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

In the Matter of

PENNINGTON PLUMBING AND HEATING, INC.

Employer

and Case 9-RD-090337

MICHAEL J. FLINT, AN INDIVIDUAL

Petitioner

and

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 33

Union

Appearances:

On behalf of the Employer:
Fred F. Holroyd, Attorney
Brian D. Yost, Attorney

On behalf of the Union:
Marilyn Widman, Attorney

Before:
Joseph F. Tansino, Hearing Officer

HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION AND RECOMMENDATIONS TO THE BOARD

I. INTRODUCTION:

Pursuant to the provisions of a *Stipulated Election Agreement* approved by the Regional Director on October 9, 2012, [1]/ an election by secret ballot was conducted on November 14

[1]/ All dates are in 2012 unless otherwise specified.

among certain employees of the Employer, [2]/ to determine whether they desired to be represented by the Union 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 Board's Rules and Regulations which disclosed the following results:

Approximate number of eligible voters	5
Number of void ballots	0
Number of votes cast for the Union	0
Number of votes cast against participating labor organization	4
Number of valid votes counted	4
Number of challenged ballots	1
Valid votes counted plus challenged ballots	5

The challenged ballot is not sufficient to affect the results of the election.

On November 20, the Union timely filed Union's Challenge and Objections to Conduct Affecting the Results of the Election, [3]/ herein called the Union's Objections, which was duly served on the Employer and the Petitioner in conformity with the Rules. On May 28, 2013, the Regional Director issued a Report on Objections to Election, Order Directing Hearing and Notice of Hearing, in which he ordered that a hearing be conducted before a duly assigned hearing officer to resolve the issues raised by the Union's Objections for the purpose of receiving testimony and evidence relevant to these Objections. At the hearing, all parties were present and were given full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence on the issues and to make closing arguments.

The Union's Objections 1 and 3 concern the alleged supervisory status of the Petitioner. Objection 1 alleges that the Petitioner is a "supervisor" within the meaning of Section 2(11) of the Act and therefore cannot have properly filed the instant petition. Objection 3 alleges that the Petitioner, as a statutory supervisor, unlawfully interrogated employees about their union support. The Union's Objection 2 concerns voter eligibility. The Union alleges that the

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[2]/ The appropriate bargaining unit as set forth in the Agreement is: "All employees of the Employer engaged in but not limited to the: (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or non-ferrous metal work and all other materials used in lieu thereof and all HVAC systems, air-veyor systems, exhaust systems, and air handling systems regardless of material used, including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; and (e) all other work included in the jurisdictional claims of the Sheet Metal Workers' International Association employed by the Employer at its facility located at 301 George Street, Beckley, West Virginia, excluding all plumbers, the truck driver, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act."

[3]/ In this document, the Union raises the issue of its challenge at the election to the ballot cast by the Petitioner, asserting that the Petitioner is a supervisor within the meaning of Section 2(11) of the Act. As noted above, the challenged ballot is not determinative of the election results and, therefore, the Regional Director found that the challenged ballot will not be considered further in this proceeding.

Employer failed to provide information necessary for the Union to determine whether the voter eligibility list included all potential voters under the *Daniel-Steiny* formula.

II. CREDIBILITY:

My findings of fact are based on the record as a whole, including a full review of the testimony, written and/or documentary evidence presented, and upon my observations of the testimony and demeanor of witnesses. All testimony has been reviewed and evaluated in light of the demeanor of each witness, the logical consistency and inherent probability of the evidence presented, and the record as a whole. I have also considered whether testimony was conclusionary as distinguished from a statement of fact, or in response to leading questions by counsel. While I have specifically addressed the credibility of particular witnesses with regard to specific matters, the absence of a statement of resolution of a conflict in specific testimony or of an analysis of such testimony does not mean that such analysis did not occur. See, *Walker's*, 159 NLRB 1159 (1966); *ABC Specialty Foods, Inc.*, 234 NLRB 475 (1978). The Board has long held that the failure of a trier of fact to detail completely all conflicts in the evidence does not mean that this conflicting evidence was not considered, and I am not compelled to annotate each such finding. *Walkers*, 159 NLRB 1159, 1161.

