

The Tiberti Fence Company and Laborers International Union of North America, Local 872, AFL-CIO, Petitioner. Case 28-RC-5628

August 28, 1998

ORDER DENYING REVIEW

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached as an appendix). The request for review is denied as it raises no substantial issues warranting review.¹ In denying review, we make the following additional observations.

The evidence upon which the Employer relies does not establish that the foremen effectively recommend wage increases "in the interest of the employer." Each foreman works alone or with one designated helper to form a "field crew." The foremen may request wage increases for their helpers by making a written request to Division Manager Herman Reid, who then submits the wage increase request to the Employer's owner, Jilindo Tiberti. The granting of the wage increase is not effectuated without review by one of the foremen's superiors, and the approval of two managers. On occasion, the division manager or an office clerical has denied or reduced a foreman's request for a wage increase for a helper.

Significantly, the wages paid to the helpers are subtracted from the foremen's piece rate earnings.² Thus, a foreman's recommendation that a helper receive a wage increase is in effect a recommendation that the helper receive a greater portion of the foreman's own pay, as there is no indication that the piece rate paid to the foreman increases with a pay raise for the helper. The foremen presumably recommend these wage increases for their helpers because they are pleased with the helpers' performance and want to reward them so that they stay working as their helpers. Under these circumstances, we find that the role played by the foremen in recommending wage increases for their helpers is not carried out in the interest of the Employer.³ Instead, the recommendations are made principally in the foremen's own interest

¹ The only issue raised on review is whether the Regional Director erred in finding that seven foremen are not supervisors within the meaning of Sec. 2(11) of the Act.

² The Employer generally guarantees its foremen a base rate of pay and, in addition, pays its foremen a piece rate based on the type of fence installed. The pay for the helpers is established from the piece rate for the foremen.

³ Contrary to the dissent's assertion, we see no inconsistency in the foremen's acting principally in their own interests in seeking wage raises for their helpers and in the Employer's retaining ultimate say over the granting of raises. The Employer's ultimate authority does not detract from the foremen's self-interest.

to ensure a harmonious relationship between themselves and their helpers, and to motivate the helpers to stay.⁴

Further, contrary to our dissenting colleague, we do not find it determinative that the requests for wage increases have been denied or reduced only under defined circumstances (e.g., if the Employer initially employed the helper at a higher rate than the division manager would have preferred, or if the request came too soon after the helper's hire date or last raise). What is critical is that the requests for wage increases are independently reviewed and based on higher management's own assessment of whether the recommended wage increase is appropriate, and that recommended wage increases can be and have been denied. Moreover, we find it significant that in at least one instance a secretary reduced a proposed wage increase at her own discretion, notwithstanding the protests of the foreman.

Accordingly, we deny the Employer's request for review.

MEMBER HURTGEN, dissenting.

I would grant review, for I think that the foremen may well be supervisors. There is evidence to indicate that the foremen can and do make effective recommendations with respect to wage increases for helpers. In this regard, I note that a foreman's recommendation is followed by the owner, except in certain defined circumstances (e.g., helper was recently hired or had recently received a wage increase). The fact that the owner has discretion, under these parameters, does not mean that the recommendation is ineffective. In any system in which recommendations are made to a superior, one assumes that the superior has discretion with respect to the decision.

Further, and quite apart from the foregoing, a foreman's decision not to make a recommendation will very likely result in the helpers' not receiving an increase. In this regard, the evidence indicates that it is difficult for a helper to get an increase in the absence of a foreman's request.

⁴ In analogous cases, the Board has found that an alleged supervisor's role in recommending the hiring of assistants or in selecting assistants from those already hired does not constitute supervisory authority in the interest of the employer, where the role the employees played in such matters was purely in their own personal interest to ensure a harmonious relationship between themselves and their assistants. See *Willis Shaw Frozen Food Express*, 173 NLRB 487, 488 (1968) (the "part played by head drivers in the recruitment and selection of their own assistants does not constitute authority, in the interest of the [e]mployer, to hire or transfer employees or to recommend the same . . . [since] the role they play in such matters is, under the [e]mployer's policy, principally in their own interest to ensure a harmonious relationship between themselves and their assistants during the lengthy periods that they will be alone on the truck and away from their homes and friends"); *Bricklayers Local 6 (Key Waterproofing)*, 268 NLRB 879, 883 (1984); *Lipsey, Inc.*, 172 NLRB 1535 fn. 2 (1968); *Gulf Bottlers, Inc.*, 127 NLRB 850 (1960), aff'd. 298 F.2d 297 (D.C. Cir. 1961). See also *Greenspan, D.D.S., P.C.*, 318 NLRB 70, 76-77 (1995).

