Alois Box Co., Inc. *and* Graphic Communications Union Local 415-S, AFL–CIO, Petitioner. Case 13–RC–19729

September 30, 1998

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held November 12, 1997, and the hearing officer's report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 19 for and 14 against the Petitioner, with 7 determinative challenged ballots.[2]

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations as modified below, and finds that a certification of representative should be issued.

The hearing officer found, and we agree, that the challenge to the ballot of Jeff Miller should be sustained because he is a statutory supervisor.[3] We also agree with the hearing officer's recommendation that the challenge to the ballot of Mato Brasic should be sustained because he is a relative of management who was granted special privileges. Further, we adopt the hearing officer's recommendation that the challenge to the ballot of Julius Rimdzuis be sustained, because the record supports the hearing officer's findings that Rimdzuis is not a regular part-time employee and that he does not share a community of interest with the unit employees.[4]

The hearing officer also found, however, that Manuel Garcia is a statutory supervisor, and recommended that the challenge to his ballot be sustained. We disagree. We find nothing in the record before us upon which to predicate a finding that Garcia is a supervisor within the meaning of Section 2(11) of the Act. 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 burden of proving supervisory status is on the party who alleges that it exists. *California Beverage Co.*, 283 NLRB 328 (1987). The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), affd. in relevant part 794 F.2d 527 (9th Cir. 1986).

In making his recommendation, the hearing officer relied on evidence that Garcia was higher paid than any other hourly employee, that he once sent an injured employee to receive medical attention, and that he once told an employee to do his job properly or else he would be sent home. The hearing officer concluded that Garcia exercises independent judgment in "the resolution of various problems that arise on the second shift without first consulting higher authority."

We disagree. The issue presented is not whether Garcia used independent judgment in solving problems, but whether he used independent judgment with respect to the exercise of one or more of the specific authorities listed in Section 2(11). It appears that the hearing officer intended to find that Garcia utilized independent judgment in directing the work of the employees on the second shift. The record, however, will not support such a finding.

Garcia is an experienced employee who has worked for the Employer for approximately 25 years, concededly the most senior person among all the hourly employees. His hourly wage reflects this. The record shows, and the hearing officer's own findings establish, that Garcia attends daily preshift meetings with Plant Manager Vlado Brasic, that Garcia then relates to the four other employees on the second shift the instructions he has received from Brasic, that Garcia has standing orders to telephone Brasic or President David Jones if questions arise, and that Garcia has no authority to make independent decisions with respect to the second shift employees. Thus, it appears that Garcia merely serves as a conduit for management instructions.

The isolated incidents wherein Garcia sent an injured employee for medical assistance and told employee Chris McBee that if he did not do his job properly he would be sent home are insufficient to establish that Garcia used independent judgment in exercising supervisory authority. Any senior employee could be expected to seek

[1] The pertinent portions of the hearing officer's report are attached as an Appendix.

[2] The parties stipulated on the record that Juan Duran, whose ballot was challenged, was terminated prior to the eligibility cut off date and was ineligible to vote in the election. Absent exceptions, we adopt pro forma the hearing officer's recommendation that the challenges to the ballots of Miguel Granillo and Tom D'Incognito should be overruled.

[3] Member Liebman would overrule the challenge to Miller's ballot. She finds that the Petitioner has failed to sustain its burden of showing that the authority Miller exercised required the use of independent judgment.

[4] Contrary to the majority, Member Hurtgen would overrule the challenge to Rimdzuis' ballot. The unit expressly includes regular part-time maintenance employees. Rimdzuis performs maintenance functions and appears to be a regular part-time employee. In this regard, Member Hurtgen notes that, for the past 7 years, Rimdzuis has worked for Respondent. He works approximately 20 hours per week for $300 per week. The fact that he schedules his own 20 hours does not detract from his regular part-time status. To exclude Rimdzuis would mean that he is the only part-timer who is not included in the unit, except for the plant manager's brother. Member Hurtgen would not disenfranchise him.

medical attention for an injured coworker. Garcia's statement to McBee that he would have to do his work properly or go home appears to be at most an oral warning which had no effect on McBee's employment status. That is, there is no showing that McBee was actually sent home.

We conclude that the Petitioner has failed to meet its burden of showing that Garcia used independent judgment in responsibly directing the work of other employees or in exercising any of the other statutory indicia of supervisory status. Such a showing of the use of independent judgment is essential to establish supervisory status. See *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573–574 (1994). Accordingly, we overrule the challenge to Garcia's ballot.

