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**Building Contractors Association, Inc. and The District Council of New York City and Vicinity of The United Brotherhood of Carpenters and Joiners of America, AFL–CIO Petitioner.** Case 02–RC–154031

August 16, 2016

ORDER DENYING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND MISCIMARRA

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Employer’s Request for Review of the Regional Director’s Decision and Direction of Election and Supplemental Decision and Direction of Election is denied, as it raises no substantial issues warranting review.

The Petitioner seeks to represent a unit of carpenters employed by construction employers in the New York metropolitan area who have designated the Employer Building Contractors Association (the Association) to negotiate and enter into collective-bargaining agreements on their behalf. In her Decision and Direction of Election and Supplemental Decision and Direction of Election (pertinent portions of which are attached as an appendix), the Regional Director found that the petitioned-for multiemployer unit was appropriate; the Association has requested review of this finding.<sup>1</sup>

Our dissenting colleague would grant review so that the Board could examine whether the member-employers of the Association had the requisite intent to engage in multiemployer bargaining under Section 9(a) of the Act. As fully explained by the Regional Director, however, a multiemployer unit is appropriate here because the member-employers of the Association have indicated their “unequivocal intent” to participate and to be bound by group bargaining. *Arbor Construction Personnel, Inc.*, 343 NLRB 257, 260 (2004) (citing *Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991)).

The Association’s membership agreement and designation form allow member-employers to designate the Association as their bargaining agent as to only certain unions with whom the Association bargains, but they

<sup>1</sup> In her Supplemental Decision and Direction of Election, the Regional Director also determined that the Association had not established that the Carpenter-Foreman and Carpenter-General Foreman are supervisors within the meaning of Sec. 2(11). The Employer has also requested review of this finding. We agree with the reasons stated by the Regional Director and deny review.

require member-employers to be bound by the terms of any collective-bargaining agreement entered into by the Association with those designated unions.<sup>2</sup> Further, the 2012 Notice of Proposed Amendments<sup>3</sup> explains the differences between 8(f) and 9(a) bargaining relationships and discusses the possibility of a union seeking to convert the relationship from 8(f) to 9(a) status through a showing of majority status. The Association imposed no conditions precedent to convert to 9(a) status, such as consent from the member-employers. Finally, the parties here have bargained on a multiemployer basis for more than 30 years, and, as of the time the petition was filed, were parties to an 8(f) agreement. As the Regional Director found, each member-employer indicated its unequivocal intent to adopt a contract resulting from joint bargaining. See *The Cement League*, 02–RC–154016 (2016) (not included in bound volumes).<sup>4</sup>

Our dissenting colleague argues that the membership documents (and the recent bargaining history) did not serve to convert the 8(f) bargaining relationship into a 9(a) relationship and therefore did not indicate the members’ consent to multiemployer bargaining. However, the dissent conflates two distinct issues, the resolution of which turns on different considerations: (1) whether there is a multiemployer bargaining relationship, and (2) whether, if such a relationship exists, it is governed by Section 8(f) or Section 9(a). As to the first issue, the evidence discussed above clearly shows that the member-employers of the Association agreed to be bound by multiemployer bargaining, and indeed have done so for decades. As to the second issue, the evidence shows that the membership agreement does not distinguish between

<sup>2</sup> In 2012, the Association amended its by-laws to allow for this selective designation. (Previously, member-employers of the Association were bound by all agreements entered into by the Association.) The new designation form lists 11 different unions, each with a yes/no check-off space, thereby allowing a member-employer to indicate which particular unions it was designating the Association to bargain with on its behalf. The form expressly informs the member-employer that a designation binds it to the terms of a collective-bargaining agreement entered into by the Association with that union and authorizes the Association to act on its behalf regarding grievances and other contractual matters.

<sup>3</sup> The amendments discussed in the Notice were adopted as proposed.

<sup>4</sup> As in this case, the petitioner in *The Cement League* sought an election in a multiemployer unit it had represented in an 8(f) relationship (at the time the petition was filed, however, the most recent 8(f) agreement had expired). Relying on the language of the employer bargaining association’s constitution and by-laws and the parties’ history of multiemployer bargaining (under both Section 8(f) and 9(a) agreements), the Regional Director found an unequivocal intent to participate in and be bound by group bargaining (whether on an 8(f) or 9(a) basis) and accordingly directed an election in the multiemployer unit. The Board denied the employer bargaining association’s request for review.

8(f) and 9(a) agreements. Further, some employers in the multiemployer association have 9(a) relationships with designated unions, while the petitioned-for Association employer-members had 8(f) relationships. Finally, the membership agreement acknowledges that unions seeking to convert a bargaining relationship from 8(f) to 9(a) could do so through a showing of majority status. That is exactly what the Petitioner has sought to do here: convert the relationship from 8(f) to 9(a) based on a showing of majority support.

Our colleague's reliance on *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert denied 488 U.S. 889 (1988), is similarly misplaced. *Deklewa* sets out the requirements for converting an 8(f) relationship to a 9(a) relationship based on an employer's voluntary recognition of a union's majority support within the unit. Here, the issue is not whether the Association may voluntarily recognize the Union; rather, the issue is whether the members of the Association have clearly indicated their intent to engage in multiemployer bargaining with the Petitioner—whether on an 8(f) or 9(a) basis.<sup>5</sup> The separate issue of whether the Petitioner qualified as the 9(a) bargaining representative was determined by the majority vote of the employees in an election.

Our colleague also suggests that under *Deklewa*, supra, and *Comtel Systems Technology, Inc.*, 305 NLRB 287, 289 (1991), when a union seeks to convert an 8(f) relationship to a 9(a) relationship through an election, the employees should vote on an employer-by-employer basis as to whether to establish a 9(a) multiemployer bargaining relationship. As our colleague appears to acknowledge, however, neither of these cases is directly on point.<sup>6</sup>

Finally, we disagree with our colleague that the inclusion of 16 member-employers who currently do not employ employees within the election unit is unwarranted. The Board has long recognized the special status of the construction industry within the representation process,

<sup>5</sup> Contrary to our colleague's assertion, we do not assume that a party's intent to bargain on an 8(f) basis and its intent to bargain on a 9(a) basis are "interchangeable." As discussed, the Association's membership documents show that the member-employers authorized the Association to bargain on their behalf regardless of whether that bargaining was on an 8(f) or 9(a) basis.

<sup>6</sup> As noted above, *Deklewa* involved the conversion of an 8(f) relationship to a 9(a) relationship based on voluntary recognition. Although, as our colleague observes, the Board in *Deklewa* expressed concern about merging single-employer 8(f) units into a larger 9(a) multiemployer without the employees' consent, it also forthrightly stated that "we do not imply that multiemployer associations and multiemployer bargaining are no longer appropriate in the construction industry." *Id.* at 1385 fn. 42. As for *Comtel Systems*, the Regional Director correctly distinguished it on the facts.

especially regarding the experience of employees working for an employer on a project and then going to work for another employer or employers on other projects. *Daniel Construction Co., Inc.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967).<sup>7</sup> The Regional Director's inclusion of the 16 member-employers, who do not currently employ employees in the unit, is consistent with the general recognition that the employee complements of construction employers fluctuate. Those 16 member-employers designated the Association to bargain on their behalf with the Petitioner, and there is no indication that any of them attempted to withdraw from the 8(f) agreement despite their nonemployment of unit carpenters.<sup>8</sup> As the Regional Director noted, there is no indication that any of the 16 member-employers have permanently ceased carpentry work or will not accept such work in the future. Under these circumstances, we see no reason to exclude these member-employers from the unit.

In sum, the Association has raised no substantial issues warranting review, and the Request for Review is accordingly denied.

Dated, Washington, D.C. August 16, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

I would grant review of the Regional Director's decision to direct an election in the petitioned-for multiemployer unit for purposes of 9(a) representation. In my view, the Building Contractors Association (Association), a multiemployer association, raises substantial issues warranting review regarding whether its members

<sup>7</sup> The *Steiny/Daniel* formula determines employees' voting eligibility in a case like this one based on their recent employment with the unit employers in the aggregate, not whether they are employed by any particular employer in the period immediately prior to the direction of election. *Id.*; *Steiny & Co.*, 308 NLRB 1323 (1992).

<sup>8</sup> With respect to 8(f) agreements, an employer who employs one or fewer unit employees on a permanent basis is free to withdraw recognition, repudiate its contract, or unilaterally change terms and conditions of employment without affording an opportunity to bargain. See *Baker Concrete Constr., Inc. v. Reinforced Concrete Contractors Ass'n*, 820 F.3d 827 (6th Cir. 2016) (quoting *Stack Electric*, 290 NLRB 575, 755 (1988)).

had the requisite intent to engage in multiemployer bargaining under Section 9(a) of the Act.

The Association and the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Carpenters Union) have a long-standing history of multiemployer bargaining for only Section 8(f) agreements. In 2012, the Association sent its members several documents in conjunction with proposed changes to the Association bylaws. One of these documents allowed Association members to authorize the Association to engage in multiemployer bargaining on its behalf. Another of these documents outlined the difference between 8(f) and 9(a) agreements and stated that “a union can convert an 8(f) relationship and agreement to a 9(a) relationship and agreement by demonstrating its majority status at any time during the term of the agreement.” Contrary to the implicit suggestion of my colleagues, no language in *any* of these documents indicated that the purpose of these documents was to effect such a conversion. In fact, during the negotiation of the last two 8(f) agreements between the Carpenters Union and the Association in 2012 and 2015, the parties made proposals that would convert the parties’ 8(f) agreement to a 9(a) agreement. None of these proposals were adopted. On June 11, 2015, the Carpenters Union filed a petition to represent the bargaining unit currently covered by the parties’ 8(f) agreement. The Regional Director directed an election among all the bargaining unit employees at each of the Association’s members. The results of the election do not reflect whether the Carpenters Union has majority support among the bargaining unit within any individual member of the Association. In fact, 16 members of the Association currently do not employ any bargaining unit employees.

