

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

JOHN LUCAS TREE EXPERTS CO.  
d/b/a LUCAS TREE EXPERTS

Employer<sup>1</sup>

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 42,  
AFL-CIO

Petitioner

Case 01-RC-097504

**DECISION AND DIRECTION OF ELECTION**

Petitioner (the Union) seeks to represent a unit of laborers and working foremen employed by the Employer who provide "vegetation management" services pursuant to contracts with public utility companies. This work consists of trimming trees and removing brush from around power lines, and applying herbicide along the utilities' rights of way. The Employer asserts that the petition should be dismissed because it intends to significantly expand its workforce within the next eight months, and therefore there is not currently a substantial and representative complement of employees working in Connecticut. The Employer, contrary to the Union, would also exclude the working foremen on the ground that they are statutory supervisors under Section 2(11) of the Act.

For the reasons set forth below, I find, contrary to the Employer, that a substantial and representative complement of employees is currently employed in the

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<sup>1</sup> The Employer's name appears as amended at the hearing.

petitioned-for unit and that an immediate election is warranted. I further find that the Employer has failed to satisfy its burden of establishing that the working foremen are supervisors under Section 2(11) of the Act, and that therefore they should be included in the petitioned-for unit.

**I. Overview of Operations**

The Employer has operations in New England, the Carolinas, and Canada. In February 2012, it extended its operations to include the State of Connecticut and in that year staffed its Connecticut operations using a combination of local employees and "travel crews," who are employees from out of state. Manager Gary Fournier oversees its New England operations. In total, four supervisors report to him, including Tom Griswold, who directly supervises the Connecticut operations.<sup>2</sup>

Most of the work under the Employers' 2012 purchase order with Connecticut Light & Power (CL&P) consisted of standard maintenance trimming (SMT), which primarily involves maintenance trimming. SMT work is typically performed by a two-person crew consisting of one working foreman and one laborer. About 80 percent of the work under the 2012 purchase order consisted of SMT work. The remaining work consisted of enhanced tree trimming (ETT), which involves a more aggressive approach to trimming, including pushing back tree lines. As a result of the more aggressive nature of ETT work, ETT crews can be staffed by up to five employees

**II. Existence of a substantial and representative employee complement**

At the time the petition in the instant case was filed, the Employer had six crews operating in Connecticut, consisting of seven laborers and six working foremen. On about January 24, 2013, the Employer entered into a purchase order with CL&P that significantly expanded its scope of work in Connecticut. The 2013 contract requires more ETT work than was required under the 2012 contract. Fournier estimated that 60 percent of the crews will perform SMT work, while the remaining 40 percent will perform ETT work. Thus, while the majority of the crews under the 2013 contract will require only two employees, the remaining 40 percent of the crews could require anywhere from three to five employees. Although Fournier initially indicated that the Employer

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<sup>2</sup> The parties stipulated that Griswold and other employees with the title of "Supervisor" are supervisors under Section 2(11).

would ultimately operate with a total of 20 crews under the 2013 contract, he made clear at the hearing that 16 of those 20 crews would be in place by midnight on March 4. Of those 16 crews, six would initially consist of travel crews from out-of-state, and those six crews, along with the additional 4 crews to reach the 20 crew total, would eventually be staffed with Connecticut-based employees within 6-8 months.<sup>3</sup> Although not entirely clear, the remaining ten crews that will be in place by March 4 will consist of the existing Connecticut-based employees and new hires, but only one foreman will be assigned to each crew, regardless of crew size.

Thus, by the time this decision issues, the Employer will have anywhere from 24 to 32 employees occupying all positions in the petitioned-for unit (i.e., six SMT crews consisting of 12 employees and four ETT crews consisting of 12-20 employees). Within six to eight months, there may be an additional ten crews similarly consisting of 24 to 32 employees (i.e., six SMT crews consisting of 12 employees and four ETT crews consisting of 12 to 20 employees).