Because the ballots of Manuel Garcia, Miguel Granillo and Tom D'Incognito are not determinative of the results of the election, we shall not direct that their ballots be opened and counted. Rather, because the Petitioner has received a majority of the valid ballots cast, we shall issue a certification of representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Graphic Communications Union Local 415-S, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production, maintenance and shipping employees employed by the Employer at its facility currently located at 2000 North Mannheim Road, Melrose Park, Illinois 60160; but excluding all other employees, office clericals, guards and supervisors as defined in the Act.

APPENDIX

HEARING OFFICER'S REPORT ON CHALLANGED BALLOTS

. . . .

CHALLENGED BALLOTS[4]

The ballots of Jeff Miller, Manual Garcia, and Miguel Granillo were challenged by the Petitioner on the basis that they are supervisors as defined in Section 2(11) of the Act.

Section 2(11) of the National Labor Relations Act sets forth the test to determine supervisory status:

> The term "supervisor" means 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 responsibility 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.

Possession of any one of these enumerated powers establishes supervisory status, since Section 2(11) is to be read in the disjunctive. See *Penn Industries*, 233 NLRB 928 (1977). Where possession of any of these enumerated powers is not conclusively established, the Board looks to certain other factors as evidence of supervisory status: the individual's responsibility for a shift or phase of the employer's operations; attendance at supervisory meetings; granting time off to other employees; responsibility for inspecting the work of others; ability to assign work; decision making in the hiring process; responsibility for reporting rules infractions; designation as a supervisor, pay differentials; and the ratio of supervisors to employees. See *Health Care & Retirement Corp. v. NLRB*, 987 F.2d 1256 (6th Cir. 1993). *Flex-Van Service Center*, 228 NLRB 956 (1977). In addition, an analysis of supervisory status must consider the fact that the intent of Section 2(11) was to exclude leadpersons and low-level supervisors having modest supervisory authority. See *NLRB v. Res-Care Inc.*, 705 F.2d 1461 (7th Cir. 1983).

Mato Brasic was challenged on the grounds that he received special privileges based upon his relationship to his younger brother, Vlado Brasic, the Employer's plant manager.[5] Tom D'Incognito was challenged on the grounds that he is retired, and thus, not employed by the Employer. Julius Rimdzuis was challenged on the grounds that he does not share a community of interest with bargaining unit employees.

Alois Box manufactures customized corrugated boxes for customers who then use the boxes to package their own products. Alois Box employs about 35 production and maintenance employees on [the] first shift and 5 production employees on [the] second shift.

Jeff Miller

The Petitioner claims that Jeff Miller is a supervisor on first shift. Specifically, the Petitioner adduced evidence and argued that Miller assigns and disciplines employees, adjusts their schedules, and has responsibility for the first shift. The burden of proving supervisory status rests on the party asserting that such status exists. See *Bennett Industries*, 313 NLRB 1363 (1994); *Soil Engineering Co.*, 269 NLRB 55 (1984). Thus, Petitioner has the burden to show that Miller as well as Garcia and Granillo are supervisors under the Act. In response, the Employer claims that Miller is a first-shift, nonsupervisory employee in the maintenance department. The Employer claims that Miller's position was officially changed to that of a mechanic in the maintenance deptartment sometime in 1995. It is well established that the Board does not view titles or the lack thereof to be determinative of supervisory status. The proper consideration is whether the functions and authority of the individual, irrespective of title, meet the criteria defined in Section 2(11) of the Act. *Mack's Supermarkets*, 288 NLRB 1082 (1988).

The following facts are not in dispute: Miller was hired by the Employer on May 29, 1990; Miller was promoted to a production supervisor under Vlado Brasic in 1993; Miller arrives at work before Brasic and hands out factory orders and posts Brasic's job assignment sheet for first-shift employees, Miller

[4]The parties entered into a stipulation on the record that Juan Duran was ineligible to vote in the election. Having been terminated prior to the eligibility cutoff date.

[5] In order to avoid confusion, Vlado Brasic, the plant manager, will be referred to as Brasic and Mato Brasic, the slitter operator, will be referred to as Mato.

meets with the Employer's temporary employees each morning; and Miller did not testify at the hearing.

President David Jones testified to the organizational structure that he implemented soon after joining Alois Box: Jones is the president; Gruna Bernardo is the vice president of sales; George Hurd is the office manager; Bob Hilmers is the design and maintenance manager; and Vlado Brasic is the plant manager. Jones testified that the managers are all of equal rank and report directly to him.

In addition to the organizational structure described by Jones above, three types of paperwork determine how the Employer utilizes the three alleged supervisors: (1) the factory order form; (2) corrugator lineup sheet; and (3) Brasic's handwritten job assignment sheet. The factory orders—also referred to as the "Pinks" because of their color—are computer printouts that contain various bits of information on the specific customer's order. The factory orders also include printing and cutting instructions and the machine to be used. The corrugator lineup tells employees the order of the jobs to be performed on the corrugator. George Hurd takes the factory orders that need to be performed on the corrugator and schedules them onto the corrugator lineup sheet in the order that employees are to perform. And finally, Brasic, the plant manager handwrites specific job assignments for those employees who do not have steady positions. He usually prepares these in the afternoon for Jeff Miller to use the next day.

