

NATIONAL LABOR RELATIONS BOARD
REGION 19

Re: Premier Holding Company, Inc. d/b/a
Premier Electric
Case No.19-RC-089887

**EMPLOYER PREMIER HOLDING COMPANY
d/b/a PREMIER ELECTRIC'S
RESPONSE TO PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S REPORT
AND RECOMMENDATION ON CHALLENGED BALLOTS**

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I. INTRODUCTION

The International Brotherhood of Electrical Workers 73 (“IBEW”) has challenged the election votes of Premier Holding Company (“Premier”) employees Todd Jost and William Paradee. IBEW has asserted that Mr. Jost and Mr. Paradee are “supervisors” under Section 2(11) of the Act, and thus, are ineligible to vote in the current election. After hearing and post-hearing briefing by both parties, the Hearing Officer found that Mr. Jost and Mr. Paradee did not have any of the Section 2(11) indicia of supervisory authority and were not supervisors under the Act.

IBEW objects to numerous items in the Hearing Officer’s Report and Recommendations on Challenged Ballots (“Report”), each of which purportedly relates to one of three primary legal arguments made by IBEW: (A) the Hearing Officer erred in determining that Mr. Jost and Mr. Paradee do not “reasonably direct” other employees by applying the standard from Oakwood Healthcare, Inc., 347 NLRB No. 37 (2006); (B) the Hearing Officer erred in determining that Mr. Jost and Mr. Paradee do not “assign” employees; and (C) the Hearing Officer erred in not deciding the case based on secondary indicia alleged by IBEW.¹

IBEW fails to apply the Board’s actual standards for evaluating supervisory authority and ignores the scope of evidence presented at the time of hearing. IBEW asks the Board to focus on outdated and rejected legal standards, erroneous and disputed evidence, and to resolve all credibility determinations on disputed evidence in its favor. IBEW fails to meet its burden of establishing that Mr. Jost and Mr. Paradee are supervisors.

Premier respectfully requests that the Board deny IBEW’s exceptions and uphold the Hearing Agent’s recommendations.

¹ IBEW also generally argues that the Hearing Officer erred in considering evidence of post-petition changes to employment practices. Brief at pp. 6-7. However, IBEW utterly fails to meet its burden of establishing that any *pre-petition conduct* somehow meets any of the indicia of supervisory status.

II. BACKGROUND

Premier is an electrical contractor.² Travis Smith is Premier's owner, and Tony Beck is Premier's manager.³ The overwhelming testimony at the hearing was that the only Premier employees with true management prerogative at Premier are Mr. Smith and Mr. Beck.⁴

In reality, Mr. Jost and Mr. Paradee are no different than a number of other Premier employees who perform electrical work on job sites, and who, because of their experience and craft knowledge, often function as "lead men" on behalf of Premier.⁵ The other Premier employees who also act as lead men include Shane Greene, Mike Hoden, Aaron Porter, and Mike Yearsley, and IBEW witness, Eric Ward.⁶ These employees have sufficient knowledge in the field, time with the Company, and the trust of management to fill that leadership role.⁷ In fact, IBEW's witness, Shawn Lowry, agreed that Mike Hoden, Shane Greene, and Aaron Porter all qualify as "lead men," whose "duties are no different than those of Todd Jost or Will Paradee."⁸

In their roles as "lead men," all of these employees "take[] direction from management and help[] delegate tasks on each job."⁹ However, all of these employees, including Mr. Jost and Mr. Paradee, also perform electrical work on jobsites, just like any other Premier employee.¹⁰ Like the numerous other Premier employees who also act as lead men, Mr. Jost and Mr. Paradee work in the field,¹¹ have the right to order materials for a job site,¹² communicate with

²Transcript at 135.

³ Id.; Transcript at 136.

⁴ Id.; Transcript at 145, 156, 160-63.

⁵ Transcript at 137, 142.

⁶ Transcript at 51 (Mr. Ward admitting that he has acted as a lead man), 68, 111-13, 138-39, 210, 233.

⁷ Transcript at 139.

⁸ Transcript at 112-13 (emphasis added).

