**Gaines Electric Company, Inc. *and* Local No. 237, International Brotherhood of Electrical Workers.** Cases 3–CA–16329 and 3–RC–9744

December 16, 1992

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On March 23, 1992, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs, and the Respondent filed a brief supporting the judge's decision and opposing the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

## I. OVERVIEW

This is a consolidated representation and unfair labor practice proceeding. The Respondent is an electrical contractor engaged in business in the Niagara Falls area. It employs about 17 workers. Concerning Case 3–CA–16329, pursuant to an unfair labor practice charge filed by the Union on May 23, 1991,[1] and an amended charge filed June 20, the Regional Director issued a complaint on August 23 alleging that the Respondent threatened one of its employees with discharge in January because of his protected, concerted activities, and that subsequent to May 20 the Respondent made several threats to close its business because of its employees' union activities.

With regard to Case 3–RC–9744, the Union filed a petition on May 17, and the Stipulated Election Agreement approved by the Regional Director on June 5 set forth the appropriate bargaining unit as ''all full time and regular part time production and maintenance employees including journeymen, apprentices and helpers.'' Following the July 3 election, the initial tally of ballots showed six votes in favor of representation by the Union and five against, with five challenged ballots—a number sufficient to affect the outcome of the election. The Union filed objections to the election.

On August 29, the Acting Regional Director issued a report on objections and challenged ballots, in which he ordered the representation case consolidated with the pending unfair labor practice case and set for hearing concerning the five challenged ballots and the Union's first objection—to the extent that that objection was coextensive with the business-closing threats alleged in the complaint.

Of the five challenged ballots, three had been challenged by the Union at the election. The parties stipulated that two of these belonged to ineligible voters and thus the challenges to their ballots were sustained. The Union's third challenge—to the ballot of employee Scott Thomas—was overruled by the judge.

Of the two ballots challenged by the Respondent at the election, the first—that of employee Gerald Wisor—was sustained by the judge. He also sustained the Employer's second challenged ballot—that of Jayson Mitchell. The judge agreed with the Respondent that Mitchell, when working as a ''journeyman foreman,'' was a supervisor within the meaning of Section 2(11) of the Act and was therefore ineligible to vote. Further, because Mitchell's supervisory status excluded him from the Act's coverage, the judge found it unnecessary to address the evidence relating to the Union's objection and the complaint's unfair labor practice allegations, each of which involved alleged conduct by the Respondent assertedly in violation of Mitchell's rights as a statutory employee. Pursuant to his supervisory-exclusion rationale, the judge overruled the objection and dismissed the complaint.

We agree with the judge's sustention of the challenge to Wisor's ballot and his overruling of the challenge to Thomas' ballot for the reasons set forth in his decision. We do not agree with his disposition of the challenge to Mitchell's ballot. We conclude that, at best, Mitchell possessed 2(11) authority on a sporadic, insubstantial basis—insufficient to deny him the coverage of the Act with respect to his membership in the bargaining unit and the rights afforded by Section 7. We therefore overrule this challenge and order that his ballot and that of employee Thomas be opened and counted and that a revised vote tally be made. We also address the substance of the complaint allegations and the Union's objection and, as explained below, conclude that they lack merit.

## II. MITCHELL'S CHALLENGED BALLOT

Mitchell worked for the Respondent from 1984 until early September 1991, when he was laid off, apparently for economic reasons. About 1989, while working for the Respondent, Mitchell became a journeyman electrician.

In 1987 or 1988, the Respondent established the ''journeyman foreman'' position (foreman). Thus, on any particular job with four or more employees, the Respondent would select one of its journeyman electricians to be the foreman. According to the Respondent, the selection was based in part on seniority and in part on supervisory skill and knowledge of the job. It is undisputed that from time to time Mitchell and

[1] All subsequent dates are in 1991 unless otherwise noted.

several other journeymen electricians were designated as foremen on particular jobs.[2] The foreman designation paid $1 an hour over straight time pay.

We will assume for purposes of this decision, without finding, that when Mitchell worked as a foreman he possessed supervisory authority over unit employees within the meaning of Section 2(11) of the Act. Notwithstanding this, we find that Mitchell is not excludable from the bargaining unit because the evidence does not show him to be engaged sufficiently as a foreman—in comparison with his work as a journeyman electrician—to negate his community of interest with the unit employees and to identify him as a statutory supervisor.