The majority, however, contends that the recommendation for a wage increase is not made “in the interest of the Employer.”

The contention is without merit. Unlike my colleagues, I do not believe that the Employer is wholly disinterested in the wages of the helpers. The majority concedes that the Employer is the final decisionmaker with respect to wages for helpers, and has occasionally denied the recommendation to increase the wages of helpers. If the Employer were wholly disinterested in the matter of wage increases for helpers, one wonders why the Employer insists on playing a decisive role in the granting of such increases.

We need not look far for an answer to the foregoing question. If the increase in a helper’s wages achieves its goal, i.e., increased productivity, the foreman will make more money (even after paying the helper), and the Employer will get greater production in less time. Thus, the Employer and the foreman will benefit from the wage increase for the helper. In sum, it is little wonder that the Employer insists upon a decisive role in determining the wages of helpers.

I fear that my colleagues have fallen into the error exposed in *NLRB v. Health Care & Retirement*, 114 S.Ct. 1778 (1994). The fact that an alleged supervisor may have an interest in the terms and conditions of employment of the employees working under him does not mean that the employer of that alleged supervisor is wholly disinterested in the matter. For example, if a foreman recommends a reward or discipline for an employee, the foreman has an interest in the matter, for he wants competent well-performing employees working under him. But, this is not to say that the employer is wholly disinterested in the matter. This point is especially clear in this case. The Employer is sufficiently interested in the employment terms and conditions that it insists upon ultimate control of those matters.

Based on the above, I reject the majority’s contention that the wage increases for helpers are not in the interest of the Employer.

I would grant review.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The parties agree that a unit of all laborers and trainees engaged in construction or fence erection and working in or out of the Employer’s facility located at 4610 Wynn Road, Las Vegas, Nevada, is appropriate for purposes of collective bargaining. The parties disagree over the inclusion of some seven foremen in this agreed-upon unit. The Petitioner contends that the foremen are employees within the meaning of Section 2(3) of the Act and should be included in the unit. Contrary to the Petitioner, the Employer contends that the foremen are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the stipulated unit. There is no history of collective bargaining in the agreed-upon unit.

The Employer conducts its operations from two locations, a yard and office at Wynn Road and a second yard and office at Rogers Road, all in Las Vegas, Nevada. The foremen at issue work in the Employer’s residential division and out of the Wynn Road facility. Herman Reid is the manager for the residential division. He reports to Jilindo Tiberti, the owner of the Employer.

Each foreman works by himself or with one designated helper to form a “field crew.” The field crews perform several assigned work orders in discrete geographical locations each day. Several helpers have gone on to become foremen and at least one foreman has become a helper. There are 28 laborers and trainees in the petitioned-for unit, including the 7 foremen in issue. The unit includes yard employees working at the Wynn Road facility, as well as trainees.

The parties stipulated, and based on the record I find, that the foremen are not sub-contractors of the Employer. Both helpers and foremen receive pay checks and W-2 tax forms each year from the Employer. Occasionally the Employer engages in “prevailing wage jobs” on which the helper and the foreman each earn the identical hourly wage of \$23.14.

It appears from the record, that the Employer’s contentions with respect to the supervisory status of foremen over helpers relate to wage increases given to helpers; assignment and direction of work; layoff, transfer or discharge of helpers; hiring recommendations; and discipline. I shall address each of these individually.

