

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

SHELBY ENERGY COOPERATIVE, INC.

Employer

and

Case 9-RC-18225

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION 2100

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

I. INTRODUCTION

The Employer is an electrical utility company engaged in the distribution and sale of electricity to commercial and residential customers in several counties in the Commonwealth of Kentucky. The parties agree that the bargaining unit should include line and service technicians, apprentice line technicians and material technicians/warehousemen employed by the Employer at its facility located at 620 Old Finchville Road, Shelbyville, Kentucky, excluding guards and supervisors as defined by the Act.

The parties disagree on whether three clerical employees designated as customer service representatives, the "staking technician" and the safety and loss control coordinator share a sufficient community of interest to warrant their inclusion within the unit and whether three line supervisors should be excluded from the unit as supervisors within the meaning of Section 2(11) of the Act. The Petitioner, contrary to the Employer, seeks to exclude the customer service representatives and the staking technician asserting that neither of these job classifications share a sufficient community of interest with the unit employees to warrant their inclusion. The Employer, in contrast to the Petitioner, contends that the line supervisors are supervisors within the meaning of Section 2(11) of the Act and thus must be excluded. The Petitioner would also exclude the safety and loss control coordinator arguing that the job classification reports to a different supervisor than employees in the proposed unit and lacks a community of interest with the unit employees. The Employer concedes that the safety and loss coordinator job classification may appropriately be excluded from the unit in the future, but contends that at present, the incumbent is only in training for the position and spends approximately 50 percent of his time performing line technician duties.

As set forth in detail below, I have determined that the customer service representatives should be excluded from the unit, but that the staking technician shares a sufficient community of interest with other unit employees to be included. I have also determined that the Employer

has failed to meet its burden to establish that the line supervisors possess any indicia of supervisory authority within the meaning of Section 2(11) of the Act. Further, I have determined that the line supervisors share a sufficient community of interest with other unit employees and should be included in the unit that I have found to be appropriate. Finally, the employee in training as the safety and loss coordinator is eligible to vote based on his current job duties.

In reaching my determination on these issues, I have considered the record evidence as a whole, as well as the arguments made by the parties at the hearing and in their post-hearing briefs. In explaining how I came to my determination on these issues, I will first describe the Employer's operations, discuss the duties of the employees at issue, then set forth the applicable legal precedent, and finally analyze each issue in relation to that precedent. Before beginning my analysis, I note that there is no history of collective bargaining affecting any of the employees involved in this proceeding and that the Petitioner has agreed to proceed to an election in any unit found appropriate. There are approximately 13 employees in the unit that I have found to be appropriate.

II. FACTUAL OVERVIEW

A. The Employer's Operations and Workforce

The Employer is an energy cooperative that provides electrical service to residential and commercial customers in Shelby and Trimble counties, as well as parts of Carroll, Owen, Odham, Franklin and Jefferson counties in Kentucky. Its primary facility is in Shelbyville, Kentucky (Shelby County) with a satellite office in Bedford, Kentucky (Trimble County).

The highest ranking official in the company is CEO Debbie Martin. Reporting directly to Ms. Martin are Operations Manager David Martin, Billing and Payroll Manager Farah Cox and Engineering Manager Wayne Anderson, all of whom have supervisory responsibilities. There is also an accountant, Denise Humes, and an IT Specialist, David Graham, which neither party contends should be included in the unit. Billing and Payroll Manager Cox supervises six customer service representatives, including Becky Jennings, Candi Waford and Nancy Gossom, whom the Employer would include in the unit. There are three other customer service representatives, but neither party seeks to include these employees. Engineering Manager Anderson is in charge of David Eubank, the staking technician. Operations Manager David Martin has supervisory responsibility for the line technicians, apprentice line technicians and the line supervisors at issue, Mike Clark, James Wheeler and Rick Shaw. Martin also oversees a materials technician/warehouseman, Marion G. (Pete) Bohannon. Both parties agree that it is appropriate to include the materials technician/warehouseman in the unit. Bohannon works out of a warehouse located a few feet away from the Employer's Shelbyville office where he keeps track of and orders new inventory. Jason Ginn, who is in training to become the safety and loss coordinator, reports directly to CEO Martin and works with Operations Manager David Martin. There are no employees who report to Ginn and neither party contends that he is a supervisor within the meaning of Section 2(11) of the Act.