The test for determining whether the Board will schedule an election in an expanding unit is whether there is a "substantial and representative" complement of employees at the time of the Board's decision, considering such factors as the size of the present work force at the time of the hearing, the size of the employee complement eligible to vote, the size of the expected ultimate employee complement, the time expected to elapse before a full work force is present, the time and size of projected interim hiring increases before reaching a full complement, the number of job classifications requiring different skills that are currently filled and that are expected to be filled when the ultimate complement is reached, and the nature of the industry. *Toto Industries (Atlanta)*, 323 NLRB 645 (1997); *Frolic Footwear, Inc.*, 180 NLRB 188 (1969). Although not rigidly applied, the Board has found an existing complement of employees substantial and representative when at least 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. *Shares, Inc.*, 343 NLRB 455 n. 2 (2004); *MJM Studios*, 336 NLRB 1255, 1256 (2001); *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000).

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<sup>3</sup> The parties stipulated that employees assigned to travel crews should be excluded from the petitioned-for unit.

Based upon the forgoing, I find that by the time this decision issues, the Employer will have employed well over 30 percent of the eventual employee complement in 100 percent of the anticipated job classifications (i.e., approximately 50% of the complement expected to be in place within 6-8 months).<sup>4</sup> In light of the Employer's firm commitment with CL&P to have the additional Connecticut based employees in place by March 4, it appears that such employees will also satisfy the Board's eligibility requirements to vote in the election directed herein. Accordingly, I find that it is appropriate to schedule an election at this time.

II. **Section 2(11) status of working foremen**

A. **Facts**

1. **Employer operations**

Fournier and Griswold devise a plan to complete the necessary work and Griswold selects the equipment and determines the crew size for each project. He also determines both the laborers' and the foremen's work schedules. Next, Griswold assigns a project consisting of about a month's work to each foreman. The foremen, in turn, plan out each day's work, based on traffic patterns and other factors. For example, they are responsible for determining whether they need flaggers or police details in congested areas where there may be school buses or rush hour traffic during specified times. Each morning, the foreman is required to contact Griswold to advise him of where the crew will be working and what he plans for the crew to accomplish that day.

In total, Griswold only spends about ten percent of his time on job sites. He spends the remainder of his time performing administrative work, talking to clients, and bidding jobs. The foremen typically spend 90 to 95% of their time working alongside the laborers. The remainder of the foremen's time is spent planning the day and completing paperwork.

2. **Personnel matters**

Fournier and the Human Resources department make all final hiring decisions. Griswold participates in the hiring process by interviewing candidates who have

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<sup>4</sup> A substantial and representative complement also exists if a comparison is simply made between the 13 current Connecticut based employees and the new Connecticut based employees expected to be hired by March 4 (i.e., anywhere from 40% to 54% depending upon the actual ETT crew size; 13 of 24 or 13 of 32).

submitted applications to Human Resources. The involvement of foremen and laborers in the hiring process appears to be limited to referring prospective applicants to the Employer's website.

According to Fournier, Griswold is responsible for making all significant personnel decisions within the Employer's Connecticut operations. He resolves routine personnel issues, which includes writing up employees for attendance deficiencies and resolving personality clashes between foremen and laborers when the foremen are unable to resolve those issues on their own.

As to discipline of employees, the record indicates that, if a laborer is involved in an incident that will become part of his record, the foreman completes an incident report, and notifies Griswold, who is then required to complete a report documenting that he has investigated the incident. It is Griswold who ultimately decides whether discipline is appropriate, and if so, what level is warranted. When a foreman merely directs a laborer to perform a particular task differently, or informs him that he is not performing a task safely, neither the foreman nor Griswold is required to complete any paperwork because there is no expectation that the counseling will become part of the laborer's permanent record. Griswold made clear that, when he was a foreman, he might tell an employee whom he believed to be "out of line" to "fix himself" or leave the job site. He did not terminate anyone while working in that capacity. If he had occasion to write up an incident involving an employee, he would notify his supervisor about the incident.

