

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

ROCHELLE DISPOSAL SERVICES, INC.

Employer¹

and

Case 33-RC-5002

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Rochelle Disposal Services, Inc., operates the Rochelle Municipal #2 landfill located in Rochelle, Illinois. The Petitioner, International Union of Operating Engineers, Local 150, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of heavy equipment operators and mechanics employed by the Employer at its landfill. A hearing officer of the Board held a hearing and the parties have filed briefs.

As evidenced at hearing and in the briefs, the parties disagree on two issues: (1) whether the scale operator should be included in the unit; and (2) whether the landfill supervisor should be excluded from the unit as a supervisor and/or managerial employee. The Employer contends that the scale operator should be included in the unit because the scale operator shares a substantial community of interest with the petitioned-for employees and, if excluded, the scale operator would be the only non-unit employee employed by the Employer at the landfill. The Petitioner contends that the scale operator should be excluded because the scale operator does not share a community of interest with the unit. The Employer also contends that the landfill supervisor is a supervisor or managerial employee and should be excluded. The

¹ The Employer's name appears as amended at hearing.

Petitioner contends that the landfill supervisor is a heavy equipment operator with no supervisory or managerial authority and should be included in the unit. I have considered the evidence and arguments presented by the parties and I have concluded that the only appropriate unit must include the scale operator and the landfill supervisor, whom I have found not to be a supervisor or managerial employee.²

I. OVERVIEW OF OPERATIONS

The Employer's owner is ultimately responsible for the landfill operation, although he is not based at the landfill. The landfill supervisor is the highest ranking employee stationed at the landfill. Both the owner and the landfill supervisor possess landfill operator certificates issued by the Illinois Environmental Protection Agency (EPA). Certification requires completion of a test on the EPA regulations covering landfill operations and every landfill in Illinois must have at least one certificate holder on site. The Employer employs four other employees at the landfill: one scale operator and three heavy equipment operators. The Employer employs no mechanics at the landfill; however, the landfill supervisor and the heavy equipment operators all perform varying degrees of mechanical repair and maintenance work on the Employer's equipment. The Employer also utilizes temporary employees employed through a temporary agency to perform routine tasks such as picking up litter, pulling back tarps, and cleaning the shop. No party contends that the temporary employees are employees of the Employer and both parties agree that the temporary employees are appropriately excluded from the unit.

The Employer's landfill is located on approximately 80 acres, 61 of which are permitted to receive waste. The scale house is located at the entrance to the landfill. The scale house

² Although at hearing the Petitioner declined to proceed to an election in any alternate unit, subsequent to the filing of briefs, the Petitioner submitted a letter expressing its willingness to proceed to an election in any unit including the landfill supervisor. In view of the Petitioner's change in position, dismissal of the petition, as urged in the Employer's brief, is not appropriate.

contains the scale operator's counter, an office, a washroom, a computer, a fax machine, and a small area with a coffee pot and snacks. A maintenance storage shed is located approximately 75 yards east of the scale house. The maintenance storage shed is used to service and repair equipment.

Trucks entering the landfill pull directly onto the scale at the scale house. The scale operator weighs the truck and visually inspects its load to ensure that it contains no prohibited materials. If the inspection reveals that the truck's load contains prohibited materials, the scale operator calls the landfill supervisor or one of the other heavy equipment operators. Following the weigh-in and inspection, trucks proceed into the landfill to deposit their waste. Some trailers use a hoist or a walking floor to eject the waste. Trailers without such equipment use the Employer's tipper, a machine that tips up the trailer to a point where the waste falls out the back. One heavy equipment operator, hereafter sometimes referred to as the tipper operator, operates the tipper. The landfill supervisor and the other two heavy equipment operators operate the other landfill equipment, which includes compactors, scrapers, a loader, bulldozers, a tub grinder, spreaders, and tractors. The compactors and bulldozers are used to move the waste away from the tipper and then to spread and compact the waste into as small an area as possible. Other equipment is utilized to remove bulky items, cover the waste, maintain roads, move fencing, and other tasks as needed.

