

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Reno, Nevada)

ATC/VANCOM, d/b/a ATC/VANCOM OF NEVADA, INC.¹

Employer

and

Case 32-RC-4774

OPERATING ENGINEERS LOCAL UNION NO. 3,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly being filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²
2. The Employer, ATC/Vancom, herein called ATC or the Employer, is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of

¹ The name of the Employer appears as corrected at hearing.

² At hearing, the Employer requested that the hearing be continued to a later date so that it could present evidence through the testimony of an individual not available the day of hearing. The hearing officer denied the request. In its brief, the Employer did not renew this request. Based on the record, I find the additional

the Act to assert jurisdiction herein. ATC provides transportation services to the public, and is fully licensed to do business in the State of Nevada, with a principle business location in Reno, Nevada. During the last 12 months, ATC had gross revenues in excess of \$250,000, and in that same period purchased and received goods and services valued in excess of \$5,000 which originated from businesses located outside the State of Nevada.

3. Petitioner, Operating Engineers Local Union 3, International Union of Operating Engineers, herein called the Petitioner or Local 3, is a labor organization within the meaning of Section 2(5) of the Act.

4. Petitioner claims to represent certain employees of the Employer, and 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 Employer's reservationists and shuttle bus operators at its Reno facility are presently represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, and Professional, Clerical, Public and Miscellaneous Employees, Local 533, herein called Local 533, pursuant to Board-conducted elections and subsequent certifications as those employees' exclusive collective bargaining representative.³ The current collective bargaining agreement between the Employer and Local 533 expires June 30, 2001. The Petitioner does not seek to represent the employees currently represented by Local 533 and, though given notice of these proceedings, Local

testimony would not alter the outcome of the hearing, and I affirm the hearing officer's denial of the request to postpone the hearing.

³ Cases 32-RC-3770, 32-RC-4213. The Employer asserted at hearing that the prior Board certification of an appropriate bargaining unit of reservationists and operators requires the exclusion of the employees sought herein by Petitioner, because they were excluded from the voting unit in the prior elections. The Employer is mistaken. The election in the earlier case was conducted in a unit created on the basis of a stipulated election agreement entered into voluntarily by the Employer and Local 533, its exclusion of certain employees is not determinative of their status in the instant petition. See, *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1192 (1994).

533, did not choose to intervene in this matter. I find no contract-bar to the instant petition.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time office and clerical employees, including office managers, routing supervisors, lead dispatchers, computer technicians,⁴ and office clerical employees⁵; excluding all other employees, guards, and supervisors as defined by the Act.

THE FACTS

ATC operates a shuttle bus service at its Reno, Nevada facility, which transports elderly and disabled persons within the Reno metropolitan area, pursuant to a contract with the Regional Transportation Commission, a public entity. The Employer's headquarters are in St Louis, MO. At its Reno facility, ATC employs 54 operators who drive the shuttle buses, and 7 reservationists, all of whom are in a collective bargaining unit represented by Local 533. ATC also employs at its Reno facility an office manager, a routing supervisor,

⁴ At hearing, the parties appeared to agree that the computer technician, Dwight Stapleton, is a "manager" with no supervisory duties. At hearing and on brief, however, the Employer argues that the computer technician, who was not sought in the petition, must be included in a unit found appropriate for collective bargaining, because failing to do so would create the impermissible result of a residual unit of one unrepresented employee. I note an absence of record evidence that the computer technician has any authority to formulate, determine or effectuate policy, or that he has discretion independent of the employer's established policies, and find he has not been shown to be a "managerial employee" subject to exclusion from the voting unit. *Tops Club, Inc.*, 238 NLRB 928 fn. 2 (1978). Because certification of the unit found appropriate would result in the creation of an impermissible residual unit of one employee if the computer technician were not included, and considering there is evidence that he shares a community of interest with the other employees in the petitioned-for-unit, the computer technician shall be included in the unit. See, *North New Jersey Newspapers*, 322 NLRB 394, 396 (1996); *Virginia Manufacturing Co.*, 311 NLRB 992, 994 (1993).

