip op. at 8. The Board stated that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. However, the Board clarified that, ". . . the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." Id.

In excluding individuals from a unit based upon supervisory status, the burden of proof rests upon the party alleging that an individual is a supervisor. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001); Bennett Industries, 313 NLRB 1363 (1994). A lack of evidence is construed against the party asserting supervisory status. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999). In the instant case, it is the Union that is asserting that individuals who hold the positions of assistant store manager, second shift and third shift supervisor, front-end supervisor, or manager of any of the various departments are supervisors within the meaning of section 2(11) of the Act, and thus, are ineligible to vote in any election directed in this case. The Union, therefore, has the burden of establishing the supervisory status of those individuals. Each of the challenged classifications will now be discussed in turn.

2. Assistant Store Managers

As set forth above, each of the four stores which comprise the bargaining unit in this case have both a store manager and an assistant store manager. The store managers are the top Employer official at each store and have been traditionally excluded from the bargaining unit. The assistant store managers assist the store managers in carrying out their duties of operating their respective stores, and the assistant store managers have traditionally been included in the bargaining unit. The Union now asserts that the assistant store managers are supervisors and ineligible to vote in any decertification election. At the hearing, and again in its post-hearing brief, the Employer offered to stipulate that the assistant store managers are supervisors within the meaning of Section 2(11) of the Act. The Union, however, has refused to so stipulate. However, even without a stipulation, there is sufficient evidence to establish the supervisory status of the assistant store managers.

Assistant store managers regularly issue discipline to employees. The discipline issued by the assistant store managers includes situations involving some discretion on the part of management as to whether and what form of discipline to issue such as disputes between employees. This type of discipline goes beyond a simple notice given to an employee for failing to meet numerical guidelines established by the Employer's corporate office, which involves no discretion on the part of the issuer and no use of independent judgment. For example the Madison West assistant store manager issued a written warning to an employee for failure to follow work or safety rules, and the Madison East assistant store manager issued a written warning to an employee who was involved in a dispute with another employee. Assistant store managers also issue discipline of a more serious nature than simply a verbal or written warning. Assistant store managers also have the authority to suspend employees for violation of work rules. The assistant store manager in Janesville issued a one day suspension to an employee and then issued a report on "disciplinary action prior to termination" to the same employee.

In addition to their role in discipline, assistant store managers also play a significant role in the hiring process. Assistant store managers interview applicants for employment and make hiring recommendations. Furthermore, assistant store managers have the authority to alter employees' work schedules by granting requests for leave or by allowing an employee to leave

before the scheduled end of the shift. Given the assistant store managers' authority in the areas of discipline, hiring, and the alteration of work schedules, they are clearly supervisors within the meaning of Section 2(11) of the Act and are, under existing Board law, ineligible to vote in the election in this matter.

3. Second and Third Shift Supervisors

As previously discussed, both the store manager and the assistant store manager at each of the four stores in the bargaining unit typically work the day shift at their respective stores. All four stores, however, are open 24 hours a day. This means that someone else must be in charge of the store during the hours that the store manager and assistant store manager are absent. This role is filled by the second shift supervisor and the third shift supervisor, and each of the four stores has at least one individual who fills each of those positions. All of the second and third shift supervisors have traditionally been included in the bargaining unit, but the Union now asserts that all of these individuals are supervisors within the meaning of Section 2(11) of the Act. The Employer, with two exceptions, denies that the shift supervisors are statutory supervisors. A review of the evidence indicates that shift supervisors do possess supervisory authority, including the authority to discipline, assign, and responsibly direct employees, under Section 2(11) of the Act and are, thus, supervisors within the meaning of that section.

At the hearing, and again in its post-hearing brief, the Employer offered to stipulate that the Madison East third shift supervisor, Rodney Kellerhuis, and the Janesville third shift supervisor, Dean Haney, are supervisors within the meaning of Section 2(11) of the Act.⁸ The Union refused to enter into that stipulation but continues to maintain those two, along with the other third shift supervisors, are supervisors. The third shift supervisors have the authority to issue discipline to employees for poor work performance or for other violations of Employer work rules. Both also regularly instruct the employees working the third shift on what work needs to be done and assign tasks to those employees. They direct employees as to where and what to stock, when or how to rotate stock, and what to do with expired stock. These instructions are based on the third shift supervisor's own judgment as to what needs to be done. Employees follow these directions from the third shift supervisors and can be disciplined if they fail to do so. All the third shift employees who testified at the hearing stated that they considered the third shift supervisor to be their "boss".