The Employer essentially argues that Brasic alone supervises the production employees through a combination of the paperwork described above and Miller who acts as a conduit for his orders. The record evidence clearly indicates that most of the approximately 35 employees on first shift do not need any special instructions to start their work each morning. Brasic described these employees as having "steady" positions. The operators, for one, can rely upon the factory orders to start their jobs. Brasic estimated that about 10 employees are essentially unassigned. Brasic testified that he makes up the assignment sheet the day before so that these unassigned employees would definitely have something to do when they first arrive for their shift. One can reasonably infer from Brasic's statement that his assignment sheet is not intended to give employees all their assignments for the day. The Petitioner called various employee witnesses that provided extensive testimony that Miller essentially picks up where Brasic's assignment sheet and the factory orders leave off. These witnesses testified that Miller continues to assign and direct them well after the usefulness of Brasic's written assignments have been exhausted.

Pablo Barba, a machine operator since May 1997, testified that during his time at Alois Box, Miller assigns work to the permanent employees.[6] He described Miller making individual assignments; not only based on Brasic's handwritten sheet, but by conversing with employees. Although Barba's testimony did not go into details on how Miller converses with employees, his testimony brought into question how self-explanatory and encompassing Brasic's written assignments actually are. Manuel Reyes, a machine operator for the last 4 years, testified that Miller tells employees when to stop jobs and start others. Reyes credibly testified that Miller has been doing this for the entire time that the latter has worked at Alois Box.

Reyes corroborated Brasic's testimony that most employees have steady positions. However, he also testified that various changes are made on the production floor, and Miller is the person who takes care of making the changes. Neither party adduced any specific evidence that Miller has a system where he contacts Brasic or some other superior before making any changes concerning production. Both Jones and Brasic denied that Miller had any authority to make changes in either employee assignments or production. However, the totality of the record indicates otherwise Miller was the person who usually fine-tuned production and assignment of employees. The record indicates that Brasic spent more time in his office than on the production floor. Since Miller did not testify, these witnesses' testimony, which was consistent, is mostly uncontradicted. Jones and Brasic could not specifically deny the majority of testimonial evidence regarding Miller's activities on the production floor. They could only testify that Miller was not authorized to make changes to production and assignment of employees.

Juan Duran, a machine operator of 4 years, had been the Union's main organizer at Alois Box.[7] Nonetheless, Duran credibly testified that when employees finished their assigned tasks, they go to Miller to ask where they should work next. Although a bit argumentative during cross-examination, I found Duran to be credible, unevasive, and willing to provide full descriptions and explanations even when they tended to support the Employer's side. In sum, Duran and other employees depicted a scene in which Miller shuffles employees between machines and different factory orders throughout the shift.

Duran testified in great detail how Miller moved him around. Duran testified that Miller had told him to move to a different machine almost every day. A majority of the employee witnesses also testified that they regularly worked on more than one machine during a shift. According to Duran, Miller sometimes had him use up to six different machines during the course of one shift. If orders were half orders where the customer needed the product immediately, Miller would move him to a different machine to fulfill those orders. Reyes also testified that Miller makes adjustments in assignments depending on the changing needs of the production.

There is also uncontradicted testimonial evidence that Miller has substantial discretion in the handing out of employee assignments. Barba testified that Miller listens to employee requests for certain machines or jobs: "People get accommodated to which things that they need to work." Miller may very well rely upon Brasic's work assignments, but the credible testimony reveals that he also makes adjustments to them based on individual requests as well as changing production needs. Nothing in the record indicates that Miller makes these impromptu decisions by first checking with Brasic or any other management personnel. No witness contradicted Barba's testimony.

The Employer in its brief argues that Miller merely relays Brasic's orders to the first-shift employees. As discussed above, there is no dispute that Brasic writes up an assignment sheet for each first shift. The Board law is clear in this area. The mere distribution of work assignments that are created by management personnel does not confer supervisory status. *Blue Star*

[6] The record makes a few references to Miller's new responsibility for meeting with the Employer's temporary workers each morning. However, the record does not provide any reliable evidence regarding these temporary workers.

[7] Duran's termination was the subject of a separate ULP charge which is not at issue in the instant matter.