The office is open from 7:30 a.m. to 4:30 p.m. and these are the regular working hours for all employees. One week every month, the line technicians and Ginn are scheduled "on call"

after regular hours. Other employees, such as the customer service representatives, may be called in after hours to work overtime during major outages, but it is unclear from the record whether they are routinely scheduled on call like the line technicians and Ginn. All employees receive the same benefits and use the same break room and restrooms. The line technicians and service technicians wear uniforms when working in the field, but the other employees are not required to do so as long as they carry a badge.

B. The Duties and Responsibilities of the Customer Service Representatives

Of the six customer service representatives, the Employer would include only Becky Jennings, Candice Waford and Nancy Gossom in the bargaining unit because of their contacts with the staking technician and their dispatching duties. The other three customer service representatives, who are located on the same floor as Jennings and Waford (Gossom works out of the Employer's Trimble County sub office), sit at a long desk handling walk-in customers, taking payments and answering the phones. If the three customer service representatives at the desk are overwhelmed by incoming calls, Jennings and Waford will assist in answering phones. However, the other three customer service representatives do not substitute for Jennings or Waford and do not perform any dispatching duties because they lack the training to do so.

Like the other customer service representatives, Jennings, Waford and Gossom, primarily interact with customers. Waford handles the Employer's "drive through" window where customers can pay their bills and Jennings serves in a backup role. Jennings and Waford also answer telephones and address customer concerns such as requests for new service or service outages. For construction jobs, Jennings solicits basic information from the customer such as the job address and contact information and generates job orders for David Eubank, the staking technician, which are placed in his in-box. Eubank draws up a print or plan for a given job. Jennings holds the print or plan until any required payments are made and inspections are completed; afterwards, she releases the job to the Operations department. Jennings and Waford also accept service orders and forward them to Line Supervisor Mike Clark, who distributes the service work orders to the line technicians performing service work.

Jennings performs some dispatching of crews via radio and telephone contact. Operations Manager Martin estimated that Jennings spends about 45 percent of her time dispatching. Waford backs up Jennings in these roles, but very seldom does any dispatching. The dispatching aspect of the job requires some knowledge of electricity as there is a requirement that multiple work crews not be sent to positions in which they could inadvertently harm each other. It appears from the record that Jennings', Waford's and Gossom's job duties do not require the same degree of skill as that of the line supervisors, line technicians and staking technician. Further the record reflects that none of the three customer service representatives are trained to work in the field and have never performed field duties. Nancy Gossom performs a similar role to Jennings and Waford, but the vast majority of Gossom's time is spent taking payments and generating work orders in Trimble County, with only about 10 percent of her time spent dispatching. When Gossom is absent, Jennings substitutes for her and if Jennings and Waford are both absent, Gossom would substitute for them, but would not need to physically report to Shelbyville since she could still perform her functions using the communications

system in Trimble County. Gossom does visit the Shelbyville office two or three times per month to attend meetings. Jennings and Gossom are paid \$18.15 per hour and Waford is paid \$15.77 per hour.

C. The Duties and Responsibilities of Staking Technician David Eubank

David Eubank is presently the only staking technician, a title derived from the fact that he places stakes in the ground designating where the power lines will go. The record shows that Eubank is routinely involved in construction jobs, but typically not engaged in service work assignments. During major outages, Eubank may be assigned to perform laborer duties such as hauling materials in the field, but this only happens two or three times a year. As noted above, for construction jobs, the customer service representatives accept orders from customers for new jobs and place them in Eubank's in-box. Eubank then makes appointments with the customers and travels to the prospective job site to meet with them, typically meeting with several customers over the course of a day. During the meeting, Eubank and the customer agree how the new line will be designed and where it will go. While in the field, Eubank makes a rough drawing of the proposed installation. Upon returning to the office, he converts his rough drawing of the job scene into more detailed prints, which include a list of the materials that will be used on the job. Upon completion of the print, Eubank forwards the print to Engineering Manager Anderson for approval. After final approval, the line technicians may inspect the job site and discuss the plan with Eubank if they have any questions or concerns. Operations Manager Martin estimated that Eubank spends about 75 to 85 percent of his time working in the field and 15 to 20 percent in the office. Bruce Stansbury, who was a staking technician for 6.5 years until June 27, 2008, mostly corroborated Martin's testimony. Stansbury testified that he was frequently called to the field to meet with the line technicians and answer questions about where poles and anchors were to be placed. He also communicated with the line technicians via radio and cell phone. Stansbury testified that he interacted with the line technicians on a daily basis – more so than with the office personnel. The staking technician has an office in the basement of the Employer's facility directly across the hall from the line technicians' office.