After depositing its load, the waste hauling truck proceeds back to the scale house where it is weighed again to reflect the change in the truck's weight. Weighing a truck on its way out of the landfill determines the amount of waste brought into the landfill by subtracting the truck's weight at arrival from its weight as it leaves the landfill. Any prohibited items brought into the landfill remain in the truck and are brought back out. The scale operator prints out a ticket, has the truck driver sign the ticket, and gives a copy of the ticket to the truck driver. The truck then exits the landfill.

The EPA regulates the landfill's operating hours. The EPA allows the landfill to remain open from 6:00 a.m. to 6:00 p.m. Waste hauling trucks generally enter the landfill between 6:00 a.m. and 4:00 p.m. The landfill is open to the public between 7:00 a.m. and 4:00 p.m. On occasion, the landfill may remain open past 4:00 p.m. to accommodate late arriving trucks.

All landfill employees work similar hours which generally correspond with the hours the landfill is open, although the landfill supervisor and two of the equipment operators generally start an hour earlier so that they can service their equipment and they work ½ hour later than the scale operator. The equipment operators must take a 30-minute lunch break; the scale operator does not. The Employer has a standard benefit package available to all of its landfill employees, including health insurance, retirement, paid vacation and holidays, and a health savings account. All employees are hourly paid and receive time and a half for hours they work in excess of 40 per week. The scale operator's hourly rate is only about 3% lower than that of the tipper operator. The other two equipment operators are paid a significantly higher rate and the landfill supervisor's hourly rate is approximately 1.8% higher than their rate. The landfill supervisor and the equipment operators wear uniforms and are provided with steel-toed boots. The scale operator wears street clothes.

All of the employees have daily contact. The scale operator receives calls concerning incoming loads or other information and relays that information to the landfill supervisor or the other operators. The equipment operators visit the scale house to punch the timeclock, eat lunch, fill water jugs, and use the telephone. Although the scale operator does not operate any of the heavy equipment or perform any other equipment operator or mechanic duties, the landfill supervisor or the tipper operator does operate the scale when the scale operator is absent.

II. UNIT PLACEMENT OF THE SCALE OPERATOR

The scale operator must be included in the unit. The scale operator shares a strong community of interest with the employees in the petitioned-for unit. These employees are

commonly supervised, share similar terms and conditions of employment, have daily contact and, although their work functions and skills are different, their work is functionally integrated. In *Hankins Lumber Co.*, 316 NLRB 837, 849 (1995), the Board included scale employees noting that the weighing of trucks was the first part of the sawmill's production process. In similar circumstances, weigh house employees have also been found to be plant clerical employees whose interests are more closely aligned with production employees than with office clerical employees. *Worth Steel Co.*, 53 NLRB 168, 171 (1943). Thus, the record establishes that the scale operator's interests are closely aligned with those of the employees in the petitioned-for unit. *Hankins Lumber*, supra; *Worth Steel Co.*, supra. Moreover, I note the critical fact that excluding the scale operator from the unit would result in a residual unit of one employee, a result the Board has long found to be undesirable. *United Rentals, Inc.*, 341 NLRB 540, 542 fn. 11 (2004); *North Jersey Newspapers*, 322 NLRB 394, 396 (1996). Accordingly, I shall include the scale operator in the unit found appropriate here.

III. SUPERVISORY STATUS OF THE LANDFILL SUPERVISOR

The Employer contends the landfill supervisor should be excluded from the unit as a supervisor. The traditional test for determining supervisory status used for all employees is: (1) whether the employee has the authority to engage in any 1 of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994).

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital - Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997). Lack of

evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). "[W]henver the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer contends that the landfill supervisor "supervises" all employees at the landfill including the temporary employees and that he has the authority to assign; to responsibly direct employees; to discipline or effectively recommend discipline; and to hire and discharge the temporary employees. The Employer does not contend that the landfill supervisor has any authority with respect to the other indicia set forth in Section 2(11) so those indicia will not be further discussed here. With respect to authority over the temporary employees, the Board has held that an individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, in order to qualify as a supervisor under Section 2(11). *Franklin Home Health Agency*, 337 NLRB 826, 826-7 (2002); *Crenulated Co.*, 308 NLRB 1216 (2002). The temporary employees are employed by a temporary agency and no party contends that they are employees of the Employer. Thus, the landfill supervisor's authority over these employees has no bearing on his supervisory status. However, I will address the Employer's assertions with respect to the temporary employees.