III. FACTUAL BACKGROUND:

The Employer is engaged in the business of commercial plumbing and heating construction, primarily in new construction and renovation work on commercial, light commercial, and residential buildings. The Employer also does some service work. The Employer's operations are divided roughly into two types of work: plumbing/pipefitting, and HVAC. Eric Mahaffey has served as the Employer's president for approximately 4 or 5 years. The Employer employs an estimator and project manager Mark Bowles to handle the plumbing/pipefitting side of operations. Amelia Fox has been the Employer's bookkeeper for approximately 7 years. Fox keeps track of receivables and payables, maintains personnel files, generates payroll and drafts checks for the bills and paychecks. On the HVAC side, Mahaffey is personally involved in the day-to-day operations of the Employer, scheduling work and manpower, identifying issues on jobsites, interpreting problems, plans and specifications, coordinating work with field employees, and directing schedules of how the work is to be accomplished on the work site. For those projects that are not subcontracted, Mahaffey directs employees where to go and how to perform the work, but he is not physically present at the jobsite. Mahaffey determines the number of employees assigned to a jobsite. If there are multiple employees on a jobsite, Mahaffey assigns one of the employees as lead mechanic, who coordinates the installation of the work and handles questions from other employees.

During the time period from September 30, 2010 to September 30, 2012, the Employer employed approximately 15 to 20 field employees and was signatory to a collective-bargaining agreement with the Union. The parties did not identify the effective dates of that agreement. The Employer employed five bargaining-unit members, sheet metalworkers who were engaged primarily in work on the HVAC side of operations; the remaining 10 to 15 employees worked as pipefitters. The five bargaining-unit employees were: Charles Adkins, Jr., Charles Flint, Jeremy Adkins, Michael Flint, and Shaun O'Hara.

Most of the Employer's project work is done via bid system, and a small percentage of service work is done privately for friends, family, and customers. For each project that the Employer undertakes, it assigns a Job ID. The Employer may perform project work itself or subcontract the work to other companies, including Air Systems and Beckley Mechanical, which is owned and operated by Eric Mahaffey's father. The Employer requires subcontractors to submit certified payrolls for its employees if required. The Union's evidence discloses that the Employer has done work on 16 projects involving sheet metal work between 2010 and September 2012. The record does not disclose how many employees were sent out on each of these projects.

The Employer employs its sheet metal workers through an application process that begins by contacting Jim King, the business representative for the Union. King was appointed to the office in April 2007 and elected in 2009. As business representative, King is responsible for securing work for union members, enforcing the rules and conditions of collective-bargaining agreements, and referring workers for jobs. The Employer is within the Union's jurisdiction. King testified that he fills out a referral slip whenever a union member goes to work on a job, including the worker's personal information and his deductions for pension, health and welfare, hourly rate, and taxes. Employees are frequently sent over to the Employer's jobsites directly from the hiring hall, and Mahaffey may never even meet them. With regard to the five employees included on the election eligibility list, Mahaffey's routine practice was to contact his employees directly to send them out on a job. Mahaffey assigns an employee to work as the lead mechanic on each job.

Lead mechanics are not paid any differently than other sheet metal workers nor do they enjoy super-seniority with respect to layoff. Lead mechanics are not responsible for turning in or checking other employees' timecards. Rather, employees fill out their own timecards and turn them in directly to Fox. Fox uses the timecards to generate payroll. Timecards occasionally identify different projects and hours spent on each project: this assists the Employer in allocating the time employees have spent working different jobs.

According to O'Hara, who has worked for the Employer for approximately 2 years and has worked in the field and in the shop as a fabricator, welder, painter, and truck driver, practically every field employee, including Adkins and Charles Flint, have served as lead mechanic. While acknowledging he has not done so, O'Hara explained that this is because he generally works in the shop and only works in the field when shop work slows down. However, when working in the shop and the field, O'Hara stated that he does so per Mahaffey's instructions. He further averred that the lead mechanics have never referred him to a jobsite. Although acknowledging that he has worked on jobs on which the Petitioner was the lead mechanic, O'Hara averred that he worked pursuant to Mahaffey's instructions and would only ask the Petitioner or one of the other employees what to do if he was unclear about something. O'Hara also testified that he could refer to the prints.

Like O'Hara, Charles Adkins, who has been one of the Employer's HVAC installers since 2010, testified that he receives his job instructions from Mahaffey. He further averred that he and his son (Jeremy Adkins) typically work together, and when they do, Charles directs

Jeremy per Mahaffey's instructions. If he finds himself short-handed, he contacts Mahaffey to assign additional employees to Adkins' jobsite. Adkins acknowledged that he has been working for the Employer since 2010 and that the Employer has been making union pension contributions since that time.