Wage increases

On the majority of jobs, the Employer guarantees its foremen a base rate of pay of \$14 per hour and pays its foremen a piece rate based on the type of fence installed. From this piece rate for the foremen, the pay for the helper is established. As an example, for the week ending March 25, 1998, foreman Luciano Alvarez earned a total of \$1162 based on the type of jobs he and his helper performed. From this total, the Employer subtracted 5% for yard time or work, leaving a total of \$1103.90 for the week. From this amount, the Employer subtracted \$387, of which \$297 was for the 33 hours helper Troy Valdez worked at \$9 per hour and \$90 was for the 7.5 hours helper Jose Corona worked at \$12 an hour. This left Alvarez receiving \$716.90 for the 39 hours he worked during the week which was at \$18.38 per hour.

Employer Exhibit 1 illustrates 16 occasions between May 4, 1994, and January 16, 1998, where helpers received wage increases. Like initially determined wage rates, these increases come out of the piece rate that the foremen earn. To obtain a wage increase for a helper, his foreman makes a request to division manager Reid that the helper be awarded a wage increase, typically 50 cents or \$1 per hour. The foreman may write the request initially on a scrap of paper or the request might be formalized on a paper generated by an office secretary for the foreman’s signature. Reid then submits the wage increase request to Tiberti to be “approved.” Many of the hand written wage increase requests are presented to and signed by Tiberti. Only after Tiberti approves a wage increase for a helper is it submitted to payroll. Foreman may not go directly to payroll to effectuate raises for helpers, even though such a wage increase comes out of the foreman’s piece rate and, as such, does not effect the Employer’s profit margin. Foremen normally initiate the wage increase process; and it is difficult for a helper to obtain a raise in the absence of his foreman’s request.

On occasion, Reid or an office clerical have denied or reduced the foreman's request for a wage increase for the helper. Thus, if the Employer initially employed the helper at a higher wage rate than Reid would have preferred or if the request comes too soon after the helper's hire date or last raise, the Employer will deny the wage increase requested. The record reflects that in calendar year 1997 and calendar year 1998, foremen initiated three wage increases for helpers. Reid referred one of these requests to a secretary who reduced the raise at her own discretion, notwithstanding the protests of the foreman.

The Board has held that for a supervisor to "effectively recommend," the recommendation must be implemented without review by superiors. The fact that the recommendation is ultimately effectuated is irrelevant. *Children's Farm Home*, 324 NLRB 61 (1997). With respect to wage increases for helpers, I find that the foremen do not have the authority to determine and effectuate an ultimate personnel decision where recommendations on wage increases are not implemented without review or question, require the approval of the Employer's managers, and are sometimes subject to denial by a secretary. See *Quadrex Environmental*, 308 NLRB 101 (1992); *Hillhaven Rehabilitation Center*, 325 NLRB No. 9, slip op. at 2 ([Nov. 9.] 1997). Specifically, I find that the raises in the 1994 through 1996 time frame are not dispositive of current crew leaders' authority, because such raises are subject to independent review by a superior.

Assignment and direction of work

The record reflects that an average workday starts with the residential division manager, foremen, and helpers meeting at 7 a.m. at the Wynn Road yard. The division manager distributes work orders for the day to the foremen. At times, the division manager may prioritize the work orders, and it is expected that the foremen perform the jobs in that order. One of the Employer's sales persons may require that a job be completed on a specific day. In those cases, the Employer expects its foremen to complete such jobs, even if it requires that employees work overtime. Foremen may ask their helpers if they wish to work overtime. Since December 1997 or January 1998, the Employer has required that the division manager approve the use of overtime. If a job requires overtime work, the foreman will arrange for the Wynn Road yard gate to be left open or unlocked so he may return the truck to the yard and use his key to access the office after regular office hours. Once at the yard, the foreman may prepare for the following day's work.

Once the foreman has his job assignments for the day, he might give his helper a packing list and instruct him to load his truck with supplies or tools or cut the pipe. He may also direct the helper to check the truck to make sure it is ready for the day's work. They travel to the jobsites together. The work of the helper and foreman at the site is the same regardless of the foreman with whom the helper is working on a particular day. Helpers generally are capable of performing any and all tasks that a foreman may perform on a jobsite. Sometimes the foreman suggests how to approach a given task at a jobsite and, at other times, the helper makes the suggestion. Routinely, there are discrete tasks to be performed on a jobsite with the foreman performing one task and the helper performing another at the same time. Tasks rotate from job to job. Helpers may ask to perform a certain task on a certain day and the foremen gener-

ally acquiesce in such requests. On occasion, the foremen request a second helper or a yardman to assist in a project.