Assignment of Work

The landfill supervisor's role in assigning work lacks the requisite independent judgment and therefore does not demonstrate supervisory status. The landfill employees' roles are generally well-established. The scale operator can only operate the scale and cannot leave her position. The temporaries do not operate the heavy equipment. One equipment operator can

only operate the tipper because of medical restrictions. The Employer's owner admitted that the other two equipment operators are interchangeable. The landfill supervisor testified that he was specifically instructed by the owner to keep two compactors running at all times and to assign the two operators to those compactors. Therefore, the landfill supervisor performs the other duties requiring heavy equipment such as hauling and spreading cover material; removing large items from the open face; watering and cleaning the roads; and grinding yard waste. The owner denied that he instructed the landfill supervisor to assign the operators to the compactors. The owner testified that 80% of the time, only one compactor is necessary and that the landfill supervisor determines specific job assignments and tasks. However, the owner failed to specify what criteria the landfill supervisor would utilize to make specific job assignments to the two remaining operators. Thus, the owner's general statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, supra. Moreover, by his own admission, the two operators are interchangeable. Independent judgment is demonstrated by evidence that an individual has discretion to assign work of differing degrees of difficulty or desirability on the basis of his own assessment of an employee's ability or attitude. See *Palagonia Bakery Co.*, 339 NLRB 515, 535 (2003). No such evidence was presented.

The landfill supervisor also testified that he receives general guidelines from the owner as well as specific instructions for special projects. He testified that the owner regularly changes their method of performing a given task; for example, the owner instructs the operators to change the direction they are pushing the garbage or to move the fences. The owner denies this, stating the landfill supervisor is responsible for these decisions. However, the owner conceded that the operators are very familiar with the work at the landfill and generally know if anything particular needs to be done at a particular time of the day. It is also undisputed that the owner visits the landfill twice daily for at least an hour, which he spends observing the

ongoing operation. He is also in contact with the landfill supervisor by telephone on a daily basis.

The landfill operation is also heavily regulated by the Illinois EPA, which has issued approximately 350 pages of regulations covering what has to be done at the landfill. For example, the regulations require that the waste be compacted and confined to the smallest practical area; that the slope of the operating face not be too steep; that the waste be covered with dirt or some other approved material each night; that road dust be minimized; that fences be utilized to control windblown litter; that windblown litter be picked up daily; that waste not be pushed into water; and that leachate not leak into the ground water. The regulations also control the time frames in which many tasks are to be performed. There is no evidence the landfill supervisor can deviate from these regulations. Where assignment authority is so circumscribed by established company policy or higher authority, it is nonsupervisory. See *Dynamic Science Inc.*, 334 NLRB 391 (2001); *Halpak Plastics, Inc.*, 287 NLRB 700, 706 (1987).

In its brief, the Employer cites a few lines from the EPA regulations as evidence that the regulations do not set forth the specific manner in which certain tasks are performed and therefore the regulations give the landfill supervisor discretion and independent judgment in meeting the EPA standards. Although these regulations are not in evidence, the excerpts cited fail to establish supervisory authority where the record does not contain specific examples of the landfill supervisor exercising independent judgment in following the EPA regulations. The Employer's conclusory statements that the landfill operator uses independent judgment without any specific examples of the use of such judgment, is insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, supra. Similarly, the Employer contends the landfill supervisor uses discretion in determining the timing of tasks to ensure they are completed timely in accordance with the regulations. Again, the record fails to reflect specific examples of the landfill supervisor using independent judgment in determining the timing of

tasks performed by the other employees. Further, work assignments not based on the level of employee skill but on the need to get work completed on time is not indicative of the use of independent judgment. *Esco Corp.*, 298 NLRB 837, 839 (1990).