As of the date of the hearing, no foreman in Connecticut had terminated an employee. There was extensive testimony at the hearing concerning the discharge of a laborer who, according to Griswold, repeatedly violated the Employer's safety procedures. Griswold testified that the laborers' foreman contacted him and told him that he could no longer work with the laborer. Griswold directed the foreman to bring the laborer to the parking lot at the end of their work day, so that Griswold could conduct his exit interview. Although the record was unclear as to who actually informed the laborer that he was terminated, it is clear that the laborer worked until the end of the day, and that he did not leave work until after he had met with Griswold.

### **3. Performance and Promotions**

Since the Employer has been operating in Connecticut for less than a year, current employees have not yet received performance evaluations. According to Fournier, the Employer historically has done evaluations between March and April. He acknowledged, however, that he has yet to communicate to his foremen his intention that they conduct performance evaluations of the laborers on their crews, or what their responsibilities will entail with respect to those evaluations. In any event, the Employer's company handbook states that performance evaluations do not necessarily involve a change in employees' rate of pay.

The Employer's Operations Training Manual sets forth a detailed series of skill sets a laborer must master to be eligible for promotion. As the laborer masters each skill set, the laborer's foreman checks the skill set off on a checklist and passes the completed checklist on to Griswold. Upon receipt of the checklist from the foreman, Griswold independently assesses whether the employee has mastered the skill set in question. Griswold explained that typically, even if a laborer has been deemed to be ready to go up in the bucket, a more experienced foreman will generally perform that work if it is being performed in a sensitive area. The foreman, together with a representative of the Employer's Safety Department, decides when a laborer is ready to handle these more challenging assignments.

Griswold testified that when he was a laborer, three foremen reviewed his work, but it was his Supervisor who ultimately made the decision, in consultation with the manager, to promote him to foreman. Once he was a foreman, Griswold recommended laborers for promotion, and his supervisors generally accepted his recommendations.

### **4. Wages and benefits**

The wage ranges for laborers and foreman vary, depending on their level of experience, and whether they possess specialized skills or a CDL, pesticide, or arborist license. The base rate for a laborer is \$10.00 to \$13.00 per hour, while the base rate for a foreman is \$15.00 to \$20.00 per hour. Both laborers and foremen can supplement these hourly rates by participating in the Employer's incentive program, which rewards them on a weekly basis for increased productivity. Additionally, when a laborer acquires

a new skill set or license, he becomes eligible for a pay increase. While both supervisors and foremen can recommend pay increases, Fournier makes the final decision about such increases. Foremen and laborers are eligible for the same health insurance plan. Similarly, vacation benefits, which are accrued based on an employee's tenure with the Employer, are accrued at the same rate by both foremen and laborers. Unlike foremen and laborers, Griswold and other supervisors are salaried, and are issued employer vehicles, which they are entitled to drive to and from work.

#### **A. Analysis and Conclusion**

It is well-established that the burden of proof rests upon the party alleging that an individual is a supervisor. *Oakwood Healthcare Inc.*, 348 NLRB 686 694 (2006); accord *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). The party seeking to establish supervisory status must do so by a preponderance of the evidence. *Oakwood Healthcare Inc.*, supra. Since an employee who is determined to be a supervisor loses the protection of the Act, the Board is reluctant to confer supervisory status too broadly. *Id.* at 688. The Board has found that a particular indicia of supervisory status is not established if the evidence with respect to that indicia is either in conflict, or inconclusive. *Phelps Community Med. Ctr.*, 295 NLRB 486, 490 (1989). Moreover, in the absence of detailed, specific evidence, mere inferences or conclusionary statements are insufficient to establish Section 2(11) supervisory authority. *Sears Roebuck & Co.*, 304 NLRB 193 (1991). In fact, a lack of evidence in the record will be construed against the party asserting supervisory status. *The Wackenhut Group*, 345 NLRB 850, 854 (2005).