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert denied* 488 U.S. 889 (1988), the Board explained the fundamental and significant distinctions between 8(f) and 9(a) relationships and agreements. The Board also explained that an 8(f) relationship could become a 9(a) relationship where a construction industry employer voluntarily recognized the union as a majority representative and the union demonstrated majority support among unit employees. *Id.* at 1387, fn. 53; see also *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 717 (2001); *Golden West Electric*, 307 NLRB 1494, 1495 (1992).

Neither the Association nor any of its members have voluntarily recognized the Carpenters Union as a majority representative or demonstrated any intent whatsoever to do so. While I agree with the Regional Director and

my colleagues that the Association’s members clearly evidenced intent to engage in 8(f) multiemployer bargaining with the Carpenters Union, there is virtually no evidence that the members intended to engage in 9(a) bargaining. Rather, the undisputed evidence shows that the Association, on its members’ behalf, has on multiple occasions *rejected* collective-bargaining language that would allow for a 9(a) relationship to be formed.<sup>1</sup> It strains credulity to conclude that, in the face of these multiple rejections of 9(a) bargaining and a 30-plus year history of 8(f) bargaining, that mere references to 9(a) bargaining in documents shared with members evidences clear member intent to convert to 9(a) bargaining.<sup>2</sup>

Furthermore, I believe that directing this election in a multiemployer unit does not adequately preserve employee free choice of a representative. In processing the conversion of an 8(f) bargaining relationship to a 9(a) bargaining relationship, “the appropriate unit normally will be the single employer’s employees covered by the agreement.” *John Deklewa & Sons*, above at 1377, 1385. *Deklewa* specifically rejected the application in 8(f) cases of the merger doctrine, in which employers and unions may merge employer units into a multiemployer unit, because the cost in terms of employee free choice was too high. *Id.* at 1385, fn. 42. For these reasons, *Deklewa* holds that “employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association.” *Id.* I believe that directing this election contradicts the spirit, if not the letter, of this holding. Cf. *Comtel Systems Technology, Inc.*, 305 NLRB 287, 289 (1991) (a collective-bargaining agreement “will not be binding as anything other than a sec-

<sup>1</sup> The evidence showed that the Association’s longstanding relationship with the Carpenters Union has been exclusively an 8(f) relationship. Although the relevant documents in this case explained how a conversion from an 8(f) to a 9(a) relationship might occur, these documents at no point signaled intent to engage in such a conversion. The takeaway from my colleagues’ decision, therefore, is that the question is no longer whether the employer intended to effect a conversion of an 8(f) relationship to a 9(a) relationship, but rather, whether an employer affirmatively disavowed any intent of converting its relationship from an 8(f) to a 9(a) relationship. However, even if “affirmative disavowal of intent to convert” were the standard, that standard is met here by the Association’s repeated rejection of proposals that would have converted the 8(f) relationship to a 9(a) relationship.

<sup>2</sup> My colleagues cite to *The Cement League*, 02–RC–154016 (2016) (not included in bound volumes) for the proposition that an unequivocal intent to be included in joint bargaining generally equates to an intent to be included in Section 9(a) bargaining specifically. I dissented in *The Cement League* for much the same reasons I dissent here, namely that a multiemployer bargaining association’s longstanding 8(f) relationship with the union evidences only an intent to engage in 8(f) bargaining, and cannot, without more, evidence an intent to engage in 9(a) bargaining.

tion 8(f) agreement in the absence of a showing that a majority of the employees *in the employer's work force* had manifested their support for the union before the employer became bound to the agreement.”) (emphasis added).

And I believe that the inclusion in this election of the 16 employers who employed no unit employees during the eligibility period is particularly unwarranted. When these employers eventually hire unit employees, those employees will be subject to a 9(a) bargaining unit and agreement even though no employees of those employers ever had any opportunity to express their views concerning representation. My colleagues thereby countenance what amounts to a 9(a) prehire agreement as to these employers and their employees. I believe such an agreement is contrary to the express will of Congress, which has authorized prehire agreements only pursuant to Section 8(f). See generally *Deklewa*, above.

My colleagues assert that I improperly conflate whether a multiemployer bargaining relationship exists with whether such a relationship is governed by Section 8(f) or Section 9(a). Respectfully, I believe my colleagues' decision today tends to ignore the key differences between 8(f) and 9(a) relationships entirely. As discussed above, the documents upon which my colleagues base their finding that the Association intended to engage in multiemployer bargaining, do not provide a scintilla of evidence that the Association intended to engage in 9(a) bargaining with the Union. Thus, to reach this conclusion, one must assume that intent to engage in 8(f) bargaining and intent to engage in 9(a) bargaining are essentially interchangeable; such an assumption necessarily relies on there being no meaningful difference between an 8(f) bargaining relationship and a 9(a) relationship. I cannot agree with my colleagues that no such meaningful difference exists. See *King's Fire Protection, Inc.*, 362 NLRB No. 129, slip op. at 3–4 (2015) (Member Miscimarra, dissenting) (highlighting key differences between 8(f) and 9(a) relationships).<sup>3</sup>

Furthermore, I would also grant review to consider whether it is appropriate to include the classifications of Carpenter Foreman and Carpenter General Foreman (together, “Foremen”) in the proposed unit. The Foremen possess supervisory authority if they engage in any one

of the 12 different supervisory functions enumerated in Section 2(11). The parties' Section 8(f) collective-bargaining agreement, in effect when the Carpenters Union petitioned for this election, explicitly stated that the Foremen possess the authority to engage in at least two supervisory functions, stating “[t]he General Foreman and the Foreman shall be the agents of the Employer. The right to hire and discharge employees, rests with the General Foreman and/or Foreman who are authorized representatives of the Employer.” Furthermore, the Association's evidence that Foremen exercise supervisory authority is uncontroverted, with the Regional Director instead criticizing the evidence for being insufficiently specific. As I have previously explained, the Board should not disregard un rebutted evidence “merely because it could have been stronger, more detailed, or supported by more specific examples.” *Buchanan Marine*, 363 NLRB No. 58, slip op. at 9 (2015) (Member Miscimarra, dissenting) (citations omitted). Thus, I would grant review to consider the Foremen's supervisory status under the three common sense factors I set forth in *Buchanan Marine*, above at slip op. 10, namely: (i) the nature of employer's operations; (ii) the work performed by undisputed statutory employees; and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.

Dated, Washington, D.C. August 16, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

#### DECISION AND DIRECTION OF ELECTION

The District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Petitioner) seeks an election in a multiemployer unit consisting of all employees employed by member-employers of the Building Contractors Association, Inc., (the Association) who designated the Association to bargain on their behalf with respect to the Petitioner. The Petitioner contends that the multiemployer unit is an appropriate unit because it is the historical unit represented by the Petitioner for more than 30 years.

The Association contends that the petitioned-for unit is not appropriate because the member-employers comprising the Association did not consent to bargain for a Section 9(a) contract or to proceed to an election in a multiemployer bargaining unit. Further, the Association submits that a multiemployer unit is inappropriate because it would deprive the employees of

<sup>3</sup> Indeed, explaining why it is appropriate, to bind employers without employees to the results of an election for a 9(a) unit, my colleagues rely on “the special status of the construction industry within the representation process.” I agree with my colleagues that the Board has long recognized this special status of construction industry employers; it is why the Act recognizes 8(f) relationships. However, my colleagues provide no precedent that 9(a) agreements are appropriate for construction industry employers with no employees. To the contrary, such 9(a) prehire agreements are clearly inappropriate.

individual member-employers the opportunity to choose their bargaining representative in single units.<sup>1</sup> In addition, the Association argues that it has no knowledge of who its member-employers employ and cannot force its member-employers to provide a voter list of employees. Lastly, the Association asserts that two classifications within the petitioned-for unit, Carpenter Foremen and Carpenter General Foremen, are statutory supervisors and therefore, are ineligible to vote.

A hearing officer of the Board held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record and relevant Board law, I find that the petitioned-for unit is an appropriate unit, and that the member-employers of the Association who designated the Association to bargain on their behalf consented to multiemployer bargaining covering the multiemployer unit. Further, I conclude that the Association's contention that certain classifications be excluded need not be litigated or resolved before the election is conducted because the Association has not shown that the resolution of this issue would significantly change the size or character of the unit.

#### I. BACKGROUND FACTS

##### A. *The Association and its Member-Employers*

The Association is a multi-employer construction trade association that consists of approximately 172 construction companies in the New York metropolitan area. One of the primary purposes of the Association is the negotiation and administration of collective-bargaining agreements with approximately 13 building trades unions on behalf of its member-employers. In addition, the Association provides management-labor relations assistance, services and coordination to its members, including collecting wage data from its members, providing health insurance options, lobbying politicians, and keeping members informed of industry developments.

Of the 13 unions that the Association has bargaining relationships with, the record reflects that three of them—Mason Tenders District Council, General Building Laborers' Local 6, and Bricklayers Local 1—have attained Section 9(a) status. It is undisputed that it has an 8(f) relationship with the remaining 10 unions, including the Petitioner.

