

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

In the Matter of

THE ARDIT COMPANY

Employer

and

Case 9-RC-083978

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

Petitioner

SECOND SUPPLEMENTAL DECISION
AND ORDER

Pursuant to the provisions of a *Decision and Direction of Election* that I issued on July 13, 2012, ^{1/} an election by secret ballot was conducted on August 10, 2012 among certain employees of the Employer ^{2/} to determine whether such employees desired to be represented by the Petitioner for the purposes of collective bargaining.

Upon the conclusion of the election, a tally of ballots was made available to the parties in conformity with the Rules and Regulations of the Board, herein called the Rules, which disclosed the following results:

Approximate number of eligible voters.....	12
Number of void ballots.....	0
Number of votes cast for Petitioner.....	0
Number of votes cast against participating labor organization.....	1
Number of valid votes counted.....	1
Number of challenged ballots.....	8
Number of valid votes counted plus challenged ballots.....	9

The challenged ballots were sufficient in number to affect the results of the election.

^{1/} Thereafter, the Employer filed a request for review of the Decision with the Board. On August 9, 2012, the Board issued its Order denying the Employer's request for review.

^{2/} The appropriate bargaining unit as set forth in the Decision is "All tile, marble and terrazzo installers and helpers employed by the Employer at or out of its facility in Columbus, Ohio, excluding office clerical employees and all professional employees, and guards and supervisors as defined in the Act."

On August 13, 2012, following an investigation of the issues raised by certain of the challenged ballots, I issued a Supplemental Decision and Order overruling the challenges to the ballots of six of the challenged voters and ordering that their ballots be counted. On August 27, 2012, the Employer filed a Request for Review of the Supplemental Decision and Order with the Board.

On August 17, 2012, the Employer filed timely Post Election Objections which were duly served on the Petitioner in conformity with the Rules. On September 6, 2012, following an investigation of the issues raised by the Objections, I issued a Supplemental Decision on Objections overruling all of the Employer's objections to the election. Thereafter, on September 20, 2012, the Employer filed a Request for Review of the Supplemental Decision on Objections with the Board.

On October 18, 2012, the Board issued Orders denying the Employer's Request for Review of the Supplemental Decision and Order and denying the Employer's Request for Review of the Supplemental Decision on Objections. On October 25, 2012, the ballots of the six challenged individuals found to be eligible voters in the Supplemental Decision and Order were counted and added to the original tally of ballots. The revised tally of ballots was made available to the parties in conformity with the Rules and Regulations of the Board, herein called the Rules, which disclosed the following results:

	Original Tally	Challenged Ballots Counted	Final Tally
Approximate number of eligible voters.....	12		
Number of void ballots.....	0	0	0
Number of votes cast for Petitioner.....	0	4	4
Number of votes cast against participating labor organization.....	1	2	3
Number of valid votes counted.....	1		7
Number of challenged ballots.....	8		2
Number of valid votes counted plus challenged ballots.....	9		9

Because the challenged ballots were sufficient in number to affect the results of the election, pursuant to the provisions of Section 102.69 of the Rules, an investigation of the issues raised by the challenged ballots was conducted under my direction and supervision and after carefully considering the results thereof, on November 5, 2012, I issued a Supplemental Report, Order Directing Hearing and Notice of Hearing ordering that a hearing be conducted before a duly designated hearing officer to resolve the issues raised by the challenges to the ballots of Keith Barnes and Thomas McAllister. Pursuant to that order, on November 13, 2012, a hearing was held in Cincinnati, Ohio before Hearing Officer Daniel Goode. Thereafter, on December 17, 2012, the Hearing Officer issued and caused to be served upon the parties his report in which he recommended that Keith Barnes and Thomas McAllister were not supervisors and thus, were eligible voters. The Employer timely filed exceptions to the Hearing Officer's Report, accompanied by a supporting brief, and the Petitioner filed a reply brief. The Employer argues that the Hearing Officer erred in failing to find that Barnes and McAllister are supervisors pursuant to Section 2(11) of the Act. In this regard, the Employer argues that Barnes and

McAllister have the authority to terminate employees, to assign work and to responsibly direct the workforce.