Ready-Mix Concrete Corp., 305 NLRB 429 (1991). Furthermore, an individual is not a supervisor if he directs employees according to guidelines established by management personnel and that direction does not require the use of independent judgment. *Juniper Industries*, 311 NLRB 109 (1993). The record indicates that Miller verbally conveys Brasic's assignments or sometimes posts the sheet itself above the timeclock. However, the record also indicates that Miller's duties vis-a-vis the production employees calls upon Miller to use independent judgment on a daily basis. Credible evidence indicates that Miller not only issues new assignments after he exhausts the use of Brasic's sheet, he makes adjustments to Brasic's original assignments as well. The delegation of these duties to Miller clearly requires that he use independent judgment, which belies the argument that Miller is a conduit employee or one with only an incidental amount of supervisory duties.

The record also indicates that Miller has the power to inspect the work of employees. While neither party argues that Miller is a stand-alone quality control person, the record indicates that an employee goes to Miller for approval of his sample run before starting the rest of the order. If Miller finds the work acceptable, the employee proceeds with the order and then upon completion goes back to Miller for further directions. Miller can decide to move the employee onto a different machine or factory order. If the work is unacceptable, he tells the employee the improvements that are needed. Duran testified that Miller had reviewed his work and told him to improve the painting on that order. The Employer had ample opportunity to call Miller to rebut the testimony of the employee witnesses, especially Juan Duran who provided detailed accounts of Miller's role in approving work and handing out new assignments, but did not. There was neither evidence nor representation that Miller was unavailable.

It is disputed whether Miller has the power to control employee work schedules. Reyes testified that prior to the Petitioner's organizing campaign, Miller had assigned overtime and employees had complied. Reyes also testified that Brasic had replaced Miller as the person who talked to employees about overtime assignments, and that this change occurred about the time of the organizing and NLRB election. While Brasic personally handling of overtime matters around the time of the organizing raises some suspicion, Petitioner has not adduced any persuasive evidence that Miller controlled the allocation of overtime. Cirilo Garcia, a 19-year employee at Alois Box, and Manuel Reyes testified that overtime is not mandatory but one based on the employees' cooperation. These two employee witnesses also stated that Miller writes employees' names in a small notebook regarding overtime matters. Since Petitioner did not adduce any evidence beyond the likelihood that Miller writes down the names of the employees who have agreed to work overtime on a particular day, I find that Miller had only a de minimis role in the assignment of overtime.

Petitioner next contends that Miller grants employees permission to leave early or arrive late. Duran testified that Miller gave him permission to leave early, and Miller gave that permission immediately and without checking with anyone else. Manuel Reyes testified that when Brasic was out of the plant, Miller gave him permission to leave early so that he could go to court. Cirilo Garcia testified that he had asked Miller on two occasions to leave early. On one occasion, Miller checked with Brasic before telling Garcia that he could leave early. However, on the other occasion, Miller approved the request without checking with Brasic. Notwithstanding the Employer's argument in its brief that Garcia had contradicted himself regarding how many minutes Miller had taken before granting permission on his own, I credit Garcia's testimony that Miller had granted permission without contacting anybody else on the one occasion. It should not escape notice that when Miller granted permission on his own, these employees were satisfied that they had properly obtained permission to leave early. They neither went to Brasic as an additional step nor did they ask Miller to talk to Brasic on their behalves. Although Jones and Brasic denied that Miller had authority to grant employees permission to leave early or come in late, the weight of the credible and detailed accounts indicate that the practice was to the contrary.

The Employer's position is that Miller was effectively relieved of his supervisory duties in 1995 when he was converted into a mechanic in the maintenance dept. The Petitioner argues that employees were not notified of Miller's loss of his supevisor's job, and that the Employer continued to hold out Miller as a supervisor. Cirilo Garcia and Juan Duran credibly testified that on several occasions in the last 2 years Brasic had told employees to do whatever Miller tells them to do. In addition, employee witnesses testified that during monthly meetings they were told to listen to Miller. Both Jones and Brasic ostensibly denied that employees were told this at meetings. I do not credit either of their denials. When asked if employees were told to listen to Miller, both hesitated and then stated that they could not recall or remember employees being told to listen to Miller. The record evidence indicates that far from telling employees that Miller was no longer their supervisor, the Employer led employees to believe the exact opposite, thus, in effect reaffirming in the minds of employees that Miller was their designated superior.