The third shift supervisors spend most of their shift directly overseeing employees and making sure their instructions are being carried out. The third shift supervisors also have the authority to offer employees overtime and may use their discretion to determine which employees are offered the overtime. The third shift supervisors also are responsible for deciding if a probationary employee on their shift has passed their probationary period and for completing

⁸ The Employer provided no explanation for why the third shift supervisors at the Madison East and Janesville stores are supervisors within the meaning of the Act, but the third shift supervisors at the Madison West and Beloit stores are not. Employer President Phil Woodman, however, testified that the duties of the various positions were the same at all four stores.

annual employee evaluations for all the employees on their shift. Given the above, the third shift supervisors are clearly supervisors within the meaning of the Act due to their ability to discipline employees, assign them work using independent judgment, and to responsibly direct those employees.

The record also establishes similar responsibilities for second shift supervisors. Second shift supervisors⁹ have the authority to discipline employees for work rule infractions, and this discipline may be either written or verbal. In fact one second shift supervisor had it noted in his annual evaluation that he needed to be more “aggressive” in writing-up employees in order to ensure that they were following Company policy. Second shift supervisors also have the authority to discipline employees for not following their instructions. A large percentage of the second shift supervisor’s time is spent assigning work to employees and in overseeing that work. The second shift supervisors use their own judgment in determining what assignments to make. The second shift supervisor determines which items should be restocked first and bases this decision on the popularity of various items.

Second shift supervisors also are responsible for determining if probationary employees on their shift have passed their probation and for completing annual employee evaluations for the employees on their shift. The second shift supervisors also have the authority to release employees before the end of their scheduled shift. Thus for the same reasons set forth above for third shift supervisors, second shift supervisors are supervisors within the meaning of Section 2(11) of the Act.

4. Front-End Supervisors¹⁰

Each of the four stores in the bargaining unit has employees who occupy the position of front-end supervisor. The front-end supervisor oversees the checkout section of the store, where customers’ purchases are scanned and bagged. The front-end supervisors have traditionally been included in the bargaining unit, but the Union now asserts that those employees are in fact supervisors within the meaning of Section 2(11) of the Act and thus, ineligible to vote in the election. The Employer denies that front-end supervisors are supervisors within the meaning of the Act and argues that the employees holding those positions should be eligible to vote in any election directed in this matter.

⁹ Evidence was not submitted as to the work duties and authority of all the individuals who hold the position of second shift supervisor, but the Employer’s President Phil Woodman testified that the duties for various positions are the same across the four stores.

¹⁰ In arguing that front-end supervisors are supervisors within the meaning of the Act, the Union repeatedly relies on performance evaluations that refer to these individuals as supervisors and describe their job duties as supervision. However, it is a long-settled matter of Board law that the title of a position is not controlling as to supervisory status but rather the authority vested in the position. Fleming Companies, Inc., 330 NLRB 277 (1999).

There has been no allegation that front-end supervisors possess the authority to suspend, lay off, recall, promote, or discharge employees or to adjust employee grievances. Rather the Union contends that front-end supervisors do have the authority to hire, transfer, assign, responsibly direct, discipline, or reward other employees and that possession of any one of these indicia would render the front-end supervisors ineligible to vote in any election directed in this matter. Therefore, each of the alleged indicia will now be analyzed in turn.

The first indicia of supervisory authority allegedly possessed by the front-end supervisors is the authority to hire employees. There was substantial evidence produced at the hearing that hiring employees is the responsibility of the store managers. Employer President Phil Woodman testified that the main duty of each store manager was the creation of the workforce at his respective store. The evidence at the hearing also indicated that the store managers are assisted in the task of hiring new employees by their assistant store managers. In contrast, the evidence that front-end supervisors play any role in hiring employees was extremely limited and outdated.

One employee at the Madison East store testified that she had been interviewed and hired by a front-end supervisor named Randy Cook in 1995. Another employee testified that front-end supervisor Jackie Inman hired her at the Janesville store approximately 20 years ago. This is the extent of the evidence that front-end supervisors have the authority to hire employees. This is simply insufficient to establish supervisory status. First, two instances in the last twenty years does not establish that front-end supervisors regularly possess the authority to hire employees. There is simply no evidence that it is a normal part of front-end supervisors' job duties. Second, and more important, there was no evidence that even if front-end supervisors did decades ago possess the authority to hire employees, that they still possess that authority today. The two instances are simply too remote in time to have any bearing on front-end supervisors current authority and are, therefore, insufficient to establish current supervisory authority for front-end supervisors.