As the party seeking to exclude an individual from the unit, the Respondent has the burden of proof on the issue of Mitchell's supervisory status. See, e.g., *Pacific Dry Dock Co*., 303 NLRB 569 (1991). Where, as here, the individual at issue is engaged part of the time as a supervisor of unit employees and the rest of the time as a unit employee himself, the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his working time in a supervisory position or whether such work is merely sporadic and insignificant. See, e.g., *Canonie Transportation Co*., 289 NLRB 299, 300 (1988); *Latas de Aluminio Reynolds*, 276 NLRB 1313 (1985); *Aladdin Hotel*, 270 NLRB 838, 840 (1984).

The Respondent submitted in evidence payroll information concerning Mitchell covering the period from January 6, 1990, to May 25, 1991,—a total of 72 consecutive 1-week pay periods. Based on the $1-an-hour differential for foremen, this documentation clearly sets forth the times when Mitchell worked as a foreman and as a journeyman electrician. Of these 72 weekly pay periods, there were 14 in which Mitchell received at least some pay for foreman work. Thus, considered in this light, Mitchell acted as a foreman 19.4 percent of the time. In other words, he worked as a journeyman electrician, a unit employee, slightly more than 80 percent of the time.

In a sense, however, calculating the amount of Mitchell's foreman work by the number of pay periods is misleading because in several of the pay periods in which he was paid the foreman's rate he worked less than 40 hours as a foreman. For example, in one pay period he worked only 4 hours as a foreman, in another only 8 hours. Of the 14 pay periods in which he worked some amount of time as a foreman, there appears to be only 8 weeks when he acted as a foreman for a full 40-hour week. Accordingly, his total hours worked as a foreman set against his sum total of hours worked for the entire 17-month period yields a more accurate picture. Of Mitchell's approximately 2938.5 total hours worked, he acted as a foreman approximately 429.5 hours, or, about 14.6 percent of the time. In other words, he worked as a unit employee slightly more than 85 percent of the time.

With regard to the regularity of Mitchell's work as a foreman, the Respondent's documentation shows that over the 17-month period he worked 1 partial week (i.e., less than 40 hours) and 1 full week as a foreman in March 1990; 2 partial weeks in April 1990; 2 full weeks in July 1990; and 3 consecutive partial weeks in April 1991 followed by 5 consecutive full weeks from the end of April until May 25, 1991.

Evaluating this evidence in light of the legal standard set forth above, we conclude that over the 72-week period provided by the Respondent, it has not been established that Mitchell spent a regular and substantial portion of his worktime as a foreman. Rather, there appears to be no pattern to his foreman assignments; they were intermittent and sporadic. Further, in view of the relative percentage of his time spent as a foreman—about 15 percent—and as a unit employee—85 percent, we find that Mitchell's foreman work is insufficient to exclude him from the unit on this basis. Accordingly, we conclude that he is an employee within the meaning of Section 2(3), not a supervisor within Section 2(11), and that he is included in the appropriate unit. See, e.g., *Canonie Transportation*, supra. Therefore, we overrule the Employer's challenge to Mitchell's ballot.[3]

## III. THE ALLEGED UNFAIR LABOR PRACTICES AND THE UNION'S OBJECTION

As explained above, because he concluded that Mitchell was a supervisor, the judge found it unnecessary to address the evidence supporting the complaint allegation that the Respondent unlawfully threatened to discharge Mitchell in January and the evidence supporting the complaint allegation, and the Union's parallel election objection, that the Respondent, during the critical period before the election, made threats to Mitchell that it would close its business if the Union were selected. We have reversed the judge's finding that Mitchell was a supervisor with respect to his challenged ballot and accordingly we proceed to a consideration of the objection and the complaint allegations.

[2] The Respondent at no time has contended that any of these other journeymen electricians are statutory supervisors.

[3] The Respondent contends that Mitchell was a foreman from May 25 through the July 3 election and remained so until he was laid off in September. In view of our finding that, on this record, Mitchell's engagement in foreman activity is insufficient to exclude him from the unit, the fact that he may have been engaged in 2(11) duties on the date of the election would not make him ineligible to vote. See *Thermoid Co*., 123 NLRB 57, 58–59 (1959). See also, e.g., *Lovilia Coal Co*., 275 NLRB 1358, 1365–1366 (1985); *Sharondale Corp*., 262 NLRB 1238 fn. 3 (1982). In any event, although clearly within its control, the Respondent has provided no evidence of Mitchell's foreman work following May 25—either to show his status on the relevant eligibility dates, or to affect our view of the sporadic, insignificant character of his foreman assignments.

