

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

In the Matter of:

Case No. 9-RC-83978

THE ARDIT COMPANY

Employer

and

INTERNATIONAL UNION OF BRICKLAYERS
& ALLIED CRAFTWORKERS, OHIO KENTUCKY
ADMINISTRATIVE DISTRICT COUNCIL,
LOCAL UNION NO. 18

Petitioner

**PETITIONER'S BRIEF IN OPPOSITION TO THE ARDIT COMPANY'S EXCEPTIONS TO
THE HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS AND
RECOMMENDATIONS TO THE REGIONAL DIRECTOR**

The Employer challenged the ballots of bargaining-unit members Thomas McAllister and Keith Barnes, asserting they both are statutory supervisors. A hearing was conducted. The Hearing Officer reported and recommended that neither should be found to be a statutory supervisor; that the Employer's challenges should be overruled; and that the remaining two ballots be opened and counted.

The Employer filed exceptions. They are unavailing. McAllister and Barnes act within a limited sphere in giving instructions to others, which are bounded by other employees' skillsets, blueprints, instructions from the Employer's operations manager (or other admitted supervisors), and directions from owners and general contractors. As such, the Employer's exceptions should be overruled.

I. The Standards for Statutory Supervisory Status Determinations

Section 2(11) of the Act provides:

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 the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. *See KGW-TV*, 329 NLRB 378, 381 (1999). The requirement of use of independent judgment, however, is conjunctive. Thus, an individual is not a supervisor unless the individual exercises an authority with the use of independent judgment and holds the authority in the interest of the employer. *Id.*

The requirement that independent judgment be exercised imposes a significant qualification that limits the definition of "supervisor" to include only people whose exercise of any of the 12 stated Section 2(11) authorities is not merely routine. In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees - such as "straw bosses, leadmen, set-up men, and other minor supervisory employees" - who enjoy the Act's protections even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (*quoting* S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

In Oakwood Healthcare, Inc., 348 NLRB 686, 692 (2006), the Board adopted an interpretation of "independent judgment" that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or technical).

For an individual's judgment to be "independent" within the meaning of Section 2(11), the individual "must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Id.* at 692-693. As the Board explained, "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." *Id.* at 693. The Board recognized that at one end of the spectrum there are situations where there are detailed instructions for the actor to follow, but that at the other end there are situations where the actor is wholly free from constraints. *Id.* It found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement[]" but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. *Id.*

Additionally, the judgment that a putative supervisor exercises must "rise above the merely routine or clerical" for it to be truly supervisory within the meaning of Section 2(11). *Id.* at 693. "If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data." *Id.*

Consistent with the Congressional intent to distinguish between truly supervisory personnel and those who merely perform minor supervisory duties, the Board is careful

not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. *See KGW-TV*, 329 NLRB 378, 381 (1999). Thus, the burden of proving supervisory status is on the party asserting it, in this case the Employer. *See NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Springfield Terrace LTD*, 355 NLRB 937, 941 (2010). Conclusory evidence is not sufficient to establish supervisory status. *See Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Similarly, “[j]ob descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight” as “[t]he Board insists on evidence supporting a finding of actual as opposed to mere paper authority.” *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

II. Argument

A. Construction Industry Working Foremen Typically Are Not Supervisors

Contrary to the Employer’s statement that working foremen regularly are found to be supervisors, (Employer’s Br., pp. 12-13), the Board has refused to find supervisory status when the foremen act “within a very limited sphere in giving instructions to employees, bounded by the blueprints and instructions from the contractor or his supervisor.” *Intl. Assn. of Bridge, Etc., Loc. Un. No. 28*, 219 NLRB 957, 961 (1975). *See also Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487, 488-489 (1993); *George C. Foss Co.*, 270 NLRB 232, 234-235 (1984), *enfd.* 752 F.2d 1407 (9th Cir. 1985); and *Ogden Allied Maintenance Corp.*, 306 NLRB 545, 546 (1992), *enfd.* 998 F.2d 1004 (3rd Cir. 1993). Each of the Employer’s authorities is completely distinguishable from this matter, (Employer’s Br., pp. 12-13), and only two actually discuss construction industry employers.

Imperial Cabinet Shop, 204 NLRB 1102 (1973) (finding supervisory status were the foreman “had full authority to hire or fire personnel as needed by the scheduling of work”); *Draggo Electric Co., Inc.*, 214 NLRB 847 (1974) (finding, without any analysis, supervisory status where foreman was in charge of the business when the owner was absent and assigned work within a department). To be sure, none of the cases cited by the Employer was decided in the last couple decades. But as recently as 2007, the Board evaluated whether a group of working foremen on a construction crew, with duties similar to Barnes and McAllister’s duties, were statutory supervisors. It found they were not. *Shaw, Inc.*, 350 NLRB 354 (2007).

In *Shaw, Inc.*, 350 NLRB 354 (2007), the Board summarized all the foremen’s jobsite duties as follows:

Once at the site, foremen are charged with *ensuring the performance and completion* of the Respondents’ job. In carrying out this function, *a foreman might tell a crew-member to run a loader, or bulldozer, or to pull pipe, inform welders how he wants the work done, or switch the task assignments of employees during the day.* Foremen *regularly work alongside and perform the same types of tasks* as other members of the crew. Like other crewmembers, foremen are *paid hourly*, earning approximately 50 cents per hour more than operators and \$ 5 per hour more than laborers. During a normal workday, the Respondents’ *field supervisors routinely visit* the various jobsites, checking on progress and *providing assistance in solving possible problems.* When not on site, *supervisors are readily accessible* to foremen by radio or telephone as necessary. Foremen are provided corrective action notice forms (also referred to as writeup sheets) to *document employee infractions*, which may be used as bases for disciplinary action.