The Union further alleges that front-end supervisors possess the authority to transfer, assign, and responsibly direct other employees. As previously stated, front-end supervisors oversee the front of the store. In the front of the store there are multiple check-out lines. Each line has a register. The registers are operated by checkers, who scan a customer's purchases and then accept payment from the customer for those purchases. In addition to the checker operating the register, each line also has a bagger who places the customer's items into a bag. The Employer's corporate office determines how many checkers and baggers to schedule for each of the three shifts at each of the four stores. The corporate office also assigns each checker and bagger to a specific check-out line.¹¹

During the course of a shift the number of customers in a store will vary, and the number of customers seeking to check out will also vary. At times all of the check-out lines with assigned checkers and baggers will be occupied by customers, and at other times some of those

¹¹ One employee testified that front-end supervisors could change a checker's particular lane assignment, but there was no testimony concerning under what circumstances or for what reasons a lane assignment could be changed.

lines will be empty. If the front-end supervisor notices that customer flow is light and that some of the open check-out lines are not being used, the front-end supervisor can direct the checker and bagger to perform tasks elsewhere. These tasks can include stocking shelves, collecting carts from the parking lot, or general clean-up around the store. There is no set rule on when a front-end supervisor should release checkers or baggers to perform duties elsewhere.

On the other hand, if the lines of customers at the open check-out lines begin to get too long, the front-end supervisor may also call previously released checkers and baggers back to the front-end to reopen their check-out line and begin assisting customers. The front-end supervisor may also open a line and begin checking out customers or go to an open line and assist with the bagging of groceries. Indeed, there was testimony offered at hearing that front-end supervisors spend as much as 85-90% of their time checking or bagging groceries. Once again there is no set rule on how long customer lines have to be before additional check-out lines should be opened. In addition, a front-end supervisor can request that a checker or bagger delay their corporate-scheduled break, if it occurs at a time when the check-out lines are particularly busy.

In addition to the above duties, front-end supervisors are responsible for bringing additional cash to a register if it is needed. Front-end supervisors also do more basic tasks like retrieve carts from the parking lot and do general cleaning around the store as well as stocking shelves. Front-end supervisors must approve all checks over a certain amount and are responsible for a limited amount of paperwork.¹²

The above described duties of the front-end supervisors do not rise to the level of establishing supervisory authority under Section 2(11) of the Act because they do not require the use of any real independent judgment on the part of those employees. The Board in Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006) held that “the assignment of an employee to a certain department or to a certain shift or to certain significant overall tasks would generally qualify as ‘assign’ within the ambit of the Act. However, to confer supervisory status such assignment must require the use of independent judgment on the part of the individual making the assignment. The assignment must involve a degree of discretion that rises above the routine or clerical in order for supervisory authority to be found.” Id. at p.10. Simply directing employees to do other work when check-out lines are short and then directing them back to the check-out lines when those lines get too long does not require any independent judgment. Indeed, there was testimony that the checkers themselves can call for additional help if the lines get too busy. It is simply a rote call not based on the skills or abilities of the employee. Lines are long, call for more checkers. Lines are short, release the checkers. Therefore this is not assigning work or transferring employees within the meaning of Section 2(11) of the Act. Front-end supervisors

¹² Front-end supervisors also do evaluations of the work performance of employees in their department. Section 2(11) does not include “evaluate” in its enumeration of supervisory functions. It is only when evaluations affect the wages and/or job status of the employee that the individual performing the evaluations will be found to be a supervisor. Harborside Healthcare, Inc., 330 NLRB 1334 (2000). Here there was no evidence that these evaluations have any affect on the wages or job status of the evaluated employee. Thus the evaluations are not indicative of supervisory authority.

are evaluated by management on how well they perform this task, but once again since the initial decision by the front-end supervisor requires no real independent judgment, this does not raise this duty to the level of responsible direction within the meaning of Section 2(11) of the Act.¹³

The Union also contends that front-end supervisors have the authority to discipline employees by issuing either verbal or written warnings for violation of Company policies. In support of this assertion the Union offered into evidence several written warnings signed by front-end supervisors on the line requiring signature by a management official. A review of the evidence, however, indicates that at all four stores in the bargaining unit, all written discipline must be reviewed and approved by the store manager. In addition the types of violations for which front-end supervisors issue discipline do not require any independent judgment on the part of those employees. The incidents involve violations of bright line rules set by the Employer's corporate office, such as a cash drawer being short, not making the minimum number of scans per minute, or accepting a bad check, and for which the front-end supervisor has no discretion as to whether to issue the discipline.