The Employer places somewhat heavy reliance upon the fact that employees Edgar Pinto, Jose Zapata, and Delfino Tapia occasionally directed the work of other employees but were allowed to vote without challenge. While there is some support in the record that they did, in fact, direct other employees, their direction of other employees was sporadic, more akin to training, and incidental to their own assignments. See *Bakersfield Californian*, 316 NLRB 1211 (1995). For instance, Pinto taught another employee how to clean up. Zapata taught 5-month employee Mariano Rodriguez how the Employer wanted things done as well as handing written orders directly to him. The underlying reason for these more frequent opportunities to direct employees was that the Employer had hired many new employees, both permanent and temporary. It is undisputed that the Employer suffered a serious manpower shortage after an INS raid in April 1997 that resulted in about one-third of the production employees leaving Alois Box. The Employer had called upon many of its experienced and/or senior employees to help with the training of the new hires. In comparison, Miller's direction of employees was clearly more extensive and of an ongoing nature.

The Petitioner also contends that Miller has disciplinary authority over employees. Petitioner highlights the termination of Federico Melendez as an example of Miller's authority to discipline. Various employee witnesses testified that they saw Miller arguing with Melendez immediately prior to his discharge. Overall, their testimonies concerning Melendez are based on speculation and hearsay, and thus, are unreliable. Jones provided credible testimony that he himself terminated

Melendez. The Petitioner has not shown that Miller discharged or even recommended Melendez' discharge.

More troublesome is Manuel Keyes' credible testimony that Miller stopped an exemployee, Ruben Contaras, from working until Brasic returned to the plant. The responsibility for reporting rules infractions can be an additional factor in determining supervisory status. See *Flex-Van Service Center*, 228 NLRB 956 (1977). The record is not clear why Miller stopped Contaras from working. Although the event clearly shows that Miller ultimately referred the discipline matter to his superior, Miller, nonetheless, believed that he had the authority to stop an employee from continuing his work. In sum, there is insufficient record evidence to support a finding that Miller even reported Contaras, let alone recommended discipline. However, the event does illustrate the type of independent judgment Miller practices when Brasic is away from the production floor. Instead of merely reporting the situation to his superior, Miller took it upon himself to halt another employee's work. This event belies Brasic's contention that Miller has no authority to make decisions that require use of independent judgment.

The Employer seems to suggest that the combination of the factory order forms and Brasic's handwritten assignment sheet is sufficiently specific that first-shift employees can perform their work without any additional supervision. The totality of the record simply does not support this contention. According to Reyes, when Brasic is not there, Miller does not preface or qualify his orders to employees as being from Brasic or the plant manager. "When Brasic not available, Miller is the man to see." Cirilo Garcia also testified that Miller is in charge when Brasic is not around. The record evidence indicates that Miller spends most of his time on the production floor directing employees or in the production office. The rest of the time he fills in on machines as an operator or helps the mechanics. A total of nine employee witnesses testified extensively about Miller's prominent role on the production floor. Based on the credible, consistent, and mostly uncontradicted evidence of these employee witnesses—all of whom with the exception of Duran are still employed by the Employer—I find that Miller does have responsibility for the first shift and uses independent judgment in his duties as a supervisor. The totality of the record indicates that Miller, and not Brasic, is the frontline supervisor in production.

Accordingly, I recommend that the challenged ballot of Jeff Miller be sustained.

Manuel Garcia

The petitioner claims that Manuel Garcia is the supervisor of the second shift. The Employer claims that Garcia is merely the principle machine operator on the second shift. An individual is a supervisor if he is in charge of a facility operating at night if he is authorized to exercise independent judgment and is not able to consult higher authority on a routine basis. See *NLRB v. McCullough Environmental Services*, 5 F.3d 923 (5th Cir. 1993).

The following facts are not in dispute: Garcia has about 25 years of experience with the Employer and his hourly rate is $20.[8] Garcia is not only the most senior employee on second shift, but most senior person among all hourly employees, having worked at Alois Box 3 years longer than any other hourly employee. Garcia's only break in employment came about 3 years ago, when he quit Alois Box for a period of about 5 months due to personal reasons unrelated to work. He returned to Alois Box when Vlado Brasic, the plant manager, offered him a job on the then soon to be formed second shift. The second shift usually starts at 3 p.m. and ends at 11 p.m. He started working a modified work schedule where he came into work 30 minutes earlier than the rest of the second shift to have his daily meetings with Brasic.

The Petitioner suggests that Garcia attends these meetings as a supervisor. The Employer's position is that Garcia goes in to receive from Brasic the factory orders and all relevant instructions for the second shift, which Garcia then relates to the four other employees on second shift. Garcia testified that he only receives orders as an operator. Thus, there is insufficient support in the record for the Petitioner to prevail on this point. However, during Garcia's description of these meetings, I sensed that the witness was purposely downplaying anything about him that could possibly be interpreted as supervisory in nature. For example, Garcia advanced internally contradictory testimony regarding the frequency with which he had his meetings with Brasic. He initially testified that he met with Brasic only twice a week. Later in his testimony, Garcia admitted that he had daily meetings in Brasic's office.