For the reasons set forth below, I find that the Employer has failed to satisfy its burden of establishing that the foremen either possess or exercise supervisory authority within the meaning of Section 2(11) of the Act.

#### **1. Assigning employees**

In *Oakwood Healthcare Inc.*, supra, the Board defined the term "assign" as "the act of designating an employee to a place (such as location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. task, to an employee." *Id.* at 689. The assigned task must be significant and not an ad hoc instruction to perform a discrete task.

There is insufficient evidence in the record to establish that the foremen assign work to laborers within the meaning of *Oakwood*. Rather, the record demonstrates that Griswold assigns the crews, typically consisting of one foreman and one laborer, to month-long projects. In so doing, he designates the location of the work, informs crew members of their work schedule, and designates their overall duties. In the absence of evidence showing that the foremen assign laborers, it is unnecessary to determine whether the foremen utilize independent judgment in making such assignments. Accordingly, I find that the foremen's assignment of work to the laborers does not establish their supervisory status under Section 2(11) of the Act.

## **2. Responsibly directing employees**

The Board in *Oakwood* defined the term "responsibly to direct" as the act of directing "what job shall be done next or who shall do it," provided that "the direction is both 'responsible' and carried out with independent judgment." *Id.* at 691. The Board in *Oakwood* further found that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be 'accountable' for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Id.* at 692. "Accountability," for purposes of responsible direction, must be established, according to the Board in *Oakwood*, by showing "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.* The Board emphasized that " ...the concept of accountability creates a clear distinction between those employees, whose interests, in directing other employees' tasks, align with management from those whose interest, in directing other employees, is simply the completion of a certain task." *Id.* Thus, according to the Board, the former envisions an adversarial relationship with those the purported supervisor is directing, in that the purported supervisor will be "carrying out the interest of management – disregarding, if necessary, employees' contrary interests." *Id.* Finally, the Board in *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006), found that there must be "evidence of actual accountability," which the Board interpreted as requiring "more-than-

merely-paper showing" that a prospect of adverse consequences exists. *Id.* Thus, according to the Board in *Golden Crest*, "where accountability is predicated on employee evaluations, there must be evidence that a putative supervisor's rating for direction of subordinates may have, either by itself or in combination with other performance factors, an effect on that person's terms and conditions of employment." *Id.*

I find that the Employer has failed to satisfy its burden of establishing that the foremen "responsibly direct" the laborers in its Connecticut operations. More particularly, while there is some evidence that a foreman has the authority to direct a laborer who is doing groundwork to retrieve brush that the foreman has trimmed, and to send it through the brush chipper, or to perform a particular task in accordance with the Employer's safety guidelines, there is no evidence that foremen are held accountable for the laborers' performance of these tasks. Indeed, the absence of any evidence establishing the "prospect of adverse consequences" to a foreman for a laborer's failure to perform an assigned task, failure to operate in a safe manner, or failure to perform in accord with overall expectations, makes clear that they do not "responsibly direct" the laborers.

Having found that the foremen do not "responsibly direct" the laborers, it is unnecessary for me to address the question of whether they exercise independent judgment in connection with the direction of these employees. Nevertheless, even assuming arguendo that they responsibly direct employees within the meaning of *Oakwood*, I find that the Employer has failed to satisfy its burden of establishing that the foremen exercise independent judgment in their direction of the laborers so as to warrant the conclusion that they are supervisors under Section 2(11) of the Act. More specifically, the Employer has failed to establish that, in directing the laborers' work, the foremen exercise the kind of independent judgment required under *Oakwood*, since their direction of the laborers is limited to the completion of routine tasks which the laborers are accustomed to performing on a daily basis.

