

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

ASPLUNDH TREE EXPERT CO.

Employer

and

Case 07-RC-131249

**LOCAL NO. 876, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS (IBEW), AFL-CIO¹**

Petitioner

APPEARANCES:

Kenneth A. Jenero, Attorney, of Chicago, Illinois, for the Employer

Fillipe S. Iorio, Attorney, of Grand Rapids, Michigan, for the Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer provides line clearance services to utility companies throughout the United States. It is headquartered in Willow Grove, Pennsylvania, and is organized by region.

The Petitioner seeks to represent a unit consisting of planners, crew forepersons, ground persons, tree trimmers, tree trimmer trainees, and sprayers employed by the Employer to perform line clearance and utility line maintenance for Indiana Michigan Power (I & M) in the “Michiana” Region.

The Employer contends that the planners and crew forepersons should be excluded from the unit on the grounds that the crew forepersons are supervisors within the meaning of Section 2(11) of the National Labor Relations Act (the Act), and the planners lack a community of interest with the crew members.

Both the Petitioner and Employer agree that any unit found to be appropriate should include all full-time and regular part-time trimmers, trimmer trainees, ground

¹ The name of the Petitioner appears as amended at the hearing.

persons and sprayers employed by the Employer to perform line clearance and tree trimming in I & M's Michiana Region, and should exclude general forepersons, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Based on the case law and record evidence, I conclude that the crew forepersons are not supervisors as defined by the Act, and that the planners have a sufficient community of interest with the other petitioned-for employees to be included in the bargaining unit.

Overview

The Michiana Region, which is comprised of the geographical area on both sides of the border of Michigan and Indiana, is part of the Employer's Region 63. Carl Marcum is the regional manager of Region 63. He oversees all of the Employer's operations in the region. The Employer has two regional safety superintendents (RSS's) who are responsible for overseeing the Employer's day-to-day operations in the field. Seven general forepersons are assigned to the Michiana Region. They report to the RSS's. Each general foreperson supervises thirty to thirty-five crews. The Employer has other employees in Region 63; only the Michiana employees are at issue in this case.

Crews:

There are three types of crews: bucket crews, which perform roadside tree trimming work on highways and driveways; manual crews, which clear lines in off-road locations; and super crews, which consist of one or more bucket or manual crews. There are typically two employees, a crew foreperson and a crew member, assigned to a bucket crew, and two to three employees (including the crew foreperson) assigned to a manual crew. Super crews are not common and are used only when there is a particularly large job to complete. The majority of the crews are bucket crews. There are approximately eighty-six crew members and thirty-five crew forepersons in the Michiana Region.

The crews are responsible for trimming and removing trees along or near I & M's power lines. The crews do not work in the same location every day, but instead the general foremen assign them to different locations depending on the work that needs to be done. Each morning, the crews meet with their general foremen at a pre-designated parking area within a thirty-minute radius of their work site, and then disperse to their job sites. The crews reconvene at the parking area at the end of the day.

Planners

There are nine work planners assigned to the Michiana Region. The planners work out of I & M's office in Buchanan, Michigan. The planners report directly to regional manager Marcum. The planners spend from one-hour to two-hours each day in the Buchanan office, performing office work and contacting customers. They spend the remainder of their day in the field marking trees for line-trimming by the manual and bucket crews, contacting property owners who will be impacted by the line clearance work, and responding to calls from customers.

The planners receive their assignments directly from I & M employees called foresters. The foresters give the planners a map of a circuit to patrol. The planners then walk the power lines in that circuit, marking the trees that need to be trimmed in order to ensure that the power lines remain clear. The planners follow I & M's guidelines for three years' of clearance on the lines, along with their own knowledge of tree growth patterns, to determine which lines should be cleared.

The planners are responsible for contacting property owners to inform them that a tree on their property must be trimmed or removed. If a property owner is not home, the planner will leave a door hanger. The door hangers bear I & M's name, and state the work that must be done to clear the lines. Some of the planners affix a sticker with their names and the Employer's name to the door hangers; however, the Employer's name does not appear on the printed door hanger. Some door hangers have a printed reply postcard, which bears I & M's address.

