

Tri-City Motor Company, Inc. d/b/a Auto West Toyota, Employer-Petitioner and East Bay Automotive Council, for and on behalf of East Bay Automotive Machinists Lodge No. 1546, a/w Machinists Automotive Trades District Lodge No. 190 of Northern California; Auto, Marine and Specialty Painters Union, Local No. 1176; and Teamsters Automotive Employees Union, Local No. 78. Case 32-RM-452

30 June 1987

## DECISION AND DIRECTION

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held 2 May 1986<sup>1</sup> and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 8 against the Joint Union Representative (the Union), with 3 challenged ballots.<sup>2</sup>

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

The hearing officer found that Mark Goularte was a supervisor within the meaning of Section 2(11) of the Act and recommended that the Union's challenge to Goularte's ballot be sustained. The Employer excepts, contending that Goularte possessed none of the indicia of supervisory status enumerated in Section 2(11) of the Act. We find merit in the Employer's exceptions and conclude that the Union has not met its burden of establishing that Goularte was a supervisor.

The Employer operates an automobile dealership, which includes a service department and a parts department.<sup>3</sup> Mark Goularte had been the parts manager for the dealership's previous owner, King Arthur Toyota, and the Employer retained him as parts manager when it purchased the dealership in September 1985. Goularte continued in this position until he quit in approximately June 1986. In addition to Goularte, there were five other employees in the Employer's parts department, all of whom had worked for King Arthur Toyota and

had at least 5 years' experience. Three of these employees worked exclusively as partsmen, one worked as a parts delivery driver, and one, Randy Johnson, divided his time between working as a partsman and engaging in off-premises sales of parts to various businesses. Goularte spent 65 to 70 percent of his time performing the same duties as other parts department employees; the remainder of his time was spent maintaining and ordering an adequate supply of parts and conducting the department's inventory.

During Goularte's tenure with the Employer, there were no hirings, firings, significant discipline, or evaluations of the parts department employees. Moreover, there is no evidence that Goularte had the authority to hire, fire, discipline, or evaluate employees while with the Employer. When the Employer began operations, it did not consult Goularte regarding its decision to hire the other former King Arthur parts employees, even though Goularte was the ostensible supervisor of those employees while at King Arthur.

Approximately 1 month after the Employer commenced its business, Goularte was told by Don Carvalho,<sup>4</sup> the Employer's parts and service coordinator, that if Goularte or other parts department employees wanted time off or to leave work early, Goularte would have to seek approval from Carvalho prior to granting such requests. This was a change from the way Goularte operated as parts manager at King Arthur Toyota because at King Arthur Goularte could leave work when he wanted and could grant time off to the parts employees. Subsequently, on the occasions when Goularte left work early while employed by the Employer, Carvalho reminded Goularte that he was not to do that. Goularte later discussed Carvalho's remarks with Bob Charles, the Employer's part owner and general manager, who reaffirmed that the service coordinator was "in charge" of the service and parts departments. Goularte understood "in charge" to mean that the service coordinator was the immediate supervisor of those departments.

Carvalho was replaced by Farrell (Corky) Morrow<sup>5</sup> as service coordinator about 1 March. Sometime after 1 March, but before the 2 May election, Morrow reiterated to Goularte that, as service coordinator, Morrow was in control of the parts department and would handle all personnel matters.<sup>6</sup> When a parts employee asked Goularte

<sup>1</sup> All dates are 1986 unless stated otherwise.

<sup>2</sup> During the hearing the Employer and the Union withdrew their respective objections to the election. The Union further withdrew its challenges to two of the three challenged ballots. The hearing officer, in view of his recommendation that the challenge to the remaining ballot be sustained, found that the above two challenged ballots were no longer determinative and they should not be opened and counted.

<sup>3</sup> The Employer is one of several automobile dealerships operated by a parent company, TASHA Corporation.

<sup>4</sup> The hearing officer inadvertently referred to Carvalho as "Carvello."

<sup>5</sup> The hearing officer inadvertently referred to Morrow as "Morro."