⁵ The parties stipulated at hearing that the recently hired, permanent clerical employee named Martha, whose surname was not made part of the record, should be included in a unit found appropriate. On brief, the Petitioner appears to contend that, in addition to this employee, an unnamed temporary clerical employee hired through a temporary agency about two weeks before hearing should also be included in the voting unit. In the absence of any evidence in the record demonstrating the certainty or definiteness of this temporary employee's tenure, her expectation of continued employment, or whether the employee has worked at the facility before, and considering the employee's status as an employee of a temporary agency contracted by

three lead dispatchers, one or two office clerical employees, a computer technician, road supervisors, an operations manager, a maintenance manager, and the general manager.⁶

The road supervisors are usually on the road, and not on the premises. Although the record is not entirely clear, it appears likely that the operations manager and general manager are present at the Reno facility during working hours. There is no evidence that either manager is located anywhere other than at the Reno facility during working hours.

The Employer operates two shifts per day, from about 5:00 a.m. until 9:00 p.m. The reservationists, lead dispatchers, and route supervisor assign rides for clients on predetermined routes. Operators bid on hours and routes, and are assigned their preferences, based on seniority as specified by the collective bargaining agreement between the Employer and Local 533. Reservations are added to routes through a computerized scheduling program. Effort is made to make the routes as efficient as possible, which sometimes requires the reservationists, lead dispatchers, or routing supervisor to “override” the limitations put on routes by the computer scheduling system, or to readjust a schedule due to an override input previously. The lead dispatchers and office manager occasionally assist the reservationists in taking calls from clients.

The routing supervisor is responsible for scheduling the “standing” rides, which are regular rides by a single client at least three times per week, e.g., rides to work each morning. Other rides, “demand response rides” or “DRs” are the result of a client’s request for a single ride, e.g., to a doctor’s appointment. Apparently, in order to comply

the Employer, I find that the temporary clerical employee at issue is not eligible to vote. See *Indiana Bottled Gas Co.*, 128 NLRB 1441 fn. 4 (1960).

⁶ The collective bargaining agreement between the Employer and Local 533 also covers mechanics, utility workers and bus washers, and the Employer’s organizational chart indicates it employed two mechanics and two utility persons in January 1998; no additional evidence is presented on this record concerning these positions.

with requirements of the Americans with Disabilities Act (ADA), the Employer must ensure that no more than 50% of rides in any given hour on a particular route are “standing” rides as compared to “demand response” rides; the routing supervisor readjusts runs assigned to given routes in order to meet this ADA requirement. The routing supervisor and one of the lead dispatchers also “optimize” routes, using a computerized scheduling system to adjust runs so that routes are as efficient and productive as possible.

ANALYSIS

A. Supervisory Issues

The Employer contends that the routing supervisor, office manager, and lead dispatchers are statutory supervisors. The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Bennett Industries, Inc.*, 313 NLRB 1363 (1994); *Tuscon Gas and Electric Co.*, 241 NLRB 181, 181 (1979). The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner which is more than routine or clerical. *Harborside Healthcare, Inc.*, 330 NLRB No. 191 (2000); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner, however, does not confer supervisory status on employees. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985); *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Because supervisory status removes individuals from some of the protections of the Act, only those personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S.Rep.No. 105.

80th Cong. 1 Sec. 4 (1947); *Ten Broeck Commons*, 320 NLRB, 806, 809 (1996). In the instant matter, the Employer has failed to establish the supervisory status of the routing supervisor, office manager, and lead dispatchers.

1. Routing Supervisor (Donna Armstrong).

The routing supervisor, Donna Armstrong, has worked at ATC for 10 years. She began as a van operator, and became routing supervisor coincidental to learning she had a disability that prevents her from driving regularly. She is paid \$11.90 per hour for a 40-hour week, and receives no overtime pay for hours worked in excess of 40 hours per week. She receives some employee benefits that the employees represented by Local 533 do not have, including a 401(k) plan with a matching benefit, and access to a short-term disability plan. She works by herself in an office that locks.

Armstrong assigns client rides, called “runs,” to particular routes to make the routes as efficient as possible. Routes are predetermined, and are organized by time and geography. She is primarily responsible for assigning the standing runs. The process of making the routes more efficient, called “optimizing,” involves switching some runs already assigned by the reservationists from one route to another, when necessary to make a route feasible. Computer generated reports, and a computer scheduling system, provide Armstrong with the information she uses to determine where to assign a particular client’s ride. She also considers factors such as the requests of the client, e.g., whether the client requires a wheelchair lift, or whether the particular client prefers not to ride with a particular operator or other client. Armstrong must ensure that the Employer complies with requirements that no more than 50% of runs assigned to any given route in any given hour are standing runs.