⁹ Id.; see also Transcript at 233-34

¹⁰ Transcript at 68-69, 141, 207, 209, 230-31, 233. IBEW goes to great lengths to dispute the Hearing Officer's determination that IBEW failed to establish that Mr. Jost or Mr. Paradee spend any particular amount of time in a supervisory role, versus doing electrical work. This argument is irrelevant, however, given IBEW's failure to otherwise establish that Mr. Jost or Mr. Ward actually perform any supervisory functions.

¹¹ Transcript at 145, 177-78.

contractors and resolve minor issues,¹³ may attend foreman meetings,¹⁴ may pick up checks or other paper work,¹⁵ may assist or guide other employees who have questions,¹⁶ may train other employees,¹⁷ have access company cars,¹⁸ and may use the company gas card.¹⁹

Consistent with their shared status with other Premier employees, Mr. Jost and Mr. Paradee do not enjoy benefits or employment conditions that are any different than other Premier employees. They do not wear distinctive clothing,²⁰ do not have special bathrooms, offices, or parking spaces,²¹ they do not receive special bonuses,²² and do not receive any other special employment benefits.²³ In other words, there is nothing to distinguish these employees from the rest of Premier's employees whose votes have not been challenged by IBEW, and no legitimate basis to exclude them from the bargaining unit.

III. ARGUMENT

A. Burden of Proof.

The burden is on the party asserting supervisory status to prove that such status exists. Oakwood Healthcare, Inc., 347 NLRB No. 37. The moving party bears the burden of providing unambiguous, fact specific testimony and documentary evidence to support its position: “Conclusory statements made by witnesses in their testimony, without supporting evidence, does Mattress Mfg., 327 NLRB No. 30, slip op, 102 (Oct. 30, 1998) (“Mere inferences without specific support in the record are insufficient to establish supervisory status.”). Extremely

¹² Transcript at 118, 141-42.

¹³ Transcript at 154-55.

¹⁴ Transcript at 155-56.

¹⁵ Transcript at 156.

¹⁶ Transcript at 151, 235-36.

¹⁷ Transcript at 152.

¹⁸ Transcript at 131, 171;

¹⁹ Transcript at 171.

²⁰ Transcript at 177, 220-21, 242-43.

²¹ Transcript at 177, 220-21, 242-43.

²² Transcript at 169, 220-21, 242-43; see also Employers Exhibits 4 and 5 (demonstrating that Mr. Jost and Mr. Paradee do not get special bonuses).

²³ Transcript at 177-78.

important to the issues herein – and completely ignored by IBEW – supervisory status is not proven where the record evidence is “*in conflict or otherwise inconclusive.*” Phelps Community Medical Ctr., 295 NLRB 486, 490 (1989) (emphasis added).

B. “Supervisor” Status Under Section 2(11).

Section 2(11) of the Act defines “supervisor” as follows:

any individual having the authority, in the interest of the employer, to **hire, transfer, suspend, layoff, 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.

29 U.S.C. 152(11) (emphasis added). Critically, the Board looks to whether the purported supervisor exercises “independent judgment” in exercising any of these supervisory acts. Id.

As a general principal, the Board has exercised caution “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” Chevron Shipping Co., 317 NLRB 379, 381 (1995). The analysis is to be performed “to assure that exemptions from the Act’s coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” Holly Farms Corp. v. NLRB, 517 U.S. 392, 399 (1996).

Accordingly, the definition of “supervisor” seeks to distinguish two classes of workers: true supervisors vested with “genuine management prerogatives,” versus employees such as “**straw bosses, lead men, and set-up men**” who are protected by the Act even though they perform “minor supervisory duties.” NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974) (emphasis added); Oakwood, 347 NLRB No. 37; NLRB v. St. Clair Die Casting, LLC, 423 F.3d 843 (8th Cir. 2005) (emphasis added). “The dividing line between these two classes of workers...is whether the putative supervisor exercises ‘genuine management prerogatives.’” Oakwood, 347 NLRB at 4.

The Board has consistently distinguished between a “superior workman or lead man who exercises control over less capable employees...and a supervisor who shares the power of management.” NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 235, 239 (4th Cir. 1958). Employees whose directions to others are based on professional, technical or craft knowledge are deemed non-supervisory. Kaiser Engineers v. NLRB, 538 F.2d 1379, 1384 (9th Cir. 1976); Austin Company, 77 NLRB 938, 942-43 (1948) (purported supervisors who “perform substantially the same work as the employees under their direction, as well as assign and review the work of the latter” are not supervisors but “leaders.”); NLRB v. Yeshiva Univ., 444 U.S. 672, 690 (1980).