The record is clear that front-end supervisors do verbally counsel employees if they notice an employee violating some Company policy. One employee who is employed as a checker testified that if she noticed a bagger incorrectly packing groceries and causing customer dissatisfaction, she would bring this to the attention of the front-end supervisor, and it would be the responsibility of the front-end supervisor to address the problem with the bagger. Other front-end supervisors also testified that they would talk to an employee if they noticed that he or she was doing something improper. There was no evidence however that this verbal counseling was part of any disciplinary system or that such verbal coaching could lead directly to discipline for the employee. Since these verbal "warnings" did not amount to discipline, they do not confer supervisory status on the front-end supervisors. Ken-Crest Services, 335 NLRB 777 (2001).

The Union also produced evidence of written warnings signed by front-end supervisors for infractions including accepting a bad check, failure to meet the minimum standard of 30 scans per minute, taking a check for an incorrect amount of money, accepting a return for over \$5.00 without obtaining authorization, or for accepting a "Woman, Infant, and Children" voucher for an item not covered by that program. All of these situations, though, involve rules established by the Employer's corporate office for situations in which there can be no doubt as to whether the employee violated the rule. Either the employee made the minimum number of scans, or they did not. Either the employee accepted a return of over \$5.00 with authorization, or they did not. There is no evidence of any permissible discretion on the part of the front-end supervisor as to whether to issue the discipline. Without discretion in deciding whether discipline is warranted, there can be no independent judgment. If the front-end supervisor does not use independent judgment in issuing the discipline, then the issuance of said discipline does not convey supervisory status within the meaning of the Act.

¹³ Further in order for the direction of work to be "responsible", the person directing and performing the oversight must be accountable for the performance of the task by the other such that some adverse consequence may befall the one overseeing the tasks if the tasks are not properly performed. Oakwood Healthcare, Inc., 348 NLRB No. 37, at p. 10 (2006).

As to the other written warnings signed by front-end supervisors including those related to customer complaints or failure to follow work or safety rules, all four store managers testified that front-end supervisors do not have the authority to issue written discipline. All four store managers also testified that all written discipline issued in their respective stores must be reviewed and approved the store manager. The store manager will investigate the situation and make the decision as to whether and what level of discipline is appropriate. The Union offered no evidence to contradict this testimony. There was no evidence presented that any of the written discipline issued by front-end supervisors did not come from the store manager. Since there was no evidence whether the front-end supervisors used their own independent judgment in issuing this discipline or were simply following the instructions of the store managers, it does not establish supervisory status. Dean & DeLuca New York, Inc., 338 NLRB 1046, 1047 (2003)

There was also no evidence that front-end supervisors could effectively recommend written discipline to the store managers or that their recommendations for written discipline were regularly followed. Accordingly, the Union has failed to meet its burden of establishing that front-end supervisors are supervisors within the meaning of the Act based on their authority to discipline employees.

Finally, the Union asserts that front-end supervisors have the authority to reward employees. This claim by the Union is based solely on front-end supervisors recommending employees for a bonus if the employee catches a bad check before it is accepted. There was no evidence, however, that the front-end supervisor used any independent judgment in recommending the bonus or if the front-end supervisor's recommendation is regularly followed. Thus, there is insufficient evidence to establish that front-end supervisors have the authority to reward employees within the meaning of Section 2(11) of the Act.

Based on the above, the Union has failed in its burden of establishing that the front-end supervisors are supervisors within the meaning of Section 2(11) of the Act.¹⁴ The authority of the front-line supervisors with respect to the assignment and direction of work, transfer of employees, discipline of employees, as well as rewarding employees appears to be merely routine and clerical in nature and involves very little discretion on the part of the front-end supervisors. There is certainly not sufficient discretion for a finding that the exercise of this authority involves the use of independent judgment. The front-end supervisors are, therefore, eligible to vote in the election directed in this matter.

¹⁴ The Union produced a variety of evidence related to so-called secondary indicia of supervisory status. This included the method of compensation for front-end supervisors and how front-end supervisors dressed at work. In the absence of primary indicia of supervisory status, as in the present case, secondary indicia are not sufficient to establish supervisory status. Carlisle Engineered Products, Inc., 330 NLRB 1359 (2000).