When the planners determine that a tree should be trimmed or cut down, they mark it with spray paint and enter the information into their laptop computers. These computers contain software that creates a work manifest based on the information entered by the planners. The manifest is then given to the foresters, who approve the manifests, and then give the manifest to the general foreperson for assignment to the work crews.

Collective Bargaining History

There is no history of collective bargaining regarding any of the involved employees.²

² Petitioner attempted to introduce collective bargaining agreements at the hearing that purportedly showed that planners and crew forepersons have been included in bargaining units in other regions. The hearing officer rejected these exhibits on the basis of relevancy, and I did not consider these documents in reaching my decision.

II. Analysis

The two issues in this matter are whether or not the crew forepersons are supervisors as defined in the Act, and whether or not the planners have a sufficient community of interest with the other petitioned-for employees to be included in the same bargaining unit as the crew members and crew forepersons.

A. Board law

Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

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

An individual will be found to be a statutory supervisor if he or she (1) has the authority to engage in any of the twelve supervisory functions listed above; (2) uses independent judgment in exercising that authority and (3) holds the authority in the interest of the employer. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001).

The party alleging supervisory status has the burden of proof. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *Kentucky River Community Care*, supra, at 711-712. The lack of evidence on any factor is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). In order to exclude someone from the unit on the basis of their supervisory status, that status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, supra at 694, citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

Evidence that is purely conclusionary is not sufficient to establish supervisory status. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004), citing *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). The Board requires actual evidence that the individual possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381, fn. 6 (1995).

The Board is cautious “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Oakwood Healthcare*, supra at 688, citing *Chevron Shipping Co.*, supra at 381. Inconclusive evidence will not be grounds for a finding of supervisory status. *New York University Medical Center*, 324 NLRB 887, 908 (1997), enfd. in relevant part 156 F.3d 405 (2nd Cir. 1998); *The Door*, 297 NLRB 601 fn. 5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

2. Community of interest

In determining whether a bargaining unit is appropriate, the Board examines whether or not the petitioned-for group of employees share a community of interest. *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 9 (2011). The factors that are relevant to making this determination include whether the employees have similar skills, duties, working conditions, wages and benefits. The Board also considers whether the employees have common supervision, whether there is interchange between the employees, and whether the groups of employees are functionally integrated within the Employer’s operation. *Id.*

The Petitioner’s desire to represent a particular group of employees is always relevant in making a community of interest determination. *Id.* at 8. A petitioned-for unit need only be an appropriate unit, not “*the* single most appropriate unit.” *Id.*; see also *Int’l Bedding Co.*, 356 NLRB No. 168 (2011). In most workplaces, there is usually more than one appropriate bargaining unit that could potentially be found.

B. Application of Board law to this case

1. Crew Forepersons - Supervisory status

In reaching the conclusion that the crew forepersons are not statutory supervisors, I rely upon the following analysis and record evidence.

a. Hire, transfer, layoff and recall

Crew forepersons do not hire employees or assign them to particular crews. A crew foreperson can ask that a particular employee be assigned to (or removed from) a crew, but the general foreperson makes the final determination as to where each employee will be assigned, and crew members can also ask the general foreperson to move to a different crew. A crew foreperson may recommend that an employee be hired. However, the general forepersons make the final hiring decisions. I find that the record does not support a finding that the crew forepersons have sufficient authority in these areas to be statutory supervisors.

b. Promotions

All employees on the crew are to perform their work subject to the guidelines set out in the Employer's Line Clearance Qualification Standard (LCQS) books. The Employer has a book for every level of crew member, from ground person/trainee through crew foreperson. Each employee is given the book appropriate to her/his classification. A full set of LCQS books is kept on each work truck.