The Employer claims that Armstrong is a statutory supervisory because she assigns work to the operators. Armstrong is clearly responsible for maintaining a significant portion of the schedule of runs on the routes driven by the operators; however, the operators, as noted, bid for the routes, pursuant to a seniority based system in the collective bargaining agreement between the Employer and Local 533. Armstrong never reassigns operators from one route to another; she assigns standing runs to the predetermined routes. Although this assignment of runs may affect a route's overall productivity, there is no evidence that productivity affects the job status of operators, whose salary, benefits and seniority are determined by the collective bargaining agreement between the Employer and Local 533. Moreover, the assignment of runs to routes, even if construed as an assignment of work to employees, does not require Armstrong to exercise independent judgment as envisioned by the Act, but is performed in a routine manner consistent with the Employer's strict guidelines, which require her to "optimize" routes for efficiency, review the productivity based on objective criteria provided to her through computer generated reports, and comply with government and regulations. See *SDI Operating Partners, L.P., Harding Glass Division*, 321 NLRB 111 (1996). Neither the complex nature of the task of assigning work, nor its importance to the Employer is itself, indicative of supervisory status, when the assigning is done, as here, in a routine and perfunctory manner, based on clear expectations set by the Employer. See *Ten Broeck Commons*, supra at 811; *Chicago Metallic Corp.*, supra.

I find, therefore, that Armstrong does not assign work to employees within the meaning of Section 2(11) of the Act. See *Brown & Root*, 314 NLRB 19 (1994).

The Employer also argues that Armstrong is a supervisor because she has been involved in the hiring process. It is undisputed that Armstrong meets with applicants for the operator position and explains to them the nature of the job, including the Employer's wage and benefit package. Some applicants choose not to continue the process after receiving this factual information. Armstrong sometimes then provides the operations manager, Dan Fox, with a short note in which she offers an opinion about the individual applicant to whom she spoke. She may also escort the individual to a manager for a formal interview. Armstrong does not attend the applicant's interview with managers or contribute more to the process after this initial meeting with the applicant.

It is clear from the record that Armstrong is not the decision-maker with respect to hiring. I further find, that Armstrong's involvement in the initial stages of the hiring process, including the brief opinions she provides the managers about the applicants, have not been shown to be effective recommendations for hire. The record reflects that some applicants she spoke highly of were hired, and others were not. However, her negative comments were rare, and the record does not establish that her suggestions were followed without further consideration by managers. It is the Employer's burden at this juncture to demonstrate that Armstrong effectively recommends hiring within the meaning of Section 2(11) of the Act, and I find it has failed to do so on this record. *See Bennett Industries, Inc., supra.*

Based on the record and the above analysis, I conclude that Armstrong does not possess the primary indicia of supervisory authority enumerated in Section 2(11) of the Act. Specifically, I find the record does not demonstrate that Armstrong has authority, in the interests of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge,

assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action in a manner which is not merely routine but requires independent judgment.

The Employer claims Armstrong's status as a supervisor is demonstrated by secondary indicia, including: Armstrong's title contains the term "supervisor"; the Employer presents her to its employees as a supervisor by having her sign forms designed for supervisors and permits her to give them verbal "pats on the back";⁷ she has had various training responsibilities; she has business cards, a private phone line, and an office of her own, unlike most employees; she participated in a supervisory training program; and she encourages operators to come to her with problems with their routes; she has attended management meetings with Local 533 members in order to take notes for management; and some employees act as if they believe she is a supervisor. In contrast, Armstrong's pay of \$11.90/hour is comparable to the operators (up to \$12.10/hour) and reservationists (up to \$11.32/hour) despite having worked for the Employer for over ten years. Although she has some benefits which are different from the other employees, the majority of her benefits and working conditions are similar to theirs. The Employer admits that the road supervisors are the operators' direct supervisors, so it is unclear, if Armstrong were a supervisor, how she would fit into the supervisory structure. Indeed, the Employer's own organizational chart does not list anyone reporting to Armstrong. Secondary indicia of supervisory authority may be relied upon only in a close case where some evidence indicates the existence of primary indicia. See *GRB Entertainment*, 331 NLRB No. 41

⁷ The Employer appears to consider Armstrong's verbal "pats on the back," her recording of incidents and client complaints, and her offers to help adjust grievances as secondary indicia of Section 2(11) supervisory status. I find, nevertheless, that the record fails to demonstrate that, by these actions, Armstrong rewards employees, disciplines them, or resolves their grievances within the meaning of Section 2(11) of the Act.