5. Department Managers

As set forth above in the Statement of Facts, each of the four stores that comprise the bargaining unit in this matter are divided into departments. The departments are the same at each of the four stores with the exception of Madison West which does not have a gas and lube department.¹⁵ The departments are dairy, produce, grocery, gas and lube, photo, bakery, health and beauty aids (HABA), frozen food, warehouse, maintenance, and liquor. Each of the departments at each store has an employee who is designated as the department manager. These department managers have traditionally been included in the bargaining unit. The Union now asserts that the department managers are supervisors within the meaning of Section 2(11) of the Act and are ineligible to vote in the election in this matter. The Employer denies that the department managers are statutory supervisors and contends that the department managers are eligible to vote in any election held among the bargaining unit employees.

There is no allegation that department managers possess the authority to hire, transfer, suspend, lay off, recall, promote, discharge, discipline, or reward employees or to adjust employee grievances. Rather the Union contends that department managers do have the authority to assign and responsibly direct employees and that possession of one of these indicia would render the department managers ineligible to vote in any election directed in this matter. Therefore, each of these alleged indicia will now be analyzed in turn. During the course of the hearing, evidence was not offered as to the duties of every department manager at every store but the Employer's President Phil Woodman did testify that the duties of various positions are the same from store to store. The evidence concerning department managers and their alleged supervisory authority to assign and responsibly direct will now be analyzed on a department by department basis.

a. Dairy Department

First, as to the dairy department, the record indicates that at the Beloit and Janesville store no other employees in the dairy department regularly work the same hours as the dairy department managers at those two stores. In addition only one employee in the dairy department at Madison West and Madison East stores works at the same time as the dairy department manager at those two stores. The other dairy employees at the four stores work various shifts outside the direct supervision of the dairy manager. The dairy managers communicate with these other employees via notes which primarily deal with what products need to be ordered or during shift overlaps. Each of the dairy managers testified that all of the employees in their dairy departments know their jobs and require no supervision. None of the four dairy managers testified to making any work assignments to other employees or to responsibly directing their work. The dairy managers spend their working hours stocking shelves, dealing with vendors and ordering products. The orders are primarily the same each week, and the dairy managers can not order any new product without first obtaining corporate approval. The Madison West dairy manager also testified that he does some training of new employees by showing them how to properly stock the shelves.

¹⁵ While the Janesville store does not have a gas and lube department there is a gas department manager.

The Union has clearly failed in its burden of establishing that the dairy department managers are supervisors within the meaning of Section 2(11) of the Act. Two of the dairy department managers, Beloit and Janesville, do not even have any other employees present to assign or responsibly direct. All of the other dairy employees at those two stores work different shifts than the dairy department managers. There was also no evidence of assignment or responsible direction by the dairy managers at the Madison East and West stores.

b. Produce Department

For the produce department evidence was offered concerning the produce managers at the Madison East¹⁶ and Madison West stores. Both produce managers who testified stated that they spent no time directing the work of other employees. They further testified that the other employees in their department are experienced and know what they need to do each day. The produce manager can ask another employee to do a task such as to stock a particular product, pick up some pallets, or clean the floor, but other employees in the department also can make the same requests of him.¹⁷ The produce manager spends his working hours stocking product and placing orders with vendors. Other employees in the produce department also regularly place orders with vendors for items such as salad dressing. No direct evidence was offered as to the job duties of the produce managers at the Janesville or Beloit stores, but as was previously stated, the Employer's president Phil Woodman testified that the job duties of various positions are the same from store to store so it can be assumed that the job duties of the produce managers at Janesville and Beloit are the same as the produce managers at Madison East and West.

Once again the Union has failed to establish any supervisory authority on the part of the produce managers. The evidence that the produce managers make any assignments to other employees or responsibly direct their work was extremely limited and no evidence was offered of the produce managers using any independent judgment in issuing any of these actions.

c. Grocery Department

As to the grocery department, none of the four grocery department managers testified at the hearing. There was also no testimony from any other employee working directly under any of the four grocery department managers. Therefore, there was no evidence of the grocery department managers exercising any Section 2(11) authority, and the Union has failed to meet its burden of establishing that the grocery department managers are supervisors within the meaning of the Act.

¹⁶ The produce manager at the Madison East store is Rich Rahn, the Petitioner in this matter.