I have carefully reviewed the Hearing Officer's rulings made at the hearing and find that they are free from prejudicial error. Accordingly, his rulings are affirmed. After a review of the record in light of the exceptions and the parties' briefs, and for the reasons set forth in detail below, I agree with the Hearing Officer's conclusions and recommendations finding that Barnes and McAllister are not supervisors within the meaning of Section 2(11) of the Act. Prior to examining the errors alleged by the Employer, I note the well settled principle that "the party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact ineligible to vote." *Regency Service Carts, Inc.*, 325 NLRB 617, 627 (1998). Additionally, proving supervisory status is the burden of the party who contends that an employee is a supervisor. *NLRB v Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001). Thus it is the Employer's burden to show by "a preponderance of the credible evidence" that Barnes and McAllister are supervisors pursuant to Section 2(11) of the Act. *Dean & Deluca New York, Inc.* 338 NLRB 1046, 1047 (2003). Where the evidence is in conflict or otherwise inconclusive on an indicia of supervisory authority, I must find that supervisory status has not been established on the basis of that indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Finally, with respect to the Employer's challenges the hearing officer's credibility resolutions, I observe that it is the Board's longstanding and well established policy not to overrule the credibility resolutions of the trier of fact unless the clear preponderance of all the relevant evidence shows them to be incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961).

I. Authority to Terminate Employees

The hearing officer correctly found that neither McAllister nor Barnes has the authority to terminate employees. The Employer argues that McAllister terminated an employee named Bill Denney, but its only evidence in this regard was Denney's last timesheet from June 25, 2000, which bears a note that "Tom fired him." The hearing officer quite reasonably found McAllister's testimony that he did not terminate Denney more credible than this vague note written by Norma Martina, who was not present when Denney was terminated. Moreover, even if the statement in the note were credited, it would still be unclear whether McAllister decided independently to terminate Denney or merely conveyed to Denney management's decision to terminate him. The existence of this note on Denney's pay stub is plainly inadequate to meet the Employer's burden of demonstrating that McAllister has the authority to terminate employees. Similarly unpersuasive is Norma Martina's hearsay testimony that her husband, former Employer President George Martina, told McAllister that he had the power to terminate employees, particularly in view of McAllister's express denial that he was ever so instructed.

Likewise, the Employer failed to show that Barnes terminated an employee named Travis Southerly. The record evidence demonstrated that Barnes reported to the Employer's president, Michelle Johnson, that Southerly had not appeared for work one day despite turning in a timesheet claiming to have worked 8 hours. There was no evidence admitted into the record that Barnes terminated Southerly. Although Michelle Johnson terminated Southerly because of Barnes' report that he had not appeared for work, the ability to report misconduct to superiors is certainly not tantamount to disciplinary authority. *Los Angeles Water and Power Employees Assoc.*, 340 NLRB 1232, 1234 (2003). Although Barnes could not recall whether he

recommended that Southerly be terminated, this is insufficient to prove the authority to terminate or to effectively recommend termination. Regardless of what Barnes did or did not recommend, the record evidence is clear that Michelle Johnson did not merely rely on Barnes' report, but rather contacted Southerly on her own to investigate and inquire of his whereabouts. Thus, the Employer has fallen well short of carrying its burden of demonstrating that McAllister or Barnes had the power to terminate employees. Having found that the evidence is insufficient to demonstrate that McAllister or Barnes possessed the power to terminate employees, I find the numerous cases cited by Employer, holding that working foremen who have authority to terminate or discipline are supervisors, are inapplicable.

II. Assignment of Work and Responsible Direction of Work

The hearing officer correctly found that neither McAllister nor Barnes has the authority to assign or responsibly direct work. In arguing that the hearing officer erred, the Employer purports to quote numerous examples from the transcript contradicting the hearing officer's findings, even going so far as to recite the facts as if McAllister or Barnes were speaking in the first person. A review of the transcript, however, reveals that the so-called quotes are entirely inaccurate, and frequently omit key qualifiers that change their meaning. As one of many examples, on page 7 of the Employer's brief, the Employer represents that McAllister testified that "as job foreman I am responsible if someone does not do their job on a project." The actual transcript reads as follows:

Q. Do you believe that you would be held accountable and subject to discipline if a job was not – if somebody didn't do their job on a project, would you be responsible, or would somebody else?

