

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

ASPLUNDH TREE EXPERT CO.¹

Employer

and

Case 11-RC-071606²

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 342**

Petitioner

APPEARANCES:

Kenneth A. Jenero, Attorney, of Chicago, Illinois, for the Employer
John Murphy, of Franklin, North Carolina, for the Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record³ in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
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.

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

² This case was transferred to the undersigned pursuant to the interregional assistance program for decision writing only, under OM 03-77.

³ Both parties submitted timely briefs, which were duly considered.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

The Petitioner seeks to represent a unit consisting of approximately nine full-time and part-time working foremen or crew forepersons⁴, groundmen, climbers and bucket operators (crew members) employed by the Employer to perform tree trimming services on the property of Northstate Communications in the High Point, North Carolina, area.

The Employer contends that the crew forepersons are supervisors within the meaning of Section 2(11) of the National Labor Relations Act (the Act), and should not be included in the unit. The Petitioner contends that they are not supervisors under the Act, and should be included in the unit. Both the Petitioner and Employer agree that any unit found to be appropriate should include all full-time and part-time groundmen, climbers and bucket operators (crew members) employed by the Employer to perform services on the property of Northstate Communications in the High Point, North Carolina, area, and should exclude all other employees, including office clerical employees, confidential employees, and guards, professional employees and supervisors as defined in the Act.

I conclude that the crew forepersons are supervisors as defined in the Act with respect to their authority to responsibly direct employees and assign tasks, their ability to evaluate employees' job proficiencies, which can result in promotion to a higher paid position, and by virtue of their authority to discipline employees up to and including discharge.

Collective Bargaining History

There is no history of collective bargaining regarding any of the involved employees. The Petitioner is part of the 10th District of the International Brotherhood of Electrical Workers (IBEW), AFL-CIO. There are currently no locals within the 10th

⁴ The parties stipulated that the terms "working foremen" and "crew forepersons" refer to the same individuals; however, the Employer stated that by so stipulating, it was not conceding that the term "working foremen" was the appropriate title for the employees at issue, or that it is an adequate description of the job classification. The term "crew foreperson" will be used throughout this decision.

District that have a collective bargaining relationship with the Employer.⁵ The Employer has about 70 collective bargaining agreements with various unions across the United States, covering about 30-35% of its workforce. The Employer's labor relations manager, John Dettle, testified that many of the Employer's collective bargaining agreements include crew forepersons in the bargaining units, and that the Employer has the same LSQS books in those locations that it does in the unit at issue in this case. However, with the exception of the Local 702, IBEW agreement covering a unit in Illinois, the record does not reflect whether all of the Employer's policies are the same in its represented units as they are in the location at issue in this matter. Dettle testified that the crew forepersons in Illinois have less involvement in employee discipline than the crew forepersons at issue in the instant petition, and the general forepersons in Illinois supervise fewer crews than the general foreperson in the instant matter.

The Employer's Operations

The Employer is headquartered in Willow Grove, Pennsylvania. It provides tree clearance services to utility companies throughout the United States, and is organized by regions. The Northstate property at issue in this matter is in Region 49, which includes parts of North Carolina. Each region has a regional manager, supervisor(s), general foreperson(s), crew forepersons and crew members. The Employer has four types of crews: bucket crews, conventional crews, mowing crews and super crews. The three crews at issue in this case are three-person bucket crews. Each bucket crew consists of a crew foreperson, a climber and a groundman. The three crew forepersons assigned to the crews are Kenneth Roten, Lonnie Patterson and Michael Turner. The Northstate crews meet at the Northstate Communications office each morning.

The Northstate Communications crews report to general foreperson Mann McMillan. McMillan has been the general foreperson since June 2011. Nathan Dorsett was the general foreperson prior to McMillan. He reported to McMillan, who was a regional supervisor at that time. Dorsett testified that his duties were generally the same as McMillan's. McMillan does not have an office, but works out of his truck. In addition to the three Northstate Communications crews, he oversees nine crews working for other customers. McMillan reports to supervisor Roger Skenes.⁶ His office is in Greensboro, North Carolina. Barry Sudereth is the regional manager and vice-president of Region 49. His office is in Charlotte.

⁵ Local 1912, IBEW, which is within the Petitioner's 10th District, represented the Employer's employees in and around Winston Salem, North Carolina, at one time; however, that collective bargaining relationship was terminated. The Petitioner's witness was unable to recall whether or not Local 1912 represented any crew forepersons employed by the Employer.

⁶ The Petitioner and Employer stipulated that general foreman Mann McMillan and supervisor Roger Skenes are both supervisors as defined in Section 2(11) of the Act, and should not be included in any bargaining unit found to be appropriate.