(2000); *Billows Electric Supply*, 311 NLRB 878 fn.2 (1993). Here, I find the secondary indicia of supervisory authority, considered together, do not support a finding that Armstrong is a supervisor within the meaning of Section 2(11). Accordingly the routing supervisor will be included in the unit herein found appropriate.

2. Office Manager (Gayle Claiborne)

The office manager, Gayle Claiborne, has worked for ATC for 7 years and has been office manager since September 1996. She has also been an operator, dispatcher and reservationist for the Employer. She currently reports directly to the facility's top management official, the general manager, Kent Hinton. She is paid \$11.33 per hour for a 40 hour work week, regardless of whether she works additional hours. She has her own office, which locks, in which she maintains some employee personnel records, including payroll records which she maintains in a locked cabinet. The office is separate from the room in which the reservationists and lead dispatchers work.

The Employer claims Claiborne is a supervisor, primarily because of her role in the hiring employees.⁸ On at least one occasion, Claiborne was responsible for contacting temporary agencies and contracting for a temporary clerical individual, which she did based on a cost comparison among agencies. The decision to hire the temporary, however, was made by the general manager. Several weeks before the hearing, she also participated in the hiring process of a permanent clerical employee who would be working directly with her, by "sitting in on" the applicants' interviews with Hinton and operations manager, Dan Fox, and providing the managers with her opinion of the candidates using a "candidate

⁸ Like Armstrong, Claiborne reviews applications for employment and notes her opinion of the applicant for the manager's review. The Employer failed to demonstrate on this record, however, that Claiborne's comments resulted in any action by the Employer, and, therefore, failed to demonstrate that she effectively recommended hiring through her comments.

evaluation form.” Hinton made the hiring decision. When the initial person hired, who had been Claiborne’s first choice, left after only one day, Claiborne requested that Hinton hire another candidate, the current office clerical employee, Martha _____. Hinton subsequently hired Martha. Before this hiring process, Claiborne had never participated in hiring other employees.

I find that the record tends to support a finding that Claiborne effectively recommended the hiring of the permanent clerical position several weeks prior to the hearing. I also find, however, that the record does not demonstrate that Claiborne ever played a similar role in recommending hiring of any other employee in the years she has been an office manager. In fact, the record indicates that she has never participated in the hiring process. An isolated or sporadic exercise of supervisory authority does not make an employee a supervisor under the Act. I conclude, that this isolated incident of making a recommendation to hire does not render Claiborne a statutory supervisory. *See Chicago Metallic Corp. supra; E & L Transport*, 315 NLRB 303 (1994), enforcement denied in part, 85 F.3d 1258 (7th Cir. 1996).

I also find that her role in “hiring” the temporary clerical from the temporary agency does not make her a statutory supervisor, as it was clearly based on the cost of the service alone, and was, therefore, merely a routine task which did not require independent judgment as contemplated by the Act.⁹

Based on the record and the above analysis, I conclude that Claiborne does not possess the primary indicia of supervisory authority enumerated in Section 2(11) of the Act; specifically, I find the record does not demonstrate that Claiborne has authority, in the

interests of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action in a manner which is not merely routine but requires independent judgment.

The Employer also urges that the secondary indicia including Claiborne's participation with management in the development of an administrative clerk position, her completion of a time off requests for employee Doris Hunter in 1999, and her attendance at a supervisory training program establish that she is a supervisor. However, as with Armstrong, Claiborne's pay is comparable to that of non-supervisory employees. Although she has some additional benefits, her benefits package and working conditions are more similar than different from other employees, and she substitutes occasionally for other employees, including Armstrong and the lead dispatchers. Therefore, I conclude that, on balance, Claiborne's secondary indicia of supervisory authority, when contrasted with her community of interest with employees, do not demonstrate that she is a Section 2(11) supervisor. See *Nationsway Transport Services*, 316 NLRB 4 (1995) (office manager not supervisor despite access to personnel information and performance of ministerial personnel functions).