The LCQS books contain detailed instructions to employees on how to safely perform their jobs, from instructions about wearing seatbelts while in the company truck to drinking water while working in hot weather. The book also contains various proficiencies that an employee must master before being eligible to move to the next step in their career. As an example, one of the proficiencies a ground person/ trainee must attain is in temporary traffic control. The LCQS book provides detailed information about the type of traffic a crew might encounter and the best means of controlling that traffic so that the crew can work safely. After review with the crew foreperson, there is a space to initial whether the trainee can explain concepts such as buffer spaces (the area around the work space that should be clear of traffic).

The crew foreperson works with crew members to attain the on the job proficiencies (OJT) necessary to work through the LCQS book. When an employee completes a proficiency, the crew foreperson will initial and date the employee's book. Once an employee completes all of the proficiencies in the LCQS book, the general foreperson is notified. The general foreperson then administers a final proficiency exam, which consists of oral questions and answers demonstrating the employees understanding and proficiency in the subject. A general foreperson may refuse to pass an employee even if all of their OJT's have been initialed by the crew foreperson. When an employee passes a final proficiency test, the crew member, crew foreperson and general foreperson all sign the crew member's book to indicate that the employee has worked through that book and is ready for the next one.

The Employer contends that the crew forepersons have supervisory authority over promotions because of the role they play in ensuring employees have met their OJT proficiencies. Crew members can be promoted to a higher graded position after they have passed the final proficiency exam in their current classification. Such promotions are not automatic, however. Even if an employee completes all of his or her proficiencies and passes the final exam, he or she cannot be promoted unless there is a higher graded position available. The general foreperson determines when a position is available and decides which employees should be promoted.

The authority to "effectively recommend an action generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *DirectTV LLC*, 357 NLRB No. 149,

slip op. at 3 (2011), citing *Children's Farm Home*, 324 NLRB 61, 61 (1997)(internal quotations omitted). Because initialing an employee's OJT proficiencies does not guarantee that an employee will pass their final proficiency, which in itself does not guarantee promotion, I find that the crew forepersons do not exercise supervisory authority in the area of promotions.

c. Assignments

In order to be considered supervisory under Section 2(11), the authority to make assignments must include the authority to assign an employee to a particular work location, time (such as a different shift or overtime), or give an employee significant overall duties. *Oakwood Healthcare*, supra at 689. An individual does not exercise independent judgment in assigning work if the authority to assign is "dictated or controlled by detailed instructions." Id. at 697-698. A putative supervisor exercises independent judgment by assessing the skills of an employee in determining where to assign them. Id. at 693. Merely acting as a conduit for assignments and directions that have been given by a higher level supervisor does not confer supervisory status. *Golden Crest Healthcare*, supra at 729; *Heritage Hall*, 333 NLRB 458, 459 (2001); *Youville Health Care Center*, 326 NLRB 495, 496 (1998); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548, 552-553 (9th Cir. 1997).

All of the crews meet at a pre-designated parking area within 30 minutes of their job site each the morning. Crew members and crew forepersons work from 7:00 AM to 5:30 PM in the summer, and from 8:00 AM to 4:30 PM in the winter, due to the lack of daylight. The crew foreperson cannot change those hours or assign an employee to a different shift.

The general foreperson meets the crews at the parking area and assigns portions of the manifest to each crew for completion. The manifests contain detailed information about the work that is to be done at each site. The general foreperson then conducts a safety check (or stand down) on each crew to ensure that they are prepared for the work day. After the safety stand down, the crews leave the parking area and go to their work sites. A GPS unit on the work truck monitors when the crews leave the parking lot and go to their assigned job site. The crews must leave the meeting by 7:15 AM each morning when they are on the 7:00 AM shift.

Upon arrival at the job site, the crew foreperson and crew members go through a job briefing. This consists of going through a checklist of work tasks, safety precautions, and potential job site issues which the crew may confront during the work day. This briefing can be filled out by the crew foreperson or a crew member. After the briefing is complete, all of the crew members initial it. The job briefing is then left on a green safety cone so that anyone coming to the site, such as the general foreperson or RSS, can quickly review it before entering the site.