In addition to their operating duties, the two operators and the landfill supervisor also perform mechanical work on the equipment. The assignment of this work also does not require independent judgment. The landfill supervisor and the two operators, by necessity, must arrive 1 hour before the landfill opens to perform daily maintenance on the equipment as required by the equipment service manuals. The owner instructed that the service manuals be strictly adhered to. If equipment repairs are necessary, the landfill supervisor and/or the operators will make the repairs if they have the expertise; if not, an outside mechanic is called. The decision on whether to call an outside mechanic is made by the landfill supervisor and the operator who is the most experienced mechanic, and does not evidence supervisory authority. *The Washington Post Company*, 254 NLRB 168, 188 (1981). Other decisions are also made by consensus, such as when and where to reposition the tipper or that the video camera should be stored in the tipper and therefore videotaped random load inspections should be conducted by the tipper operator. These decisions are subject to change by the owner. Decisions on major projects, such as construction of new cells, changing the primary work location, or moving roads are made by the owner or professional engineers.

The Employer also contends that the landfill supervisor authorizes overtime. The record does not establish, however, that independent judgment is utilized in the decision to authorize overtime. On occasion, less than once per month, the owner is contacted to approve overtime. The record does not reflect under what circumstances the owner has to approve the overtime or how often overtime is otherwise authorized. The landfill supervisor testified that he was instructed by the owner to keep the landfill open past the normal closing time if trucks were in line at the scale house or if notified by the dispatcher of the Employer's waste hauling

operations that its trucks were on the way. The owner also testified that the landfill supervisor could make the decision to keep the landfill open if requested by other haulers or clients, but no specific evidence was presented that this actually occurred or that the decision required the use of independent judgment. Employees also work overtime in order to ensure that all work is completed in accordance with EPA regulations, such as ensuring the garbage is properly compacted and covered. Other tasks, such as moving the tipper, must be performed when the landfill is not open, and therefore requires the operators to work overtime. There is no evidence the landfill supervisor has the authority to refuse overtime or to allow overtime except when necessary to complete work in accordance with the Employer's instructions and pre-established policies. The ability to assign overtime in accordance with the Employer's pre-established policies does not require the use of independent judgment and does not confer supervisory status on the landfill supervisor. See *Dico Tire, Inc.*, 330 NLRB 1252, 1253 (2000). Moreover, there is no evidence that the landfill supervisor has the authority to compel any landfill employees to work overtime. The limited authority to authorize but not compel overtime does not confer supervisory status. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000).

The evidence is conflicting as to whether the landfill supervisor has the authority to grant time off or approve vacation requests. The Employer's owner testified that the landfill supervisor has the authority to grant time off and approve vacation requests. The landfill supervisor denies this authority. The landfill supervisor testified that on the one occasion he permitted an employee to leave early for a doctor's appointment, he checked with the owner first. He further testified that vacations are approved by the dispatcher of the Employer's waste hauling operations. The evidence does establish, however, that the owner has told the landfill supervisor that operational needs and staffing limits require that only one of the five landfill employees can be off at a time and that approval is routinely given for one employee to be off. Moreover, all employees must submit their time off requests to the dispatcher of the Employer's

waste hauling operations, who can deny those requests. The scale operator testified that on one occasion when she and another operator wanted the same day off, the landfill supervisor told her that the two operators would have to work it out between themselves. The record reflects no instances of the landfill supervisor approving leave requests on his own authority or denying any leave requests. In these circumstances, the Employer has not established that independent judgment is required.

Responsible Direction

The Employer has failed to establish that the landfill supervisor responsibly directs the work of the landfill employees. Responsible direction means the individual is held accountable and responsible for the work of the employees they direct, and exercises significant discretion and judgment in directing these employees. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002).

The owner testified generally that the landfill supervisor is “responsible” for the operation of the landfill; for example, if operators were not properly trained, or fences were not placed in the right spot, the owner would hold the landfill supervisor “responsible” by “say[ing] something” to him. No other specific evidence was presented that the landfill supervisor is held accountable for the performance of the landfill employees. The landfill supervisor has never received any discipline for performance mistakes made by the other employees. There is no evidence the landfill supervisor is evaluated or rewarded based on the performance of the other employees. This lack of evidence is construed against the Employer. *Michigan Masonic Home*, supra.