Although the line supervisors, line technicians and staking technician all need a working knowledge of how electrical lines function, their training and job duties are different. Eubank is not qualified to perform line technician work and they are not qualified to perform most staking technician work. In this regard, although line technicians occasionally draw simple prints for situations where a line does not need to be moved, for example, changing a rural light, Eubank, who has a drafting degree, makes more complex drawings. If Eubank is absent for a day or so, the Engineering Manager fills in for him. If Eubank is absent for a longer period of time, a staking technician from another cooperative would substitute for him as part of a reciprocity agreement. Eubank is paid \$23.80 per hour.

D. The Duties and Responsibilities of Line Supervisors Mike Clark, James Wheeler and Rick Shaw^{1/}

The line supervisors and line technicians install and handle the construction of new lines as well as the servicing of existing lines. At the time of the hearing, there were two construction crews and one service crew. Mike Clark is the line supervisor of a two person service crew consisting of two line technicians, but the line technicians performing service duty usually work alone. James Wheeler is the line supervisor of a two person construction crew consisting of one line technician and one apprentice. Rick Shaw is the line supervisor of a three person construction crew consisting of one line technician and two apprentices. For construction jobs, Operations Manager Martin gives work assignments to the line supervisors and discusses a plan for the job. Line technicians may not be present when Martin and the line supervisors discuss the plan. After this, the crews go to the warehouse to get the materials needed for the job from the materials technician/warehouseman. For non-construction service jobs, Line Supervisor Mike Clark distributes jobs to the line technicians assigned to service duty. Clark substitutes for Operations Manager Martin when he is absent. Martin estimated that this occurs about 30 percent of the time, but did not explain why this would happen or what duties Clark would assume in Martin's absence. The Operations Manager rearranges the crews when employees are absent.

When the line supervisor, line technicians and apprentices arrive at the jobsite, the line supervisor conducts a "tailgate session" during which he discusses safety precautions with the line technicians and apprentices and tells them who will perform which tasks and in what order to implement the plan drawn up by the staking technician. The line supervisor's decision as to who will perform what tasks is based upon the crew's level of training. Apprentices are not qualified to perform many duties. According to Martin, most jobs are routine. Tasks include duties such as setting poles and anchors, framing poles, putting materials on poles, digging holes, acting as flag man and running the trucker. The line supervisors and line technicians have safety training and are responsible for working in a safe fashion and alerting each other of any safety concerns. The job descriptions of the line technicians and apprentices indicate that they report to the line supervisors. The line supervisors have authority to make minor changes to the staking technician's plan (e.g. moving a hole 3 or 4 feet), but not major departures (e.g. moving a hole 15 or 20 feet). If a major change from the plan is required, the line supervisor would have to go to the Operations Manager or engineering department for approval of a new plan. If there is a disagreement about how something is to be done on the job, Martin testified that the line supervisor would make the decision but there are no examples in the record of any circumstances when this actually has happened.

Based upon the distance of the worksite from the home office, a line supervisor has limited discretion to decide that a small amount (1 to 1 ½ hours) of overtime work should be done. This would be the case if the job is some distance away and the cost of fuel and transit time would exceed the cost of overtime pay. If a substantial amount of overtime work is

^{1/} It should be noted that employee Walter Miller, who is technically classified as a line supervisor, no longer performs this role on a regular basis and only substitutes occasionally. He works primarily as a line technician and neither party contends that he is a supervisor within the meaning of Section 2(11) of the Act.

required, the line supervisors simply call the Operations Manager and ask him to make the decision. In either case, the line supervisor would advise the Operations Manager prior to working overtime and the Operations Manager could overrule the decision if he disagreed. The record does not reflect whether the line supervisor could decide to work overtime without securing the Operation Manager's approval. At the end of the day, the line technicians fill out time sheets and the line supervisor for that crew checks the time and signs the time sheet. In this connection, it appears that the line supervisors' review of the time sheets is simply a ministerial function and the record does not reflect whether the line supervisor can approve or disapprove of the time recorded by the line technicians and apprentices.

The line supervisors have responsibilities regarding the apprentice line technicians in terms of ensuring that safe work practices are observed and helping them progress to line technician status. Martin testified that the line supervisors provide him with feedback regarding the progress of the apprentices and fill out quarterly progress reports, but the record does not reveal whether the line supervisors make recommendations in the progress reports. He also testified, however, that the apprentices must take tests to move up the ladder. Significantly, there is no record evidence that an apprentice who passed a test has ever been denied advancement or an apprentice who has failed a test has ever advanced based on the recommendation of a line supervisor. According to former Staking Technician Stansbury, line technicians sometimes take an apprentice and show him how to safely complete the work on smaller jobs – just as a line supervisor would do on a larger job.