The crew forepersons and crew members spend the remainder of the work day performing manual labor, such as trimming and removing trees, as outlined in the work manifest. The crew forepersons perform the same work as the crew and use the same equipment. The general forepersons visit the crews in the field during the work day. The general foreperson may not visit every crew in a particular day, and may spend an entire day with one crew if that crew is working on a particularly difficult job. The general forepersons are required to spend at least fifteen hours per week in the field with the crews. If any equipment breaks during the work day, the crew foreperson contacts the general foreperson to ask for a replacement.

If a crew completes an assignment early, or cannot complete an assignment within the expected time, the crew foreperson calls the general foreperson. If a work assignment is finished early, the general foreperson will come to the job site with the manifest to give the crew a new assignment. The crews do not work in certain types of inclement weather. If inclement weather arises, the crew foreperson contacts the general foreperson for instructions. The general foreperson determines whether the crew should wait for the weather to pass, or go home for the day.

At the end of the work day, the crew loads its equipment, leaving the safety cones for last. The crew then returns to the parking area. The general foreperson meets the crews at the end of the work day, and receives a briefing from the crew about any issues that arose at the work site. If the crews finish this briefing before the assigned quitting time, they must wait in the parking lot until the end of the shift.

The crew foreperson does not have the authority to assign an employee work at a particular time or location. The crews work a set schedule, and the general foreperson assigns each crew to a particular work location. The crew foreperson is unable to authorize time off, and if an employee calls in sick, the general foreperson is notified. The crew foreperson reports the hours worked by the crew to the general foreman, and the general foreman is responsible for keeping time records for the Employer.

As to the authority to assign duties to the crew, the crew foreperson is the highest ranking employee on the job site when the general foreperson is not present, and is responsible for ensuring that the work as outlined in the manifest is completed. However, in most circumstances, there is only one member of the crew other than the crew foreperson, which clearly limits the independent judgment the crew foreperson must use in assigning work.

The Employer's classification system further constrains the decisions that the crew foreperson makes. If an employee has not completed the proficiencies necessary to use a certain piece of equipment, the crew foreperson cannot assign that employee to that job. "Assigning employees to their known skills is not evidence of independent judgment."

Shaw, Inc. 350, NLRB 354, 356, fn 9 (2007), citing *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn 10 (2004); *SDI Operating Partners, L.P.*, 321 NLRB 111 (1996). In addition, the assignment of work is constrained by the Employer's detailed instructions and policies. The job manifests are extremely detailed with respect to the work that is to be done. Before starting work each day (and after lunch) the crew must go through the job briefing checklist provided by the Employer. This checklist is exhaustive, and both the crew members and crew forepersons are responsible for going through it to make sure they are prepared to start their work. The trees at each work site are marked for removal or trimming before the crew foreperson gets there, and each crew is required to carry LCQS books on their trucks for reference. The Employer acknowledged that if a job is particularly difficult, the general foreperson may spend an entire day with a crew to assist them.³

In sum, any authority that the crew forepersons may exercise while the general foreperson is not on the job site is circumscribed by the Employer's established policies and by the involvement of the general forepersons at the beginning, end and throughout the day. I find that the crew forepersons do not exercise enough independent judgment over the course of the work day to be considered supervisors under the Act.

d. Suspensions and discharge

In Region 63, only a general foreperson can terminate an employee. RSS Gamble testified that the Employer would "unofficially" ask the opinion of the crew foreperson before doing so, but did not provide any specific examples of when a crew foreperson's recommendation led to or prevented an employee's termination. There was conflicting evidence as to whether a crew foreperson could send an employee home for committing a life-threatening safety violation. The Employer did not have any record of this occurring, but asserted that crew forepersons have this authority.

The only crew foreperson who testified at the hearing stated that he would have the authority to take an employee to the general foreperson, but would not have the authority to take any further action. He has never had to exercise this authority; nor has he ever suspended or fired anyone, or recommended that anyone be suspended or fired.