Garcia also insisted that he did not park in the reserved parking spaces. Both Brasic and Jones testified to the contrary. Brasic had apparently given Garcia permission to park in a reserved space because it was safer when he locked up the plant. Garcia also attempted to backtrack on some of his earlier testimony when he had repeatedly referred to the second shift and its employees using proprietary language. For example, Garcia used the following descriptions: "I ran the shift;" "my employees;" and "during my shift." In light of the fact that Garcia volunteered these descriptions. I found his subsequent backtracking insincere. Overall, he was highly evasive and appeared to be testifying in a preformatted manner. Thus, I viewed Garcia's testimony with a good deal of suspicion.

Pay differentials can be a factor in determining an individual employee's supervisory status. See *Health Care & Retirement Corp*., supra. The Employer claims that Garcia's wage rate reflects his seniority, experience and the difficulty of his job as a Flexo operator. Garcia earns $20 an hour which is $4.05 more than the next highest paid hourly employee, Miguel Granillo, who has nearly 22 years with the Employer. The record adduced does not permit helpful comparisons between the pay rates of hourly employees. However, the record does indicate that Garcia's annual wages exceed the salary of Bob Hilmers, the maintenance supervisor.[9] This pay differential alone does not confer supervisory status on Garcia; however, his wages certainly put him into the range of supervisor compensation.

Plant Manager Brasic testified that Garcia has standing orders to call him or President Jones if he were not at home, in the event of a problem during second shift. Garcia testified that he calls Brasic "a couple of times" a week. Brasic essentially corroborated, stating that Garcia calls about once a week. Brasic forcefully testified that Garcia has no authority to make independent decisions on second shift, that he is supposed to call to obtain additional orders regarding machine breakdowns,

[8] Garcia's start date was February 21, 1972.

[9] Jones testified that Hilmers' annual salary is $33,000–$35,000, with a bonus of $1200–$1500. Garcia's annual wages for a standard 2000 hours would be $40,000. This is a conservative estimate because it excludes Garcia's bonus and overtime pay, which the record indicates he receives.

questions in regard to a particular order, and quality issues. While supervision by phone is plausible, the record shows that it did not stop Garcia from solving problems on his own.

Garcia testified that a former employee named Jose injured his foot while working on second shift. Although the injury was not a medical emergency, he decided to send Jose to the Employer's off-site clinic. And since Jose had a foot injury, he instructed another former employee, David Quintaro, to drive him to the clinic. The two men returned to inform Garcia that the clinic was closed. Garcia then decided to send Jose to the emergency room at the nearby hospital. The record evidence does not indicate in the slightest that Garcia followed the phone procedure that Brasic described during his examination. He did not attempt to call Brasic or Jones. The record indicates that Garcia eventually talked to Brasic about the injury but only after having resolved the problem for the night.

The Petitioner also contends that Garcia disciplines second-shift employees. Mariano Rodriguez testified that while on second shift he had gone to Garcia to complain about Chris McBee, a coworker's poor work. Rodriguez credibly testified that Garcia went to McBee and told him to do his job properly or else he would be sent home. Rodriguez testified that McBee has been mad at him ever since Garcia had spoken to him, but that McBee now does his job properly. The McBee incident does not conclusively show that Garcia has disciplinary authority. It does, however, demonstrate another instance where Garcia was willing to exercise his independent judgment in resolving a problem on second shift. There is no indication in the record that Garcia contacted Brasic or Jones at any time to discuss the McBee situation.

Based on the credible evidence that Garcia exercises independent judgment in the resolution of various problems that arise on second shift without first consulting higher authority, I concluded that Garcia is a supervisor. Accordingly, I recommend that the challenged ballot of Manuel Garcia be sustained.

. . . .

Mato Brasic

Mato Brasic was challenged on the grounds that he is the brother of Vlado Brasic, the plant manager and thus, receives special privileges. The Employer denies that Mato receives any special benefits and that any accommodation afforded Mato was due to its desperate need for workers following the April INS raid. An employee who is a relative of management may be excluded from the bargaining unit if he enjoys special benefits based on that relationship or if his special status aligns his interests more closely with management than with unit employees. *M. C. Decorating*, 306 NLRB 816 (1992).

The following facts are not in dispute: Brasic hired Mato to operate the slitter machine at $3 an hour; Mato started at Alois Box on August 11, 1997; he works the first shift; he had no prior experience either on the machines at Alois Box or working in the corrugated box industry; prior to his job at Alois Box; Mato was self-employed in the home rehab business.