The Petitioner does hand duct, equipment, and service work. He acknowledged that he has worked as a lead mechanic for the Employer. He further averred that, as lead mechanic, he is responsible for installing duct work and equipment. According to the Petitioner, when working as lead mechanic, he acts as the point of contact between Mahaffey and the jobsite. He is responsible for storing equipment at the jobsite and makes purchases on behalf of the Employer with Mahaffey's clearance. He may suggest to Mahaffey that additional employees be dispatched to his jobsite if he needs extra hands. He averred that he has not had any situations on jobsites where he has had trouble with employees he was working with, including both HVAC and plumbing employees, or with contractors. Flint, who circulated the RD petition, acknowledged that while Mahaffey is the project manager, he is not physically present at the jobsite. Mahaffey dictates what the work is to be done, and, according to Flint, the employees all work together according to their experience. Flint confirmed that, with the exception of O'Hara, all of the employees have equal experience. Flint testified that he calls Mahaffey several times a day for instruction. When Flint acts as lead mechanic, it is his responsibility to make sure there are enough materials and equipment for the job in question. If he is running short on materials, he calls Mahaffey, who either places an order directly with the distributor or else, if it is urgent, instructs Flint where to purchase the materials.

Mahaffey stated consistent with Flint's testimony that he discusses projects with the lead mechanic on a daily basis, either in person or by telephone. Out of the five bargaining-unit employees, Mahaffey testified that anyone could be assigned as lead mechanic. Mahaffey could not recall whether employee O'Hara had worked as a lead mechanic, but he acknowledged that O'Hara is primarily a fabricator who works in the shop. Mahaffey specifically identified Charles Adkins, Charles Flint, and Michael Flint as employees who had worked as lead mechanic during the time period between September 30, 2010 and September 30, 2012.

IV. OBJECTIONS 1 AND 3:

The Union alleges that the Petitioner is a "supervisor" within the meaning of Section 2(11) of the Act and therefore cannot have properly filed the instant petition. The Union further alleges that Petitioner, as a statutory supervisor, unlawfully interrogated employees about their union support. Section 2(11) of the Act defines "supervisor" as:

> . . . any individual having (the) 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.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). But the exercise of that authority must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory Authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961,963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether Michael Flint possesses any of the supervisory indicia set forth in Section 2(11), I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Id.* at 1689. Such "minor supervisory duties" do not deprive such individuals of the benefits of the Act. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974). The Board has warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital- Los Angeles,* 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital,* 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply,* 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). I note that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Dean & Deluca,* supra at 1047; *Star Trek: The Experience,* 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact "to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact's existence." *In re Winship,* 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home,* 332 NLRB at 1409. Moreover, "[w]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), in light of the Supreme Court's finding in *Kentucky River*. See also *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Goldencrest Healthcare Center*, 348 NLRB 727 (2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court's rejection of the Board's interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted "definitions for the term 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Oakwood*, at 688.

With regard to the Section 2(11) criterion "assign," the Board noted that this factor shares with other Section 2(11) criteria the "common trait of affecting a term or condition of employment" and determined to construe the term "assign" "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Id.* at 689. The Board reasoned that, "It follows that the decision or effective recommendation to affect one of these - place, time, or overall tasks - can be a supervisory function." *Id.* The Board clarified that, " ... choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Id.*

The Board sought to define the parameters of the term "responsibly to direct" by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, (5th Cir. 1986):

> To be responsible is to be answerable for the discharge of a duty or obligation ... In determining whether "direction" in any particular case is responsible, the focus is on whether the alleged supervisor is "held fully accountable and responsible for the performance and work product of the employees" he directs . . . Thus in *NLRB v. Adam [&] Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department. *Oakwood*, at 691.

In agreeing with the circuit courts that have considered the issue, the Board 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 employees are not performed properly." In clarifying the accountability element for "responsibly to direct" the Board noted that, "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.