Id. at 355 (emphasis added). The Board, first, considered whether the construction foremen’s duties constituted responsible assignment and direction of the workforce. *Id.* It found that the construction foremen “overs[aw] routine functions and follow[ed]

established prescribed practices,” determining that the Employer’s “projects involve tasks which are recurrent and predictable, but . . . they are also carried out in conformance with supervisors’ specifications and oversight.” *Id.* Noteworthy was the fact that the Employer’s operations manager would, before a job begins, (1) go over a job plan with the foremen, (2) identify materials and tools that were needed, and (3) plan how and where to install materials. *Id.* at n.8. Once the job was underway, the operations manager would often visit the job and handle unexpected problems on the job. *Id.*

The Board then evaluated whether the foremen were exercising independent judgment in assigning work to other employees on the site. *Id.* at 355-56. Importantly, the Board found that the act of assigning tasks to certain employees based on an employee’s trade or known skills is “essentially self-evident.” *Id.* at 356. It noted that “[a]ssigning employees according to their known skills is not evidence of independent judgment. *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996).” *Id.* at n.9. Next, the Board considered the foremen’s role in directing the work of other employees. *Id.* Although the Board observed that the “foremen also oversee the accomplishment of the day’s work, providing a degree of direction to ensure the work’s completion,” it held that no independent judgment was used because the direction was “given in accordance with the [employer’s] prior instructions” and the work was “routine and repetitive.” *Id.*

Finally, the Board analyzed whether the working foremen exercised any independent judgment with respect to discipline. In *Shaw*, the foremen would report incidents to the employer—one even went as far as writing the words “recommending discharge” on an incident report. *Id.* at 357. But that was insufficient to convert working

foremen into statutory supervisors. *Id.* And although there was evidence in the record that one of the working foremen participated in a decision to suspend another employee, the Board held that “this isolated incident—the only instance on this record in which any foreman exercised such authority—is insufficient to establish that the foremen were statutory supervisors.” *Id.* It further noted that oral warnings about job performance deficiencies, “which have no impact on employment status of the person being warned, are not evidence of disciplinary authority.” *Id.* at n.21. The Board held that the working foremen were not statutory supervisors.

B. Barnes and McAllister Are Not Statutory Supervisors

As the Hearing Officer recommended, the Regional Director should find that Barnes and McAllister are not statutory supervisors. The Petitioner agrees with the Hearing Officer’s report in its entirety. The Employer’s exceptions—and specifically its list of evidence that the Hearing Officer allegedly failed to consider, (Employer’s Br., pp. 7-9)—actually demonstrate the routine and self-evident nature of Barnes and McAllister’s duties. Their actions, without any dispute or evidence to the contrary, are pre-determined by the laws of physics, blueprints, general contractors’ orders, instructions from operations manager Alex Johnson, established prescribed practices, and the collective bargaining agreements. Their assignment of tasks to certain workers—matching tasks with workers’ training, skillsets, and strengths—does not reflect any sort of independent discretion. Neither does their oversight of others’ daily work to ensure proper job completion, which—importantly—is done according to Alex Johnson’s instructions, based on

blueprints, and established prescribed practice.¹ Finally, Barnes' incident report regarding Travis Sutherly (and alleged recommendation of his dismissal) as well as McAllister's alleged termination of an employee a dozen years ago—even if true—are isolated incidents. (Employer's Br., pp. 10-12.) Indeed, such sporadic behavior is insufficient to establish supervisory status.² *Shaw, Inc.*, 350 NLRB at 357.

CONCLUSION

Based on the foregoing, the Regional Director should overrule the challenges and direct that the ballots of Barnes and McAllister be opened and counted.

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Date: January 11, 2013

¹ The Employer points out that McAllister decided not to pour a floor at the Franklin County Courthouse as instructed by Alex Johnson. (Employer's Br., p. 9-10.) But McAllister did not make the decision not to pour it; instead, he called admitted supervisor Norma Martina for further instruction, who (along with Michelle Johnson) has final say-so on all decisions at the Employer. (Tr. 160.) "Norma said do not install and started looking into it." (Tr. 154.) It's difficult to see how Norma making the decision not to pour makes McAllister a statutory supervisor.

² Tellingly, the Employer conceded it has no record of ever giving Barnes and McAllister these powers. (Tr. 137-39.)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing paper was served this 11th day of January 2013 upon the Board and Regional Director Gary Muffley, Region 9, via electronic filing and by email upon the following:

Gary Muffley
Regional Director

and

Ron Mason, Esq.
Aaron Tulencik, Esq.
Counsel for the Employer

s/Ryan K. Hymore

Ryan K. Hymore

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 4, 2013, an electronic original of The Ardit Company's Exceptions to the Hearing Officer's Report on Challenged Ballots and Recommendations to the Regional Director was transmitted to the National Labor Relations Board, Region 9, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

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