In 2012, the Association amended its by-laws to alter the way in which its member-employers authorize the Association to enter into collective-bargaining agreements on their behalf. Prior to the amendments, any contractor who joined the Association was bound to all of the agreements that the Association negotiated. Under the 2012 amendments, contractors can be member-employers of the Association, as long as, they designate the Association as their bargaining agent for at least one of the unions with whom the Association has a collective bargaining relationship. The amended by-laws make no reference to 9(a) or 8(1) relationships and agreements.

The Association sent three documents to its member-employees concerning the amendments to the by-laws: a Notice

<sup>1</sup> The Association conceded at the hearing that multiemployer bargaining is permissible in the construction industry and that a unit of employees engaged in carpentry work, absent supervisors, would be an appropriate craft unit.

of Proposed Amendments, a Designation of Bargaining Rights form, an updated Application for Membership form.

The Notice summarized the proposed amended by-laws and outlined the differences between 9(a) and 8(f) agreements. Although the Notice indicated that the Association has “mostly 8(f) agreements” and some 9(a) agreements, it does not limit the Association's bargaining authority based on the type of agreement. In the section defining an 8(f) agreement, the Notice restated current Board law and provided that “a union can convert an 8(f) relationship and agreement to a 9(a) relationship and agreement by demonstrating its majority status at any time during the term of the agreement.” There is no language elsewhere in the Notice identifying any other conditions precedent required to convert an 8(f) relationship and agreement to a 9(a) relationship and agreement, such as consent from member-employers or a showing of majority support at each individual member-employer.

The Designation of Bargaining Rights form provides member-employers the freedom to designate the Association to bargain on behalf of the member-employers for one or more of the unions. The form is titled “Designation of Building Contractors Association, Inc., As Collective Bargaining Representative” and states, “The undersigned contractor hereby designates the Building Contractors Association (hereinafter “BCA”) as its sole and exclusive bargaining representative with respect to the following labor organization(s).” The form then listed 11 unions, including the Petitioner, with a space to initial next to either YES or NO for each union.<sup>2</sup> At the bottom, it states:

This designation authorizes the BCA to negotiate and agree to terms of collective bargaining agreements with each of the labor organizations designated above, and for BCA to act on your behalf with respect to grievances and other matters related to such collective bargaining agreements, and to bind you with respect to its actions on your behalf.

Such authorization will “remain in full force and effect as to all designated unions” unless a member-employer provides written notice of termination to the Association or revocation of the designation with respect to any union not less than 180 days prior to the expiration of a collective-bargaining agreement between that union and the Association. Thus, member-employers can update their Designation of Bargaining Rights form and revoke bargaining authorization with respect to particular unions, provided such changes are timely made.<sup>3</sup> Notably, the form does not differentiate between authorizing the Association to negotiate Section 8(f) and 9(a) labor agreements.

The updated membership application is required for new members, and it tracks the language from the Designation of Bargaining Rights form. The application states that the member-employer “will abide, be governed by, and conform to the

<sup>2</sup> The form has been updated to include thirteen unions after the Association began a collective-bargaining relationship with two additional unions.

<sup>3</sup> Although the designation forms specifically require written notice of revocation at least 180 days before the expiration of an agreement, the Association has allowed its member-employers to revoke bargaining authority verbally over the phone or through written notice up to a month before expiration.

By-Laws of the Association; and agrees that it will be bound by the terms of all Association trade agreements it adopts and/or for which it designates the Association as its collective-bargaining representative for the duration of those agreements.” Similar to the designation form, the membership application does not distinguish between 8(f) and 9(a) agreements, or otherwise limit the Association’s authority to bargain on their behalf.

At the Association’s next general membership meeting in December 2012, the amendments were adopted, as proposed. All member-employers were then given the option to fill out a Designation of Bargaining Rights form. Any member-employer who did not fill out the new form continued to be bound by all of the agreements that the Association negotiated.

In early 2013, the Association updated its Designation of Bargaining Rights form and Application for Membership. The Association now requires that all member-employers must adopt the 9(a) agreements with the Mason Tenders District Council and the General Building Laborers Local 66. The member-employers remain free to designate the Association to negotiate and agree to terms of collective-bargaining agreements with the remaining 11 unions.

Finally, at a February 2015 Board of Directors meeting, the Association changed the structure of its Labor Relations Committee. Currently, the Association has separate Labor Committees for each individual trade union with whom it negotiates. Previously, the Association’s by-laws created only one Committee, comprised of a least three members, who would negotiate collective-bargaining agreements with all of the unions. Apart from the structure, the duties and authority of the committee remained unchanged. Presently, the Committees’ acts and findings “with respect to any union shall be binding on all Members of the Association who have designated the Association as their representative with respect to that particular union.” Although the Committees’ decisions are subject to the approval of the Association’s Board of Directors, individual member-employers do not vote on the final agreement negotiated by the Committees.

#### *B. The Association and the Petitioner’s Collective-Bargaining History*

For more than 30 years, the Petitioner and the Association have been signatories to successive prehire construction industry agreements. The most recent collective-bargaining agreement, effective by its terms from July 1, 2011, to June 30, 2015, covered the wages, hours and conditions of employment for all employees employed by the member-employers in the following classifications: carpenter foreman, carpenter general foreman, journeyman, carpenter, journeymen carpenter, and journeymen carpenter apprentices. On June 25, 2015, the parties signed a memorandum of agreement that extended the agreement until June 30, 2016.

Of the Association’s approximately 172 member-employers, 145 of them designated the Association to negotiate and agree to a collective-bargaining agreement with the Petitioner in the most recent negotiations. These member-employers either specifically designated the Association through a designation

form, or continued to be bound by all of the agreements that the Association negotiates, including one with the Petitioner.

The Petitioner is seeking to represent the classifications in the contractual unit, employed by the 145 member-employers that authorized the Association to bargain with the Petitioner on their behalf.

Notwithstanding the authorization, the Association claims that only 96 of 145 member-employers have actually employed carpenters in the past 6 months. By analyzing 6 months of benefit funds reports, the Association identified only 96 member-employers who remitted benefit contributions on behalf of their employees. A member-employer’s failure to remit dues suggests that it did not employ carpenters during those 6 months. Thus, the Association asserts that 49 member-employers should not be included if an election is directed. Notably, no record evidence was adduced covering a longer period, such as the past 2 years, even though such documents appear to be readily within the Association’s possession. Additionally, the Association did not produce evidence demonstrating that those 49 member-employers have no plans to employ carpenters at a future date.

With respect to hire, member-employers either use the Petitioner’s hiring hall via an out-of-work list, or hire carpenters directly. In some instances, member-employers may be able to hire their complete work force for a project, with the exception of a shop steward, without going through the Petitioner’s out-of-work list. Although the Petitioner asserts that a majority of the carpenters are hired on a project-by-project basis, it concedes that some carpenters may stay with a single member-employer for a longer period of time covering multiple projects. As such, both parties agree that carpenters can be employed by several member-employers over the course of a year. Neither party introduced documentary evidence to establish the percentage of bargaining unit employees who work for a single employer over an extended period versus employees who work on a project-by-project basis for multiple employers.

It is undisputed that the collective-bargaining relationship between the parties is governed by Section 8(f) of the Act. No evidence was adduced at the hearing, and the parties do not contend, that the Petitioner has demonstrated majority support among the employees. Indeed, the purpose of the petition is to demonstrate majority support among the employees in the unit through a Board election.

During the parties’ last two recent negotiations for successor agreements, both parties made proposals that would convert their 8(f) relationship and agreement to a 9(a) relationship and agreement. The Petitioner proffered evidence of the Association’s proposals to demonstrate that the Association has the ability to convert the parties’ relationship to 9(a) without any additional consent of its member-employers. On both June 11, 2012, and on June 25, 2015, the Association made proposals that would convert the parties’ agreement to 9(a) if the Petitioner agreed to the rest of the Association’s proposals. In the 2015 proposal, the Association added language that would allow the successor agreement between the Association and the Petitioner to convert a 9(a) agreement if the Petitioner was able to demonstrate that it “represents a majority of the employees in the unit covered by this Agreement.” It did not require the

Petitioner to show it represents a majority of employees at each of the 145 member-employers that agreed to be bound by the Association's bargaining. The Petitioner ultimately did not accept either proposal. Had the parties reached a full agreement, the Association asserts that final approval by the Board of Directors is still required. Because no evidence was adduced regarding the frequency or circumstances wherein the Board has, in fact, withheld approval, the bargaining proposals suggest that the parties believed that they had the ability to create a 9(a) relationship by mutual agreement.

## II. LEGAL PRINCIPLES AND ANALYSIS

### A. Multi-employer Bargaining in the Construction Industry.

In determining an appropriate bargaining unit, the Board seeks to fulfill the Act's objectives of ensuring employee self-determination, promoting freedom of choice in collective bargaining, and advancing industrial peace and stability. See *National Labor Relations Act*, 29 U.S.C. Section 151 (Section 1 of the Act declares it to be the "policy of the United States" to encourage "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing"). The Supreme Court stated, "Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide." *Hill v. Florida*, 325 U.S. 538, 541 (1945).

The Board has held that employee free choice is equally important in the Section 8(f) construction industry context as well. *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Under Section 8(f) of the Act, parties can bargain without any showing of majority support or input amongst employees in the construction industry. The Board in *Deklewa* sought to address this exception and more closely align Section 8(f) with the "fundamental statutory objectives of employee free choice and labor stability." *Id.* at 1380. The Board stated "Congress sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires." *Id.* at 1381. To not allow construction industry employees the ability to freely select their representative would effectively treat them as second-class citizens under the Act, where non-construction industry employees will not have a representative thrust upon them without a showing of majority support.