³ In its brief, the Employer argues that the crew forepersons in Michiana are supervisors because they have similar job duties to crew forepersons in North Carolina, who were found to be supervisors in Case 11-RC-071606. The facts of that case are clearly different than the facts in this one. The crew forepersons in North Carolina arrived at the site of the Employer's customer, Northstate Communications, in advance of the rest of the crew and received their assignments directly from the customer. The crew forepersons then had to plan how the work should be completed and decide what equipment should be used. In bad weather, the crew forepersons in North Carolina communicate directly with the customer about stopping work. All of these tasks are performed by general forepersons in Michiana, making the responsibilities of the crew foreperson much more routine.

The record is devoid of any evidence that a crew foreperson in the Michiana Region has suspended or terminated an employee.⁴ A crew foreperson may have the authority to remove an employee from the job site if he or she commits a serious safety violation; however, I do not find that this authority is in itself supervisory. The taking of limited action in response to a flagrant situation has long been held inadequate by itself to support a supervisory finding. *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1139 (1999).

e. Discipline and rewards

In order to be supervisory in nature, an individual's role in disciplining employees must affect the employee's job tenure or status. *Ten Broeck Commons*, 320 NLRB 806, 813 (1996). A merely reportorial role in the disciplinary process is insufficient to confer supervisory status. *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); *Ten Broeck Commons*, supra at 813; *Northwest Nursing Home*, 313 NLRB 491, 497-498 (1993); *The Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

The Employer has a four-step progressive discipline policy which begins with a verbal warning and ends in termination. A crew foreperson can write up a performance notice if he or she observes that a crew member has broken a rule or is not working safely. There was some testimony that crew members may also write up these performance notices, but no examples of performance notices written by crew members were produced at the hearing.

The Employer provided several examples of performance notices that were written by crew forepersons. Some of these notices were from outside the Michiana Region. It was unclear from the record how frequently crew forepersons write such notices. A crew foreperson testified that if he observes an employee committing an unsafe act or breaking a rule, he calls his general foreperson to find out what level of discipline should be marked on the form. The crew foreperson does not have access to personnel files or the disciplinary history of the crew members.

All of the performance notices from the Michiana Region that were introduced at the hearing were either verbal or written notices (except for the performance notice addressed at footnote 4 herein). After a performance notice has been filled out, it goes to the general foreperson, and then to the RSS. The general foreperson initials the forms before they are filed. According to the testimony of RSS David Gamble, a general foreperson or RSS may determine that a performance notice should not be added to an employee's file.

⁴ There is one performance notice, serial #762338 in Employer Exhibit 13, which indicates a three-day suspension, but there is no testimony related to this performance notice.

The Employer provided no examples of employees being suspended or terminated by a crew foreperson, or by the general foreperson, based on performance notices written by a crew foreperson. Similarly, the Employer stated that positive performance notices may be used in making promotion decisions, but did not provide any specific examples where that has occurred.⁵

The LCQS book for forepersons makes reference to the foreperson's ability to discipline an employee up to and including discharge. However, the Board has long held that evidence of actual authority trumps mere paper authority. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare*, *supra* at 731; *Valley Slurry Seal Co.*, 343 NLRB 233, 246 (2004); *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002); *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); *Chevron U.S.A., Inc.*, 309 NLRB 59, 69 (1992).

In its brief, the Employer acknowledges this fact, but argues that the Employer's action in referring to individuals as supervisors is strong evidence of supervisory status. The two cases cited by the Employer, *SAIA Motor Freight, Inc.*, 334 NLRB 979 (2001) and *Wolverine World Wide*, 196 NLRB 410 (1972) involved different facts than the ones at issue here. In *Wolverine*, the putative supervisors, in addition to being held out as supervisors, had authority to transfer employees, to allow them to leave early, and to suspend them. The supervisors in *SAIA* were able to grant time off, correct time and attendance records, and discharge employees.