<sup>6</sup> The parts and service coordinator had an office in the Employer's facility but shared a desk in the parts department with Al Goularte, the assistant parts manager.

for 2 days off, Goularte told him that he had to check and see if it was allowable. Goularte advised Morrow of the request, and Morrow said the employee could take the days off. There is no evidence that Goularte independently granted time off to employees while he was working for the Employer. Furthermore, Goularte did not request employees to work overtime; rather, it was Morrow who made such requests.

As the Employer's parts department manager, Goularte was paid a salary and received no overtime pay. The hearing officer found that all the parts department employees were paid on an hourly basis and received overtime. The record indicates, however, that employee Randy Johnson was paid a salary and also received overtime. Moreover, all department employees, including Goularte, were eligible for a "bonus" payment that was based on the department's net profit. The manager was paid 4 percent of the department's entire net profits, while the other employees received from 2 to 3 percent of the department's net profits over \$15,000.<sup>7</sup> The hearing officer found that there was a substantial difference, averaging approximately \$700 per month, between these two plans. The Employer contends, however, that there was no credible basis for the hearing officer to find an average monthly difference of \$700 because Goularte testified that his bonus varied between a low of \$350 to \$400 to a high of \$800 to \$900. We find merit in the Employer's exception, as it appears that the hearing officer's finding is based on the testimony of Al Goularte, who became parts manager after Mark Goularte quit. Although Al Goularte testified that the average bonus for partsmen was \$200 per month and that the average bonus for parts managers was \$900 per month, there is no evidence that Mark Goularte averaged a \$900 bonus per month.

The hearing officer found further differences in the terms and conditions of employment between Goularte and the other parts employees. Thus, he found that Goularte, unlike the other employees, did not have to fill out a timecard, and that Goularte had the use of a demonstrator vehicle. The record shows, however, that although only Goularte appeared to have regular use of the parts van or truck, the other parts employees were allowed to take home the van or truck when they needed it for personal use.

Approximately 4 to 6 weeks after the Employer began operations, it instituted a new schedule

whereby the parts employees other than Goularte and the parts delivery driver worked 4 hours overtime on Saturday mornings. The hearing officer found that while an uncomplicated and regular rotation of Saturday assignments was quickly devised, Goularte was responsible for that scheduling.<sup>8</sup>

Sometime before 1 February, Goularte suggested to the Employer that the compensation package for the parts employees be improved. The record shows that Goularte informed TASHA Corporation Parts and Service Coordinator Charles Andresen that because the Employer's sales were lower than those of King Arthur, the employees were not receiving bonuses under the current bonus plan. Andresen requested some documentation, and Goularte gave him some financial statements from King Arthur. Andresen then formulated a new compensation package without any input or recommendations from Goularte. The new compensation package, effective 1 February, was reduced to writing and distributed to the parts employees over the signature of Goularte and another individual.<sup>9</sup> Either Andresen or Carvalho asked Goularte to sign the new plan and distribute it to employees, which Goularte did. Furthermore, in September 1985 Goularte and Andresen signed a separate compensation package for employee Johnson.<sup>10</sup>

Goularte attended two management meetings which were held at the TASHA Corporation's facility and were attended by parts and service managers for various TASHA dealerships, as well as by Charles Andresen. The topics discussed at both meetings were past sales, sales trends, sales training, and customer service. Goularte testified that these meetings were like a "pep talk."

Prior to the union election scheduled for 17 March,<sup>11</sup> Goularte met with Bob Charles, the Employer's part owner and general manager, and Morrow. At this meeting, Charles asked Goularte about the probable votes of each of the parts department employees. Also discussed at this meeting was whether the parts employees were aware of the purported benefits of the Employer's "flat rate" compensation system compared to a traditional

<sup>8</sup> We note that in so finding, the hearing officer relied in part on events which occurred after Goularte was no longer employed by the Employer. Such events do not affect our assessment of the authority, if any, exercised by Goularte while he was the Employer's parts manager.

<sup>9</sup> When shown the compensation package at the hearing, Goularte testified that the other signature might be that of Don Carvalho, the parts and service coordinator. The other signature is illegible and we find that the identity of this other signer has not been established.