Although Operations Manager Martin testified that line supervisors have the authority to “write up” employees, he was unable to provide examples of line supervisors having done so. The only example cited of a line supervisor issuing “discipline” occurred when a line technician walked off the job and the line supervisor reported the incident after the job was complete. Without any recommendation from the line supervisor, the Operations Manager terminated the employee. Martin stated that if a line supervisor observes a line technician doing something unsafe, he can shut down the job and take the technician to the Operations Manager so that he can decide how to handle the situation. The line supervisor's job description provides, in part, that the line supervisor “delegates such responsibilities and authorities to those reporting to him with full recognition that he retains full accountability.” However, there is no record evidence showing how or in what circumstances the line supervisor is held accountable. Martin testified in general terms that 6 or 7 years ago, while he was working as a line supervisor and before becoming Operations Manager, Line Supervisor Rick Shaw was demoted to line technician because his jobs were not completed in a timely fashion because Shaw shut down jobs that were more difficult. However, there is no record evidence that Shaw was held responsible for the work performed by the line technicians and apprentices in his crew.

The line supervisors are paid \$29.84 per hour; the line technicians earn \$26.96 per hour and the pay for apprentice line technicians ranges from \$16.82 to \$21.41 per hour. The maintenance technician/warehouseman receives \$21.34 per hour. Martin testified that the line supervisors have received or are in the process of receiving supervisory training, but he did not explain what this training entails.

E. The Duties and Responsibilities of Safety and Loss Control Coordinator Jason Ginn

Jason Ginn is in training to become the Employer's Safety and Loss Control Coordinator. The record discloses that the position was created about 2 months prior to the hearing and Ginn still has 2 years of training to complete before he can fully perform the duties of his new role. As the safety loss control coordinator, if Ginn observes an unsafe situation, he can recommend to the line supervisors that the job be shutdown; however, line supervisors and line technicians are also trained to recognize safety hazards. At present, Ginn does not have the power to discipline employees for safety violations. Like the other line technicians, Ginn is on call once a month and works during outages. He spends approximately 50 percent of his time performing line technician duties in the field and the remainder learning the safety loss control coordinator job by studying and accompanying Operations Manager Martin on safety audits in the field.

III. LEGAL ANALYSIS

A. The Appropriateness of the Petitioner's Proposed Bargaining Unit The Legal Framework

The Act does not require that the unit for bargaining be the only appropriate unit, or the ultimate unit, or even the most appropriate unit; the Act requires only that the petitioned-for unit be appropriate. *Transerv Systems*, 311 NLRB 766 (1993); *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). Moreover, a union is not required to seek representation in the most comprehensive grouping of employees unless such grouping alone constitutes an appropriate unit. *Bamberger's Paramus*, 151 NLRB 748 (1965). Although not dispositive, a petitioner's unit desire is a relevant consideration. *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964). Moreover, it is well settled that there is often more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Despite this, the Board will not find a grouping of employees that is arbitrary or artificial to be appropriate. *Moore Business Forms, Inc.*, 204 NLRB 552 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Thus, I must first examine the petitioned-for unit and determine if it is appropriate. If it is not, I will then examine the alternative unit suggested by the Employer, but I retain authority to select an appropriate unit that is different from the petitioned-for unit or the alternative unit. *Boeing Co.*, 337 NLRB 152, 153 (2001).

The Board will not grant the Petitioner its desired unit in situations where it does not possess a separate community of interest from the Employer's other employees. *Brand Precision Services*, 313 NLRB 657 (1994). In analyzing this issue, I am cognizant of Board precedent which states that "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951). In determining whether the employees within the departments such as those at issue here have a community of interest, the Board looks at factors such as the degree of functional integration, frequency of contact with other employees, interchange among the employees, the nature of the employee

skills and functions, commonality of wages, hours, benefits and other working conditions, and shared supervision. *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004).