Finally, although the Board stated a single employer unit would normally be the appropriate unit in the construction industry, the Board's holding was limited to announcing new rules to apply to 8(f) agreements; it did not jettison its long standing procedure that, in determining the appropriate unit under Section 9(b), it will first examine the petitioned-for unit. See *Barron Heating & Air Conditioning, Inc.*, 343 NLRB 450, 453 (2004); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 945 (2011) (if petitioned-for unit "is an appropriate unit, the Board's inquiry ends"), *enfd. sub nom. Kindred Nursing Centers East LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). Thus, I will examine whether the petitioned-for unit

is appropriate, and if it is an appropriate unit, an election will be ordered in that unit.

### B. The 145 Member-employers Intended to be Bound by Multiemployer Bargaining with the Petitioner

A multiemployer bargaining unit is appropriate where "the employers involved have evidenced a clear intent to participate in multiemployer bargaining and to be bound by the actions of the bargaining agent." *Arbor Construction Personnel, Inc.*, 343 NLRB 257, 257 (2004) quoting citing *Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991). Thus, "the Board requires evidence of an unequivocal intent to be bound by group action manifested by either participation in the group bargaining or delegation of authority to another to engage in such bargaining." *Arbor Construction Personnel*, 343 NLRB at 258. See also *Sands Point Nursing Home*, 319 NLRB 390, 390 (1995) ("a party urging a multi-employer unit must demonstrate a controlling history of bargaining on a multi-employer basis and an unequivocal intent by the employer to participate and be bound by the results of group bargaining").

Here, 145 member-employers of the Association have demonstrated an intent to participate and be bound by group or joint bargaining with the Petitioner. Most importantly, a large number of those member-employers signed a Designation of Bargaining Rights form that states "the designation authorizes the BCA to negotiate and agree to terms of collective-bargaining agreements with each of the labor organizations designated above and to bind you with respect to its actions on your behalf."<sup>4</sup> Notably, the designation forms, along with all the other membership materials including the application forms, do not make any distinction or limit the Association's authority based on whether the contract is an 8(f) and 9(a) agreement. Similarly, under the Association's by-laws, the Labor Relations Committee is authorized to act on behalf of the member-employers for all dealings with the unions selected via the designation forms and does not differentiate between 8(1) and 9(a) agreements.

Additionally, there is no evidence that the three alleged 9(a) agreements are negotiated pursuant to some other authorization by the member-employers. The same designation form is used for the unions that have 8(f) agreements with the Association. Thus, contrary to the Association's claim, neither the designation form nor the Association's past practice provides a basis for limiting its authority to negotiate agreements with the Petitioner on behalf of its member-employers on an 8(f) basis. Moreover, evidence of intent to be bound to the multiemployer agreement is also established because the member-employers are not allowed to either approve or reject the final negotiated agreement between the Association and the Petitioner.

Finally, the parties have bargained on a multiemployer basis for a "significant period of time." *Central Transport, Inc.*, 328 NLRB 407, 408 (1999) (12 years of multiemployer bargaining) Here, the multiemployer relationship between the Petitioner and the Association has proceeded for more than 30 years, and

<sup>4</sup> The remaining member-employers are bound pursuant to their failure to fill out a Designation of Bargaining Rights form because any member-employer who did not fill out the form remained bound to all the agreements that the Association negotiates.

quite possibly much longer. Based on the lengthy history, it is evident that the member-employers have demonstrated an intent to continually participate in group bargaining.

Based on the above, the Association's assertion that its 145 member-employers only authorized the Association to negotiate 8(f) agreements, and not 9(a) agreements, with the Petitioner is unfounded. The Association claims that since it identified in its Notice of Proposed Amendments to By-laws that its agreement with the Petitioner was an 8(f) agreement, its member-employers were only authorizing the Association to bargain an 8(f) agreement with the Petitioner; they did not authorize the Association to enter into a 9(a) relationship or agreement with the Petitioner when they executed the Designation of Bargaining Rights forms. I agree that Association identified that its agreement with the Petitioner was an 8(f) agreement in its Notice. In my view, however, the Association merely informed its member-employers that there has never been a showing of majority support among the employees represented by the Petitioner that would convert the agreement to a 9(a) agreement. Thus, when a member-employer initialed next to YES for a union that had an 8(f) relationship and agreement on its Designation of Bargaining Rights form, it simply acknowledged that the particular union had not demonstrated majority status.

The member-employers cannot limit employee free choice by initialing YES next to the name of a union that currently has an 8(f) agreement. It is for the employees, not the member-employers or the Association, to decide the nature of relationship between the Petitioner and the Association. By the Association's own admission, in its Notice, the Association specifically notified its member-employers that "a union can convert an 8(f) relationship and agreement to a 9(a) relationship and agreement by demonstrating its majority status at any time during the term of the agreement." Every member-employer was aware of this language and still agreed to adopt the proposed amendments. There is no evidence that member-employers objected to this language. Thus, according to a document that every member-employer has in its possession and implicitly agreed to, the only barrier in converting an 8(f) relationship and agreement to a 9(a) relationship and agreement, is a showing of majority support by a union. That is the only conversion condition that the Association notified its member-employers of—it did not state that its member-employers would have to consent to allow the union to convert the relationship.

Here, the Petitioner seeks to establish a 9(a) relationship through a secret ballot vote conducted through a Board election: While the Association claims that its member-employers have the choice of whether to allow an 8(f) agreement to become a 9(a) relationship, its view is contradicted by its own documents and Board law.

Lastly, the Association's reliance on *Comtel Systems Technology*, 305 NLRB 287 (1991), is misplaced. The Association claims that *Comtel* holds that a union must demonstrate majority support at every individual employer within a multiemployer unit. However, I find that *Comtel* is limited to its facts and does not have the broader meaning ascribed to it by the Association. In that case, there was a 9(a) relationship between a multiemployer association and a union in the construction industry.

The Board held that when a new employer joins an existing multiemployer association that has a 9(a) relationship with a union, that employer will only have an 8(f) relationship with the union, until the union establishes its majority status among the new employer's bargaining unit employees. *Id.* at 291. The Board in *Comtel* attempted to ensure that employees of an employer, who had never bargained on a multiemployer basis, would have a vote in whether to join a multiemployer unit. Those facts are completely inapposite to the instant case. Here, there is no risk that the employees would not get to choose whether they want to be represented by the Petitioner in a multiemployer unit. This is the very question on the ballot that the employees will decide.

#### *C. The Petitioned-for Unit is an Appropriate Unit*

The petitioned-for unit is a presumptively appropriate unit. In analyzing the language of Section 9(b), the Board has held that bargaining units consisting of "all employees in a particular craft" are "presumptively appropriate." *Specialty Healthcare*, 357 NLRB 934, 940 and fn. 16. A craft unit consists of a distinct and homogeneous group of skilled journeymen craftsmen who, together with helpers or apprentices, are primarily engaged in the performance of tasks which require the use of substantial "craft" skills. *MGM Mirage*, 338 NLRB 529, 532 (2002); *Reynolds Electrical & Engineering*, 133 NLRB 113 (1961). Here, the petitioned-for unit is a craft-wide unit consisting of carpenters, including journeyman and apprentices.

Moreover, the Board's traditional deference to bargaining history to determine unit scope is applicable in the construction industry. See *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988) (8(f) bargaining history was significant in determining appropriateness of unit in construction industry). See also *Alley Drywall*, 333 NLRB 1005, 1007 (2001) (history of collective bargaining under 8(f) is a one factor in determining scope of unit for 9(a)); *Crittenton Hospital*, 328 NLRB 879, 880 (1999) (Board accords great deference to collective-bargaining history); *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965) (same); *West Lawrence Care Center*, 305 NLRB 212, 217 ("the longer the history of bargaining in a broader unit, the greater the weight of that history in the balance").

Here, the parties have bargained on a craft-wide multiemployer basis for at least 30 years. The Association has provided no justification for disturbing the long-established stable bargaining relationship, nor has it provided any evidence to suggest that the historical multiemployer unit is not an appropriate unit or repugnant to Board policy.<sup>5</sup> As the parties chose to bargain in this manner, there is no reason for the Board to disturb it.

Contrary to the Association's claim, eligible employees of every member-employer will cast their individual vote to determine whether the Petitioner will be their representative for the petitioned-for unit. Because every employee will have an opportunity to vote in the historical unit, the Act's objectives are secured by promoting employee free choice while also de-

<sup>5</sup> Although the Association asserts that Carpenter Foreman and Carpenter General Foreman classifications should be excluded from the unit, it agreed that a craft unit is appropriate.

ferring to the stability of labor relations between Petitioner and the Association. Moreover, such a procedure adheres to the well-established voting procedure ordinarily used in multiemployer units.

Additionally, the possibility that the Petitioner can become the exclusive bargaining representative of a particular employer's employees even though a majority of them may ultimately vote against representation, is true of all multiemployer elections. Yet, elections in multiemployer units have a long history of being appropriate. Further, such a result is not significant to the current situation because of the nature of the construction industry, where there is no stable work force among the employers and employees often work for multiple employers a year.