The Employer also contends that the landfill supervisor is “responsible” because he reports and initially investigates accidents and injuries to the employees at the landfill. However, the landfill supervisor testified that he was simply instructed to report all accidents immediately to the owner and to take no further action. The Employer relies on a single incident that was not reported to the owner in which an operator cut his finger. In this instance, the

landfill supervisor asked the operator if he wanted to see a doctor and the operator said no. This insignificant incident does not negate the mere reportorial nature of the landfill supervisor's authority and therefore does not establish any supervisory authority. See *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Moreover, any senior employee could be expected to seek medical attention for an injured coworker. *Alois Box Co., Inc.*, 326 NLRB 1177 (1998). The Employer presented no other specific instances of the landfill supervisor handling emergencies or unusual circumstances on his own. The landfill supervisor testified that he contacts the owner when problems occur. Further, while the landfill operator is frequently the highest ranking employee at the landfill, this alone does not indicate that the landfill supervisor is "responsible" for the employees at the landfill. The owner visits the landfill twice each day to observe operations; contacts the landfill supervisor by telephone at least once per day; and is generally available to the landfill supervisor if problems arise. Having the owner available in person and by telephone is further evidence that the landfill supervisor does not exercise independent judgment. See *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390, 393 (1989).

The Employer also contends that the landfill supervisor is responsible for resolving employment issues as they arise. The Employer relies on the scale operator's testimony that she occasionally has problems with drivers of the waste hauling trucks treating her rudely as they enter the landfill. She complains to the landfill supervisor, who talks to the driver or to the driver's manager. This is akin to the handling of "squabbles" between employees, which is considered routine and not supervisory. *St. Francis Medical Center – West*, 323 NLRB 1046, 1047-48 (1997).

The Employer also failed to establish that the landfill supervisor exercises significant discretion and independent judgment in directing the employees. As discussed above, the operation of the landfill is highly regulated by the EPA and leaves little room for discretion. The equipment maintenance work is regulated by the service manuals, which the landfill supervisor

was instructed to adhere to. The work performed by the temporaries is clearly routine. The scale operator testified that her job was routine, took 3 days to learn and she has performed the task for 7 years. The operator's jobs are routine as the operators are experienced, trained employees who know what tasks need to be performed. Where tasks are highly regulated, repetitive and well-known to employees, the degree of independent judgment is reduced when directing employees in such tasks. *Franklin Home Health Agency*, supra at 831; *Beverly Health and Rehabilitations Services, Inc.*, 335 NLRB 635, 669 (2001). Moreover, the record contains little evidence that the landfill supervisor even monitors and corrects the work of the employees. The landfill supervisor spends the vast majority of his time operating equipment or working in the shop. The only specific evidence of monitoring was on one occasion, the landfill supervisor told a new operator that he was letting his machine idle too long, that he had to keep it moving. The ability to call attention to a particular task that has not been performed properly generally does not require independent judgment. *Id.*

Discipline

There is conflicting evidence as to whether the landfill supervisor was told he had the authority to discipline employees. The owner testified that he told the landfill supervisor at the time of his hire that he had the authority to discipline employees. The owner provided no further guidance at the time nor does the Employer have any employee guidelines or disciplinary policy. The landfill supervisor denies being told he had the authority to discipline nor does he believe that he has the authority to discipline. The only specific evidence of the landfill supervisor exercising authority to discipline presented by the Employer at hearing concerned the statement to the operator for idling his machine too long as described above, which the owner characterized as an "oral reprimand." The landfill supervisor did not view his statement to the operator as discipline and stated that he simply discussed his concerns with the owner either prior to the incident or after. In any event, no evidence was presented that this "oral

reprimand” lead to any personnel action. To confer supervisory status, the exercise of disciplinary authority must lead to personnel actions without the independent investigation or review of other management personnel. *Franklin Home Health Agency*, supra. Even assuming that the landfill supervisor was told 2½ years ago that he had the authority to discipline, the evidence fails to establish the actual existence of true authority to discipline as opposed to mere titular or theoretical power. See *RMS Foundation, Inc., d/b/a Queen Mary*, 317 NLRB 1303, 1309 (1995); *Lakeview Health Center*, 308 NLRB 75, 78 (1992); *Winco Petroleum Company*, 241 NLRB 1118, 1122 (1979). The landfill supervisor’s belief that he lacks actual disciplinary authority is bolstered by his testimony that he discussed his concerns about the job performance of two temporary employees with the owner prior to taking any action against those employees. In these circumstances, particularly where the testimony is conflicting, the evidence is insufficient to establish that the landfill supervisor has the actual authority to discipline employees. *Northwest Steel, Inc.*, 200 NLRB 108 (1972); *Ten Broeck Commons*, 320 NLRB 806 (1996).