¹⁷ No evidence was submitted at the hearing of any employee ever being disciplined for failing to follow the instructions of the produce manager or other department manager or front-end supervisor.

d. Gas and Lube Department

The only gas and lube department employee who testified at the hearing was the Madison East gas and lube department manager.¹⁸ He testified that he does not assign or direct the other employees in the department. The employees are experienced and know what they need to do. The Madison East gas and lube manager testified that he spends his working hours doing oil changes, running the register in the department, maintenance around the building, and washing cars. If he needs to order product, he is told what to order by the Employer's corporate office. If work in the department is slow, the employees themselves find other work to do without any instruction from him. If employees need their schedules adjusted, they handle it amongst themselves without involving the department manager. The Madison East gas and lube manager has never been disciplined or warned based on the failure of other employees in the department to properly perform their jobs. Based on the above, there is insufficient evidence to find that gas and lube department managers are supervisors within the meaning of the Act.

e. Photo Department

For the photo department, the Madison East photo department manager testified at the hearing. He testified that there are currently no other employees in the photo department at Madison East who work the same hours as him. He works alone all day and spends his time dealing with customers and ordering product for the department. There was no evidence of him making assignments to other employees, responsibly directing their work, or exercising any other section 2(11) authority. Therefore, since no evidence was offered of supervisory authority on the part of the Madison East photo department manager, and since based on Phil Woodman's testimony, it can be assumed that the duties of the other photo department managers are the same, the Union has failed to establish that the photo department managers are supervisors under the Act.

f. Bakery Department

The Union also offered evidence concerning the Madison East bakery department manager and her duties. One of the employees in the bakery department testified that she received her daily work assignments from the bakery manager and that if the bakery manager was absent she would leave the employee a note with instructions as to what needed to be done. The employee also testified that she had the bakery manager's number and contacted her at home if there was a problem with some product, a customer, or a vendor. This occurred approximately once a month. However, no evidence was offered that these assignments were anything other than routine and clerical in nature. There was no evidence that the assignments required any independent judgment on the part of the bakery manager. The bakery manager also places orders with vendors. Like the orders previously described for the Madison West dairy managers, most of the orders placed by the bakery manager are routine in nature, and she is not allowed to order

¹⁸ Based on the testimony of Phil Woodman, it will be assumed that the duties of the other gas and lube department managers are the same as those of the department manager at Madison East.

any new product with obtaining authorization from the buying department. It will be assumed, per the testimony of Phil Woodman, that the other bakery managers have the same or similar duties as the Madison East bakery manager. The evidence produced at the hearing is insufficient to find that the bakery department managers are supervisors within the meaning of the Act.

g. HABA Department

The only HABA department employee to testify at the hearing was the Madison East HABA department manager. He testified that there are no other employees in the HABA department when he is there so he spends no time assigning work or responsibly directing employees. Instead, his work hours are spent stocking shelves, placing orders with vendors, and assisting in the check-out area on an as-needed basis. Like all department managers, he is not permitted to order new products without corporate approval. As stated before, it will be assumed, based on the testimony of Phil Woodman, that the duties of the other HABA managers are the same as the Madison East HABA manager. There is no evidence that these individuals exercise any supervisory authority as set forth in Section 2(11) of the Act, and thus, they are eligible to vote in the election directed in this matter.

h. Frozen Food Department

With regard to the frozen food departments at the four stores, evidence was offered on the frozen food managers at Beloit, Madison East and Madison West.¹⁹ There was no evidence offered that any of these three managers exercise any supervisory authority over other employees in the frozen food departments. There was no evidence of assignment of work or responsible direction. In fact all three testified that the other employees in their departments generally work different hours and are not even present at the time the department managers are at work. The department managers spend their time stocking shelves and placing routine orders with vendors. Once again, no orders for new items may be made without prior corporate authorization. Based on this lack of evidence of supervisory authority, the Union has failed in its burden of establishing that the frozen food managers are supervisors within the meaning of Section 2(11) of the Act.

i. Warehouse Department

Only one current warehouse department employee testified at the hearing. That employee works second shift at the Beloit warehouse. The warehouse department manager in Beloit works the first shift so the testifying employee has little contact with him. The employee testified that the warehouse employees immediately begin working after their arrival at the warehouse each day. There is no need to wait for assignments because the employees all know where they are supposed to be and what they are supposed to be doing. They receive orders from the store and they pull those products from the shelves in the warehouse. There was no