3. Lead Dispatchers (Deborah Omoghene, Sal Knutson, Jackie Johnson)¹⁰

Deborah Omoghene has been a lead dispatcher since September 1996, and earns \$11.23 per hour. Like Armstrong and Claiborne, she receives no additional compensation for work performed in excess of 40 hours per week. She normally works from 5:45 a.m. to

⁹ The Employer mischaracterizes this task as "interviewing" applicants. Claiborne stated she made calls to temporary employment agencies and compared costs. There is no evidence that she interviewed the temporary clerical employee.

¹⁰ All three dispatchers have the title of "lead dispatcher."

2:45 p.m, and receives the wage and benefits package Armstrong receives. Sal Knudson works from 5:00 a.m. to 2:00 p.m.; Jackie Johnson works from 2:00 p.m. to 9:30 p.m. The lead dispatchers sit at a desk in the same room as the reservationists.

According to the Employer, the seven reservationists report directly to the three lead dispatchers. The Employer's organizational chart reflects this claim. The reservationists report to the lead dispatchers if they need to leave early presumptively to obtain approval of their early departure. There is no evidence, however, that lead dispatchers have any discretion to deny these requests, or that they are empowered to force a reservationist to stay or to send them home. The lead dispatchers observe the reservationists' attire, observe and monitor the reservationists' behavior in the workplace, edit the work of reservationists, and sign Employer documents in a manner which presents them to other employees as supervisors. Lead dispatcher Omoghene distributes memos informing and updating reservationists about work-related issues, and trains reservationists. Omoghene also has supervisory manuals in her office, and has participated in supervisory training, including training on how to identify drug and alcohol problems in others. The lead dispatchers consider the skills of the operators on particular routes when making some run assignments. The lead dispatchers are authorized to reassign a bus to an operator if that operator's bus breaks down. The Employer asserts that Omoghene monitors the calls made by reservationists. Thus, although the phone has the capacity to permit her to monitor calls of reservationists, Omoghene has done so only once to monitor calls from a problem client. Further, as secondary indicia, the ratio of supervisors to employees is inconclusive in this case. See, e.g., *Hospital Shared Services, Inc.*, 330 NLRB No. 40 (1999) (whether resulting ratio would be 17 employees to 1 supervisor, or 8

to 1 is not dispositive of supervisory status); *J.C. Brock Corp.*, 314 NLRB 157 (1994) (unrealistic result of 40 employees to 1 supervisor not determinative of supervisory status in the absence of statutory indicia). The above facts, however, are merely reflective of secondary indicia of supervisory authority, and, in the absence of a showing that the lead dispatchers exercise authority under one of the primary indicia enumerated in the Act, I find that the lead dispatchers have not been shown to be statutory supervisors with respect to the reservationists' duties. See *GRB Entertainment*, supra.; *Billows Electric Supply*, supra.

While arguing that all three lead dispatchers have the same duties, the Employer conversely argues, and presents evidence, that lead dispatcher Omoghene has distinct responsibilities which confer on her supervisory status. The Employer argues that Omoghene is a supervisor because she signed and presented written warnings to reservationist, Clarence Hamp. Omoghene testified that, although she prepared and signed the warnings, she did so at the specific direction of the general manager. The possession of any one of the indicia of supervisory authority, including the authority to discipline employees, is sufficient to establish supervisory status, provided that such authority, exercised in an employer's interest, requires independent judgment which is not merely routine or clerical in nature. Here, although Omoghene clearly participated in the disciplinary process of employee Hamp on behalf of the Employer, the record does not demonstrate whether her role required her to exercise independent judgment which was more than routine or clerical, or whether she was merely a conduit for the general manager's decision. See *Ryder Truck Rental, Inc.*, 326 NLRB no. 149 (1998); *Ten Broeck Commons*, supra. I find, therefore, that the Employer has not met its burden of

demonstrating on this record that Omoghene's role in preparing the disciplinary notices renders her a statutory supervisory. Id.