Based on the foregoing, I find that the record evidence fails to establish that foremen responsibly direct or assign the work of helpers. It appears that helpers and foremen perform the same tasks as helpers and may interchange tasks with helpers from job to job. Moreover, the Board distinguishes between the routine direction or assignment of work and that which requires the use of independent judgment. See *Children's Farm Home*, supra; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996) (only supervisory personnel "vested with genuine management prerogatives should be considered supervisors, not straw bosses, lead men, setup men and other minor supervisory employees"); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996) (Board concludes that a leadman glazier was not a statutory supervisor where he provided "direction and guidance to other employees based on his experience and craft skill" and directed employees "to perform various tasks according to the skills they [had] previously demonstrated . . . [t]hese responsibilities involve no real managerial discretion that would require the exercise of independent judgment"); *First Western Building Services*, 309 NLRB 591, 601 (1992) (instructions given by a more experienced employee to a less experienced employee is not "responsible direction of employees" within the meaning of Section 2(11) because use of independent judgment is not involved; rather, it is "the authority of a skilled employee over an unskilled employee").

In these circumstances, I find that foremen do not direct or assign the work of helpers as those terms are used in Section 2(11) of the Act. In reaching this conclusion, I have taken into account the time spent by the foreman in performing unit work as compared to the time spent instructing and directing helpers. In *Commercial Fleet Wash*, 190 NLRB 326, 326 (1971), the Board viewed "as significant" that the leadmen spend 80-90 percent of their time working as part of the crew in concluding that leadmen were not supervisors within the meaning of the Act. Here, the foremen spend nearly 100 percent of their time working as part of the crew.

Finally, the Employer's requirement that the foremen explain to their helpers the Employer's policies and procedures does not establish that the foremen have or exercise Section 2(11) authority. The Board has held that "[i]nstructing employees concerning the [e]mployer's rules, even in the their breach, demonstrates neither authority over the employees nor the exercise of independent judgment as required by Section 2(11)." *S.D.I.*, supra at 112.

Layoff; transfer; and discharge

The record establishes that the Employer maintains a policy whereby a foreman who feels that he cannot work with his particular helper may complain to the division manager and request that the helper be fired. The manager then investigates this request on his own to determine both if the crew should be broken up and if the helper should be discharged. The manager ultimately decides based on his own independent judgment what action, if any, will be taken. Normally, if the division manager finds merit to the complaint of the foreman, the manager places the subject helper with another foreman and assigns a new helper to the complaining foreman. If there is no work available for the helper with another foreman, the manager will seek to place the helper in a yard job. Failing both of these options, the manager discharges the helper. No helper has ever

been discharged because of an investigation instigated by a foreman. The record discloses a single occasion where a foreman requested another helper. Thus, "several years ago," foreman Rojelio Alvarez requested that helper Jesus Villegas be replaced on his crew and the Employer placed Villegas with another foreman.

Based on the record evidence, I find that foremen do not have authority to effectively recommend the layoff, transfer or discharge of helpers by virtue of a policy whereby a foreman may request that a helper be removed from his "crew." As noted above, the Board holds that the authority to effectively recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Children's Farm Home*, supra.

Hiring

The record reflects that foremen do not interview job applicants and are not directly involved in the hiring process. One and two years ago, respectively, foreman Jose Zamora attempted to seek employment for his brother Francisco Zamora and for Jorge Sanchez. Reid told foreman Zamora that he was too busy to interview the potential employees. Zamora apparently told them that they would have to follow the usual procedure of completing applications, but they declined to do so and were never hired. The record also reveals that at one time foreman Rojelio Alvarez recommended to Reid that Omar Terrones and Rodrigo Torres be hired. Reid told Alvarez that he would check with Tiberti and "see if he wants to hire them." Alvarez had no other involvement and the two were ultimately hired by the Employer.