1. Functional Integration

I will first examine the degree of functional integration among the employees at issue. The customer service representatives, staking technician, line supervisors, line technicians and apprentices, maintenance/warehouseman, and safety and loss control coordinator are all involved in the process of providing electrical service to customers. The customer service representatives interact with customers to determine their needs regarding construction of new lines or service of existing lines. Additionally, Jennings dispatches the other employees and interacts with them by radio and telephone contact. The other two customer service representatives, Waford and Gossom, spend very little time in this dispatch role and much more time taking payments from customers and doing related paperwork. Indeed, Waford doesn't come to the Shelbyville office except to attend the occasional meeting. Eubank, staking technician, creates a plan for the construction of new lines. The line supervisors, line technicians and apprentices perform the actual work of constructing new lines and servicing existing lines. The materials/warehouseman provides the materials that the line supervisors and line technicians require for their jobs. Finally, Ginn, the safety and loss coordinator, is actively engaged in performing technician duties while he trains for his new role, a position in which he will help to ensure that the work of installing and servicing lines is performed safely. However, the customer service representatives primarily deal with customers' needs and requirements. Only Jennings spends a significant amount of time interacting with other employees in the proposed unit as a consequence of her dispatching duties. Thus, I find that there is a significant amount of functional integration only between Jennings, Eubanks, the maintenance/warehouseman, the line supervisors, line technicians and apprentices and Ginn.

2. Frequency of Contact

The functional integration discussed above results in a significant amount of work related contact among certain, but not all of the employees. The line supervisors and line technicians pick up the necessary materials from the maintenance/warehouseman to perform their jobs. The staking technician frequently interacts with the line supervisors and line technicians if they have questions about his plans for the construction jobs. Further, the line supervisors and line technicians have an office in very close proximity to that of the staking technician in the basement of the Employer's facility. In contrast, the customer service representatives are located on a different floor. Only Becky Jennings has a substantial dispatch role and her responsibilities in this regard appear to be largely limited to contacts with Mike Clark, the line supervisor assigned to service duty. Customer service representatives Jennings and Waford appear to have little contact with the staking technician beyond placing work orders in his in-box and handling associated paperwork. Gossom, who works in another county, is even more limited in her contact with the other members of the proposed unit. Although Ginn's office is located on the first floor, he currently performs a number of the same duties that the line technicians perform and also interacts with them when he conducts safety audits in the field.

3. Interchange

There are few examples of interchange among the employees. As noted previously, Ginn regularly performs the same work that the line technicians perform, i.e., servicing of lines, even while training to assume his new position. The line supervisors and line technicians occasionally perform a simplified version of the staking technician's job, i.e., creating simple sketches when they change rural lights. Similarly, Eubank will occasionally perform simple laborer duties in the field with the line technicians during major outages. However, Eubank does not perform the full range of line or service technicians' duties and the reverse is also true. Customer service representatives Jennings, Waford and Gossom substitute for each other and occasionally assist the other three customer service representatives who sit at the front desk, but never perform any aspect of the job functions of the other employees at issue. Although the record does not disclose whether the maintenance technician/warehouseman substitutes for any other employees or whether any other employees substitute for him, the parties agree that he should be included in the bargaining unit.

4. The nature of the employee skills and functions

The line supervisors and line technicians have skills and training related to the "hands on" aspects of installation and servicing of electrical lines. The staking technician's training and skills are more theoretical, although he also has a strong working knowledge concerning the functioning of the lines in order to plan their installation and construction. Ginn is a former line technician who is being trained for the new position of safety and loss coordinator. Accordingly, he has all of the same skills that a line technician has, but will be developing more advanced skills in the area of safety. Moreover, the line supervisors and line technicians also have safety training and responsibilities for themselves and their fellow crew members. Although there was no testimony regarding the training that the customer safety representatives take, they clearly perform duties that are more comparable with office work than field work. They are in telephone contact with customers, handle money and do paperwork and only Jennings has any significant dispatch responsibilities. This requires her to have some knowledge of electricity so that she does not dispatch crews in a manner where they could inadvertently create dangerous conditions for one another, but it is clearly not the same level of technical training and skill that the line supervisors, line technicians, Eubank and Ginn possess, since she does not work in the field or make detailed technical sketches of electrical lines.

5. Commonality of wages, hours, benefits and other working conditions

The line supervisors, line technicians, Eubank and Ginn all perform a substantial portion of their duties in the field. This is an important difference from the clericals, who never work in the field and lack the training to do so. All of the employees at issue here have substantially the same benefits, but the line supervisors, line technicians, maintenance warehouseman and staking technician enjoy higher rates of pay than the customer service representatives, at least once the line technicians have advanced past the apprentice level. Although Ginn's pay rate is not in the record, I find it reasonable to infer that his pay is at least comparable to that of the line technicians since he worked in that capacity before being selected as safety loss control coordinator and still performs many of those functions. The line supervisors earn more money

than the line technicians, but not a significant amount. Similarly, the staking technician does not earn significantly less than the line technicians and receives more compensation than the apprentice line technicians.