As a threshold matter, concerning the Respondent's contention that Mitchell's excluded supervisory status absolved it of any unfair labor practice liability, it was the Respondent's burden, like its burden in the election proceeding here, to establish that status. See, e.g., *Pontiac Osteopathic Hospital*, 284 NLRB 442, 449 (1987). For the same reasons set forth above with respect to our disposition of the challenge to Mitchell's ballot, we find that the Respondent has not established Mitchell's supervisory status with respect to the alleged unfair labor practices and objection.[4] Because we have concluded that Mitchell was an employee within the meaning of the Act, we must address the evidence of the Respondent's allegedly unlawful and objectionable conduct.

The General Counsel supplied evidence in support of the complaint allegation that in January, Roy Gaines, the owner and president of the Respondent, threatened to discharge Mitchell because of his protected, concerted activity. The crucial testimony involved a conversation between Mitchell and Gaines alone. Mitchell was the only witness presented concerning this conversation; Gaines had died prior to the hearing.

Mitchell testified that, on or about January 16, a meeting involving several of the Respondent's journeyman electricians—Kevin Coram and Mike Taylor among them—was held at Mitchell's house. The employees discussed terms and conditions of employment, especially wages and benefits, and specifically how to approach Roy Gaines concerning these matters. Nothing was resolved at the meeting, which lasted about 3 hours.

According to Mitchell's further testimony, the following morning, January 17, he reported to the Respondent's facility before heading out for his worksite. He noticed that Mike Taylor's truck was parked in the lot and that Taylor had arrived earlier than usual. Mitchell was told that Taylor, who had been present at the employees' discussion the night before, was meeting with Gaines in his office. Mitchell then left for his worksite. At the end of the workday, he reported back to the Respondent's facility, and Gaines called him in to his office. On direct examination by the General Counsel, Mitchell testified:

> A. (by Mitchell) He started yelling at me, telling me that I had a big mouth and I should learn to keep my mouth shut. He said he thought I was spreading rumors and then he just started discussing, he thought I should look for work elsewhere while I still had a good record, reputation, record I think he said. And, I asked him if it had anything to do with the meeting and he said, I don't know anything about your stupid meeting and then he told me to—he told me he says, pick up my check the next day and I asked him what time, he said 9:00 and I said all right, I'll get—be in after 9:00 o'clock. I got up and started walking out and he says, well, we can work this out. He says, you're too good of a worker to lose. He says come in in the morning and we'll work it out.
>
> Q. (by General Counsel) When Mr. Gaines was asked by you if what he was talking about had anything to do with your meeting—
>
> A. Uh, huh.
>
> Q. You're referring to the meeting of the night before?
>
> A. Right, yeah. At my house, yes.

On cross-examination by the Respondent's attorney, Mitchell gave the following testimony concerning the reason for Gaines' threat to discharge him:

> Q. (by Respondent's Counsel) You're telling us that he fired you because he said you had a big mouth and were spreading rumors?
>
> A. (by Mitchell) That's right. That's what he said, yeah.
>
> Q. And yet he never in that conversation told you what rumors you had spread or what you'd been saying that upset him?
>
> A. He might, he did say something. He brought up something about some job that he was going to do for somebody from Texas. I didn't listen to it too much because I didn't know anything about it, but he was talking about a job, that something to do in Texas or some Texas firm, but like I said, I didn't pay that much attention to it because I knew that that was beside the story, it wasn't why I was there.
>
> Q. Well, you just finished telling us that he never told you why you were there except to criticize you for having a big mouth and spreading rumors. Other than with reference to the Texas job, did he ever tell you what it was you had said or allegedly what rumors you'd spread that upset him so?
>
> A. No, I don't remember. If he did, I didn't pay attention.

After January 17, nothing further occurred between Mitchell and Gaines concerning this incident.