The Employer also argues that the lead dispatchers are supervisors, because, like the routing supervisor, lead dispatchers assign work to the operators by assigning particular client rides to routes. Lead dispatchers Knudson and Johnson spend much of their time on the phone dispatching operators to various sites. Lead dispatcher Omoghene analyzes the operators' manifests (individualized schedules) to assist in making assignments, and controls the "flow and balance" of work among operators, based on the daily work load. She also assigns overtime to operators, pursuant to the terms of the collective bargaining agreement between the Employer and Local 533, and determines the need for "extra board operators," which involves calling up an additional operator from the list developed pursuant to the collective bargaining agreement between the Employer and Local 533. She "trip edits," which involves identifying breaks in a particular route's schedule which might accommodate another client ride; these breaks do not cause operators to go "off the clock." Omoghene, like Armstrong, handles client complaints or comments, referred to her by the reservationists, and records them on forms provided by the Employer. On occasion, Omoghene provides employees with written compliments and attempts to resolve customer complaints. She coordinates the redistribution of routes during a holiday period when work is slow.

Similar to the routing supervisor, I find that the record does not demonstrate that the lead dispatchers assign work using independent judgment in a manner that is not routine or clerical. The parameters for schedules are pre-set through the computerized scheduling system. Any overtime or "extra board operator" assignments are made

pursuant to a seniority-based system in the collective bargaining agreement between the Employer and Local 533. Any direction Omoghene may provide through written memos has not been shown on this record to be more than routine communications and directions. I find, therefore, that lead dispatchers do not assign work within the meaning of Section 2(11) of the Act. *Ten Broeck Commons*, supra.; *Brown & Root*, supra.

I conclude, based on the record and the above analysis, that the lead dispatchers are not supervisors within the meaning of Section 2(11) of the Act; specifically, I find the record does not demonstrate that the lead dispatchers have authority, in the interests of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action in a manner which is not merely routine but requires independent judgment. Accordingly they will be included in the unit herein found appropriate.

B. Confidential Employee Issue

The Employer also argues that office manager, Gayle Claiborne should be excluded from the unit because she is a confidential employee.¹¹ Confidential employees are employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties. *B.F. Goodrich Co.*, 115 NLRB 722, 724

¹¹ At hearing and on brief, the Employer implied that the office clerical employee is a confidential employee because she would be required to type and prepare materials for contract negotiations in collective bargaining. However, the Employer presented no evidence that the office clerical had ever done so in the past. I find the record does not support a claim that the office clerical assists the general manager in a confidential capacity, and, therefore, she shall not be excluded from the unit. I note that the Employer's assertion that he would assign the office clerical confidential tasks in the future, without more, is insufficient to establish her status as a confidential employee at this time. See *ITT Grinnell*, 253 NLRB 584, 585 (1980). Moreover, as noted supra at fn. 5, the parties stipulated at hearing to include the clerical employee in a unit found appropriate.

(1956). In support of this claim, the Employer presented evidence that Claiborne reports to a manager with labor and personnel responsibilities, Kent Hinton, who is also responsible for hiring and firing; that she attends management meetings with Hinton; that she interviewed applicants for the clerical position; that she has access to confidential personnel information; that she knows the pay rate of every employee; and, because she processes payroll, knows of wage increases before others do. She also issues COBRA documents upon an employee's separation from the Employer, and on occasion, may type personnel-related information for Hinton. Claiborne, however, has never prepared wage surveys or other materials in support of the Employer's collective bargaining position. She has never participated in any way in assisting the Employer in collective bargaining. Although Hinton testified that he would rely on Claiborne and the administrative clerical employee to prepare written materials for him in the event of contract negotiations with the Union, there is no record evidence that he, or any manager, had ever relied on them, or any one in their positions, to prepare materials in prior contract negotiations with a union.

Assuming that Kent Hinton, the general manager and top management official at the Employer's Reno facility, is a person who formulates, determines, and effectuates management labor relations policies, what remains at issue is whether Claiborne assists and acts in a confidential capacity to him with regard to labor relations. See *B.F. Goodrich Co.*, supra. As noted, it is undisputed that Claiborne has never assisted Hinton in preparation for collective bargaining. She has never typed wage surveys, or prepared proposals for contract negotiations. Although there is some discrepancy between her testimony and Hinton's regarding how much typing she does for him, it is clear that preparing typed or other materials for him is not a regular or significant part of her work.

Hinton claims, and Claiborne denies, that she has typed disciplinary warnings on his behalf. See *Acme Markets Inc.*, 328 NLRB No. 173 (1999)(where evidence is in conflict, Board will find indicia have not been established). She clearly maintains or has access to some personnel files, but that task alone does not render a person a confidential employee such that she is excluded from a voting unit. See *RCA Communications*, 154 NLRB 34, 37 (1965). On this record, I find that Claiborne does not assist and act in a confidential capacity to general manager Hinton. *B. F. Goodrich Co.*, supra.