The crews that McMillan oversees are spread over a fairly large geographic area in the state of North Carolina. He estimated that he spends about 45 minutes a week with each crew, and may sometimes go three weeks without visiting a crew in the field. In addition to visiting the crews in the field, he meets with the Northstate crews at the Northstate office at the beginning of their shift once or twice a week to review safety matters. McMillan processes employment applications, maintains employee files, does final certifications on crew member proficiencies, audits paperwork turned in by the crew forepersons, trains the crew forepersons, services existing customer accounts, and makes sales pitches to potential new customers regarding the services the Employer offers.

Crew Forepersons

The Northstate crew forepersons spend the entirety of their work day with the bucket crews. The crew foreperson is responsible for driving the truck to the job site. The Employer has several manuals and handbooks that describe its employees' job duties and responsibilities. These include an employee handbook, Line Clearance Qualification Standards (LCQS) booklets for each position, a foreperson's manual, and a regional policy manual. These documents are distributed to employees, and are kept on the Employer's trucks at all times. The crew foreperson must be fully proficient in all of the classifications in the crew over which he or she is foreperson. The crew forepersons are qualified for their positions through on-the-job training and testing.

The crew forepersons are scheduled to arrive at the Northstate Communications office a half hour in advance of the rest of the crew. The crew forepersons meet with Northstate Communications personnel in the morning and receive the crew work assignments for the day. The customer provides the crew forepersons with a map that shows where it needs line clearance work performed. The crew forepersons are then responsible for planning how the work should be completed and conducting an initial job briefing with the crew regarding what work they will be performing, whether there are potential safety hazards, and what equipment and procedures will be used. The crew foreperson reports directly to Northstate Communications when a job is completed. The customer may require a crew to discontinue work depending on weather conditions; if this occurs, the customer communicates directly with the crew foreperson.

Assignment and Direction of Work

After receiving the work assignment from Northstate, the crew forepersons conduct a job briefing. The LSQS booklet for crew forepersons directs crew forepersons to plan the day's work so that it can be completed in a safe and efficient manner to prioritize the tasks associated with the job, to ensure that they have the

right tools and qualified employees available, to give clear and detailed information to the crew members regarding the work to be done, to ensure that crew members have enough work to do and are not idle, and to have a plan for appropriate work to perform in case of bad weather. The LSQS booklet also instructs the crew foreperson to distribute the workload fairly among the members of the crew.

The crew forepersons are required to conduct a job briefing with their crew members at the start of the day and after the crew's midday break. In addition, they must conduct a job briefing if any significant change occurs during the work day that might affect the safety of the crew. The job briefing must identify the hazards associated with the crew's work assignment and the weather and environment conditions that may impact the crew and its work; identify such energy source issues as minimum approach distances and outage procedures; describe the equipment and tools to be used, the sequence in which work will be performed, and the employees who will perform each task. The LSQS requires the crew foreperson to give "very specific" instructions to crewmembers, which may "require pointing out specific tasks and rehearsing what needs to be done." The job briefings are documented on a job briefing form. The completed form must be signed by the crew forepersons and initialed by all of the crew members after each briefing.

During the course of the workday, the crew foreperson is responsible for telling crew members what jobs to do, and when and how to do them, correcting crew members if they perform work incorrectly, and ensuring that the crew is following the proper safety guidelines. The crew foreperson is responsible for adapting the crew's job briefing to any changes in weather or other conditions, and assessing which employees are qualified to do which jobs, based on their training and experience. Crew forepersons can be, and have been, disciplined by the Employer for failing to properly direct the work of their crew. The record includes examples of discipline issued to crew forepersons for leaving a job site with their crews without permission, and for failing to properly set up a drop zone.

A general foreperson may override the decisions of the crew foreperson. The record includes testimony from a crew foreperson that McMillan specifically directed his crew member's work, and finally took over the job, when his crew was assigned to a storm cleanup project in New York City. However, the record evidence shows that the general foreperson is rarely present with the crews in the field, and that the crew foreperson directs the work of the crew the majority of the time.

Training and Evaluation

The LSQS for each classification are contained in a booklet specific to that classification. All employees receive a copy of the LSQS for their position.

Employees are not allowed to work unless they have their LSQS booklet with them. The LSQS contains the career path for each classification. The groundman LSQS, for example, has a flow chart showing possible progression to climber trimmer trainee, bucket operator, or specialized equipment operator, up to foreperson. The employee must work through sets of critical tasks, which include on-the-job (OJT) proficiency activities and final proficiencies.

