

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**NATIONAL GRID ENERGY
MANAGEMENT, LLC
Employer**

and

Case No. 29-RD-261756

**MICHAEL BASILE
Petitioner**

and

**LOCAL 101, TRANSPORT WORKERS
UNION OF AMERICA
Intervenor**

DECISION AND DIRECTION OF ELECTION

National Grid Energy Management, LLC, herein called the Employer, is a domestic corporation providing maintenance, installation and repair services for heating and cooling energy systems in commercial buildings. An existing unit of employees of the Employer has been represented for the purposes of collective bargaining by Local 101, Transport Workers Union of America, herein called the Union or the Intervenor. [REDACTED] herein called the Petitioner, seeks to decertify the Union as the collective-bargaining representative of the employees in the unit. The parties stipulated that there is no contract bar to this proceeding. The parties also agreed that if an election is directed herein, the election shall be conducted by mail ballot.

The Union contends that the Petitioner, [REDACTED], is a manager and a supervisor within the meaning of Section 2(11) of the Act. The Petitioner and the Employer deny that the Petitioner is a manager or a statutory supervisor. Indeed, the Petitioner asserts that he is still an active dues-paying member of the Union and that he holds a unit position.

Section 9(c)(1)(A) of the National Labor Relations Act states that a petition for certification or decertification of the bargaining representative of employees may be filed by “an employee or group of employees or any individual or labor organization acting in their behalf.” The Board has held that under the statute a petition for decertification filed by a statutory supervisor or a management representative is invalid and must be dismissed. *Modern Hard Chrome Service Co.*, 124 NLRB 1235 (1959) (any decertification petition filed by a statutory supervisor is invalid); *Clyde Merris*, 77 NLRB 1375 (1948) (employers are precluded from filing valid decertification petitions). Further, a petitioner’s disqualification to file a decertification petition is not cured by inclusion in a bargaining unit. See *Star Brush Manufacturing Co., Inc.*, 100 NLRB 679 (1952) (confidential employee who had been included in a unit of clerical employees was disqualified from filing a decertification petition). Thus, there is a dispute in this representation case as to whether the

Petitioner is qualified under Section 9(c)(1)(A) of the Act to file a valid decertification petition. Accordingly, the employee status of the Petitioner raises a jurisdictional issue that must be resolved before an election can be directed. The parties reached stipulations covering all other litigable issues.¹

The Union also argued at the hearing that the Petitioner solicited employee signatures as part of a showing of interest in support of a decertification petition which he subsequently filed with the Board. On June 26, 2020, the Union filed an unfair labor practice charge in Case No. 29-CA-262220, alleging, among other things, that the Employer provided unlawful assistance to a labor organization, Local 638B, in violation of Section 8(a)(2) of the Act. At the hearing and in its post-hearing brief, the Union requested that the unfair labor practice charge filed in Case No. 29-CA-262220 block the instant petition from proceeding to an election. In this regard, I take administrative notice of the unfair labor practice charge in Case No. 29-CA-262220 and the Regional Director's August 13, 2020 letter dismissing the aforementioned charge. The August 13, 2020 letter setting forth the Regional Director's determination to dismiss the unfair labor practice charge in Case No. 29-CA-262220 states the following:

The investigation established that [REDACTED] is not a manager or a supervisor within the meaning of the Act. Under Section 2(11) of the Act, a supervisor is an individual who: (1) possesses at least one of the 12 enumerated supervisory functions, (2) exercises independent (as opposed to routine or clerical) judgment in exercising authority, and (3) holds authority "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001). An individual who assigns work based on well-known employee job skills does not exercise independent judgment that rises above "routine or clerical" judgment. *CNN America, Inc.*, 361 NLRB No. 47 (2014) (citing *KGW-TV*, 329 NLRB 378, 381-382 (1999); *Shaw, Inc.*, 350 NLRB 354, 356 fn. 9 (2007) (citing *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996)).