¹⁹ As stated earlier, based on the testimony of Phil Woodman, it will be assumed that the duties of the frozen manager at the Janesville store are the same as the frozen managers at the other three stores.

evidence offered that any of the four warehouse department managers exercise any authority under Section 2(11) of the Act. Therefore, the Union has failed to meet its burden of establishing that those individuals are supervisors.

j. Maintenance Department

One employee from the maintenance department also testified at the hearing. The employee who testified is the sole employee in the maintenance department at the Madison West store and is thus the manager of that department. He is given his assignments by the store manager and then spends his working hours making sure all of the machinery in the store is operating properly. He is also responsible for ordering needed parts for broken machinery. Since there are no other employees in the department he does not make any work assignments or direct the work of any other employees. There was no evidence that the individual, or any of the maintenance department managers at the other three stores, exercises any Section 2(11) authority. The Union has, therefore, failed to meet its burden of establishing that maintenance department managers are supervisors under the Act.

k. Liquor Department

The liquor department managers at the Madison East and Madison West stores both testified at the hearing. Both managers testified that they spent the vast majority of their time operating the register in the liquor department and doing clerical work. Both denied that they gave any assignments to other employees or directed them in their work. Both managers also do ordering for their department. Like other department managers, they are not permitted to order new products without obtaining corporate approval. Based on the above, there is insufficient evidence to establish that liquor department managers are supervisors within the meaning of the Act.

l. Additional Assertions Concerning Department Managers

The Union also points to several performance evaluations of various department managers which were entered into evidence.²⁰ These evaluations instruct the department managers to do a better job “managing the workforce” and to “continue working with employees” as well as “enforce Company rules and policies”. Nowhere in these documents, however, does it describe what any of these instructions mean and whether they involve using Section 2(11) authority. There is no indication that any of these instructions would involve the use of independent judgment on the part of the department managers. In addition, these performance evaluations cannot be used as evidence that department managers are in some way being held responsible for their direction of other employees in their departments. There was no

²⁰ The Union also relies on evaluation forms completed by department managers for probationary employees. However, no evidence was offered that these evaluations forms are used by the Employer’s corporate office in determining whether an employee has passed his or her probation. In fact the forms are sometimes completed by other employees in the department rather than by the department managers.

evidence that performance evaluations had any effect on the department managers' wages or other terms and conditions of employment. Rather, the evidence was that employees treated the performance evaluations in a rather cavalier fashion and often signed them without even reading them.

The Union relies on the Board's decision in Nitro Super Market, Inc., 161 NLRB 505 (1966) in support of its contention that department managers are supervisors under the Act. A review of the facts of that case, however, shows that it is distinguishable from the instant case. The supervisory issue in Nitro concerned the employer's meat department manager, head grocery clerk, and produce department manager. In Nitro it was found that those three individuals participated in the hiring of employees by interviewing applicants for employment, conferring with other management officials about the interview, and then informing the applicant of the hiring decision. The three also conferred with management regarding discipline and in at least one incident the recommendation of the head grocery clerk that an employee be discharged was followed with head grocery clerk's recommendation cited to the discharged employee as one of the reasons for his discharge. Finally, the employer's general manager testified that the three managers used their own judgment in directing employees. The trial examiner primarily relied on those three indicia to find supervisory status. In addition, the trial examiner in Nitro also found that the three prepared work schedules, authorized overtime, and recommended wage increases.

None of those factors are present in the instant case. There was no evidence presented that department managers play any role in the hiring process or can effectively recommend any discipline let alone discharge. There was also no evidence that department managers used their own independent judgment in directing employees. Finally, as to the other factors cited by the trial examiner in Nitro, there was no evidence in the instant case that department managers prepared work schedules, authorized overtime, or recommended wage increases.²¹

Based on the above, there is insufficient evidence to find that department managers assign or responsibly direct employees within the meaning of Section 2(11) of the Act.²² There is no evidence that department managers use independent judgment with respect to any instructions they give to other employees or that the instructions are more than routine or clerical

²¹ This is also true for front-end supervisors. As previously set forth, there was insufficient evidence at the hearing to hold that front-end supervisors currently play any role in the hiring process, effectively recommend discipline, or use independent judgment in directing employees. Nor do front-end supervisors prepare work schedules, authorize overtime, or recommend wage increases.