As a precursor to an employee being certified as proficient in his or her job, the crew foreperson must sign off that he or she is proficient in each of the OJT proficiencies listed in the LSQS. The crew forepersons observe employees on the crews performing various tasks, then, when appropriate, initial that the crewperson is proficient in a specific task. The LSQS booklet instructs the crew forepersons to review each task in detail with crew members, show them how the task is done, observe them performing the work, immediately correct any errors in technique, and continue to observe the employees' work once job knowledge has been demonstrated.

The crew foreperson is responsible for determining what tasks a trainee can do, how quickly the trainee can demonstrate the OJT proficiencies, and for deciding when an employee has demonstrated proficiency in a task. If an employee has started his or her LSQS checklist for a task, he or she may perform that type of work, but is not considered qualified to do it on his or her own until the crew foreperson signs off on the proficiency checklist. A crew foreperson testified that he shows crew members how to perform a task, and initials that he demonstrated the task. He then observes the employee's work until he sees that the employee is proficient in performing it, and then initials the employee's book to indicate that the employee is proficient.

Once the crew foreperson has signed off on all of the tasks in the LCQS, he or she will contact the general foreperson, who is responsible for signing off on the employee's final proficiency forms. An employee cannot achieve final proficiency until the general foreperson signs the final proficiency form. The general foreperson does not independently observe the employee's work performance before signing the form, but instead spot checks the employee by asking questions. The form contains a list of questions that the general foreperson must ask the employee before signing off that the employee is proficient in that task. An employee may not move on to another position until he or she has completed the final proficiencies for his or her existing job. If an employee is unable to demonstrate proficiency in the tasks required of his or her position in the LSQS, the employee may be let go.

Promotions and Wage Increases

Employees cannot progress from one position to another unless they receive final proficiency certification under the LCQS. As noted above, an employee cannot receive this certification unless the crew foreperson certifies that the crew member

has met all of the OJT requirements contained in the LSQS for his or her position. When an employee is certified as fully proficient in a classification, the crew foreperson may recommend that employee for a higher graded position. McMillan testified that if a crew foreperson recommended to him that an employee be promoted to an available position, he would promote the employee without conducting any additional investigation into the employees' qualifications.⁷

A crew foreperson may recommend to the general foreperson that an employee receive a wage increase. McMillan testified that when a crew foreperson recommends that a crew member receive a raise, his only role is to verify the pay rates for the job classification to determine if a higher pay rate is available within the classification. He does not do any independent investigation into the employees' work performance to determine whether a merit wage increase is warranted. A crew foreperson testified that he told McMillan that an employee on his crew wanted a pay raise, but did not indicate to McMillan whether or not that employee was doing good work. McMillan came to the job site and asked how long the employee had been working on his crew. The crew foreperson told him, and McMillan filled out a wage increase form for the employee. When an employee is due an automatic wage increase, for instance because the employee moved to another crew with a higher pay grade, the general foreman may increase the employee's hourly wage without the input of the crew foreperson.

Discipline

As part of the LSQS for each position, employees are provided with an organization chart. That chart describes the responsibilities of the crew foreperson, and states that the crew foreperson is responsible for disciplining employees who violate safety rules. The employee handbook states that the crew foreperson or general foreperson may take disciplinary action against an employee, up to and including discharge. The Employer's disciplinary forms contain check boxes to identify the violation, along with a space to describe the violation. Crew forepersons, including the crew forepersons involved in this matter, fill out these forms, sign the disciplinary forms under the words "Issued By," and give the form to the affected employee.

The crew forepersons exercise discretion as to whether an employee should be disciplined, or if counseling or coaching the employee would be more appropriate than discipline. The Employer does not have a policy that outlines the number of times that an employee can be tardy or absent before he or she is written up. The crew forepersons are responsible for determining whether or not an employees' conduct

⁷ A groundman testified that he was denied a promotion into a climber position by general foreperson Nathan Dorsett even though his crew foreperson recommended it. However, the record indicates that he was denied the promotion because he was not far enough along in completing the tasks in his LSQS book.

merits disciplinary action. The Employer maintains a four-step disciplinary policy, but these steps may be bypassed by a crew foreperson in the case of a serious violation of safety or other rules. McMillan testified that the crew forepersons are not required to notify the general foreperson prior to issuing discipline to a crew member, although they may do so. He estimated that the crew forepersons consult him prior to issuing discipline approximately 5% of the time.