Temporaries

The Employer contends that the landfill supervisor has the authority to effectively hire and fire the temporary employees as well as to assign, responsibly direct, and discipline. As discussed above, the temporary employees are not employees of the Employer and therefore the landfill supervisor’s authority over the temporary employees has no bearing on his supervisory status. *Franklin Home Health Agency*, 337 NLRB 826 (2002); *Crenulated Co.*, supra.

Furthermore, the authority exercised by the landfill supervisor with respect to the temporary employees does not require the exercise of independent judgment and therefore would not meet the requirements set forth in Section 2(11). As previously discussed, the landfill supervisor’s assignment and direction of the temporary employees is routine. Although the

owner testified that the landfill supervisor has the authority to hire temporary employees, the record reflects this authority is merely clerical. The owner has instructed the landfill supervisor to always utilize at least two temporary employees. The record does not reflect whether or not the landfill has ever utilized more than two temporary employees at a time and if so, what criteria is used to determine the number. This lack of evidence is construed against the Employer, the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). If a temporary employee is needed, the landfill supervisor simply calls the temporary agency, which then sends a temporary employee. The landfill supervisor does not interview or have any input into which temporary employee is sent to the landfill.

Although the owner testified generally that the landfill supervisor notified him after the fact that he had sent a few temporaries back to the agency and requested others, the landfill supervisor testified that he had sent back only two temporaries and had done so pursuant to the owner's instructions. On one occasion, the temporary had damaged equipment and the landfill supervisor reported the incident to the owner who then instructed the landfill supervisor to fire the temporary employee. On the other occasion, the temporary was standing around and not working. The landfill supervisor discussed this temporary employee with the owner who then told the landfill supervisor to "make the call." Thus, in these circumstances, the owner's general and conclusionary testimony, contrary to the specific details provided by the landfill supervisor, is insufficient to establish that the landfill supervisor had the independent authority to hire and discharge the temporary employees. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Secondary Indicia

In the absence of primary indicia as enumerated in Section 2(11) of the Act, secondary indicia such as higher pay, an office, or a title, are insufficient to establish supervisory status. *International Transportation Service*, 344 NLRB No. 22, slip op. at 7 (2005); *Carlisle Engineered*

Products 330 NLRB 1359, 1361 (2000). These are merely trappings and do not alone confer any supervisory status on the employee. The fact that the landfill supervisor has access to an office, has been designated by the Employer as the “landfill supervisor,” has used the title “operations manager,” is viewed by the scale operator as the boss,³ and earns more than the other machine operators at the Employer’s landfill are merely secondary indicia and not dispositive of the issue of supervisory status. Moreover, the fact that the landfill supervisor’s hourly differential is so minimal militates against a finding of supervisory status.

The Employer has also claimed that the landfill supervisor’s supervisory status is established by his completion of evaluations of the temporary employees. These evaluations are completed only after a temporary employee has left the landfill and found permanent employment elsewhere. The landfill supervisor characterized these evaluations as “exit interviews.” There is no evidence these evaluations have any impact on the wages or job status of the temporary employees. Authority to evaluate is not one of the indicia of supervisory status set out in Section 2(11) of the Act. *Williamette Industries*, 336 NLRB 743 (2001). Accordingly, when the evaluation does not, by itself, affect the wages or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. *Id.* at 743.

In view of the above, I find that the landfill supervisor does not possess any of the enumerated indicia of supervisory authority contained in Section 2(11) of the Act and therefore is not a supervisor within the meaning of the Act.