²² Once again the Union produced a variety of evidence related to secondary indicia of supervisory status for department managers. This included the method of compensation for department managers, their attendance system, how department managers dressed at work, and their receipt of Company phones. However, since the department managers possess no primary indicia of supervisory status, secondary indicia are not sufficient to establish supervisory status. Carlisle Engineered Products, Inc., 330 NLRB 1359 (2000).

in nature. Therefore, the Union has failed to meet its burden of establishing that department managers are supervisors under the Act.

B. Managerial Issues

The Union has also asserted that department managers are managerial employees and thus should be excluded from the unit. Managerial employees are 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.” NLRB v. Bell Aerospace Co. Division, 416 U.S. 267 (1974). While not specifically excluded from the protection of the Act by the statute itself, both the Board and the United States Supreme Court have held that managerial employees are not covered by the statutory definition of employee and thus not covered by the Act. Id. The party asserting managerial status has the burden of proving it. Union Square Theatre Management, 326 NLRB 70 (1998). The Employer argues that department heads are not managerial employees and thus are included in the bargaining unit in the instant case.

The Union’s argument that department managers are managerial employees rests on the department managers’ dealing with vendors and their ordering of product for the Employer.²³ The record reveals very little discretion in this ordering. No department manager can order a new product without obtaining authorization from the corporate office. The vast majority of ordering is of a purely routine nature. The department managers order the same products and the same amounts week after week. In addition there was substantial evidence that other employees who are not department managers also order product for the Employer. The majority of the ordering for the dairy department is done by the night shift employees and not by the dairy department manager, who works the day shift. A majority of the ordering in the produce department at the Madison East store is also done by an employee other than the department manager.

Ordering is also done by employees who are not included in the bargaining unit. These employees work in the Employer’s corporate office and are classified as buyers. For example, Jeff Gary is the category buyer for the HABA department. Gary determines what products will be purchased for the HABA department and the layout of those products in that department. The HABA department manager can make recommendations to Gary as to what products to purchase, but Gary makes the final decision and has ignored the department manager’s

²³ In relation to Madison East produce manager Rich Rahn, the Union also contends that his asserted place in the management hierarchy also supports a finding that he is a managerial employee. This argument is not supported by the evidence. Rahn testified that he reported to his store manager, Ron Frederickson, and the Employer’s President, Phil Woodman. It is unclear to whom else Rahn could report. He works the day shift so he does not come into contact with any of the shift supervisors. There was no testimony that he has contact with any corporate officials other than Phil Woodman. It is, therefore, difficult to determine how this somehow places Rahn so high in the Employer’s managerial structure that he qualifies as a managerial employee.

recommendations before. There is also a head buyer for the bakery department, who has final approval of purchases in that department. Before the bakery department manager can order something new, the bakery buyer must give her approval. Larry Nitz is the General Manager of all the Employer's photo departments. Nitz determines what products will be carried and sets up all meetings with vendors. In the produce department, Phil Woodman determines what products will be ordered. All pricing is set by the Employer's corporate office.

The record reveals no real discretion in ordering that would cause the department managers to be classified as managerial employees. The ordering done by the department managers is routine and clerical in nature. The Union has thus failed to meet its burden of establishing that department managers are managerial employees.²⁴

V. 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 purposes of collective bargaining by United Food and Commercial Workers Local 1473. 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. Voting Eligibility

Eligible to vote in the election are those in the unit who were 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 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, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees 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 since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

²⁴ Since I have found that the Petitioner, Rich Rahn, is neither a supervisor within the meaning of Section 2(11) of the Act or a managerial employee, I deny the Union motion to dismiss the petition in this matter on the grounds that it was tainted due to Petitioner's supervisory and/or managerial status.

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 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.). This list may initially be used by the Regional Director to assist in determining an adequate showing of interest. In turn, the list shall be made available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203-2211 **on or before July 16, 2008**. No extension of time to file this list will 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 to the Regional Office by electronic filing through the Agency website, www.nlr.gov,²⁵ by mail, or by facsimile transmission at (414)297-3880. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of two copies of the list, 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.

²⁵ To file the list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.

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 at least 3 working days prior to 12:01 a.m. of the day 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 5 full 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 nonposting of the election notice.

VI. 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, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **July 23, 2008**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,²⁶ but may not be filed by facsimile.

Issued at Indianapolis, Indiana, this 9th day of July, 2008.

/s/ Rik Lineback

Rik Lineback, Regional Director, Region 25
Acting Regional Director, Region 30
National Labor Relations Board
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, IN 46204-1577

RL/mtb

H:Decisions:DDE.30-RD-1488

²⁶ Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.