Even assuming that the judge would have fully credited Mitchell's testimony on this issue, we conclude that this evidence is insufficient to establish an unfair

[4] Apart from our finding that Mitchell worked as a foreman on a merely sporadic basis, we note that the evidence also shows affirmatively that Mitchell was working as a journeyman electrician, not a foreman, at the time of the January incident alleged as an unfair labor practice. With respect to the plant-closure allegation, the evidence set forth below indicates that the incidents occurred in June, and we again note that there is no showing at all of Mitchell's supervisory status after May 25.

labor practice. Without doubt, Mitchell was engaged in protected, concerted activity under Section 7 on January 16 in the employee meeting at his home, knowledge of which may be imputed to the Respondent, as the General Counsel argues, in light of the fact that Kevin Coram, a supervisor by stipulation of the parties, attended the meeting. What is significantly lacking, however, is a sufficient nexus in all the circumstances between Mitchell's protected activity and Gaines' threat of termination. Gaines charged Mitchell with having a ''big mouth'' and ''spreading rumors'' and these characterizations preceded Gaines' discharge threat. Yet, there is no evidence that these characterizations are descriptive of Mitchell's conduct during the employees' discussion at his home. The evidence, on the contrary, provides a separate, direct connection between the ''spreading rumors'' and ''big mouth'' accusations and a ''Texas job,'' ''something to do in Texas or some Texas firm . . . .'' The General Counsel does not contend that the Texas references pertain to protected concerted activity. On this record, it is at least as likely that Gaines threatened Mitchell with discharge in connection with a matter entirely unrelated to the protected employee activity of the night before. Accordingly, we conclude that the General Counsel has not established that an unfair labor practice occurred here, and we dismiss this complaint allegation.

With regard to the Respondent's alleged misconduct during the critical period before the election, Mitchell testified that after the petition was filed on May 17 he had several conversations—possibly as many as 12—with Roy Gaines concerning the union organizing campaign. Two of these discussions occurred at the Respondent's worksite at the Niacet Chemical facility between Gaines and Mitchell alone. Both took place in June; Mitchell could not identify the exact dates. Regarding these conversations, Mitchell testified on direct examination by the General Counsel:

> A. (by Mitchell) Basically all of his statements were the same. That we were making a terrible mistake by going Union, we didn't need the Union. He could offer us anything the Union could offer us and at one point he was telling me that he thought we were stabbing him in the back by talking to the Union, and the next meeting he would say that he enjoyed the challenge with a big smile on his face. I think you guys are proper in talking to the Union and then he says, I enjoy the challenge and then one time he was telling me that he says, I don't care what you guys do. He says my wife and I are well enough off, he says I'll just forget the whole thing and spend more time fishing.

Mitchell further testified that he did not remember the immediate context of Gaines' ''fishing'' comment, i.e., exactly what the two were discussing leading up to that statement. He also testified that the ''fishing'' comment was made in at least one of the conversations and possibly both. With Roy Gaines deceased, Mitchell was the only witness presented regarding this allegation. Also, there was no evidence that the alleged threatening language uttered to Mitchell was disseminated to any other employee.

On June 20, the Union filed an amended unfair labor practice charge alleging that the Respondent violated the Act by, inter alia, ''issuing veiled threats to close the business because of its employees' union activity.'' On and after June 21, the Respondent circulated the following statement, over the signature of Roy Gaines and dated June 21, to the unit employees:

> TO ALL EMPLOYEES
>
> On several occasions I have talked about the worsening economy and its effect on our past and future business. I have also attempted to make the point, which I sincerely believe, that by becoming an IBEW employer, our economic opportunities will be reduced in the County-not increased.
>
> You and our other employees, in an appropriate unit, have a legal right to self organization, to form, join, or assist labor organizations, including the IBEW, to bargain collectively through representatives of your own choosing and to engage in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection. You also have the right to refrain from any or all such activities.
>
> It is unlawful for me to threaten to close or sell the Company because of employees' union activities. You should disregard all statements I may have made to you, which even created an impression in your mind that I was threatening you because you were engaging in union activities.
>
> I am repudiating any express or inferred threats to discontinue business activity or impose unreasonable working conditions because I do not want any cloud to interfere with your rights and the rights of your fellow employees to vote in a fair election run by the National Labor Relations Board.
>
> The Company assures you that it will not in any other manner interfere with the rights you and other employees have which are protected by the National Labor Relations Act.

It is undisputed that Mitchell and the other unit employees, except for one, read and received a copy of the June 21 statement.

We find it unnecessary to determine whether Gaines' alleged comments to Mitchell violated the Act

because, even assuming Mitchell's testimony is fully credited and we were to find that the General Counsel had proven a violation, we conclude that the Respondent's June 21 statement was a repudiation of the unlawful conduct sufficient to remedy the violation and to restore laboratory conditions for a valid election.