### **3. Discipline**

I find that, with respect to the disciplinary process, the foreman's role is merely to convey information to the manager, who conducts an independent investigation and

makes the ultimate disciplinary decision, and that as such, the foreman's role is merely reportorial in nature. See *Willamette Industries*, 336 NLRB 743, 744 (2001); *Ryder Truck Rental, Inc.* 326 NLRB 1386 (1998); *Peco Energy Co.*, 322 NLRB 1074, 1083 (1997); *Rest Haven Nursing Home*, 322 NLRB 210, 212 (1996). The Employer offered one example of a foreman's involvement in the discharge of one laborer, contending that it was the foreman, and not Griswold, who terminated the laborer. However, the record established that the foreman merely reported his concerns to Griswold, who ultimately met the foreman and the laborer at the end of their work day and discharged the laborer. Finally, evidence presented by the Employer indicating that foremen possess the authority to issue verbal corrections which do not become part of the employee's official record is insufficient to establish their supervisory authority. *DIRECTV*, 357 NLRB No. 149 (2011).

#### **4. Hiring**

I find no evidence to support the Employer's contention that the foremen are involved in hiring, or effectively recommending the hire of laborers. The record makes abundantly clear that the only involvement of foremen with respect to the hiring of any employee is to refer prospective applicants to the Company's website, and that they are not involved in reviewing job applications or the interview process.

#### **5. Promoting and rewarding employees**

I find that the Employer has failed to satisfy its burden of establishing that the foremen possess the authority to promote, or effectively recommend the promotion of, laborers to the position of foreman. The record demonstrates that foremen are responsible for checking off items on a checklist to indicate when a laborer has mastered a particular skill set (which may make him eligible for either a pay increase or promotion). Nevertheless, the evidence clearly indicates that Griswold must approve each such entry, and that to the extent the mastery of the skill set has safety implications, a representative of the Employer's Safety Department must verify the foreman's conclusion that the individual in question has, in fact, mastered the skill set at issue. The record makes clear that a foreman's recommendation that a laborer has mastered a particular skill set is merely advisory and preliminary, and therefore cannot

be relied upon to confer supervisory status. *Children's Farm Home*, 324 NLRB 61 (1997).

In tandem with my above conclusion, I find that the foremen do not possess the authority to reward laborers based on their involvement in the annual review process. First and foremost, the Employer's handbook makes clear that performance reviews do not always involve a change in an employee's rate of pay. Thus, regardless of the extent of a foreman's involvement in laborers' performance reviews, there is no evidence that a positive review ever has or would necessarily result in a financial reward for the employee in question. *Golden Crest Healthcare Center*, supra, at 731. Moreover, the record establishes that, although no annual reviews had been given to any Connecticut employees as of the date of the hearing, the established practice at the Employer is for foremen to complete a form which they review with the supervisor before the two of them meet with the employee in question. Finally, the Employer's conclusory assertion that one laborer in Connecticut was promoted to foreman as a result of a foreman's recommendation is insufficient to establish supervisory status. *Sears Roebuck & Co.*, supra.

#### **6. Secondary indicia**

The Employers' reliance on certain secondary indicia of supervisory status, including the foremen's job description and the ratio of foremen to laborers, cannot serve as a basis for conferring supervisory status on the foremen in the absence of any primary indicia of supervisory authority enumerated in Section 2(11). *Golden Crest*, supra at n. 10; *DIRECTV*, supra, slip op. at 4; *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994).

Based upon 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 are free from prejudicial error and are hereby 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 herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and 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.

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 working foremen and laborers employed by the Employer in its Connecticut operations; but excluding all other employees, safety trainers, notification persons, Supervisors, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

#### 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 42, 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.

#### 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 employees who have quit or been discharged for cause since the designated payroll period; 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 employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

#### 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). 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. This list may initially be used by me to assist in determining whether there is an adequate showing of interest. 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 Subregional Office in Hartford, Connecticut on or before March 26, 2013. 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 Subregional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov) or by facsimile transmission at 860-240-3564. To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

#### NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day 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.

#### 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 April 2, 2013. The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov), but may not be filed by facsimile.

Dated at Hartford, Connecticut this 19<sup>th</sup> day of March, 2013.

/s/  
Jonathan B. Kreisberg, Regional Director  
National Labor Relations Board  
Region One/Subregion 34