<sup>10</sup> Goularte's signature was over the title "Dept Mgr.," Andresen's signature was over the phrase "TASHA approval."

<sup>11</sup> An election was held 17 March. Subsequently, pursuant to stipulations on objections and challenges executed by the Employer and the Union, the rerun election at issue here was held 2 May.

<sup>7</sup> The hearing officer incorrectly found that the parts manager received 4-1/2 percent of the department's net profits, and that the other department employees were paid a percentage of the department's net profits over \$20,000.

hourly wage system. Similarly, prior to the 2 May election, Goularte was again asked by Charles about the probable votes of the parts employees.

The hearing officer found that Goularte was a supervisor within the meaning of Section 2(11) because he had the responsibility for managing the operation of the parts department, as evidenced by his attendance at management meetings conducted by TASHA Corporation, as well as his responsibility for overseeing the day-to-day operation of the department. In this latter regard, the hearing officer noted that Goularte was responsible for maintaining and ordering an adequate supply of parts and for conducting the department's inventory. To the extent that Goularte's responsibility regarding personnel matters was reduced by the Employer's parts and service coordinators, the hearing officer stated that such a reduction was never communicated directly to the employees and did not involve nonpersonnel matters. Further, the hearing officer found that Goularte was responsible for scheduling the parts employees for Saturday morning overtime work. The hearing officer also noted that Goularte's supervisor, the parts and service coordinator, did not have an office in the parts department and did not routinely engage in direct supervision of the parts department operation. The hearing officer further found that Goularte's supervisory status was evidenced by Goularte's successfully recommending that the parts employees' compensation package be improved, by the Employer's asking Goularte how each parts employee would probably vote in the upcoming Board elections, and by Goularte's superior compensation relative to the other parts department employees. The hearing officer also noted that Goularte's vested interest in running a profitable parts department indicated that his interests were clearly aligned with those of the Employer. The Employer contends, to the contrary, that Goularte possessed none of the supervisory indicia specified in Section 2(11). We agree with the Employer for the reasons set forth below.

It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status on an employee,<sup>12</sup> provided that authority is exercised with independent judgment on behalf of management and not in a routine manner.<sup>13</sup> Thus, the exercise of some "supervisory authority" in a merely routine, clerical, perfunctory, or sporadic manner

does not confer supervisory status on an employee.<sup>14</sup>

Contrary to the hearing officer, we conclude that Goularte possessed none of the supervisory indicia enumerated in Section 2(11). Regarding Goularte's attendance at meetings conducted by TASHA Corporation, we agree with the Employer that the hearing officer erred in relying on Goularte's attendance as evidence of supervisory status. At the two management meetings that Goularte attended, all that was discussed were past sales, sales trends, sales training, and customer service. Goularte testified that these meetings were like a "pep talk." There is no evidence that personnel matters or other issues relating to supervising a department were discussed. Thus, we find that Goularte's attendance at these meetings does not indicate that he possessed supervisory authority.

Similarly, Goularte's responsibility for maintaining and ordering an adequate supply of parts and conducting the department's inventory is not evidence of his supervisory status, as such activities are not included among the supervisory indicia of Section 2(11). Further, the taking of inventory was a routine matter and Goularte exercised no significant independent judgment regarding it. He could decide when to take inventory, but only within the timeframe set by the Employer. Thus, the inventory requests were initiated by Morrow or Charles and they told Goularte the ultimate date by which the inventory had to be completed.

Regarding the hearing officer's finding that Goularte was responsible for scheduling employees for Saturday overtime work, the record shows that Goularte suggested to the employees that they rotate the Saturday work unless one employee wanted to work more than the others, and then Goularte asked for volunteers to start working on Saturdays. The employees volunteered which Saturday they would begin working, and a rotation system was devised which Goularte wrote on a calendar. The employees later switched their Saturday assignments among themselves without clearing such changes with Goularte. Thus, there is no evidence that Goularte himself determined which employees would work on which Saturday. Rather, Goularte simply suggested to the employees that they rotate the work and the employees adopted this suggestion, and Goularte then wrote the rotation system on a calendar. Such actions by Goularte do not indicate that he had the authority to "assign" the Saturday work; rather, his actions

<sup>12</sup> See *George C. Foss Co.*, 270 NLRB 232 (1984), *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), cert. denied 335 U.S. 908 (1949).