IBEW failed to meet its burden of attributing any of the 12 primary indicia of supervisor status to Mr. Jost or Mr. Paradee. Indeed, IBEW does not appear to take issue with the Hearing Officer’s determination that that Mr. Jost do not have the ability to hire employees, transfer employees, suspend employees, lay off employees, recall employees, promote employees, discharge employees, reward employees, discipline employees, or adjust grievances of employees. Overwhelming and undisputed evidence negating these indicia is contained in the record.²⁴ Instead, IBEW appears to solely take issue with two indicia of supervisory authority – responsible direction and assignment.²⁵

²⁴ **No right to hire** (Transcript at 56, 123, 144-45, 211-12, 235); **no right to transfer** (Transcript at 113-15, 120-21, 124-25, 220); **no right to suspend** (Transcript at 124-25, 158, 238-39); **no right to layoff** (Transcript at 54, 133, 157, 160, 198, 201-02, 219, 239); **no right to recall** (Transcript at 161, 218, 239-40, 55); **no right to promote** (Transcript at 161, 218-19); **no right to discharge** (Transcript at 54, 123, 156-68, 200, 214-16, 237-39); **no right to reward** (Transcript at 25, 61, 160-64, 78-79, 240-41); **no right to discipline** (Transcript at 23, 28, 71-73, 75-76, 78, 125, 131, 158-60, 196-97, 215-18, 128-39); **and no right to adjust grievances** (Transcript at 127, 152-53, 201, 213-14, 237).

²⁵ In its Post-Hearing Brief, IBEW solely argued that Mr. Jost and Mr. Paradee met two of the indicia of supervisory authority under Section 2(11) – “responsible direction and “assignment” of employees. The remaining indicia were undisputed. However, it is somewhat unclear whether IBEW is now asking the Board to find that Mr. Jost disciplines employees based on one alleged and disputed incident. See Brief at p. 10 (“Jost acted with the cloak of disciplinary authority”). In any case, it was established at the hearing that Mr. Jost does not have supervisory authority based on this one incident: the employee in question had already completed his work day, Mr. Jost did not have the right to send an employee home early, did not

C. Mr. Jost and Mr. Paradee Do Not “Responsibly Direct” Employees.

The Hearing Officer applied the standard from Oakwood Healthcare and its progeny (often referred to as the “Kentucky River Trilogy”),²⁶ to determine that Mr. Jost and Mr. Paradee do not “responsibly direct” employees.²⁷ Under that standard, an individual does not “responsibly direct” an employee unless the employer delegated that individual with the authority to direct the work of other employees using independent judgment, *and the individual in question is ultimately responsible for the work of the employees.* Oakwood Health Care, 348 NLRB 37. The Hearing Officer easily found that IBEW failed to meet its evidentiary burden under this standard:

I find, based on the record evidence, that the Petitioner has not demonstrated that Mr. Jost or Mr. Paradee is held accountable for the work of other electricians. To the contrary, it is clear that neither is held accountable for the work of other employees and instead the employees are each held accountable for their own work. Therefore, I find that the Petitioner has failed to meet its burden to demonstrate that Mr. Jost or Mr. Paradee possess the Section 2(11) indicia of responsible direction.²⁸

IBEW does not point to a single piece of evidence that Mr. Jost and Mr. Paradee face adverse consequences as a result of any employee failing to perform a task falling under their alleged direction.²⁹ In fact, the only testimony presented at the hearing is that neither Mr. Jost

have the right to make an employee stay late, and did not have the right to discharge the employee. Transcript at 125-26, 157, 131, 217-19.

²⁶ The decisions in Oakwood Healthcare, 348 NLRB 37, Golden Crest Healthcare Center, 348 NLRB 39 (2006), and Croft Metals, 348 NLRB 717 (2006), followed the United States Supreme Court's decision in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), and the direction given by the Court. These cases refined the definition of “responsible direction,” “assignment,” and the exercise of “independent judgment.”

