

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

THE ARDIT COMPANY	:	
	:	
Employer	:	
	:	Case No.: 9-RC-83978
and	:	
	:	
INTERNATIONAL UNION OF BRICKLAYERS	:	
AND ALLIED CRAFT WORKERS, OHIO	:	
KENTUCKY ADMINISTRATIVE COUNCIL,	:	
LOCAL NO. 18	:	
	:	
Petitioner	:	
	:	

**THE ARDIT COMPANY’S POSITION STATEMENT RELATING TO THE
SUPERVISORY STATUS OF THOMAS R. McALLISTER AND KEITH BARNES**

Thomas R. McAllister (“McAllister”) and Keith Barnes (“Barnes”) are § 2(11) supervisors and, as such, were not eligible to vote in the August 13, 2012 election.

The Act defines the term “supervisor” in § 2(11), which states:

The term supervisor means 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 to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

See, 29 U.S.C: § 152(11). The United States Supreme Court noted that § 2(11) necessarily sets forth a three part test for determining supervisory status. See, *NLRB v. Kentucky River Community Care* (2001), 532 U.S. at 712. An employee is a supervisor if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent

judgment, and (3) their authority is held in the interest of the employer. *Id.* at 712-713. Lastly, “[a]n individual need possess only one of the of the enumerated indicia of authority in order to be encompassed by [§] 2(11), as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment.” See, *Extendicare Homes, Inc.* 348 NLRB NLRB 1062, 1063 at fn. 7, citing *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003) (emphasis added).

In *Oakwood Healthcare Center, Inc.* 348 NLRB 686 (2006), the Board granted review solely with respect to the issue of whether charge nurses are supervisors under the Act. In doing so, the Board set forth definitions for “assign,” “responsibly direct,” and “independent judgment” as those terms are used in § 2(11) of the Act.

The Board noted that the ordinary definition of “assign” is “to appoint to a post or duty.” *Id.* at 689, citing *Webster’s Third New International Dictionary* 132 (1981). Since the common trait of the § 2(11) functions are to affect a term or condition of employment, the Board interpreted the term “assign” to refer to the act of designating an employee to particular place, such as a location, department, or wing; appointing an employee to a time, such as a shift or overtime period; or bestowing duties or tasks to an employee. *Id.*

The phrase “responsibly to direct” was added to § 2(11) of the Act to ensure that the statutory exception provided for in § 2(11) included those individuals who exercise essential supervision but lack the authority and/or opportunity to carry out any of the other supervisory functions listed in § 2 (11). *Id.* at 690. The Senator responsible for adding this phrase to § 2 (11) was concerned that the person on the “shop floor” would not be thought of as a supervisor, despite the fact that this particular person directly oversaw the work being done and would ultimately be held responsible if the work were done poorly or perhaps not at all. *Id.* Put simply,

if an employee has other employees working under them, and that employee decides what work should be done next or who should do it, that employee is a supervisor so long as the direction is responsible and implemented with independent judgment. Id. at 691.

The Board defined the exercise of independent judgment as effectively recommending actions, forming opinions, or making evaluations by discerning and comparing data, free from the control of others. Id. at 693.

Both McAllister and Barnes are working foreman. As such, they organize the execution of work each day of the project. They direct the day to day detailed tasks of terrazzo installation. Moreover, McAllister and Barnes have the authority to interact with the general contractor in order to make work execution decisions and they attend jobsite meetings.

When additional work ordered by the general contractor is on a time and material basis, work authorization tickets, signed by the contractor, are needed to be able to track and price the work. McAllister and Barnes are responsible for tracking this work and putting it on time and material tickets. This may include the employees who worked, along with their hours and the material and equipment used.

McAllister and Barnes determine whether more equipment, manpower and/or materials are needed for the jobsite. Likewise, each can recommend solutions to unforeseen circumstances that may arise on a particular jobsite with respect to manpower, equipment and/or materials needed for the job. Their recommended solutions have been followed.

McAllister and Barnes have the authority to hold people over past their normal working time when needed. Likewise, when manpower is redirected to a particular jobsite, said men are instructed to see McAllister and/or Barnes for direction. Accordingly, they are in charge of the jobsite and the other employees know it. Additionally, both McAllister and Barnes have the

authority to send workers home from a jobsite and McAllister has done so in the past. Lastly, McAllister and Barnes are paid at higher hourly rate than the rank and file employees they are directing throughout the day.

More importantly, the Board has regularly held that working foreman are supervisors under § 2(11) of the Act when they assign work and/or responsibly direct the workforce just as McAllister and Barnes do here. See, *Wer-Coy Fabrication Co.*, 268 NLRB 907 (1984); *Maidsville Coal Co.*, 257 NLRB 1106 (1981); *Contractors Cargo Co., Inc.*, 218 NLRB 549 (1975); *Bee Line Engineering, Inc.*, 217 NLRB 367 (1975); *Dee Knitting Mills, Inc.*, 214 NLRB 1041; *Draggo Electric Co., Inc.*, 214 NLRB 847 (1974); *Imperial Cabinet Shop*, 204 NLRB 1102 (1973); *Captive Plastics, Inc.*, 209 NLRB 749 (1974); and *Jeffrey Manufacturing Co.*, 208 NLRB 75 (1974).

For all of the reasons stated above, McAllister and Barnes are supervisors under § 2(11) of the Act and, as such, were not eligible to vote in the August 13, 2012 election. Accordingly their ballots should not be opened.

Dated at Dublin, Ohio on this 17th day of August, 2012

Respectfully submitted,

/s/ Aaron Tulencik

Ronald L. Mason (#0030110)

Aaron T. Tulencik (#0073049)

Mason Law Firm Co., L.P.A.

425 Metro Place North, Suite 620

Dublin, Ohio 43017

t: 614.734.9450

f: 614.734.9451

e-mail: rmason@maslawfirm.com

atulencik@maslawfirm.com

*Counsel For The Employer,
The Ardit Company*