The Board set forth the standard for an appropriate repudiation of unfair labor practices in *Passavant Memorial Hospital*, 237 NLRB 138 (1978). For a repudiation to be effective, it must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, and adequately published to the employees involved. In addition, it must set forth assurances to employees that no interference with their Section 7 rights will occur in the future, and in fact there must be no unlawful conduct by the employer after publication of the repudiation. Id. at 138–139.

Reviewing the June 21 statement under the *Passavant* standard, we find that it was timely, coming reasonably promptly after the alleged threat or threats were made to Mitchell, and almost 2 weeks before the July 3 election. We also find that the statement was sufficiently unambiguous and sufficiently specific in addressing the coercive conduct. The June 21 statement was free from any other unlawful conduct, and it was more than adequately published, in light of the isolated nature of the matter and the absence of dissemination to other employees. Finally, the statement made the requisite assurances to employees regarding their future exercise of Section 7 rights, and the Respondent engaged in no subsequent unlawful conduct. Overall, we conclude that the June 21 statement is reasonably consistent with the *Passavant* standard and that it adequately remedied any unfair labor practice committed against Mitchell in June. See *Raysel-Ide, Inc*., 284 NLRB 879, 881 (1987); *Broyhill Co*., 260 NLRB 1366 (1982). We also conclude that in the circumstances of this case the June 21 statement, effectively disavowing the Respondent's conduct at issue, also acted to restore in a timely fashion the laboratory conditions for a fair election on July 3. See *Agri-International Inc*., 271 NLRB 925, 926–927 (1984). Accordingly, the complaint allegation involving a threat of plant closure is dismissed, and the Union's parallel election objection is overruled.

## ORDER

The complaint in Case 3–CA–16329 is dismissed.

## DIRECTION

IT IS DIRECTED that Case 3–RC–9744 be remanded to the Regional Director for Region 3, who shall, within 10 days from the date of this Decision, Order, and Direction, open and count the ballots of Scott Thomas and Jayson Mitchell. Thereafter, the Regional Director shall prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

*Michael Israel, Esq*., for the General Counsel.
*Jeremy V. Cohen, Esq*., of Buffalo, New York, for the Respondent.
*Russell J. Sciandra, Esq*., of Buffalo, New York, for the Union.

## DECISION

### STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The original charge filed by International Brotherhood of Electrical Workers, Local 237 (the Union), on May 23, 1991, was served by certified mail on Gaines Electric Company, Inc. (the Respondent) on the same date. The first amended charge filed by the Union on June 20, 1991, was served by certified mail on the same date. A complaint and notice of hearing was issued on August 23, 1991. Among other things, it is alleged in the complaint that the Respondent unlawfully threatened an employee with discharge and threatened to close the Respondent's business in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

On July 3, 1991, an election by secret ballot had been held among employees in the following described appropriate collective-bargaining unit in Case 3–RC–9744:

> All full time and regular part-time production and maintenance employees including journeymen, apprentices and helpers; excluding all other employees, office staff, guards and supervisors as defined in the Act.

On August 29, 1991, the Acting Regional Director issued a report on objections and challenged ballots and order directing hearing on objections and challenged ballots, order consolidating cases and notice of hearing in which Cases 3–RC–9744 and 3–CA–16329 were consolidated ''for the purposes of hearing, ruling and decision'' by an administrative law judge.

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The cases came on for hearing in Buffalo, New York, on December 16, 1991. All parties were afforded full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT, CONCLUSIONS OF LAW, AND REASONS THEREFOR

#### I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent, a New York State corporation, with an office and place of business in Niagara Falls, New York (the Respondent's facility), has been engaged as an electrical contractor performing residential, commercial and industrial wiring, installation, repair, and maintenance service in the building and construction industry.

During the 12-month period ending May 31, 1991, the Respondent, in the course and conduct of its business operations described above, purchased and received at its Niagara Falls, New York facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York.

The Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE CHALLENGES

The petitioning Union challenged the ballots of David Gaines, Kevin Coran, and Scott Thomas. The parties agree that Gaines and Coran are ineligible voters. Challenges to their ballots are sustained.