As the Association member-employers are engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961) and *Steiny & Co.*, 308 NLRB 1323 (1992). See *Signet Testing Laboratories, Inc.*, 330 NLRB 1 (1999) (*Daniel-Steiny* eligibility formula applies to all construction industry employers unless the parties expressly stipulate not to use it). Because there is evidence that employees often work for multiple member-employers, if employees do not meet the eligibility formula for any one employer, the eligibility formula should be applied using their aggregate employment with all the 145 member-employers. If eligibility is not calculated in this aggregated way, there is a great risk of disenfranchising individuals who would otherwise be eligible by prohibiting them to vote. To hold otherwise would be to deny employees their fundamental right to choose their collective-bargaining representative. Indeed, applying this formula in a multiemployer wide unit ensures that all eligible employees are able to vote.

Regarding the Association claims that the approximately 49 member-employers have not employed any employees who would be in the petitioned-for unit in the last 6 months, because projects continually begin and end in the construction industry, the Board is reluctant to dismiss a petition unless there is evidence of an almost complete cessation of an employer's construction work in the foreseeable future. See e.g., *Fish Engineering & Construction Partners Ltd*, 308 NLRB 836, 836 (1992) (Board directed election where employer's current projects were expected to finish shortly after the hearing and the employer had no definite work lined up but had submitted a bid for future work); *Brown & Root, Inc.*, 314 NLRB 19, 28 (1994) (Board directed election where despite employer's claim that major construction work would be completed shortly, it continued to perform minor construction work and there was no evidence the employer would not continue to seek major construction work). Compare, *Davey McKee Corp.*, 308 NLRB 839, 840 (1992) (Board dismissed petition where employer's entire operation in the geographical area would cease within a month of the hearing, all employees would be terminated, and the employer had no other jobs underway or bid on in the area); *M.B. Kahn Construction Co.*, 210 NLRB 1050, 1050 (1974) (Board dismissed petition where contraction of petitioned-for unit was imminent due to the near completion of a project and a

showing that the employer did not have additional work in the same geographic area).

Here, the Association has not produced any evidence to adequately demonstrate that the 49 member-employers have definite plans to not employ carpenters in the petitioned-for unit in the future or that any of its member-employers were getting out of the construction industry in its entirety. Thus, given the nature of the construction industry and the lack of clear evidence that any member-employers will cease operations or stop employing carpenters, those member-employers should be part of the election. Further, because the Association only looked back 6 months and not 24 months as required by the *Daniel* formula, it is possible that those employers will have employees who should be included in the petitioned-for unit.

Lastly, the Association also claims that if an election is directed, it would be unable to supply a voter list because it does not employ the petitioned-for employees, and it would be difficult, if not impossible, to have its member-employers provide it with voter lists. That is not a sufficient basis to not direct an election. The Association adduced no evidence of hardship, or even that the Association attempted to obtain the required voter lists from its member-employers' employees. By the Association's own admission, there is regular communication between the Association and its member-employers, including membership meetings, mailings, including notices about important issues such as 'by-law amendments, and collection of wage data. Thus, the Association has not shown that it will be unable to substantially comply with the requirement to provide a voter list. I do, however, recognize that obtaining, coordinating, and compiling lists from 145 member-employers may take slightly longer which is why I am granting additional time for compliance in transmitting the voter lists to the Petitioner and the Region.

With respect to the eligibility issue raised regarding the Carpenter Foreman and Carpenter General Foreman classifications, I conclude that the evidence does not establish that their inclusion significantly changes the size or character of the unit. The parties' most recent agreement states that "When four (4) or more Carpenters are employed, one (1) shall be the Foreman" and "When five (5) or more Carpenter Foreman are employed, there will be one (1) General Foreman." The Petitioner contends that the classifications amount to "a handful of individuals within a unit of thousands," while the Association claims that the number is much higher and could be "as many as a quarter of the unit of thousands of employees." The Association was unable to quantify the exact percentage or number of unit employees within these two classifications. I understand that the peculiar facts presented in the case, combined with the aggregate *Daniel* formula calculation, make it difficult to determine an exact percentage, but the Association failed to even approximate a percentage, which it could have done by supplying a voter list that identified employees employed in those classifications. Based on the contract language, at most, 25 percent of the unit are allegedly supervisory Carpenter Foremen, and the percentage of General Foreman is even less. Moreover, if there are more than four carpenters on a given job, the percentage drops even further. Absent voter lists or any other evidence of an accurate percentage, it is appropriate to

have them vote subject to challenge. Accordingly, I shall permit the Carpenter Foreman and Carpenter General Foreman classifications to vote, in the election, subject to challenge.

#### SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Based on a petition filed June 11, 2015<sup>1</sup> by the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Petitioner), a hearing was held in the above-captioned matter before a hearing officer of the National Labor Relations Board (Board). On July 30, a Decision and Direction of Election issued and found that the petitioned-for, historical, multiemployer unit was appropriate. Further, the issue regarding whether the Carpenter Foreman and Carpenter General Foreman classifications are included in, or excluded from, the bargaining unit was deferred, so that these classifications were permitted to vote subject to challenge.

As required by Section 102.67 (1) of the Board's Rules and Regulations (the Board's Rules), the Building Contractors Association, Inc. (the Association) was required to provide a voter list and a list of those individuals permitted to vote subject to challenge. On August 12, the Association asserted that it was unable to reliably and timely prepare an accurate voter list and suggested that the Petitioner was in better position to produce a voter list based on Fund records. The Petitioner subsequently supplied a voter list and ballots were sent out to individuals on the Petitioner's voter list. However, the Association subsequently refused to waive any objections to the content of the voter list prepared by the Petitioner, and neither party produced a list of challenged voters in the Carpenter Foreman and Carpenter General Foreman classifications. As a result, the ballots were impounded and the count was indefinitely postponed.

On October 9, an Order Reopening the Record issued, in part, for the purpose of providing the Association with an opportunity to use the Board's subpoena power to obtain records that would provide a basis for a voter list.

Further, in its post-hearing submission, the Petitioner asserted that the carpenters in the disputed supervisory classifications rotated through the foreman position with a frequency that potentially affected a sizable portion of the unit. Accordingly, the record was also reopened to permit the Association to adduce evidence regarding whether the challenged classifications possess supervisory authority within the meaning of Section 2(11) of the Act.

A hearing officer of the Board held a hearing in this limited manner and the parties orally argued their respective positions prior to the close of the hearing. As explained more fully below, the Association has provided a voter list and challenge voter list so that the election may proceed in an orderly manner. With respect to the eligibility issue, based on the record and relevant Board law, I find that the Association failed to meet its burden to demonstrate that the individuals in the Carpenter Foreman and Carpenter General Foreman classifications are supervisors within the meaning of Section 2(11) of the Act.

<sup>1</sup> All dates herein are 2015.

Therefore, those classifications are included in the bargaining unit and are eligible to vote.

#### I. THE VOTER LIST

The Association produced a voter list that contains approximately 2,426 names, in accordance with Section 102.67(1) of the Board's Rules and Regulations (voter list). Accordingly, an additional 40 individuals will receive mail ballots and their eligibility to vote is not contested.<sup>2</sup>

Further, the Association produced a challenged voter list containing approximately 453 names that it contends are Carpenter Foreman or General Foreman. As a result, an additional 58 individuals will receive mail ballots. The Association retains the right to challenge the eligibility of all these individuals on the basis of supervisory status to preserve its rights on appeal.

#### II. ELIGIBILITY OF CARPENTER FOREMAN AND CARPENTER GENERAL FOREMAN CLASSIFICATIONS

The supervisory status of the approximate 453 individuals in the Carpenter Foreman and Carpenter General Foreman classifications constitutes the sole remaining issue in this matter. The Association asserts that the individuals in the foreman classifications are statutory supervisors within the meaning of Section 2(11) of the Act and that, accordingly, they should be excluded from the bargaining unit. The Association relies on article VI of the parties' collective-bargaining agreement that specifically states that the Carpenter Foreman and Carpenter General Foreman classifications are agents of the Association's member-employers that have the authority to hire and discharge employees. The Association also points to a wage differential that the classifications have over the other employee classifications. In addition, two current Association officials testified and claimed that the Carpenter Foreman and Carpenter General Foreman classifications are the most important people on the jobsite for a contractor because they are in control of the jobsite carpentry by assigning employees, supervising work, and engaging in almost every other indicia of supervisory status.

The Petitioner, on the other hand, asserts that neither position is supervisory as defined by the Act and therefore, should be included in the appropriate unit, as set forth in the prior DDE. Specifically, the Petitioner maintains that the individuals in those classifications do not exercise supervisory authority, do not exercise independent judgment in connection with the duties that they perform, and that they are not held accountable for directing work. Further, the Petitioner contends that their title and the contract language are insufficient to satisfy the Association's burden.

For the reasons explained more fully below, I conclude that the Association has failed to meet its burden to demonstrate that the individuals in the Carpenter Foreman and Carpenter

<sup>2</sup> The Association contends that 289 individuals who have received mail ballots should not be included in the unit because they do not satisfy the voter eligibility formula. Accordingly, those ballots will be challenged by the Board as "not on the list." In the event these ballots are determinative, the Petitioner has the burden to show that these individuals satisfy the voting formula in a postelection hearing.

General Foreman classifications are supervisors within the meaning of Section 2(11) of the Act.

i. Background

As detailed in the prior Decision and Direction of Election, the Association is a multiemployer construction trade association that consists of approximately 172 construction companies in the New York metropolitan area. Of those 172 member-employers, 145 of them authorized the Association to negotiate and enter into collective-bargaining agreements with the Petitioner.