A. My feeling is that, for the most part, we have qualified men that are responsible for their own work. But as a job foreman, I would probably be somewhat.

Q. Okay. Have you ever been held responsible for something going wrong on a job?

A. Probably, but I can't remember any. We've had floors and – not get – somebody would forget the hardener.

Q. And have you been disciplined for that?

A. No. . . .

This misleading portrayal of the evidence by the Employer's counsel has not gone unnoticed. That being said, I will respond to the Employer's arguments, although many of them are based on similarly altered accounts of the record testimony.

The record evidence demonstrates that, although the Employer's project managers, Alex Johnson and Kevin Rock are not present on the jobsites at all times, they visit the jobsites frequently and are available by phone (along with other managers) should the employees have questions. This situation is quite different from that in *Draggoo Electric Co., Inc.*, 214 NLRB 847 (1974), where an employee who was in charge of the employer's entire business when the owner was absent was found to be a supervisor. The testimony also demonstrated that the Employer's work force is experienced and that the nature of the work is usually routine, with the laying of terrazzo and tile being accomplished in the same steps for each job. To the extent that Michelle Johnson testified in general terms about the authority of McAllister and Barnes, the record evidence demonstrated that Ms. Johnson did not actually work in the field and that her testimony was based on second hand knowledge. Inferences and conclusionary statements are

insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). The hearing officer acted well within his discretion in giving substantially more weight to the specific testimony of McAllister and Barnes, who had firsthand knowledge of the day-to-day field operations. The Employer certainly could have called Alex Johnson, Kevin Rock or other individuals with firsthand knowledge of field operations as witnesses in this matter, but it failed to do so. Secondary indicia of supervisory authority, such as the higher pay rates of McAllister and Barnes and their job titles, are insufficient to demonstrate that they are supervisors under Section 2(11) of the Act. *Training School of Vineland*, 332 NLRB 1412 (2000); *Carlisle Engineered Products*, 330 NLRB 1359 (2000).

The Board has held that an employee possesses the supervisory indicia of authority to assign work when he designates an employee to a place, appoints the employee to a time or gives significant overall duties. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). Merely choosing the order in which employees perform discrete tasks within an assignment, however, is not indicative of the authority to assign work. *Id.* With regard to the argument that McAllister assigns work, the strongest evidence in favor of this conclusion would be an isolated piece of testimony that he once had Finisher Greg Salibritas do grout work on ceramic tile because he is the best at this task. Telling an employee to do some grout work, however, is more akin to the kind of minor orders that a leadman or straw boss might give and is insufficient to show that an individual is a supervisor. *Chicago Metallic Corp.*, 273 NLRB 1677, 1688-89 (1985). Viewing the testimony as a whole, it quickly becomes apparent that the division of labor at the jobsite is based largely on an experienced work force taking on the tasks that they are most experienced at and that are within the skill sets of their job functions. In this regard, mixers mix, grinders grind, pourers pour and finishers finish. Any direction that McAllister gives his co-workers appears to be largely based upon common sense and the need to do certain tasks at certain times in order for the work to get done properly. For instance, the reason that the mixers don't mix until McAllister tells them to do so is that McAllister is the pourer and the mix would harden if it were mixed before McAllister was ready to pour it. With regard to Barnes, it appeared that the extent of his assignment of work was relaying Alex Johnson's instructions on how he wanted the job to be run. Barnes also testified that, although he has told employees to redo certain work, all of the members of this experienced workforce critique each other's work to ensure that the job is of proper quality. The record evidence was also clear that, unlike the foremen of *Maidsville Coal Co.*, 257 NLRB 1106 (1981), *Contractors Cargo Co., Inc.*, 218 NLRB 549 (1975), *Jeffrey Mfg Co.*, 208 NLRB 75 (1974) or *Captive Plastics, Inc.*, 209 NLRB 749 (1974) neither McAllister, nor Barnes, possess the authority to assign employees to new jobsites, to require overtime or to authorize employees to be off work.