6. Shared supervision

I next examine whether common supervision exists but observe that differences in supervision do not mandate separate units. *Texas Empire Pipe Line Co.*, 88 NLRB 631 (1950); *Hotel Services Group, Inc.*, 328 NLRB 116 (1999). In this regard, the line supervisors, line technicians and maintenance/warehouseman are supervised by the Operations Manager, the staking technician reports to the Engineering Manager, the customer service representatives are supervised by the Billing and Payroll Manager, and the safety loss control coordinator reports to the CEO, but also works with the Operations Manager.

Thus, in evaluating all of the relevant factors, I find that there are many commonalities between the line supervisors, line technicians, maintenance/warehouseman, Eubank and Ginn, but few between these employees and the customer service representatives. Despite the fact that the customer service representatives' duties, in particular the dispatching duties performed by Jennings, demonstrate some degree of functional integration with those of the other positions, the significance of the other factors weigh against requiring the inclusion of these three employees in the unit. Most important is the fact that the customer service representatives never work in the field while all of the other classifications, with the exception of the maintenance/warehouseman, perform the majority of their work in the field. Also quite significant is that the customer service representatives possess a very different skill set than the other job classifications, i.e., dealing primarily with office work and telephone contact with customers rather than the actual planning, construction and servicing of power lines. As the Board held in *Mitchellace, Inc.*, 314 NLRB 536, 536-37 (1994):

Clericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit. This is true even if those clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel.

Additionally, inasmuch as I must give some weight to the Petitioner's desire to exclude the customer service representatives from the unit, I find that a unit which excludes them is not inappropriate. Accordingly, I shall exclude the customer service representatives, Jennings, Waford and Gossom, from the unit found appropriate herein. However, given the functional integration of work duties, degree of interaction and many similarities in working conditions and skills between the staking technician and the line technicians, under the circumstances presented, I find that the exclusion of the staking technician from the unit proposed by the Petitioner is not supported by the record evidence. *Transerv Systems*, 311 NLRB 766 (1993); *Phonecian*, 308 NLRB 826 (1992). Accordingly, I find that an appropriate unit, including the petitioned for employees, must also include the staking technician.

B. The Supervisory Status of Line Supervisors

The Legal Framework:

Supervisors are specifically excluded from the Act's definition of "employee" by Section 2(11) of the Act which defines a "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 one 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). The exercise of that authority, however, 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 the putative supervisors involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, 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), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 3 (2006); *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). As a general matter, 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]henver 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*, supra, 348 NLRB at pp. 687-688.

With regard to the Section 2(11) criterion “assign,” the Board considered 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 687. 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.*

In *Oakwood*, the Board explained that, “responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. 348 NLRB at 690-692. The Board reasoned, however 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 p. 692.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. Id. at pp. 692-694. Independent judgment requires that the decision “rise above the merely routine or clerical.” Ibid.

Based on the record evidence, I find that the Employer has failed to sustain its burden of establishing that the line supervisors are statutory supervisors.

1. The evidence does not establish that the Line Supervisors can hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees or adjust their grievances or effectively recommend such actions

It is well-settled that the authority to discipline must be established by a showing that the putative supervisor’s participation in the disciplinary process leads to a personnel action without independent review or investigation by other managerial or supervisory personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635 (2001). The Board has repeatedly held that the mere exercise of a reporting function that does not automatically lead to further discipline or adverse action against the employee does not establish supervisory authority. See, *Illinois Veterans Home At Anna L.P.*, 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806 at 812 (1996). According to the testimony of Operations Manager Martin, if a line supervisor observed a line technician engaging in unsafe behavior on the workplace, the line supervisor could shut down the job and bring the line technician to the Operations Manager for a decision on what should be done. It is clear from the record that the line supervisor could not impose or effectively recommend discipline and that such decisions are made by the Operations Manager. In the only example cited of a line supervisor imposing “discipline,” even in the face of a flagrant violation where a line technician abandoned his job, the line supervisor merely reported the incident to Martin without any recommendation of discipline. Although Martin testified that line supervisors can “write up” employees, the record does not disclose any examples of a line supervisor actually writing up an employee or what effect, if any, a write up has on the offending employee. In view of the record evidence, I conclude that the Employer has failed to establish that line supervisor discipline employees or effectively recommend discipline.