In *Kentucky River*, the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment

in directing less skilled employees to deliver services." *NLRB v. Kentucky River Medical Center, Inc.,* 532 U.S. at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted an interpretation of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise ... professional or technical judgments involving the use of independent judgment are supervisory if they involve 1 of the 12 supervisory functions of Section 2(11)." *Oakwood,* at 692. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "of a merely routine or clerical nature." *Id.* at 693. Consistent with the view of the Supreme Court, the Board held 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." *Id.* (citation omitted) However, " ... the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.*

The Union did not specify at hearing or in its brief which indicia it was relying on in support of its position that the Petitioner is a supervisor. In any event, the record is completely silent as to whether the Petitioner has authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action. Accordingly, I conclude that the Petitioner does not have supervisory authority to perform these functions.

Further, the evidence of Petitioner's authority to responsibly direct work is nonexistent, given that there is no evidence that the Petitioner is held responsible for the work of his fellow crew members. In finding that the Petitioner does not have supervisory authority to responsibly direct work, I rely on the Petitioner's testimony that he calls Mahaffey multiple times a day to consult with him about all manners of jobsite decisions, including the purchase of materials and the plans for the day. In asserting that the Lead Mechanic directs the bargaining-unit members as to where on the jobsite they are supposed to be working, the Union mischaracterizes record evidence. Contrary to the Union's assertion, Mahaffey explained, "I may tell [the Lead Mechanic] to have – specifically to have these two employees do X, Y and Z, or I may say take these two employees and do this section of the work now so that we can meet this schedule and they may determine." (Tr. 26-27) To the extent that the Union elicited evidence that the Petitioner engaged in some minor supervisory authority to direct work, it failed to demonstrate that such direction was carried out "responsibly," to wit: there is no evidence that the Petitioner might have suffered adverse consequences as a result of his jobsite direction of employees.

With respect to the Petitioner's authority to assign work, the only evidence in the record is that the Petitioner may suggest to Mahaffey that additional employees be sent to the jobsite if work is falling behind. No evidence was presented that the Petitioner determines which employee should be sent out or whether they should be sent out at all. Nor did the evidence demonstrate that the Petitioner's "suggestions" are routinely accepted by Mahaffey. (Tr. 81-82) To the contrary, the evidence establishes that it is Mahaffey who assigns the manpower to a jobsite, not the Petitioner. (Tr. 86)

Based on the foregoing, I do not find that the Petitioner possesses any of the indicia of supervisory authority in his capacity as a lead mechanic. Accordingly, I find that the Petitioner is not a supervisor within the meaning of Section 2(11) of the Act. Because I find that the Petitioner is not a supervisor, I also find that the Petitioner did not unlawfully interrogate employees concerning their union sympathies during the critical period. Even had the Petitioner been found to be a supervisor, no evidence was presented that he interrogated anyone.

V. OBJECTION 2:

The Union alleges that the Employer failed to provide information necessary for the Union to determine whether the voter eligibility list included all potential voters under the *Daniel-Steiny* formula. The Board has a long established policy of favoring and not restricting voter eligibility. *Ameritech Communications*, 297 NLRB 654 (1990). In 1967, the Board noted that in the construction industry, many employees experience intermittent employment and may work for short periods on different projects for several different employers in a year. *Daniel Construction Co.*, 167 NLRB 1078 (1967). Therefore, the Board established the following eligibility formula to insure that all employees with a reasonable expectation of future employment with an employer engaged in the construction industry would have the fullest opportunity to participate in a representation election:

> In addition to those in the unit who were employed during the payroll period immediately preceding the date of the Decision and Direction of Election, all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election hereinafter directed, shall be eligible to vote.

Daniel at 1078-1079.

The formula further excludes any employees who have been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Id.* at 1081.

In 1992, the Board confirmed the appropriateness of applying the *Daniel* formula when an employer has a relatively stable work force but also experiences sporadic employment patterns typical of the construction industry. *Steiny & Co.*, 308 NLRB 1323 (1992). In *Steiny & Co.*, the Board established a set of factors it considers when determining whether an employer is engaged in the construction industry: (a) intermittent employment; (b) short periods of employment on different projects; (c) several different employers in 1 year; and (d) short layoffs due to material shortages or because the work is dependent on the work of various crafts. *Id.* *Steiny* specifically holds that, to avoid confusion, reference to "days" of employment in the *Daniel* formula would be revised to add the words "working days."