Similarly, managerial employees are defined as employees who formulate and effectuate high-level employer policies or "who have discretion in the performance of their jobs independent of their employer's established policy." *The Republican Co.*, 361 NLRB 93, 95 (2014) (internal citation omitted). The fact that an employee instructs other employees does not make the employee managerial, if the employee does not exercise sufficient independent judgment in carrying out that duty. *Wolf Creek Nuclear Operating Corp.*, 364 NLRB No. 111, slip op. at 3 (Aug. 26, 2016).

Furthermore, technical expertise which may involve the exercise of judgment and discretion does not confer managerial status upon the performer. *See e.g., Solartec, Inc.*, 352 NLRB 331, 336-338 (2008) (large machine department leader who solicited better prices for tooling items from the employer's vendors, maintained machinist department inventory, and requisitioned tooling products, was not a manager); *Case Corp.*, 304 NLRB 939, 948-949 (1991) (engineers, whose basic function is to make recommendations to reduce costs and save money for employer, are not managerial employees); *Gen. Dynamics Corp.*, 213 NLRB 851, 857-859 (1974) (project managers,

¹ The Union also raised an issue as to the Petitioner's eligibility to vote and the Hearing Officer advised the parties that the Regional Director exercised her discretion to defer that issue to a post-election proceeding, if necessary.

although they make recommendations that bear on company direction and affect company policy, not managerial since their decisions and discretion are based on their technical skills and must be approved by managerial superiors).

In this case, █████ is alleged to have committed unfair labor practices on behalf of the Employer. However, the evidence adduced during the investigation shows that █████ is not a supervisor or manager under the Act. Regarding █████ supervisory status, there was no evidence that █████ assigns overtime or that he exercises the requisite independent judgment in assigning work orders. Rather, the evidence shows that in his role as Lead Senior Power Plant Technician, █████ assigns work orders to less senior and less experienced technicians based on his experience as a lead and on whether the technician has the skill required for the particular job. Likewise, there was no evidence that █████ is a managerial employee who exercised judgment independent of the Employer's established policies in carrying out his job duties. Instead, the evidence merely demonstrates that █████ uses his technical expertise in reviewing technicians' completed work orders, customer invoices, and parts orders. Based on these facts, █████ duties involve routine decisions typical of technical employees in leadman positions. █████ is not an agent of the Employer and thus the evidence fails to show that the Employer by Basile interrogated and promised employees better benefits in violation of section 8(a)(1) of the Act.

Moreover, the evidence fails to establish that the Employer by its Contract Administrator Ana Lee promised employees better working conditions if they did not support the Union. The June 24, 2020 e-mail relied on by the Union in support of this allegation does not contain any promise of benefits or better working conditions. Therefore, the evidence fails to establish a violation of section 8(a)(1) of the Act.

Additionally, there was no evidence adduced in the investigation showing that the Employer created or controlled Local 638B or provided unlawful assistance to Local 638B or any labor organization in violation of section 8(a)(2) of the Act.

Finally, the evidence does not establish that the Employer failed to bargain in good faith, as alleged in your charge. The Board examines the totality of the party's conduct in determining whether a party has violated its duty to bargain in good faith. *See, e.g., Atlanta Hilton and Tower*, 271 NLRB 1600, 1603 (1984). Bad faith bargaining can include delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, refusing to bargain with a designated agent, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Id.* The investigation revealed no evidence that the Employer engaged in any of the aforementioned conduct. Rather, the investigation revealed that the Employer proposed to extend the then current collective-bargaining agreement on May 26, 2020, and that on June 2, 2020, the Employer received a petition signed by employees showing that the Union lost majority status. On June 4, 2020, the Union refused to extend the contract. The

evidence further shows that the Employer scheduled a meeting with the Union, and on June 8, 2020 it informed the Union about the petition. The Employer did not make any unilateral changes or engage in any other bad faith conduct. Further, the Union did not present the Employer with any proposals or dates for bargaining. In view of the totality of circumstances, the foregoing conduct fails to establish that the Employer engaged in bad faith bargaining in violation of section 8(a)(5) of the Act. As the evidence fails to establish that the Employer violated the Act as alleged or in any other manner encompassed by your charge, I am dismissing the charge.