In deciding whether a purported supervisor possesses the authority to responsibly direct work, the question is whether he is held accountable and responsible for the performance and work product of the employees he directs. *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986); *Oakwood* at 691. The record evidence was insufficient to establish that McAllister or Barnes possess the authority to responsibly direct work. At most, McAllister testified that he "would probably be somewhat" responsible for the work, but he unequivocally testified that he has never been disciplined for another employee's failings. The record discloses that McAllister believes he is held responsible only for a key aspect of the work which he does himself -- the pouring of the terrazzo floor. In addition, contractors sometimes come to him if there is a problem, and he relays contractors' concerns to the other employees; for example, McAllister would tell the employees something needs to be swept up if the contractor complains about it.

The Employer made much of McAllister's concern that he might lose his job if enough of his floors had to be torn out, but again, this does not make him a supervisor – he is the one who pours the floors. When McAllister testified that men come to him with problems and he resolves them if he can, this had nothing to do with terms and conditions of employment; but rather with attempting to repair terrazzo by patching it. There was virtually no evidence that Barnes is held accountable for the performance of other employees. Although Barnes made some reference to overseeing the job, the testimony demonstrated that this was limited to him calling Alex Johnson or Kevin Rock to let them know if the job was running low on material.

In conclusion, the Employer has fallen well short of meeting its burden of proof to establish that McAllister and Barnes are supervisors within the meaning of Section 2(11) of the Act. It is significant that the witnesses called by the Employer, Michelle Johnson and Norma Martina, do not work in the field and have little firsthand knowledge of the day-to-day work of the disputed employees, instead relying on hearsay evidence. I agree with the hearing officer that one would be hard pressed to credit such hearsay over the firsthand testimony of Barnes and McAllister, particularly on an issue where the Employer bears the burden of proof.

CONCLUSION

For the reasons set forth above, I overrule the challenges to the ballots of Keith Barnes and Thomas McAllister and find that their ballots should be opened and counted.

ORDER

IT IS HEREBY ORDERED, that an agent of the undersigned shall, at a time and place to be determined by the undersigned, open and count the ballots of Keith Barnes and Thomas McAllister and thereafter immediately prepare and make available to the parties a second revised tally of ballots in accordance with the Rules.

Right to File Request for Review: Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain a review of this Second Supplemental Decision by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Second Supplemental Decision, is not part of the record before the Board unless appended to the exceptions or opposition thereto and that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Second Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111-102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on February 19, 2013 at 5 p.m. (EST), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review**

electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. ^{3/} A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. *Once the website is accessed, click on File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Cincinnati, Ohio this 4th day of February 2013.


Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

^{3/} A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

**UNITED STATES OF AMERICA
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REGION 09**

THE ARDIT COMPANY

Employer

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KENTUCKY ADMINISTRATIVE COUNCIL,
LOCAL NO. 18**

Case 09-RC-083978

Petitioner

**AFFIDAVIT OF SERVICE OF: Second Supplemental Decision and Order, dated
February 4, 2013.**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **February 4, 2013**, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

MICHELLE JOHNSON
THE ARDIT COMPANY
3535 JOHNNY APPLESEED CT
COLUMBUS, OH 43231-4985

RONALD L. MASON , ESQ.
AARON T. TULENCIK
MASON LAW FIRM
425 METRO PLACE NORTH
SUITE 620
DUBLIN, OH 43017

RYAN K. HYMORE , ATTORNEY AT
LAW
MANGANO LAW OFFICES CO LPA
10901 REED HARTMAN HWY
STE 207
CINCINNATI, OH 45242-2838

INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED
CRAFTWORKERS, OHIO KENTUCKY
ADMINISTRATIVE DISTRICT
COUNCIL, LOCAL UNION NO. 18
5171 HUDSON DR
HUDSON, OH 44236-3735

February 4, 2013

Date

Pamela J. Nagel, Designated Agent of
NLRB

Name

Signature