<sup>13</sup> See *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981)

<sup>14</sup> See *Chicago Metallic Corp.*, 273 NLRB 1677 (1985); *Advanced Mining Group*, 260 NLRB 486, 507 (1982).

were routine and ministerial, and thus did not demonstrate supervisory authority.

Regarding Goularte's role in recommending that the parts employees' compensation package be improved, we find, contrary to the hearing officer, that Goularte's actions in this respect do not establish supervisory status. Goularte's only role in the formulation of the new package was to bring the problem of employees not receiving bonuses to Andresen's attention, provide some data, sign the package at the Employer's request, and distribute the package. Goularte did not successfully recommend how the old package was to be changed, and his signing the package was simply a ministerial act. To the extent that his initial suggestion to Andresen caused the change, we do not find that fact in itself sufficient to show supervisory status and we note that Goularte's suggestion was not part of a regular review of the employee's compensation. Further, there is no evidence that Goularte had any role in formulating the separate compensation package for employee Johnson, even though both Goularte and Andresen signed the package. Goularte testified that Andresen had asked him to sign the plan and he did so, and that apparently was the extent of Goularte's involvement.

The hearing officer also considered significant the fact that the Employer asked Goularte at least twice how each parts employee would probably vote in the upcoming union elections. Contrary to the hearing officer, we find that the Employer's asking Goularte such questions does not demonstrate Goularte's supervisory status. Although this incident may well indicate that the Employer trusted Goularte, it is not probative of whether or not Goularte possessed the supervisory indicia of Section 2(11). Further, we do not agree with the hearing officer's reliance on his finding that Goularte had an "obvious vested interest" in running a profitable parts department (presumably based on the bonus system discussed above) as support for a conclusion that Goularte's interests were "clearly aligned with those of the Employer" and that he therefore was a statutory supervisor. In this regard, we note that based on the bonus system all parts department employees had an interest in the profitability of the department. Moreover, the hearing officer placed undue reliance on Goularte's "superior compensation" as compared to the other parts

employees. Although an individual's compensation is a factor considered by the Board in assessing supervisory status, it is a "secondary indicium" of supervisory status and not determinative of the issue.

Finally, the hearing officer noted that the parts and service coordinator's office was not located in the parts department and found that the coordinator did not routinely engage in direct supervision of the parts employees. Thus, the hearing officer concluded that there was no day-to-day supervision of the parts employees by the Employer's admitted managers. Goularte testified, however, that the parts and service coordinator would come into the parts department every morning to "say hello," and occasionally would give Goularte ideas to "try to help things along." Goularte also testified that in terms of the parts employees knowing what work they were to do, they "pretty much . . . knew what to do." Because each of the parts employees had at least 5 years of experience, and in view of the routine nature of the parts department jobs, we find merit in the Employer's position that little supervision of the employees was required. Moreover, to the extent that actual supervision was needed, such as for granting time off and assigning overtime, the parts and service coordinator was sufficiently close to perform such supervisory functions and, as noted above, in fact exercised the authority to grant time off and to assign overtime.

In summary, the factors relied on by the hearing officer, when reviewed in light of the record, are insufficient to establish that Goularte possessed or exercised any of the indicia of supervisory status enumerated in Section 2(11). Therefore, contrary to the hearing officer, we shall overrule the challenge to Goularte's ballot. Accordingly, we shall direct that Goularte's ballot and the ballots of the two remaining employees, the challenges to which have been withdrawn, be opened and counted.

#### DIRECTION

It is directed that the Regional Director, within 10 days from the date of this decision, open and count the ballots cast by Mark Goularte, Randy Johnson, and John Blakely and prepare and cause to be served on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.