Thus, the administrative investigation in Case No. 29-CA-262220 shows, and I have determined that, the Petitioner is an employee of the Employer who is not a manager or a supervisor within the meaning of Section 2(11) of the Act. I also find that the Union's request that the processing of the instant petition be blocked is moot as the evidence presented in the unfair labor practice investigation failed to establish that the Employer violated the Act and the unfair labor practice charge in Case No. 29-CA-262220 has been dismissed. Accordingly, I find the Petitioner duly filed a valid petition. See e.g., *Modern Hard Chrome Service Co.*, 124 NLRB 1235 (1959) (where the Board found the petitioner was not a supervisor and therefore denied the union's motion to dismiss the petition). Compare *Clyde Merris*, 77 NLRB 1375 (1948) (where the Board found the petitioner could not file a valid decertification petition in his capacity as a management representative.)

CONCLUSIONS AND FINDINGS

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

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I hereby find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

The parties further stipulated that the Employer, a domestic corporation, with an office and place of business located at 95-30 225th Street, Queens Village, NY 11429, has been engaged in providing maintenance, installation, and repair services for heating, cooling, and energy systems in commercial buildings. During the past twelve month period, which period is representative of its annual operations generally, the Employer in the course and conduct of its business operations purchased and received goods at its Queens Village, New York facility, valued in excess of \$50,000 directly from points located outside the State of New York.

Accordingly, it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I hereby find, that the Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated, and I hereby find that the following unit of employees, which is coextensive with the existing unit, is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Lead Senior Power Plant Tech, Senior Power Plant Tech, Lead Engine System Technician, Engine System Technician-A, Commercial HVAC Tech, Lead Energy Plant Tech Licensed, Lead Energy Plant Tech A, Lead Energy Plant Tech A-Plus, Energy Plant Technician A, Energy Plant Technician B Plus, Energy Plant Technician B, Energy Plant Technician C, Energy Plant Technician Licensed-A, Energy Plant Technician Licensed-B, Energy Plant Technician Licensed-C, Energy Plant Helper, Lead Heating Service Technician-A, Lead Heating Service Technician-B, Energy System Technician-A, Energy System Technician-B, Energy System Technician- C, Solar Technician A (collectively “job classifications”) who are assigned to the NYCHA Demonstration Projects located at the Boulevard, Linden, Bernard Haber, and Coney Island Houses (Brooklyn, NY) and The Bronx River Houses (Bronx, NY), and employees who perform the same duties as the employees in the job classifications at other sites in New York City boroughs of Brooklyn, Queens, Manhattan and the Bronx provided that the law does not require that another labor organization represent those employees, and physical employees who are assigned to the Green Street Brooklyn shop and who perform general maintenance and mechanical duties at work sites in the New York City boroughs of Brooklyn, Queens, Manhattan, and the Bronx.

Excluded: All employees other than those specifically described in this Article II of the June 1, 2015 through June 30, 2020 collective bargaining agreement, including but not limited to executive, supervisory, managerial, professional, clerical and security employees, superintendents, forepersons, persons employed in confidential capacities, and persons employed at any location or worksite other than those described in this Article II of the June 1, 2015 through June 30, 2020 collective bargaining agreement.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 101, Transport Workers Union of America.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 29, on **September 2, 2020**. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 29 office by close of

business on **September 23, 2020**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. The mail ballots will be counted by video conference on a date and at a time and manner to be determined by the Regional Director after consultation with the parties. In order to be valid and counted, the returned ballots must be received in the Regional office prior to the counting of the ballots.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact Evamaria Cox via telephone at (718) 765-6172 or via e-mail at Evamaria.Cox@nlrb.gov by no later than 5:00 p.m. on **September 11, 2020** in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending August 15, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **August 21, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin

with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: August 19, 2020

Teresa Poor

Teresa Poor
Acting Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center
Brooklyn, New York 11201

Attachment:

Notice of Election