The Petitioner and Employer went to great lengths to discuss the productivity and quality of Mato's work. The Petitioner contends that Mato's special privileges extend to his ability to stay on at the Alois Box irrespective of his allegedly substandard work. Thus, the Petitioner presented a string of witnesses who were very critical of Mato's performance as a slitter operator as well his industriousness. The Employer defended Mato through its own witnesses and production statistics. The best that Jones could do to defend Mato was to state that production statistics for the time that Mato was the primary slitter operator were a little below average. Brasic, on the other hand, testified that Mato was an above-average slitter operator. In sum, I am inclined to believe Petitioner's witnesses that Mato was a subpar operator lacking diligence. In short, Mato's testimony left little doubt that he viewed the slitter job as a less than demanding one.

As much as Mato's competence as a slitter operator could be a relevant factor in determining whether he receives special privileges based upon his relationship to Brasic, I am able to conclude that he receives special privileges based upon a more compelling factor, namely abundant evidence that Mato is immune from any meaningful discipline regarding his attendance problems and is permitted to determine his own schedule.

On September 30, 1997, Brasic issued Mato a written warning for not adhering to Rule #3,—Being Tardy or Absent Without Authorization. The warning detailed the 3 days that Mato had been absent: Sept. 22, 26, and 29. The Employer argues in its brief that the written warning demonstrates that Mato receives no special treatment because his brother, the plant manager, was the person who initiated the discipline. The act of issuing the written warning itself neither helps nor hurts the Employer's defense. While an act of discipline technically did take place, the "Employee Contact Report" had no teeth to it. Instead of specifying the next level of discipline if the problem was not resolved, presumably a second Written Warning or Suspension, Brasic wrote in the "Action Taken . . ." section that Alois Box may have to identify a different schedule for Mato. Mato accumulated eight additional absences after the Warning. It is abundantly clear that the discipline had little or no effect on curbing Mato's absences.

The Written Warning also points to the likelihood that Mato's official "Employee Attendance Record" *under reports* his absences. While the employee contact report records absences for Sept. 22 and 26, the employee attendance record indicates that Mato was not absent those 2 days. This discrepancy adds some credence to employee allegations that Mato was actually absent much more than nine times.

Assuming for the moment that the employee contact report was somehow incorrect and the employee attendance record is an accurate gauge of Mato's absences, during his first 4 months at Alois Box, Mato was absent 9 days and late at least twice. In addition to the actual absences, Mato also did not follow proper procedure of calling in to notify the Employer that he would be absent. The record indicates that Mato discussed whatever attendance problems he had exclusively with Brasic. In sum, Mato had a terrible attendance record. The record is relatively silent about the Employer's attendance policy. Jones only described it as "flexible." Fortunately, the record includes evidence of an established practice as it applied to another employee, Bernardo Merced, whom the Employer terminated for excessive absenteeism sometime in November 1997.

There is no evidence that Bernardo Merced was terminated for anything but absenteeism. Merced's attendance record was remarkably similar to Mato's. Another similarity was that both Mato and Merced were new employees. Merced accumulated nine absences and two tardies during his first 2 months with the Employer. Jones testified that Merced was not issued any discipline prior to his termination. In addition, Sebastian Sierra, a 23-year employee, testified that he had never seen another employee absent as much as Mato, and that the Employer in recent

months had fired other employees with fewer absences that Mato.

When compared to the case of Merced. the Employer definitely favored Mato. The Employer repeated its position that its employment policies regarding Mato was governed by its desperate need for workers after the April 1997 INS raid. This defense is flawed because it still does not explain why Merced was terminated during the same period of acute labor shortages. In addition to the comparison to Merced, the Employer's other responses to Mato's attendance problems provide sufficient evidence that he had special privileges based upon his relationship to Brasic.

In response to Mato's worsening attendance record after the Written Warning of September 30, Brasic agreed to Mato's suggestion that he switch from a 5-day to 4-day workweek. Mato testified that the Employer did not set his new schedule, apparently leaving it to him to decide on a daily basis which four days he would work. Mato testified that he need only call the company and leave a message on the mornings that he did not plan to come in. An employee who is a relative of a management personnel receives special privileges when he can unilaterally determine when he would work overtime. *M. C. Decorating*, 306 NLRB 816 (1992). Mato's ability to suggest an alternative work schedule that allows him to decide each morning whether he will go to work more than satisfies the meaning of special privileges under the *M. C. Decorating* test.

Mato also requested and received from Brasic permission to take a 2-week leave of absence for the first half of December. Mato testified that the only reason he had to provide Brasic was that it was "personal." The totality of Mato's testimony reveals that "personal" means spending time on his rehab business.[10] This occurred at a time that Jones and Brasic insisted Alois Box was desperate for workers such as Mato, whom it had to entice into the company with a higher rate of pay. Under these circumstances, the granting of the 2-week leave of absence can only be seen as another special privilege enjoyed by Mato.