The Association and the Petitioner have had a long-term collective-bargaining relationship for more than 30 years and have been signatories to successive prehire construction industry agreements. The most recent collective-bargaining agreement, effective by its terms from July 1, 2011, to June 30, 2015, covered the wages, hours and conditions of employment for all employees employed by the member-employers in the following classifications: Carpenter Foreman, Carpenter General Foreman, Journeyman, Carpenter, Journeymen Carpenter, and Journeymen Carpenter Apprentices. On June 25, 2015, the parties signed a Memorandum of Agreement that extended the agreement until June 30, 2016. The parties' agreement includes Carpenter Foremen and Carpenter General Foremen in the bargaining unit and it governs their terms and conditions of employment.

Article VI of the parties' agreement states that "[t]he General Foreman and Foreman shall be the agents of the Employer. The right to hire and discharge employees rests with the General Foreman and/or Foreman who are the authorized representatives of the Employer." Additionally, Carpenter Foremen receive a \$3- an-hour wage differential and Carpenter General Foremen receive a \$6-an-hour wage differential from the journeymen. Fringe benefits and fund contribution rates are the same for all carpenter classifications. The parties' agreement also states, "[w]hen four (4) or more Carpenters are employed, one (1) shall be the Foreman" and "[w]hen five (5) or more Carpenter Foremen are employed, there will be one (1) General Foreman." If there is a Carpenter General Foreman on a jobsite, he oversees Carpenter Foremen. Notably, there is no other record evidence about the responsibilities of a Carpenter General Foreman.

The Association's contractor member-employers are engaged in construction projects in the New York metropolitan area. The record demonstrates that each contractor maintains a primary or front office in addition to whatever labor it employs on a construction jobsite. The contractor employs a project manager and project supervisors who oversee the jobsites. Additionally, there are weekly meetings on the jobsite where the various trades coordinate their schedules and discuss issues that may arise. Project managers run the meetings and make sure all the building trades are on schedule. Foremen for all the building trades report to the project managers and project supervisors and attend the weekly meetings. According to the Association, the contractor hires and designates all the foremen who typically work for the same contractor and move from job to job with that contractor.

The Association presented two witnesses: Assistant Managing Director John O'Hare and Director of Member Services Craig Noller.

O'Hare testified that he has worked for the Association for the past 17 years. O'Hare helps manage the day-to-day functions of the Association and negotiates, administers and interprets approximately 14 different collective-bargaining agreements on behalf of the Association's member-employers. As part of his duties, O'Hare visits jobsites several times a week.

Prior to his employment with the Association, he worked for a general contractor, Walter T. Murphy from 1985 to 1992, as a laborer, and then as a project manager and estimator. He also was a project manager and estimator for Norlander Contracting Corporation, a carpentry drywall contractor from 1992 to about 1998.

Noller testified that he has worked at the Association since 2014. As the director of member services, Noller is the Association's liaison to its members and attempts to resolve any issues that arise at a jobsite. Additionally, Noller serves as the Association's safety director and is responsible to alert all contractors of safety issues and general safety awareness. Noller admitted that he has no role in granting authority to Carpenter Foremen or Carpenter General Foremen on the jobsites.

He also previously worked in the construction industry. He worked at Structure Tone Incorporated from 1984 until 2014. He started as a laborer and was eventually promoted. As the general union foreman, Noller was responsible to ensure that Structure Tone laborers and carpenters were working. However, Noller also testified that Structure Tone employed very few carpenters and subcontracted out most of its carpentry work. He claimed that he visited jobsites every day and stated that a Carpenter Foreman was responsible for the carpentry work of the subcontractors. According to Noller, Structure Tone could have 200 different jobs a day and the biggest job he was ever involved in employed about 40 Carpenter Foremen.

The Petitioner presented Union Representative Christopher Wallace to testify. Wallace has been a union representative for 18 years and previously worked as a Journeyman Carpenter for various contractors. Wallace testified that he visits jobsites as standard procedure to introduce himself and become familiar with the people on the job. After an initial visit, he will mainly go to jobsites to resolve any issues that arise regarding the parties' collective-bargaining agreement. Wallace further testified about his interaction with foremen on the jobsites he visits.

ii. Board Law

Section 2(11) of the Act defines a supervisor as any individual with the authority 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.

Pursuant to this definition, individuals are statutory supervisors if they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); their "exercise of such authority is not of a merely routine or clerical nature, but

requires the use of independent judgment” and, their authority is held “in the interest of the employer.” Supervisory status may be shown by demonstrating that the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

In considering whether the individuals in the classifications at issue 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. Indeed, such “minor supervisory duties” should not be used to deprive such individual 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, it is noted that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protections of the Act. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995); *Oakwood*, supra, 348 NLRB at 688.

The burden of proof rests with the party asserting supervisory status. *Oakwood*, 348 NLRB at 687 citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). “[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 that indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Because the party asserting statutory supervisory status bears the burden of proof, the Board holds against that party any lack of evidence on an element necessary to establish that status. See, e.g., *Dean & Deluca New York Inc.*, 338 NLRB 1046, 1048 (2003); *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). Likewise, mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (recognizing that “purely conclusory evidence is not sufficient to establish supervisory status,” and pointing out that the Board “requires evidence that the employee actually possesses the Section 2(11) authority at issue”); *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Community Educations Centers, Inc.*, 360 NLRB No. 17, slip op. at 11(2014); *Volair Contractors*, 341 NLRB 673, 675 (2004). See also *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (employer failed to present specific evidence showing that classifications were statutory supervisors). Thus, it is well established that generalized and self-serving testimony of this kind cannot suffice to prove Section 2(11) supervisory authority. See *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (evidence “limited very largely to the administrator’s general assertions” not sufficient to establish supervisory authority); *G4S Regulated Security Solutions*, 358 NLRB 1701, 1701,1702 (2012) (senior manager’s testimony discounted as conclusory

and nonspecific), reaffirmed and incorporated by reference 362 NLRB No. 134 (2015); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) (“[g]eneral testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony” (citations omitted)).

Importantly, supervisory status is determined by the duties performed and not the title of job classification. Thus, whether an individual is a supervisor is to be determined in light of the individual’s actual authority, responsibility and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). The Act requires “evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority.” *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971); *Chevron, USA*, 309 NLRB 59, 62 (1992). Thus, any written description suggesting the presence of supervisory authority is not given any controlling weight by the Board. *Avante at Wilson*, 348 NLRB at 1057, *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) (Board insists on evidence supporting a finding of actual as opposed to mere paper authority). See also *Heritage Hall, EPI Corp.*, 333 NLRB 458, 458–459 (2001) (“It is well settled that employees cannot be transformed into statutory supervisors merely by vesting them with the title or job description of supervisor”) citing *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 266 (2d Cir. 2000); *T.K. Harvin & Sons*, 316 NLRB 510, 530 (1995).

Lastly, the Board routinely makes determinations of supervisory status of entire classifications based on detailed, specific evidence of individuals in those classifications. See e.g., *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1426 (2010) (team leader classification did not meet the definition of supervisor under the Act); *Rogers Electric*, 346 NLRB 508, 513–514 (2006) (entire classification of foremen considered to be supervisors within the meaning of Section 2(11)).

### iii. Application of Board Law to this Case

I conclude that the Association failed to meet its burden of proving, by detailed, specific record evidence, that the employees classified by the Association as Carpenter Foreman and Carpenter-General Foreman are Section 2(11) supervisors. As the Association was the party asserting that the individuals in these classifications were statutory supervisors, the Association was tasked with the burden of proof on this issue. During the course of the hearing, the Association did not present any individuals classified as Carpenter Foreman or Carpenter General Foreman to testify with respect to their day-to-day duties. The record in general is devoid of detailed evidence as to the responsibilities and duties of the classifications. Rather, the Association relied largely on the written description of authority in the parties’ agreement and general conclusory statements made by two Association officials, neither of whom were ever employed as Carpenter Foreman or Carpenter General Foreman. Nor do they currently oversee or have frequent contact with individuals employed in those classifications.

Initially, I note that the Assistant Managing Director for the Association, John O’Hare testified that there are only five people on the Association’s payroll and therefore it is limited in the

type of testimony it was able to produce. However, although the Association itself has limited resources, it did have subpoena power and by its own admission, recently spoke to several of its member-employers. Both O'Hare and Craig Noller, the Director of Member Services for the Association, testified that they spoke to multiple member-employers within 2 weeks of testifying about the job duties that those member-employers' foremen perform. Specifically, O'Hare testified that he spoke to National Acoustics, Inc., and Noller testified that he spoke to numerous contractors including Eurotech Construction Corp., Cirocco & Ozzimo, Inc., and Commodore Construction Corp. Thus, it was well within the Association's control to produce additional testimony, specifically where it relied on hearsay from these member-employers. This is not an instance where the Association, could not present probative evidence from its member-employers. Moreover, it presented no evidence that it was unable to present witnesses who have first-hand knowledge of specific examples of supervisory authority of foremen. I further note that O'Hare's testimony regarding his personal knowledge dating back more than 15 years ago has scant relevance to current foreman responsibilities and duties notwithstanding O'Hare's assertion that the role of Carpenter Foreman has not changed since he was working in the field. See *Avante at Wilson*, 348 NLRB at 1058 (former nurse's testimony revealed little about staff nurses' current duties, "particularly given the fact that it contains no reference to the time period or individuals involved").