I find that the Employer has not met its burden in demonstrating that the performance notices affect an employee's employment status, or that the crew forepersons serve in anything more than a reportorial role in issuing these notices. Therefore, I find that the crew foreperson's ability to issue these notices does not confer supervisory authority and is instead reportorial in nature.

f. Responsible direction

In order to demonstrate that an individual is a supervisor based on the responsible direction of another's work, the party asserting supervisory status must show that the putative supervisor is both empowered to discipline employees, and is held accountable for the performance of the employees under his or her direction. *Oakwood Healthcare*, *supra* at 691-692. As with all of the statutory indicia of supervision, responsible direction must entail independent judgment. *Id.* at 692-693. A party seeking to establish supervisory status must show that the putative supervisor is being held accountable for

⁵ The record in this case again contrasts with that in Case 11-RC-071606, where the crew forepersons were found to be supervisors. There, the Employer demonstrated that the crew forepersons made disciplinary recommendations that were followed by the Employer and that impacted an employee's career. For example, a crew foreperson recommended termination, resulting in the demotion of one employee and the layoff of another employee. No such evidence was presented here.

another employee's performance, and not his or her own performance. *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 2 (2014).

The Employer contends that a crew foreperson may be subject to discipline for the actions of the crew. It introduced several examples of performance notices purporting to be of crew forepersons being disciplined for the actions of their crews. However, it was unclear whether the crew forepersons were disciplined for something the crews did, or for failing to perform their own jobs. For example, one performance notice was for failing to properly inspect work before it was done, which is part of the job briefing process the crew foreperson is required to complete. In another example, a crew failed a safety audit, but it was unclear whether the rest of the crew was also written up.

I find that the Employer failed to carry its burden to establish that the crew forepersons are held accountable for the performance of the crews. I therefore find that the crew forepersons do not responsibly direct other crew members.

g. Other supervisory indicia

It is well established that when putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia are insufficient to establish supervisory status. *Golden Crest Healthcare, supra* at 730 fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Nevertheless, the secondary indicia here support a finding that the crew forepersons are not supervisors.

Crew forepersons earn more than crew members, but both are paid hourly. An experienced crew foreperson (on the "A" pay scale) receives about \$19 per hour. A "B" foreperson earns about \$18 per hour. The crew members are paid less than the planners and crew forepersons. A trimmer earns about \$16 per hour, while a trainee or groundperson will earn about \$13 per hour. Employees who are classified as "sprayers" (both crew forepersons and crew members) earn between .20 and .30 additional cents per hour.

Both crew forepersons and crew members receive the same level of benefits. The crew forepersons are not eligible for the higher level of benefits received by the general forepersons. Unlike the general forepersons, who receive annual bonuses, the crew forepersons share in the same quarterly bonus pool as the crew members and are held to the same criteria for earning bonuses.

Crew forepersons work the same hours as the rest of the crew. Employees are not required to wear uniforms, but are required to wear personal protective equipment, including hard hats. Crew forepersons wear a different color hard hat than crew members, but aside from that difference, dress the same as the other crew members.

The crew forepersons do not have any special equipment, such as cellular telephones or laptop computers. In contrast, the general forepersons receive both a company cell phone and a company laptop.

Finally, if the crew forepersons were found to be supervisors, the ratio of supervisors to unit employees would be less than 2:1. Supervisory ratio is not dispositive. See *DirectTV U.S.*, 357 NLRB No. 149, slip op. at *3 (December 22, 2011). However, taken together with the other secondary indicia, it serves as additional support for a finding that the crew forepersons are not supervisors.

Based on the foregoing factors, I am persuaded that the crew forepersons are not supervisors under Section 2(11) of the Act, and are therefore eligible for inclusion in the bargaining unit.

2. Planners - Community of Interest

The planners work similar hours to the crews. The planners work from 7:00 AM to 5:30 PM, year-round. Crew members work the same hours in the summer, but during daylight savings time, they work from 8:00 AM to 4:30 PM. While the crews are sometimes off work due to inclement weather, this is a rare occurrence for the planners, who can perform office work when they are unable to work outside.