²⁷ See Hearing Officer's Report at Recommendations at p. 7.

²⁸ Id.

²⁹ IBEW points to certain (albeit disputed) evidence of *direction*. See Brief at p. 10 (describing Mr. Jost as “micromanaging” employees and checking on them frequently). Even if this evidence amounted to direction, it does not amount to “responsible” direction, as that term has been defined.

nor Mr. Paradee has *ever* been held responsible for the performance of other Premier employees is completely undisputed.³⁰

Instead, IBEW relies exclusively on an erroneous legal argument that the standard from Oakwood Healthcare only applies in healthcare settings. IBEW argues that the Hearing Officer's application of the Oakwood Healthcare standard is "flawed" because "the structure of the work environment in health care looks nothing like the work environment in construction as it relates to the interactions between supervisors and workers."³¹ IBEW cites to a number of Board decisions (notably – all pre-dating Oakwood Healthcare)³² that it deems to be more applicable outside of the healthcare field and to the Board's current analysis. See Brief in Support of Exceptions at p. 5 (citing Essbar Equipment Co., 315 NLRB 461 (1994); Debber Electric, 313 NLRB 1094 (1994); Atlanta Newspapers, 306 NLRB 751, 756 (1992); Garney Morris, Inc., 313 NLRB 101 (1993)).

Because these decisions pre-date Oakwood Healthcare, they do not look to whether the purported supervisor is "accountable" for other employees to determine whether the individual in question "responsibly directs" other employee and, instead, look to other (now non-determinative) factors such whether the ratio of employees to supervisors seems reasonable. See e.g., Garney Morris, 313 NLRB 114. For the obvious reason the IBEW has no evidence of accountability on the part of Mr. Paradee and Mr. Jost, IBEW advocates that the Board revert to this pre-Oakwood Healthcare standard.

The glaring problem with this argument is that the Board has consistently and repeatedly applied the accountability standard from Oakwood Healthcare to all manner of supervisor – including supervisors of electricians – since that decision was issued in 2006. See e.g., Entergy Mississippi, Inc., 357 NLRB 178 (2011) (utility dispatchers did not responsibly direct field electricians because dispatchers were not "accountable for the actions of field employees they

³⁰ Transcript at 142, 211, 234.

³¹ See Brief in Support of Exceptions at p. 4.

³² IBEW's argument also ignores that one of the cases in the Kentucky River Trilogy that established the standard for "responsible direction" – Croft Metals is not a healthcare case.

direct” and did not “experience any material consequences to [the] terms and conditions of employment, either positive or negative, as a result of [their] performance in directing field employees); PPG Aerospace Industries, Inc., 353 NLRB 23 (2008) (applying Oakwood Healthcare “accountability” standard to aircraft component manufacturer’s lead persons); D&J Ambulette Service, Inc., 359 NLRB 62 (2013) (applying “accountability” standard to senior mechanic); Brusco Tug & Barge, Inc., 359 NLRB 43 (2012) (tugboat mates did not responsibly direct crew members because mates were not accountable for crew members’ performance).

Clearly, the Board’s application of the “accountability” standard for determining whether a purported supervisor “responsibly directs” employees is not limited to the healthcare industry, nor is it somehow inapplicable to supervisors of electricians. Rather, it is the current standard applied by the Board to determine whether an individual “responsibly directs” other employees. Indeed, the Board has previously held that pre-Oakwood decisions (*i.e.*, every decision cited by IBEW, supra) do not guide the Board’s determination of supervisor status. Entergy, 357 NLRB 178 (electrical union case rejecting the employer’s request to rely on pre-Oakwood Healthcare decisions defining “responsibly direct” and holding: “[W]e believe that a reversion to ... a case predating Oakwood Healthcare by over 20 years, is unwarranted. The former case was decided under a different standard for determining supervisory status than the one set forth in Oakwood Healthcare For the Board to revert to a standard that does not follow the principles set forth in Oakwood Healthcare would ignore the significant doctrinal developments in this area of law.”).