A crew foreperson testified that he never issues discipline without first consulting with his general foreperson, and that he has been denied permission to discipline employees by his general foreperson in the past. He testified that Nathan Dorsett, who served as general foreperson before McMillan, told him not to fire an employee who had been written up for absenteeism several times. Dorsett testified that he told the crew foreperson that he would handle the situation, and that Dorsett docked the employee's pay, which resulted in the employee becoming a voluntary quit. The crew foreman recommended that another employee be discharged; that employee was laid off pending retirement. After McMillan took over for Dorsett, the crew foreman called MacMillan to report that an employee was not at work, and McMillan instructed him to issue a disciplinary notice to the employee. Another employee was transferred to a different crew after the crew foreman informed McMillan that the employee had performance problems.

The general foreperson receives a copy of the discipline after it is issued to the crew member. The general foreperson is not present when discipline is issued to crew members, and does not sign off on the discipline forms. The record evidence shows that discipline has been issued to employees by crew forepersons for a variety of infractions, including coming to work late, leaving gear on a job site, talking on a cell phone while working, and using foul language in front of a customer. McMillan testified that he has never overturned a discipline issued by a crew foreperson. There is no evidence of any written policy requiring the crew forepersons to contact the general foreperson for approval prior to issuing a disciplinary notice to an employee.

Hiring and Transfers

According to McMillan, when there are job openings available, he asks the crew forepersons for their recommendations. If the crew foreperson recommends someone, he or she will give the potential candidate a pre-employment application, which, upon completion, is sent to McMillan. McMillan testified that he does not interview applicants that are referred to him by the crew forepersons. He interviews applicants who come in off the street, and applicants who are referred by crew members⁸, but trusts the judgment of the forepersons with regard to the applicants

⁸ A groundman testified that he was hired on the recommendation of a crew member, without having an interview. However, the general foreperson who hired him was not McMillan, and there is no evidence on the record that the general foremen routinely hire employees that are recommended by crew members.

they recommend, and hires the candidate if he or she passes the required background checks.

A crew foreperson testified that he referred someone for employment, but that person was initially passed over by the general foreperson, and another employee was put on his crew instead. The employee he recommended was hired by the Employer, but not until two months after he made the recommendation. He also testified that employees have been transferred on and off his crew without his input or recommendation.

Other Supervisory Indicia

Employees are not required to wear uniforms while in the field, but are required to wear hard hats. The crew forepersons wear white hard hats, and the crew members wear orange ones. The crew forepersons are responsible for completing numerous forms throughout the work day, week and month. These forms include job briefings, daily vehicle inspections, records of labor and equipment hours used, lift inspection forms, time sheets, expense reports, weekly safety meeting documentation, and safety poster documentation, among others. Finally, the crew forepersons earn at least \$1.40 more per hour than other employees on the bucket crews.

Analysis

The only issue in this matter is whether or not the crew forepersons are supervisors as defined in the Act. Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

This provision is to be read in the disjunctive; thus any of the enumerated powers is sufficient to confer supervisory status, so long as the authority is held in the “interest of the employer” and exercised with the use of “independent judgment.” *Kentucky River Community Care*, 532 U.S. 706, 713 (2001).

Supervisory status may be shown if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend the same. The burden

of proving supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Accord *Kentucky River*, 532 U.S. at 711-712. Purely conclusionary evidence is not sufficient to establish supervisory status. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

The record supports a finding that the crew forepersons exercise supervisory indicia under Section 2(11) of the Act with respect to their authority to responsibly direct employees and assign tasks, their authority to evaluate employees, which may result in promotion, reward and/or termination, and their authority to discipline employees up to and including discharge.⁹

In *Oakwood Healthcare*, supra, the Board interpreted the 2(11) language “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible ... and carried out with independent judgment.” *Oakwood Healthcare*, supra, at 691. The Board further held that, for direction to be responsible under Section 2(11), the person directing the performance of a task must be accountable for its performance. *Id* at 691-692. To establish accountability for purposes of responsible direction, “it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id* at 692. Evidence of actual accountability must be presented to prove responsible direction. See *Alstyle Apparel*, 351 NLRB 1287, 1287 (2007); *Golden Crest Healthcare Center*, supra.

In *Oakwood Healthcare*, supra, the Board held that “assign,” for purposes of Section 2(11), means the “designation of significant overall tasks to an employee, not ... ad hoc instruction that the employee perform a discrete task.” *Oakwood Healthcare* at 689. As the Board has noted “[t]o establish the authority to assign, moreover, it must be shown ‘that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken.’” (emphasis in original).