The planners have a similar pay scale to the crew forepersons. They are paid on a three-tier wage scale. Planners on the “A” scale are the most experienced, and receive about \$19 per hour. Mid-level planners (or “B” planners) earn about \$18 per hour. New planners (on the “C” scale) earn between \$15 and \$16 per hour. Planners are promoted based upon suggestions from the foresters who oversee their work. Crew forepersons are also paid depending on experience. As noted above, an experienced crew foreperson (on the “A” pay scale) receives about \$19 per hour. A “B” foreperson earns about \$18 per hour. There is no “C” foreperson.

Both the planners and crew members are eligible for quarterly bonuses. I & M sets key performance indicators (or KPIs) for both the crews and the planners, which the Employer implements. Each group has a different set of criteria, but both rely heavily (40%) upon safety. There are different bonus pools for each group of employees. If the employees meet their KPIs for the quarter, they will receive a bonus. The planners may receive a bonus when the crews do not, if the crews fail to meet their KPIs for that quarter. The planners receive a higher tier of benefits than the crews. However, a finding of “minor differences in compensation among petitioned-for employees” does not render a unit inappropriate. *Macy’s*, 361 NLRB No. 4, slip op. at 11 (2014).

I find that there is significant functional integration between what the planners do in patrolling the lines and creating the work manifests and what the crews do in

performing the trimming work on those manifests. Although they do different work, both the crews and the planners have the same goal: keeping I & M electrical lines clear in the Michiana Region. Functional integration is an important factor in determining whether employees should be in the same unit. *Wheeling Island Gaming, Inc.*, 355 NLRB 637, 642 (2010).

There is limited interchange between the two groups. About half of the planners worked as crew members at one time, and at least some of the planners communicate directly with the crews about clearance work on an occasional basis. In addition, the planners serve as storm coordinators and speak directly to the crews during severe storms, which occur only two to three times per year. There is no evidence that any planners or crews temporarily substitute for one another. Permanent interchange (such as a promotion) is less significant than temporary interchange in determining community of interest. *Macy's*, supra at 13. The planners do not have LCQS books and are instead trained on the job by more experienced planners.

Although both groups ultimately report to the same regional manager, the crews are directly supervised by the general forepersons, whereas the planners report directly to the regional manager. The planners receive their assignments from the foresters, while the crews receive theirs from the general forepersons.

The record demonstrates factors both in favor of and against including the planners in the same unit as the crews. Taking into account the Petitioner's desire to represent both groups in the same unit, I find that the petitioned-for unit, while not necessarily the most appropriate unit, is an appropriate unit. See *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 9 (2011); *Int'l Bedding Co.*, 356 NLRB No. 168 (2011).⁶ The planners share a sufficient community of interest with the crews, and should be included in the unit.

CONCLUSIONS AND FINDINGS

Based on the foregoing discussion and on the entire record,⁷ I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.

⁶ The Employer's reliance on *DTG Operations*, 357 NLRB No. 175 (2011), and *Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151, 2013, is unavailing in this regard. In each case, the Board found appropriate the unit sought by the petitioner, not the larger units urged by the employers, because the petitioned-for units were appropriate, and the employers failed to establish an *overwhelming* community of interest to overcome the petitioned-for unit.

⁷ Both parties submitted timely briefs, which were duly considered.

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.
3. The labor organization involved 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 employees, including trimmers, trimmer trainees, ground persons, sprayers, crew forepersons and planners employed by the Employer to perform line clearing tree trimming services on the property of Indiana Michigan Power in the Michiana Region; but excluding general forepersons, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 7th day of August, 2014.

(SEAL)

/s/ Terry Morgan
Terry Morgan, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

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 **LOCAL NO. 876, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (IBEW), AFL-CIO**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. 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 (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. 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 Regional 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 (overall or by department, etc.). 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 Regional Office on or before **August 14, 2014**. 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 Regional Office by electronic filing through the Agency website, www.nlr.gov,⁸ by mail, or by facsimile transmission at . The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

⁸ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

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 **August 21, 2014**. The request may be filed electronically through the Agency's website, **www.nlr.gov**,⁹ but may **not** be filed by facsimile.

⁹ To file a Request for Review electronically, go to the Agency's website at **www.nlr.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.