Scott Thomas commenced working for the Employer on December 26, 1990. He performed carpentry work when he was first hired. Thereafter around May 15, 1991, he commenced performing electrical work in which he was engaged in at the time of the election. He had been placed in the apprentice program and worked with a journeyman. His job was not unlike the jobs of other apprentices and helpers which were included in the appropriate unit. The challenge to his ballot is overruled.

The Employer challenged the ballots of Gerald Wisor and Jason Stewart Mitchell. Wisor was employed by the Employer on May 8, 1991. After working a few days Wisor was laid off on May 8, 1991. Wisor testified that Roy Gaines, who is now deceased, called him on May 18 or 19 and told him that work was slow and that he did not want Wisor to come in on Monday. Gaines said that he would call Wisor if ''things got better.'' Wisor was never recalled.

The Employer produced a memo written by Roy Gaines as follows:

> called Jerry Wisor 6-14-91 at 5:05 PM, told we are slowing down & he is laid off permanently. [Emp. Exh. 6.][1]

Under the credited facts, I do not find that Wisor had reasonable expectancy of recall. Challenge to his ballot is sustained.

The Employer claims that Mitchell is a supervisor within the meaning of the Act and thus should be excluded from the appropriate unit. The Petitioner and the General Counsel claim the contrary.

At the time of the election, Mitchell was a journeymen electrician. He was hired by the Employer on July 27, 1984, and worked until September 2, 1991, at which time he was laid off. During his tenure of employment, Mitchell advanced to journeymen electrician around 1989.

Kevin Coram, who called himself an estimator, testified that Roy Gaines was over the whole operation. Under him was Coram and under Coram was ''probably'' David Gaines, Roy Gaines' son. There was no one under David Gaines. However, the Employer did have a designation, journeyman foreman. According to Coram, this designation was used when there were four or more employees on a job. ''The rule was that the, you should be, most senior journeymen on the job, would become journeymen foremen when including himself, there was three others, a total of four employees on that particular job.'' The journeyman foreman, while serving as such, was paid $1 more an hour than his journeyman pay. The designation was established in 1987 or 1988. Mitchell explains:

> The reason he started that, Roy, in my opinion, which I don't know if I'm allowed to say or not. A few years ago I was working at a job at Niacet and we were getting people, I was working during the day and there was people coming in the afternoon shift making more than what the people were making during the day because they were getting paid overtime for coming in on the afternoon shift. So I complained to Mr. Gaines about it and he says how about if I give you a dollar more an hour if I give the foreman's rate, or the JF rate for having four people and I said, well, I'll take it. I was hoping for a little bit different situation, but that's what started it with Mr. Gaines and I wasn't going to complain, it was a dollar an hour more.

Sometimes other journeymen electricians were designated journeymen foremen.[2]

Factors which reflect on Mitchell's supervisory capacity may be summarized as follows:

Michael R. Brannen, manager new construction for Niacet Chemical on whose site Mitchell had worked as journeyman foreman testified, ''we had an incident where a guy specifically on this site broke a major safety rule and Jayson threw him off the job.''

On another occasion Mitchell removed an employee from a bulldozer because he thought the employee was unable to operate it.

Mitchell could assign employees to jobs on the site, and according to Coram decide how a job was to be done before it started including the materials to be used. He was responsible for directing the work performed at the jobsite. Coram testified that if work fell off the foreman would ''probably'' recommend that someone be removed from the job, or he could request additional manpower.

Mitchell, on occasion, procured materials for the jobsite and utilized the Employer's credit. Occasionally he sent employees for materials. He made sure the employees did the ''job right the first time.''

Mitchell filled out his own and another employee's accident reports. He also filed daily reports of hours worked by employees and materials used.

Customers dealt with the foreman on the job. The foreman sometimes suggested increasing or decreasing the labor force. The customer brought safety matters to the foreman's attention. There was no on-site supervisor except Mitchell. When

[1] Wisor denied the notification. Wisor is not credited. According to Gaines' son, his father contacted Wisor ''under the advice of an attorney.''

[2] From sometime prior to the election Mitchell worked on a Niacet job and other jobs where he was designated as a journeyman foreman. Mitchell testified that his work was the same whether he was a journeyman or a designated foreman.

Mitchell acted as the designated foreman, always three or more other employees worked under him.