Additionally, and most importantly, although the Association's two witnesses spoke at length about the supervisory status of the foreman classifications, their testimony was "utterly lacking in specificity" and neither was able to provide any specific evidence, recent or otherwise, addressing the supervisory status of the foreman classifications. See *Avante at Wilson*, 348 NLRB at 1057 (rejecting claim of supervisory status absent evidence of specific examples), and other cases cited above at pp. 5-6. The Board in *Avante at Wilson* emphasized that a witness who testified that she believed she had the authority to send an insubordinate employee home failed to particularize her testimony in any way, such as by specifying when any such incident took place, who was involved, what the alleged insubordination consisted of, whether higher-level managers had been consulted, or whether the situation was anything more than a one-time occurrence. See *Avante at Wilson*, 348 NLRB at 1057. Here, while O'Hare and Noller testified generally as to foreman responsibilities, neither of them particularized their testimony in any way, such as by specifying any specific incidents that they might have witnessed, including any hiring, firing, discipline, assignment of work, adjusting grievances, or any other supervisory duties performed by foremen. Further, although O'Hare testified that he visits several jobsites a week, he failed to specify which jobsites he visits, the names of the foremen he observed while on the jobsites, or any other detailed information to meet the Association's burden.

I further rely on the following analysis and record evidence concerning supervisory indicia.

#### 1. Authority to hire and fire

The Association contends that foremen are statutory supervi-

sors based on their ability to hire and fire that is documented in the parties' collective-bargaining agreement. O'Hare testified that foremen are usually the first person on a jobsite and that they would read the blueprints and lay out the partitions of the project, order materials, schedule deliveries, and coordinate with other building trades on the work to be done. After a foreman lays out the work to be done, he would seek approval from the architect or owner and then he decides on how many carpenters he needs to get the work done.

The record evidence demonstrates that once a foreman knew how many carpenters to employ on a jobsite, the foreman would consult a hiring list that was compiled by the contractor. Each contractor maintains a list of eligible carpenters to hire and adds or removes individuals from that list based on a contractor's experience with those employees in the past. O'Hare testified that a foreman would select carpenters from the list to be hired but did not provide any specifics regarding hiring criteria, i.e., placement on the list, seniority, skill sets, familiarity with work, etc. According to O'Hare, the foreman would then call individuals on the list to hire them but failed to provide any examples or first-hand knowledge of those calls. O'Hare also testified that when he was a project manager, if an ongoing job required additional carpenters to be hired, a foreman would contact him for additional men and O'Hare as the project manager would give him the authority to make the phone calls to hire more individuals.

Prior to a few years ago, hiring was more complicated due to a manning ratio provision in the parties' collective-bargaining agreement. Under that provision, contractors were required to hire a certain percentage of carpenters off the Petitioner's out of work list, list maintained by the Petitioner that contained a list of individuals ready for hire. Thus, contractors would hire half of the carpenters via its own hiring list and the other half of the carpenters through the Petitioner's out of work list. However, the parties no longer have manning ratios and contractors are able to hire exclusively from their lists or rely on the Petitioner's out of work list for referral.

Similar to the foremen contacting carpenters from the contractor's hiring list, O'Hare testified that foremen would call a carpenter on the Petitioner's out of work list to hire them, but again failed to give any specific example or first-hand knowledge of one of those calls. The testimony of Union Representative Wallace directly contradicts O'Hare's testimony regarding the Petitioner's out of work list. Wallace testified that there are approximately 40 to 100 requests every day from the Association's member-employers to the Petitioner for dispatches of carpenters. Wallace testified that he receives a dispatch sheet via email every night from the Petitioner. The dispatch sheet lists the carpenters that are dispatched, their phone numbers, the names of the company they were sent to, the job location of the company, and the date and time that they are supposed to report for work. The sheet also lists the foreman's name and phone number as well as the name of the person who called the out of work list for the dispatch to be generated. According to Wallace, the most recent dispatch sheet prior to the hearing contained 38 dispatches but there was only one instance where the name of the person who called the Petitioner was the same name and phone number as the foreman listed.

Wallace also testified that because he looks at the dispatch sheet every day, he recognizes a large number of names and can identify whether those people are project supervisors, managers, or other contractor officials. Further, Wallace stated that in his experience, a foreman will call a contractor's office and someone from the office will make the call to the out of work list.

I conclude the Association failed to meet its burden to demonstrate that foremen have the authority to hire carpenters. Initially, the Association's witnesses failed to particularize their testimony in any way concerning instances where foremen hired carpenters. There is no evidence that O'Hare or Noller were present during any instances where a foreman hired any carpenters. Importantly, there are no examples of situations in the record where a foreman actually hired a carpenter. Moreover, notwithstanding the extreme lack of specificity, there is no evidence that foremen used any discretion or independent judgment in making hiring decisions. See *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991) (absence of independent judgment is an important factor weighted by the Board in making its supervisory determinations). There is testimony that foremen merely place phone calls to carpenters to tell them they were hired but there is no discussion of any independent judgment that a foreman makes in determining which carpenters are hired, such as selecting, screening, or interviewing candidates. Thus, any exercise of supervisory hiring authority from foremen is of a routine and perfunctory manner. See *Oakwood*, 348 NLRB at 693 citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). While foremen may place phone calls to carpenters, "mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish supervisory authority." *North General Hospital*, 314 NLRB 14, 16 (1994). Further, there is contradictory testimonial evidence that, at least as to the Petitioner's out of work list, that the vast majority of hiring phone calls come from the contractor's office and not from a foreman. Lastly, although there is evidence that foremen might make the initial determination of how many carpenters to have, O'Hare's testimony that foremen seek authority from the project manager before hiring more carpenters suggests that foremen also need to clear their initial recommendations with a contractor's office as well.

Additionally, there is no evidence that foremen have the ability to independently discharge any carpenters. O'Hare testified that a foreman will communicate to a carpenter that he has been laid off or terminated but there is no evidence that foremen use their own independent judgment to determine to terminate any employees. O'Hare further testified that a foreman would report to O'Hare as the project manager via the contractor's office that a specific project area was done and that he no longer needed the full complement of carpenters that were employed. O'Hare would then instruct the foreman to lay off the carpenters that were no longer needed. Thus, while a foreman may be the individual relaying the termination to a carpenter, the termination itself is determined by the contractor's office and the obvious needs of the jobsite.

At most, Wallace testified to one situation where if a carpenter was intoxicated, a foreman would send that person home but

further testified that "it's almost like the employee laid himself off if he's drinking on the job." Wallace states that the foreman in that situation would also contact the contractor's office and the steward to solve the problem. Even using Wallace's testimony, there is no evidence that foremen use any independent judgment during discharges and that their authority is routine in nature. In every instance, it appears that foremen must contact the contractor office before taking any action concerning discharge.

Lastly, while the Association relies heavily on the language of the parties' agreement referencing Carpenter Foremen and General Carpenter Foremen as agents and authorized representatives of the Association that have the "right to hire and discharge employees," the Board has repeatedly stated that job descriptions or other paper authority, without more, do not establish actual supervisory authority. *Training School at Vine-land*, supra, 332 NLRB at 1416 ("Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority"). Although the paper authority in this case comes from the parties' bilateral agreement as opposed to an employer's unilateral job description, the Petitioner is seeking a certification of representative. In that context, I must decide the statutory issue based on actual duties pursuant to the Act and not the agreement of the parties. Thus, notwithstanding that the parties' agreement states that "[t]he right to hire and discharge employees, rests with the General Foreman and/or Foreman," there must be an examination of whether the classifications actually possess that authority. As described in detail above and manifest by the lack of tangible examples, there is no evidence that the classifications have actual supervisory authority to hire and discharge employees.

Given the scant evidence as to specific and actual authority of foremen in hiring and firing carpenters, and the principle that any lack of evidence will be constructed against the party asserting supervisory status, I find that the evidence does not support the Association's claim that foremen have authority, as defined in Section 2(11) of the Act, to hire or fire carpenters.

## 2. Authority to responsibly direct

The Association's witnesses testified that foremen direct all the carpenters on a jobsite including determining how many carpenters are required to complete a specific task but failed to describe with any particularity actual incidents where foremen responsibly directed carpenters. The mere fact that an employer states that an employee "supervises" other employees or holds that employee out to other employees as a "supervisor" is not enough to establish that that individual is a supervisor within the meaning of Section 2(11) of the Act. See, e.g., *Polynesian Hospitality Tours*, 297 NLRB 228 (1989), enforced 920 F.2d 71 (D.C. Cir. 1990); *Chevron Shipping*, 317 NLRB at 381 fn. 6 (statement that individual "oversees" others does not establish supervisory status absent specific proof that such power was exercised with independent judgment). Thus, as mentioned above, such conclusory evidence is insufficient to prove supervisory status.

It is well established that the authority to direct another's work does not indicate supervisor status unless it is both "responsible" and requires the use of independent judgment. *Oakwood*, 348 NLRB at 691. To be "responsible" under Section 2(11), the putative supervisor "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 [other] are not performed properly." *Id.* at 692. See also *Alstyle Apparel*, 351 NLRB, 1287, 1287 (2007) (employer must present evidence of actual accountability to prove responsible direction).

Here, the Association presented no evidence on whether the foremen classifications are held accountable by its member-employers for the work performance of the carpenters. Nor did the Association present any evidence to show that the foremen classifications were in danger of suffering "adverse consequences" if the carpenters whom they assigned tasks failed to perform those tasks properly. See *Oakwood*, 348 NLRB at 692. Likewise, the evidence did not show if any foreman had been reprimanded—or rewarded—because of anything the carpenters had done or failed to do. Thus, because the Association failed to present any evidence of actual accountability, it has not satisfied its burden of proof of demonstrating that the foremen responsibly directed the carpenters.