The Board defines construction work in broad terms. For instance, the Board has held that the statutory definition of the "building and construction industry" encompasses "the

provision of labor whereby materials and constituent parts may be combined on the building site to form, make, or build a structure." *Painters Local 1247 (Indio Paint and Rug Center)*, 156 NLRB 951, 959 (1966). Additionally, the Board has found that an employer who makes repairs to and replaces integral parts of an immovable structure is engaged in "construction" as used in Section 8(f) of the Act. *South Alabama Plumbing*, 333 NLRB 16 (2001).

At the start of the hearing I notified the parties that I would not take evidence on the issue of whether the Employer was a single employer with, or alter ego of, Beckley Mechanical. In its opening statement, the Union asserted that as many as 17 employees should have been included on the voter eligibility list by virtue of the relationship between the Employer and Beckley Mechanical. Regarding this matter, I note that neither the parties' Stipulated Election Agreement nor the Regional Director's Report on Objections to Election make any reference to an alter ego relationship between the Employer and Beckley Mechanical. Accordingly, that issue is not properly before me.

Notwithstanding this express limitation on the evidence to be presented at hearing, the Union introduced evidence on employees' employment relationship with Beckley Mechanical. Certain records pertaining to employees' work history indicate, for example, that employees worked at both Beckley Mechanical and the Employer during the time period in question. In assessing whether any of these employees met the requirements for inclusion on the eligibility list under *Daniel/Steiny* formula, I consider only the hours reported for the Employer.

The Union acknowledges in its brief, and I find, that the 17 employees identified in the Report on Objections were not documented as being on the Employer's payroll for a sufficient number of hours to establish they were eligible to vote in the election under the *Daniel/Steiny* formula. (Union Post-hearing Brief, p. 5) But the Union maintains that other employees who were not included on the voter eligibility list may have qualified for inclusion, namely, Johnny Duncan, Jr., and Sherman Williams. I now consider whether the evidence establishes that Duncan or Williams should have been included on the voter eligibility list under the *Daniel/Steiny* formula.

The Union elicited testimony from Mahaffey regarding 12 employees' timecards, which the Union identified for the record as Union Exhibit 2 but withdrew prior to resting. Mahaffey testified that none of those 12 employees had performed bargaining-unit work during the time period from September 30, 2010 through September 30, 2012. One of the employees referenced with respect to the withdrawn Union Exhibit 2 was Duncan. In support of its argument that Duncan should have been included on the voter eligibility list, the Union relies solely on Mahaffey's testimony that Duncan worked on either two or three projects where both HVAC and plumbing work was completed. Given Mahaffey's earlier statement at the hearing that the employees referenced in Union Exhibit 2 did not perform bargaining-unit work, the evidence fails to establish that Duncan should have been included on the eligibility list.

The Union next elicited testimony from Mahaffey regarding an unknown number of employees' timecards, which the Union identified for the record as Union Exhibit 3 but subsequently withdrew. One of the employees referenced in Union Exhibit 3, Williams, had recorded "cleaning units" on his timecard for June 2012. The Union argues that since Mahaffey

was unable to state whether the "units" identified on the timecard referred to HVAC or plumbing work, Williams may have been rendered eligible to vote, presumably if the work done in June 2012 had qualified as HVAC bargaining-unit work. Because there is no evidence to establish that the work identified on Williams' timecard was bargaining-unit work, there is likewise insufficient evidence to establish that Williams should have been included on the eligibility list.

The Union suggests that I apply the burden-shifting standard used in ERISA cases and find that the work performed by these employees was bargaining-unit work based on perceived uncertainty in the Employer's records. This is not an ERISA case, and the Union advances no case law to support its position that ERISA law should apply in an NLRB representation proceeding. Further, the Union provides no guidance on how such a standard would be applied, and indeed, the Union withdrew from evidence those records that might have demonstrated that the employees in question could have been included on the eligibility list if the ERISA burden-shifting standard were applied.

VI. RECOMMENDATIONS TO THE BOARD:

Based on the foregoing, I recommend that the Union's Objections be overruled and that the results of the election be certified.

VII. EXCEPTIONS TO HEARING OFFICER'S REPORT:

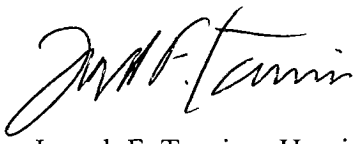
Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111-102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, DC by close of business **September 4, 2013,** 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encourage to file exceptions electronically.** If exceptions are filed electronically, the exceptions 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 exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to 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.nlrb.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 21st day of August 2013.



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