Based on the limited occasion when Alvarez recommended the hire of two men which Reid had to clear with Tiberti to "see if he wants them," and the other occasion when Zamora's recommendation was ignored, I conclude there is insufficient basis to find that foremen effectively recommend the hire of helpers. See *Commercial Fleet Wash*, supra (leadmen's transfer of crew members, recommendation that they receive a commission, and reporting of employees for theft, resulting in the layoff, viewed by the Board to be few, isolated, and insufficient to confer Section 2(11) supervisory status).

Discipline

Foreman Zamora testified that he disciplined another employee "only in order to get the work done." Zamora stated that this "discipline" consisted of his explanation to his helper at the time how Zamora worked because it was different than how his helper worked. I find that this single incident is best described as an attempt by a more experienced employee to share his work technique with a less experienced employee. It does not rise to the level of discipline within the meaning of the Act as it did not "affect the subject employee's job status or constitute[d] evidence that [the team leader] possessed the authority to discipline within the meaning of Section 2(11)." *Children's Farm Home*, supra (team leader's issuance of two write-ups that threatened further disciplinary action up to and including immediate discharge, which had no meaningful effect on employee job status, did not confer supervisory status). See also *Azusa Ranch Market*, 321 NLRB 811, 812-813 (1996).

The Employer has cited *Cartright Hardware*, 229 NLRB 781 (1977), and *Holland & Son*, 237 NLRB 55 (1978), to support its claim that foremen are supervisors. These cases are distinguishable on their facts. In *Cartright* the individual at issue disciplined and made effective recommendations regarding wage increases of his subordinates. As noted above, the foremen here do not discipline helpers and do not effectively recommend raises for them. The individual at issue in *Holland & Son* interviewed his maintenance assistant and was found to responsibly direct his work. The record in the instant case indicates that the foremen do not interview their helpers nor do they responsibly direct their work. The Employer also cites *Liquid Transporters*, 250 NLRB 1421 (1980), where shift leader used discretion in assigning tasks to employees, transferred employees from job to job, and called employees in to work for various reasons. In the instant case, I have found that the foremen do not responsibly direct or assign the work of the helpers. Moreover, the other supervisory authorities which were present in *Liquid Transporters* are not present here.

The record discloses certain other secondary indicia of authority that warrants comment. Foremen record the hours of their helpers on work orders which they submit to the Employer and are the highest ranking individuals on the jobsite. Division managers rarely, if ever, visit the jobsites. If a client complains to the office regarding the quality of work performed, the Employer sends the same crew back out to remedy the problem. Foremen generally consider themselves or the customer to be the "boss" on the jobsite. They also consider themselves the "boss" of an inexperienced helper and the "collaborator" or "co-worker" to an experienced helper. Foremen deal with customers and suppliers as necessary on any given jobsite, whereas helpers do not. Foremen are not permitted to work on a jobsite alone without express permission from a manager, and this permission is not generally granted, apparently due to safety concerns.

Foremen have keys to the Wynn Road office but not to the gate that surrounds the Wynn Road facility. If the crew is going to work overtime past the hours that the gate is regularly open, the manager will leave the lock open on the gate so that the crew can return the work vehicle and the foreman can access the office with his key. Helpers possess no such keys. Employment benefits for employees include health and life insurance. The Employer pays the full cost life and health insurance for its foremen and one-half of the cost of health insurance for its helpers.

As stated above, I find that the foremen do not possess any of the primary indicia of supervisory status as set forth in Section 2(11). In these circumstances and on the basis of the record as a whole, I find that the secondary indicia suggested above are insufficient to establish that the foremen are supervisors within the meaning of the Act. *S.D.I.*, supra at 112 fn. 2; *J. C. Brock Corp.*, 314 NLRB 157, 159 (1994).

In sum, I find that the foremen in the residential division are not supervisors within the meaning of Section 2(11) of the Act. I will, therefore, include them in the agreed-upon unit.

There are approximately 28 employees in the unit found appropriate herein.