### 3. Authority to assign or transfer work

The Association has also failed to adduce sufficient evidence to establish that foremen exercise supervisory authority by assigning work. The Association's witnesses testified that foremen assign work by (1) assigning overtime and (2) reassigning carpenters to other jobsites. Once again, the Association failed to give any specific examples or detailed instances of foremen assigning overtime or reassigning employees to a different jobsite where independent judgment was exercised. O'Hare testified that foremen decide how many and which carpenters will work overtime but that it is the jobsite conditions that dictate whether overtime is necessary. Further, O'Hare testified that foremen needed to clear all overtime with the front office, suggesting that foremen have no independent judgment to assign overtime on their own. Thus, because of the lack of specific examples to develop O'Hare's purely conclusory statements, the evidence does not establish that the assignment of overtime requires foremen to use independent judgment. See *Golden Crest Healthcare*, 348 NLRB at 731 ("purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping*, 317 NLRB at 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority).

Moreover, as to the Association's testimony that foremen can reassign carpenters to different jobsites, such reassignments and transfers appear to be no more than merely equalizing the workload and do not necessitate independent judgment. *Lynwood Manor*, 350 NLRB at 490; *Oakwood Healthcare*, 348 NLRB at 693 ("if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if

it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data").

Accordingly, the evidence presented by the Association is insufficient to establish these indicia. *Phelps Community Medical Center*, 295 NLRB at 490. Thus, the Association has not shown that foremen assign work or transfer employees.

### 4. Authority to discipline

The record is devoid of any testimony or documentary evidence that demonstrates that foremen issue or recommend any discipline to any employee. Although, the record established that the foremen report employee misconduct, such as intoxication to a contractor's office, there is no evidence that the classifications can independently issue discipline nor is there any evidence that their recommendation, if any, is a determining factor when a contractor decides whether to issue discipline and to what degree. As noted above, there is nothing about sending an employee home for being intoxicated that would require the use of independent judgment. Therefore, the Association has failed to meet its burden of proof to demonstrate that foremen have the authority to discipline employees.

### 5. Authority to adjust grievances

The Association claims that Carpenter Foremen and Carpenter General Foremen represent member-employers in resolving grievances on jobsites. All parties agree that any such adjustment is limited to step one of the grievance procedure and that foremen do not play any managerial role in steps two or three of the procedure, including monthly grievance hearings and arbitrations, other than to occasionally testify if need be. The Association was unable to give any specific examples of grievances that a foreman could resolve on his own authority and only provided generalized conclusory evidence. For example, O'Hare testified that in his personal experience from more than 15 years ago, carpenter foremen handled grievances on the jobsite and would try to resolve them on behalf of the contractor. Additionally, Noller testified that when he worked for Structure Tone, if there was a dispute that arose with a carpentry subcontractor, he would initially speak to the carpenter foreman about the dispute.<sup>3</sup>

Wallace testified that foremen handle low threshold issues that do not have much effect on behalf of the member-employers on the jobsite. Specifically, foremen would attempt to resolve minor issues where people are not getting along. Additionally, Wallace testified that he would be able to resolve simple one-off disputes with a foreman where a foreman wanted to work through lunch without paying overtime or wanted to start work a few minutes early one day. Wallace also testified that in his experience, the majority of foremen would direct him to someone else such as a supervisor or owner to handle an issue. Specifically, he mentioned that foremen would direct him to someone else on issues involving manning ratios,

<sup>3</sup> Although Noller testified that he would initially contact the foreman of a carpentry subcontractor if there was an issue when he was at Structure Tone, he provided no specificity as to whether the foreman was able to resolve the issue or not. Most importantly, that testimony bears no relevance as to whether foremen can adjust union-related grievances.

layoffs, overtime, start and quit times, and Saturday makeups. As to the manning ratio issue, there is record evidence that Wallace and other business agents eventually stopped contacting foremen and directly contacted the member-employer's offices because the vast majority of the time, foremen did not want to deal with the issue and would refer the agents to project supervisors, managers, and company owners. In other larger-scale matters, O'Hare similarly testified that in his capacity for the Association, he is involved in resolving jurisdictional disputes and is notified via a call from a project manager and not a foreman.

Wallace testified about a recent grievance with Navillus Contracting, one of the Association's member-employers. There were issues on the jobsite regarding cold temperatures and the contractor attempted to invoke a provision of the parties' agreement that stated if the contractor cannot work during the week for various reasons, including severe weather, it can work on Saturday at a straight time rate instead of being required to pay the overtime rate of time and a half. Wallace did not let the contractor invoke the provision because there were other days where the carpenters worked that were similar temperatures to the day the contractor claimed was too cold to work. The Petitioner filed a grievance over the matter because when the carpenters' paychecks arrived, they were only paid straight time and not time and a half. Wallace testified that every time he was to the jobsite to discuss the issue, he met with Kevin Smith, the project supervisor or manager for the contractor and at no time did any of the foremen get involved in any substantive discussions or attempt to resolve the grievance. According to Wallace, the foremen directed him to talk to Smith because they had no authority to resolve the issue.

Based on the record, the Association did not meet its burden of establishing that Carpenter Foremen and Carpenter General Foreman adjust grievances. Although the authority to adjust grievances can evidence supervisory status, the resolution of minor employee complaints regarding workload, lunch and break schedule conflicts, or personality conflicts has not been found to be sufficient to establish 2(11) supervisory status. *Regal Health & Rehab Center, Inc.*, 354 NLRB 466 (2009), reaffirmed and incorporated by reference 355 NLRB 352 (2010); *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991); *Ohio Masonic Home*, 295 NLRB 390 (1989). See also *St. Francis Medical Center-West*, 323 NLRB 1046, 1048 (1997) (authority to resolve personality conflicts or "squabbles" between employees does not warrant an inference sufficient to establish supervisory status).

Although the Association contends that foremen possess the authority to adjust carpenters' contractual grievances, it could not provide any examples of a foreman exercising independent judgment in adjusting any employee grievance. Rather, the strongest evidence came from Wallace, who only provided general examples of where a foreman would merely ensure that people got along or that the contractual overtime provisions were followed. This authority can only be characterized as routine and clerical and not requiring the use of independent judgment. As previously noted, the exercise of authority that is merely routine or clerical clearly does not suffice to show su-

pervisory authority as defined by Section 2(11) of the Act. *Kentucky River Community Care*, 532 U.S. at 713.

#### 6. Other supervisory functions

There is no record evidence showing that foremen can reward or promote any employees or that they can effectively recommend raises or promotions. Although O'Hare testified that he would rely on carpenter foremen to recommend a journeyman carpenter for a promotion to a foreman position, he failed to cite any specific examples. Additionally, O'Hare testified that foremen would recommend whether to keep carpenters on a contractor's hiring list but there is no specific evidence that contractors followed their recommendations. Such generalized, conclusory statements from the Association are not sufficient to establish supervisory status.

#### 7. Secondary indicia

While secondary indicia can be a factor in establishing statutory supervisory status, it is well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia are insufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB at 730 fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Here, the Association argues that the parties' collective-bargaining agreement contains evidence of secondary indicia to demonstrate that the foremen are statutory supervisors—the wage differential between foremen and journeymen carpenters and the language in article VI that states that foremen are agents and authorized representatives of the Association. However, absent evidence that foremen actually possess the primary indicia of supervisory status, the secondary indicia which the Association advances are insufficient to establish supervisory status.

Based on the above and extant Board law, I find that the Association failed to meet its burden by specific, detailed record evidence, and that the record is insufficient to prove that the individuals in the Carpenter Foreman and General Carpenter Foreman classifications are supervisors within the definition of Section 2(11) of the Act.<sup>4</sup> Thus, I shall include them in the unit and they shall be permitted to vote.

### III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

<sup>4</sup> Because I have found the classifications not to be supervisors within the definition of Section 2(11) of the Act, it is unnecessary to determine whether the classifications are permanent or assigned on a rotating basis. See *Oakwood Healthcare*, 348 NLRB at 694 (an individual must spend a regular and substantial portion of his/her work time performing supervisory functions); see also *Aladdin Hotel*, 270 NLRB 838, 830-840 (1984). However, for the sake of completeness, I conclude that the record establishes a class of Carpenter Foremen and Carpenter General Foremen, rather than a rotating title that the majority of the bargaining unit obtains. Both O'Hare and Noller testified that once an individual becomes a foreman, they generally remain a foreman. Although there is testimony that foremen can seldom work as journeymen carpenters on a jobsite, particularly during an economic downturn according to Wallace, that is not enough to disprove that the foreman classifications are stable.

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

2. The parties stipulated, and I found that the Association provides intrastate services valued in excess of \$50,000 to entities who perform interstate services valued in excess of \$50,000 and is therefore 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 parties stipulated, and I found, that the Petitioner is a labor organization that claims to represent certain employees of the Association's member-employers.

4. A question affecting commerce exists concerning the representation of certain employees of the Association's member-

employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act;

5. The following employees of the Association's member-employers who designated the Association to bargain on their behalf with respect to the Petitioner constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: Journeyman, Carpenter, Journeyman Carpenter, Journeyman Carpenter Apprentices, Carpenter Foreman, and Carpenter General Foreman;

EXCLUDED: All other employees, including clerical employees, guards, and professional employees, and supervisors as defined by the Act.