Similarly here, the Board should reject IBEW’s request to resort to pre-Oakwood cases and standards to determine whether Mr. Jost and Mr. Paradee “responsibly direct” Premier’s employees. The Hearing Officer applied the appropriate and current standard of law: In order to prove that Mr. Jost and Mr. Paradee “responsibly direct” employees, IBEW was tasked with the burden of producing evidence that Mr. Jost and Mr. Paradee are accountable for the work of other employees. And, in the undisputed absence of any evidence that Mr. Jost or Mr. Paradee are accountable for the work of other employees at Premier, the Hearing Officer made the

appropriate (and only possible) decision on this issue. Mr. Jost and Mr. Paradee do not “responsibly direct” employees at Premier.

The Hearing Officer’s determination that IBEW failed to establish that Mr. Jost and Mr. Paradee “responsibly direct” employees should not be disturbed.

D. Mr. Jost and Mr. Paradee Do Not “Assign” Premier’s Employees.

The Board has held that “assign” means to designate employees to a place, a shift (including an overtime shift), or an overall task. Entergy, 357 NLRB 178. Premier presented overwhelming testimony and evidence that neither Mr. Jost nor Mr. Paradee “assign” employees as that term has been defined.

Premier presented *undisputed* evidence that Mr. Beck and Mr. Smith exclusively set the shift and location schedule for Premier’s employees through a collaborative process that considers need, skill levels, numbers of jobs, etc., to assign employees to the various job sites and shifts. Mr. Beck and Mr. Smith maintain exclusive control of overtime shifts and assign employees to the overall task of performing electrical work for Premier during a particular shift or at a job site.³³

IBEW baldly declares the evidence that Mr. Beck and Mr. Smith exclusively control the scheduling, shifts, overtime, and assignment of employees “conflicting, [sic] and incredible.”³⁴ However, IBEW fails to point to a single piece of evidence disputing Premier’s testimony. In fact, IBEW’s primary witness further provided unequivocal supporting testimony confirming that Mr. Beck sets the schedule, which is then communicated to employees by the lead man:

Q: You talked a little about scheduling and I believe you stated that *a foreman would communicate the schedule to the people who were working out on the job*. Is that correct?

A: Yes.

³³ Transcript at 70-71, 99-100, 102, 113-15, 120, 145-46, 162 (no ability to grant overtime), 212, 219, 233-35; see also Employer’s Exhibit 3 (example of weekly schedule set by Mr. Smith and Mr. Beck).

³⁴ Brief at p. 9.

Q: With respect to who sets the schedule, you don't have firsthand knowledge as to who sets and creates the schedule. Is that correct?

A: *There's the main schedule at the shop that Tony writes up to say what jobs people are going to be on based on the people that are working for the company at the time.*³⁵

Given this testimony offered by IBEW's witness, it is difficult to see how IBEW can continue to characterize Premier's position as "conflicting or incredible."

At best, the remaining testimony cited by IBEW indicates that Mr. Jost "tells" employees what is on the schedule previously set by Mr. Beck and Mr. Smith: "[H]e'll tell us the important stuff, what takes priority on the job, what has to be done that day *based on the scheduling of the job. He knows the schedule better than we do*....When it's pertinent or precedent [sic] and *he'll tell us what the scheduling requires us to do for the day.*" Brief at p. 9 (citing Transcript at 79) (emphasis added).

IBEW also blatantly mischaracterizes *one* disputed incident of purported discipline as constituting assignment of "overtime" by Mr. Jost. See Brief at pp. 10-11. At the time of the hearing, IBEW offered testimony that Mr. Jost got angry when an employee declined to work past his shift, and that Mr. Jost told him to "pack his shit and go."³⁶ However, it was also established that the employee in question had already completed his work day, and that Mr. Jost did not have the right to send an employee home early, make an employee stay late, or to discharge the employee.³⁷ Because Mr. Jost had no actual authority to make the request, it cannot constitute "assignment." See Croft Metals, 348 NLRB 717 (holding that employees did not "assign" because they did not have "authority to require" other employees to undertake the actions in question).

Perhaps even more important to this analysis, there is no evidence in the record that Mr. Jost's request would have resulted in overtime for that employee. In fact, IBEW's own witness

³⁵ Transcript at pp. 70-71 (emphasis added).

³⁶ Transcript at pp. 23, 102, 118.