Line supervisors help apprentices learn the trade as do line technicians. Although the line supervisors provide Martin with feedback regarding the performance of the apprentices, it is clear that the apprentices’ advancement depends entirely upon whether they can pass specific tests. It is well settled that the authority to evaluate is not an indicia of supervisory authority if the evaluation does not affect employee status or tenure. *Volair Contractors, Inc.*, 341 NLRB 673 (2004); *Williamette Indus.*, 336 NLRB 743 (2001). The record establishes that success, or

lack thereof, on the apprentice tests is the crucial determinant in the apprentices' status and tenure – not the feedback of the line supervisors.

2. The evidence does not establish that the Line Supervisors assign work within the meaning of Section 2(11) of the Act

Although Martin testified that line supervisors assign tasks to the employees on construction sites and the job descriptions indicate that the line technicians and apprentices “report” to the line supervisors, the record discloses that most of the jobs are routine and that the only “assignment” involves a determination of who would perform duties such as setting poles, running digger trucks, framing poles, performing wiring and setting anchors. In this regard, the line supervisors' ability to decide who will perform which of these distinct tasks is limited by the experience and training of the employees, notably with apprentices, who make up three of the seven line technicians, being especially limited in what they can do. It is significant that as of the time of the hearing, the four man construction crew had two apprentices and the three man crew had one apprentice, leaving each construction crew line supervisor with only one line technician past the apprentice level. The Board has held that designating a nursing staff person to regularly administer medications to a patient or group of patients would constitute assignment of a significant overall task, suggestive of supervisory authority, but that a one time directive to give medication to a specific patient would not be “assignment”. *Oakwood Healthcare, Inc.*, 348 NLRB at 689 (2006). I find the situation at hand to be more analogous to the latter example. Additionally, there is no evidence from the record that there would be any adverse consequence to an employee for failing to do as a line supervisor instructed. See, *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006). Although not dispositive, my finding on this matter is bolstered by the fact that if the line supervisors are supervisors within the meaning of Section 2(11) of the Act, this would result in an improbable ratio of 1 supervisor to 2-3 employees for work that the Employer's witness characterized as being largely routine. E.g. *NLRB v. Grancare, Inc.*, 170 F.3d 662, 667 (7th Cir. 1999). This situation is distinguishable from that presented in *Mays Electric Co.*, 343 NLRB 121 (2004), cited in the Employer's brief, where a foreman who assigned sophisticated tasks to approximately a dozen skilled employees on a major construction project was found to be a supervisor within the meaning of Section 2(11) of the Act.

Although Martin testified that line supervisors have the authority to require line technicians and apprentices to work small amounts of overtime, it appears from the record that there is little independent judgment involved and the Operations Manager is advised of such decisions so that he can either approve or override them. The decision to require overtime is based simply upon whether the job is far enough away from the Employer's office that the costs of paying overtime would be outweighed by the travel costs of having to return to the jobsite at a later time. There is no basis in the record to conclude that the line supervisors exercise any independent judgment in performing this function. In a similar situation, the Board has held that the authority to prevent employees from taking breaks when the store is busy does not make one a supervisor. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Furthermore, it is well settled that timekeeping responsibilities are not indicia of supervisory power. E.g. *John N. Hansen Co.*, 293 NLRB 63, 64 (1989). Thus, the Employer has failed to demonstrate that line supervisors designate employees to a place, appoint employees to a time or give significant overall duties.

3. The evidence does not establish that the Line Supervisors responsibly direct other employees within the meaning of Section 2(11) of the Act:

There is little evidence in the record that the line supervisors provide direction of other employees in their work. Although there are times when the line supervisors are the highest ranking employees on the job site, this does not compel the conclusion that they are supervisors. In this regard, it is significant that the Employer operates a small electrical cooperative and line supervisors are not the highest ranking employees in the cooperative – just on their particular job sites. Even then, a phone or radio call to the office is all that is necessary to have questions answered. Accord, *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980); *American River Transps. Co.*, 347 NLRB No. 93 (2006). For service jobs, the norm is for no line supervisor to be present at all. Although Martin testified that Line Supervisor Mike Clark substitutes for him when he is out of the office, there is no evidence in the record that Clark exercises statutory supervisory authority when he does so.