Moreover, I note a scarcity of record evidence supporting Hinton's claim that he formulates or determines Employer policy with regard to labor relations. The corporate relationship between the Employer's Reno operation and its St. Louis headquarters was not explained in the record, and, although it is most likely that Hinton is the individual who effectuates the Employer's policy in Reno, the record does not establish that Hinton truly formulates or determines the Employer's labor relations policy. Hinton's predecessor, signed the collective bargaining agreement with Local 533, along with the Employer's corporate senior vice president. As these considerations are assessed in the conjunctive, failure to present evidence that Hinton formulates, determines and effectuates labor related policy precludes a finding that his assistant is a confidential employee. See *Weyerhaeuser Co.*, 173 NLRB 1170 (1969). Therefore, I find that Claiborne cannot be deemed a confidential employee on this record, and she cannot be excluded from the unit on that basis.

C. Managerial Employee Issue

At hearing, the Employer argued that the routing supervisor and office manager should be excluded from any unit found appropriate because they are managerial

employees. The Employer failed to pursue this argument on brief. Nevertheless, although the Act does not expressly provide for the exclusion of “managerial employees” from collective bargaining units, this category of personnel has been consistently so excluded under Board policy. See *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2nd Cir. 1964); *Ford Motor Co.*, 66 NLRB 1317 (1946); *Palace Dry Cleaning Corp.*, 75 NLRB 320 (1948). “Managerial employees” are defined as employees who have authority to formulate, determine, or effectuate employer policies by making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer’s established policies. *Tops Club, Inc.*, supra, fn. 4, quoting *Bell Aerospace*, 219 NLRB 384 (1975), on remand from the Supreme Court, 416 U.S. 267 (1974). The Supreme Court has held that, although managerial employees are not explicitly mentioned in the Act, this was because Congress reasoned that they are so clearly outside its protection that no specific exclusionary provision was required. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Managerial employees are excluded because their functions and interests are more closely allied with those of management than with production workers, and, therefore, they are not truly “employees” within the meaning of the Act.

In the instant case, there is no record evidence demonstrating that the routing supervisor and/or the office manager formulate, determine and effectuate employer policies, or have discretion in their jobs independent of the Employer’s policies. That the individuals attended supervisory trainings, including a training on identifying drug and alcohol use in the workplace; that they prepare memos on management’s behalf informing employees about management policy; that they may, on occasion, investigate accidents or

conduct employee trainings for management; that they review production reports or that they handle customer complaints, does not support a finding that that they formulate, determine and effectuate the Employer's policies, or that their interests are in such conflict with other employees they should be excluded from the voting unit and denied the protections of the act. Moreover, when, as here, employees must seek approval from management to implement their recommendations, those employees are not managerial employees. *Flint Kote Co.*, 217 NLRB 497, 499 (1975). I conclude, therefore, that the Employer has failed to demonstrate that the routing supervisor or the office manager should be excluded from the unit found appropriate as "managerial employees."

Based upon the foregoing, I conclude that the classifications of routing supervisor, office manager, and lead dispatcher are not managerial, confidential, or supervisory within the meaning of Section 2(11) of the Act. Additionally, I conclude that the record fails to establish that the temporary office clerical employee has sufficient tenure or expectation of continued employment to be included in the unit, and, therefore, shall be excluded. The record also fails to establish that the computer technician should be excluded as a managerial employee. As no other basis has been advanced to exclude this single employee, which would result in a residual unit of one employee, he will be included in the unit. Accordingly, I shall direct an election among the following employees:

All full-time and regular part-time office and clerical employees, including office managers, routing supervisors, lead dispatchers, computer technicians, and office clerical employees employed by the Employer at its Reno, Nevada facility; excluding all other employees, guards, and supervisors as defined by the Act.

There are approximately 7 employees in the voting unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.¹² Eligible to vote are those in the voting unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO.

LIST OF VOTERS

In order 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

¹² Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before August 25, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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. This request must be received by the Board in Washington by September 1, 2000.

Dated at Oakland California this 18th day of August, 2000.

/s/ Veronica I. Clements
Veronica I. Clements,
Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

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