Coram testified:

> A. Journeymen usually, if there are any problems or headaches that might arise on a job would deal back through the office for assistance or correct the situation where a journeyman would deal directly with it on site with the individuals, with the owner, try to correct it on site without coming back through the office.
>
> Q. Any other differences that you could relate to us?
>
> A. No.
>
> Q. What, if any, responsibility did journeymen foremen have for the crews on the job site that a journeyman electrician did not?
>
> A. Generally the journeyman would get the orders through the office, either for changes to be made or if the customer had changes to be made where the foreman would be in direct contact with a customer on site and if the customer wanted to make a change immediately and said it had to be done immediately, the foreman on the job would have to decide who, who to stop working on this part of the project and pull him to put him on this part or make a decision and on the need for more materials, if they weren't on site to send someone to go get them.
>
> Q. To what extent where other journeymen or apprentices on the job site where there was a foreman, entitled to refuse to obey or follow the instructions of the foreman?
>
> A. They were obligated to listen to and take direction from the journeyman foreman.

A ''supervisor'' is defined in Section 2(11) of the Act 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 law on the subject is well summarized by Judge Itkin in the case of *Amperage Electric*, 301 NLRB 5, 13 (1991):

> Actual existence of true supervisory power is to be distinguished from abstract, theoretical or rule book authority. It is well established that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a ''title and theoretical power to perform one or more of the enumerated functions.'' *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 US 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of witnesses. And while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, Section 2(11) also ''states the requirement of independence of judgment in the conjunctive with what goes before.'' *Poultry Enterprises, Inc. v. NLRB*, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some supervisory tasks in a merely ''routine,'' ''clerical'' ''perfunctory'' or ''sporadic ''manner does not elevate a rank-and-file employee into the supervisory ranks. *NLRB v. Security Guard Service*, 384 F.2d 143, 146–149 (5th Cir. 1967). Nor will the existence of independent judgment alone suffice; for ''the decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act.'' See *NLRB v Brown & Sharpe Mfg. Co*., 169 F.2d 331, 334 (1st Cir. 1948). In short, ''some kinship to management, some empathetic relationship between employer and employee, must exist before the latter becomes a supervisor of the former.'' *NLRB v. Security Guard Service*, supra.

The following factors establish that Mitchell exercised independent judgment in assigning and responsibly directing other employees.

Mitchell possessed authority to assign jobs to employees working under him and to enforce safety rules and discipline for violation of them. Mitchell was responsible for work performed on site and the quality of the work performed. Mitchell requested manpower when needed and recommend removal of employees for lack of work. Mitchell purchased materials for the job without prior approval and pledged the Employer's credit. Mitchell accounted for labor and materials used on the jobsite. Mitchell decided how jobs would be done and materials to be used. Mitchell assigned other employees to pick up supplies. Mitchell filled out accident reports. Mitchell dealt directly with ''problems or head aches'' which would arise on the site. Mitchell dealt with the customer on the site and, if immediate changes were requested, he would decide who to stop working on the project and ''pull him'' or ''make a decision on the need for more materials, if they weren't on site to send some one to get them.'' Other employees were obligated to listen to and take directions from the journeyman foreman. Journeyman foreman were paid a $1-an-hour differential in wages. Mitchell authorized overtime in an emergency.[3]

Mitchell recommended that a couple of ''real goof-ups'' be removed from the job.

Mitchell referred to the journeyman foreman as ''running the job.''

Mitchell was the sole person on the site representing the Employer.

I find that Mitchell was a supervisor within the meaning of the Act. See *Clark & Wilson Industries*, 290 NLRB 106

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[3] Brannen testified:

> If I wanted to get something done so that the unit could get back in operation over the weekend and I wanted, needed to work late on Friday night, I'd come to Jay and I'd say Jay, we got to get this job done, it's gotta be done tonight. I don't care if it's 10:00 o'clock tonight, and you know, whatever's necessary. Jay would get guys and work overtime and if the guys that were working with him at the time wouldn't work overtime, he'd get other guys from other jobs to come in and work overtime.

(1988); *McDonald Mitler Co*., 277 NLRB 701, 703 (1985); and *Amperage Electric*, supra. Accordingly the challenge to Mitchell's ballot is sustained.

## IV. THE UNFAIR LABOR PRACTICES AND OBJECTIONS TO THE ELECTION

Since the unfair labor practices alleged in the complaint are planted on alleged threats to Mitchell, a supervisor within the meaning of the Act, the complaint is dismissed. Since the objections to the election are grounded on the same facts as alleged in the complaint the objections are overruled.

[Recommended Order for dismissal omitted from publication.]