Despite the fact that the line supervisors' job description provides that they delegate duties and responsibilities while remaining fully accountable, directives to putative supervisors setting forth supervisory authority are not determinative of their supervisory status. *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). Even if I were to find that the language in the job description suggests that line supervisors provide direction to other employees, there is no evidence that they responsibly direct employees within the meaning of Section 2(11) of the Act. As stated previously, in *Oakwood Healthcare*, the Board interpreted the phrase “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ (as explained below) and carried out with independent judgment.” *Oakwood Healthcare*, supra, at p. 691 (internal quotations omitted). The Board then held that for direction to be “responsible,” the person directing the performance of a task must be accountable for its performance. *Id.* at p. 692. Further, the Board held that to establish accountability, “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 must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* at p. 692.

Before going out to the jobsite, the line supervisor meets with the Operations Manager for a review of the plan drawn up by the staking technician. Once at the jobsite, the work crew follows the plan with the line supervisor having authority to make only minor changes to the plan. Under these circumstances, it appears that very little independent judgment is exercised and there is no basis in the record to conclude that a line supervisor has been or would be held responsible for another employee's failings in performing the job. Although Operations Manager Martin testified that Line Supervisor Rick Shaw was demoted several years ago for shutting down jobs too readily, this is an example of Shaw being held responsible for his own decisions, not the actions of the employees whom he purportedly supervised. Further, although the line supervisors provide some direction to other employees by telling employees what discreet tasks they are to perform, most of the work is routine. It has not been established that the line supervisors have been given the authority to take corrective action if their directions are

not followed, nor has it been shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. *Oakwood Healthcare*, supra, at p. 692; See also, *Armstrong Machine Co.*, 343 NLRB 1149 (2004) (holding that a senior employee who answered questions from other employees was not a supervisor). Thus, it has not been shown that line supervisors responsibly direct other employees within the meaning of the Act. See, e.g., *Lynwood Manor*, 350 NLRB No. 44, (2007) (employer failed to show that RN/LPNs were accountable for their actions in directing the CNAs, since there was no evidence showing that RN/LPNs could be disciplined, receive a poor performance rating, or suffer any adverse consequences in their terms of employment due to a failure in a CNAs performance of routine functions).

For the foregoing reasons and based on the record as a whole, I conclude that the Employer has not met its burden of proving that the line supervisors are supervisors within the meaning of Section 2(11) of the Act.

Finally there remains the question of the unit placement of the safety and loss control coordinator. The Employer, during the hearing and in its post-hearing brief, concedes “that when Ginn assumes the position of the Safety Coordinator full time, he will appropriately be excluded from the unit.” However, the Employer asserts that Ginn is eligible to vote based upon his current duties as a line technician. The Petitioner asserts that Ginn reports to a different supervisor than the petitioned-for unit employees and does not share a community of interest in working conditions. I find, however, that Ginn is an eligible voter who should be included within the unit found appropriate. My decision to include Ginn in the unit is based upon the testimony regarding his present duties with the Employer and, in particular, the fact that he spends 50 percent of his time performing line technician duties. In this regard, I note that it is present duties and interests that are determinative and not future assignments. See, *Heckett Engineering Co.*, 117 NLRB 1395 (1957). The record does not provide any basis to determine what his future duties might be and whether those duties may change sufficiently to eventually warrant his exclusion from the unit.

IV. EXCLUSIONS

In accord with the stipulation of the parties and based on the record as a whole, I find that CEO Debbie Martin, Engineering Manager Wayne Anderson, Operations Manager David Martin, Billing and Payroll Manager Farah Cox and Theresa Atha are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit found appropriate herein. In addition, in agreement with the parties and based on the record as a whole, I shall exclude Accountant Denise Humes and IT Specialist David Graham from the unit found appropriate herein.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the above-referenced narrative, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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 in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer.

5. 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.

6. 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 employed by the Employer at its Shelbyville, Kentucky facility, including the Line Supervisors, Line Technicians, Service Technicians, Apprentice Line Technicians, Staking Technicians, Material Technician/Warehouse employees, but excluding all other employees, confidential employees, clerical employees, managers, guards and supervisors as defined by the Act.

VI. 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 on whether they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, Local Union 2100. 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 employees 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 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). This 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.). This list may initially be used by me to assist in determining an adequate showing of interest. 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 **September 25, 2008**. 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,^{2/} by mail, or by facsimile transmission at (513) 684-3946. 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 electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

^{2/} To file the list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. 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, D.C. 20570-0001. This request must be received in Washington by **October 2, 2008**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,^{3/} but may not be filed by facsimile.

DATED: September 18, 2008

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

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^{3/} Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.