IV. MANAGERIAL STATUS OF THE LANDFILL SUPERVISOR

The Employer also contends that the landfill supervisor should be excluded from the unit as a managerial employee. Managerial employees are those who “formulate and effectuate management policies by expressing and making operative the decision of their employer.”

³ The only equipment operator who testified stated that he viewed the owner as his boss and the landfill supervisor as a lead operator.

N.L.R.B. v. Yeshiva University, 444 U.S. 672, 682 (1980). Managerial employees “must exercise discretion within, or even independently of, established employer policy and must be aligned with management,” and they must represent “management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *Id.* at 683. The burden of proving managerial status lies with the party asserting that such status exists. *Allstate Insurance Co.*, 332 NLRB 759, 759 fn. 2 (2000).

The Employer has failed to establish that the landfill supervisor is a managerial employee. The Employer contends that the landfill supervisor is almost exclusively responsible for operating the landfill. However, no specific evidence of the landfill supervisor exercising managerial discretion was presented at hearing. Moreover, as discussed above, the operation of the landfill is heavily regulated and the landfill supervisor’s discretion is further limited by both established Employer policy and daily direction from the Employer’s owner who physically observes the daily operations of the landfill and is generally available by phone. See *Case Corp.*, 304 NLRB 939 (1991) (Engineers were not managerial employees where they lacked any discretion to deviate from employer’s established policies.)

The Employer correctly notes that managerial employees typically hold positions high in the managerial structure. *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). The Employer argues that the landfill supervisor’s reporting directly to the owner supports a finding of managerial status. This reporting structure, however, is simply a result of the small contingent of employees rather than any indication of managerial status.

The Employer also argues that the landfill supervisor has the authority to bind the Employer by contracting out for repair services without prior approval from the owner. The owner testified that the landfill supervisor could authorize repair services up to \$10,000 if necessary to continue operations, although this authority was never discussed with the landfill supervisor. The evidence establishes that the landfill supervisor does authorize the purchase of

routine supplies, repair parts, and consumables such as oil filters and air filters. The invoices in evidence show purchases up to about \$300, but no large purchases, although some invoices are illegible or contain no dollar amounts. The other operators, however, have also purchased necessary repair parts and supplies in the absence of the landfill supervisor. The authority to purchase routine supplies and parts necessary to repair the Employer's equipment does not establish the truly independent discretion necessary for managerial status under the Act. *Sampson Steel & Supply, Inc.*, 289 NLRB 481, 482-83 (1988); *The Washington Post Company*, 254 NLRB 168, 189 (1981). Thus, the Employer failed to establish the landfill supervisor exercises any "discretionary actions that effectively control or implement employer policy." *NLRB v. Yeshiva University*, supra at 683. Accordingly, I find that the landfill supervisor is neither a managerial employee nor a supervisor under Section 2(11) of the Act, and I shall therefore include the landfill supervisor in the unit found appropriate here.

V. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.⁴
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain

⁴ As I have found the landfill supervisor is not a supervisor within the meaning of the Act, the Employer's motion to dismiss the petition because of supervisory taint is denied.

employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁵

All full-time and regular part-time heavy equipment operators including the scale operator and the landfill supervisor employed by the Employer at the Rochelle Municipal #2 landfill in Rochelle, Illinois, EXCLUDING temporary employees employed through a temporary agency, office clerical and professional employees, guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 150, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Subregional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

⁵ I have not included mechanics in the unit, as sought by Petitioner, because the Employer does not employ any "mechanics" at the landfill.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Subregional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in Subregion 33, Hamilton Square, 300 Hamilton Boulevard, Suite 200, Peoria, Illinois 61602, on or before **October 5, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (309) 671-7095 or by electronic mail at Subregion33@nlrb.gov. Since the list will be made available to all parties to the election, please

furnish a total of **two** copies, unless the list is submitted by facsimile or electronic mail, in which case no copies need be submitted. If you have any questions, please contact Subregion 33.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **October 12, 2006**. The request may **not** be filed by facsimile.

E-Filing: In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Subregional Office's

initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Dated: September 28, 2006
at: St. Louis, Missouri

/s/ Ralph R. Tremain
Ralph R. Tremain, Regional Director, Region 14
National Labor Relations Board
Subregion 33