Based on the record evidence, Mato had no reason to view absences as a danger to his job at Alois Box. After the Employer's only discipline of him, Mato proceeded to accumulate even more absences. The Employer's response was not to discipline Mato, but to further accommodate him. Mato was allowed to essentially pick 4 days every week that he wanted to work. Even after gaining this unprecedented flexibility, the record indicates that Mato's absences continued unabated. And finally, Brasic gave Mato a 2-week leave of absence in the midst what the Employer explained was an acute labor shortage. The record indicates that Mato received no other discipline besides the Written Warning on September 30. Based upon the Employer's responses to Mato's attendance problems, I find that he does receive special privileges because he is effectively immunized from any meaningful discipline for absences because he is the older brother of Vlado Brasic, the plant manager. Accordingly, I recommend that the challenged ballot of Mato Brasic be sustained.

. . . .

[10] The totality of Mato's testimony clearly indicates that even after taking the slitter job at Alois Box, he continued to spend considerable time on his rehab business. After testifying that he had no other jobs outside Alois Box, Mato reluctantly admitted that he still had two houses that he had to finish rehabbing. After initially denying that his absences were due to his rehabbing work. Mato conceded that at least some of the absences were for this very reason.

Julius Rimdzuis

Julius Rimdzuis was initially challenged on the grounds that he is an office clerical, and thus, specifically excluded from the stipulated bargaining unit. The Petitioner after Rimdzuis' testimony modified the basis for its challenge. The Petitioner now contends.that Rimdzuis does not share a sufficient community of interest with bargaining unit employees. In light of Rimdzuis' own testimony that he spends a considerable amount of his working day outside of the plant, the Union's witnesses—all of whom work exclusively inside the plant—simply could not supply much testimonial evidence about what Rimdzuis did inside the Employer's plant.

In *Kalamazoo Paper Box Corp*., 136 NLRB 134 (1962), the Board enumerated the factors to be considered in determining whether individuals have a community of interest apart from other employees such that they would not belong in the same unit. Included were: a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining. See also *Keeler Brass Co.,* 301 NLRB 769 (1991).

The following facts are not in dispute: Rimdzuis is 78 years old; he started working for the Employer about 7 years ago; his job duties include troubleshooting, machine repair and procuring spare parts, he does not punch the timeclock; he works approximately 20 hours per week and is paid $300 for his work. The Employer defends Rimdzuis' eligibility on the grounds that he is a part-time maintenance employee with a sufficient community of interest with bargaining unit employees. The Employer did call Rimdzuis to the stand, and his testimony constitutes the best evidence of his real status.

Rimdzuis testified that he works approximately 20 hours per week, but he also explained in greater detail that the 20 hours are not an absolute requirement. He also testified that he worked up to 60 hours a week when he first started but did not receive any overtime pay. Rimdzuis also testified that he has no breaks. He testified that he sometimes works on Saturday and Sundays to make his 20 hours. In addition, both the testimony of Rimdzuis and Jones leaves no doubt that Rimdzuis reports to and departs from the plant at varying times of the day. In short, Rimdzuis can choose the days that he works and the hours that he spends at the Employer's plant.

In regard to his compensation, he explained that he often works in excess of 20 hours but is still paid only $300. Rimdzuis also described his weekly pay to be a flat amount: "It's a straight $300 a week, yes." The Employer did not provide evidence of any deductions for taxes, medicare, Social Security, etc. He also stated that he receives no employee benefits. At one point during his testimony, he did specifically state that his hourly wage is $15. He also has never received a raise during his 7 years working for the Employer.

Overall, I credit Rimdzuis' list of the different types of work that he has performed for the Employer. However, the evidence clearly points to his not being an hourly employee. First, the $l5 an hour is not Rimdzuis' pay rate. It cannot be. If the Employer truly paid Rimdzuis at $15 an hour for a 20-hour week, Rimdzuis would take home net wages far below the $300 he

admitted to receiving every week. Unlike in the case of D'Incognito, the Employer did not produce a W-2 form for Rimdzuis. The Employer had all the incentive to produce a W-2 for Rimdzuis but did not. In addition to the manner of his compensation, his lack of benefits, his ability to schedule his work week the way as he sees fit, and the fact that he comes and goes as he pleases clearly distinguish him from bargaining unit employees and the terms and conditions under which they work. Rimdzuis' work may very well fall under the umbrella of work performed by maintenance employees, a category of employees specifically made eligible in the Stipulated Election Agreement; however, all the other aspects of his job indicate that he is not a regular part-time employee. Thus, he does not share a sufficient community of interest with bargaining, unit employees. Accordingly, I recommend that the challenged ballot of Julius Rimdzuis be sustained.

. . . .