³⁷ Transcript at 125-26, 157, 131, 217-19.

testified that the employee in question had not worked overtime.³⁸ IBEW's assertion that this was an assignment "overtime" is a fiction.

Finally, the Hearing Officer correctly determined that the record does not contain any evidence that Mr. Jost or Mr. Paradee's assign significant overall duties to employees. It is well-established that the alleged supervisor's assignment of tasks must be an assignment of "significant overall duties," as opposed to ad hoc instructions to complete certain tasks. See Entergy, 357 NLRB 178. Critically, "directing an employee to perform a discrete task within an overall assignment does not establish the authority to assign work under Oakwood Healthcare." General Die Casters, Inc., 359 NLRB 7 (2012). Further, if the assignment is made solely on the basis of equalizing work loads, then the assignment is routine or clerical in nature and does not implicate independent judgment." Oakwood Healthcare, 348 NLRB at 694.

Here, the Hearing Officer correctly determined that IBEW failed to present any evidence that Mr. Jost and Mr. Paradee exercise independent judgment in any allocation of work on a jobsite. See Report at p. 7. On the other hand, Premier presented undisputed testimony that work is divided up based on a pre-set schedule, in which Mr. Smith and Mr. Beck have already made assignments of employees to shifts, jobsites, and tasks.³⁹ Premier also presented evidence that work on jobsites is divided up by employees in a collaborative manner.⁴⁰ Thus, there is no evidence that Mr. Jost and Mr. Paradee exercise independent judgment or otherwise "assign" significant overall tasks on a jobsite.

The Hearing Officer's determination that IBEW failed to establish that Mr. Jost and Mr. Paradee "assign" employees should not be disturbed.

³⁸ Transcript at p. 131

³⁹ Transcript at p. 151.

⁴⁰ Transcript at p. 213, 233-34.

E. In the Absence of Primary Indicia of Supervisory Authority, IBEW Cannot Establish Supervisory Status With So-Called Secondary Indicia.

IBEW attempts to point to evidence in support of so-called “secondary” indicia of supervisory status as somehow determinative. However, the Hearing Officer aptly relied on the well-established principle that in the absence of any of the 12 primary indicia of supervisory authority, secondary factors cannot be dispositive. See Central Plumbing Specialties, 337 NLRB 973, 975 (2002); Training School of Vineland, 332 NLRB 1412 (2000).

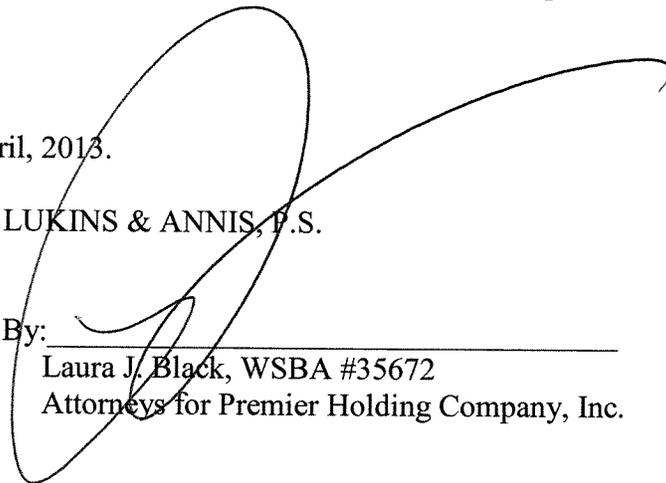
Thus, IBEW’s allegations that employees might consider Mr. Jost and Mr. Paradee to be supervisors, that Mr. Jost receives higher wages, and that Mr. Jost and Mr. Paradee have allegiance to management, are secondary indicia and do not establish supervisor status. All such allegations should be disregarded.

III. CONCLUSION

For the foregoing reasons, Premier respectfully requests that the Board uphold the Hearing Officer’s Report.

Submitted this ^{22nd} day of April, 2013.

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SERVICE CERTIFICATE

I HEREBY CERTIFY that on April 22, 2013, a **true and correct copy** of Premier Electric's Post-Hearing Brief was electronically filed with the NLRB and delivered to the following persons in the manner indicated:

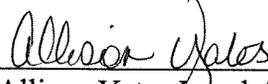
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