⁹ I find that there is inadequate evidence to establish that the crew forepersons can effectively recommend that an employee be hired. The authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *DirectTV LLC*, 357 NLRB No. 149 (Dec. 22, 2011), citing *Children's Farm Home*, 324 NLRB 61, 61 (1997). While McMillan testified that he hired employees upon the recommendation of the crew forepersons without the need for an interview, and a crew foreperson testified that someone he recommended was hired based solely upon his recommendation (albeit two months after he recommended him), the record evidence does not establish that this is the Employer’s regular policy, or that hiring recommendations received from crew forepersons are treated differently from hiring recommendations received from crew members.

Rockspring Development, Inc., 353 NLRB 1041(2009), quoting ***Golden Crest Healthcare Center***, supra, at 729.

I find that the crew forepersons exercise considerable discretion in the course of assigning work and directing their crews. After communicating with the customer and receiving a map of the work the customer wants done each day, the crew forepersons are responsible for determining how that work should be done, and which employees should perform each task. The general foreperson plays no role in this process. The record shows that each day's work is different, and that the crew forepersons are required to exercise discretion in the manner in which they choose to complete their assigned work.

The crew forepersons are responsible for conducting at least two job briefings per day with the employees on their crews. After the employees have received their initial job briefing, and the crews are in the field, the crew forepersons are responsible for ensuring that the bucket crews complete all the work outlined in the job briefing. The crew forepersons must adjust to changing conditions during the day, motivate the employees to complete their assigned tasks, and monitor whether they are performing them correctly. While the general foreperson may occasionally direct the work of the crew, he is rarely on the work site, and the job of ensuring that the work is completed falls to the crew foreperson.

I further find that the crew forepersons evaluate the members of their crew based on their observations of their work, and that these evaluations are used for promotions and accompanying wage increases. See ***Entergy Systems & Service***, 328 NLRB 902 (1999). The crew forepersons are responsible for demonstrating the various tasks in the LSQS booklet to employees, and observing their work to ensure that they correctly perform those tasks. The crew forepersons initial an employee's book when, based on their observations, the employee is proficient. Without the crew foreperson's initials on each task in the LSQS booklet, an employee is not eligible for promotion to another position, and may in fact be let go if he or she fails to establish proficiency during his or her probationary period. The general forepersons do not observe the employee's work prior to certifying that he or she has final proficiency in a task.

Finally, I find that the crew forepersons have the authority to discipline employees. The crew forepersons correct crew members who fail to perform their work in conformance with the Employer's requirements, engage in misconduct, or fail to adhere to safety standards. They exercise discretion as to whether coaching and counseling will be effective, or whether discipline is necessary. If they deem that discipline is necessary, they have the authority to issue any discipline, up to and including discharge. This authority is outlined both in the LCQS booklet and in the employee handbook.

While a crew foreperson testified that he always consults with his general foreperson before issuing any discipline to an employee, there is no evidence on the record that he is required to do so. Failure to exercise authority does not negate supervisory status because possession rather than exercise of supervisory authority determines supervisory status. See *Westwood Health Care Center*, 330 NLRB 935, 938 (2000). Further, the record shows that this crew foreperson effectively recommended discipline. On the occasions that he recommended an employee be terminated, the general foreperson opted in one instance to demote the employee; in one instance to lay the employee off; and, in another instance to transfer the employee to another crew. Thus, even though his preferred level of discipline was not imposed, the employees in question were disciplined by the Employer because of his recommendations. Although not necessary to establish supervisory status in this case, I also find that secondary indicia of the crew forepersons' supervisory status include their wearing of different hats than other employees, their higher rate of pay, and their maintenance of employee time sheets.

Based on the foregoing factors, I am persuaded that the crew forepersons are supervisors under Section 2(11) of the Act, and are therefore ineligible for inclusion in the bargaining unit.

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

All full-time and regular part-time groundmen, climbers and bucket operators (crew members) employed by the Employer to perform services on the property of Northstate Communications in the High Point, North Carolina, area; but excluding all other employees, including office clerical employees, confidential employees, and guards, and professional employees and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 8th day of February 2012.

(SEAL)

/s/ Raymond Kassab

Raymond Kassab, Acting Regional Director
National Labor Relations Board, Region 11
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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 BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 342**. The date, time and place of the election will be specified in the notice of election that the Board's Regional 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 before 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or 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 Regional 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). The 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.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **February 15, 2012**. 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 to the Regional Office by electronic filing through the Agency website, www.nlr.gov,¹⁰ by mail, or by facsimile transmission at **336-631-5210**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

¹⁰ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

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, DC 20570-0001**. This request must be received by the Board in Washington by **February 22, 2012**. The request may be filed electronically through the Agency's website, **www.nlr.gov**,¹¹ but may **not** be filed by facsimile.

¹¹ To file a Request for Review electronically, go to the Agency's website at **www.nlr.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.