R.D. # 001-08
Perth Amboy, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

K-T MARINE, INC. Employer	
and	**CASE NO. 22-RC-12911**
DOCKBUILDERS, SHORERS, PILEDRIVERS, DIVERS, TENDERS AND FOUNDATION & MARINE CONSTRUCTORS, LOCAL UNION #1456 Petitioner	

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

As described more fully below, I will direct an election in Case 22-RC-12911 in a unit of all the Employer's general labor employees.

On April 15, 2008, the Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent a unit of full-time and regular part-time dockbuilders, pile drivers, divers, tenders and marine foundation workers employed by the Employer at its Perth Amboy, New Jersey facility, excluding operating engineers, laborers, truck drivers, office clerical employees, guards and supervisors as defined in the Act.

A hearing on the petition was conducted on May 6, 2008.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record,[1] I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]
3. The labor organization involved claims to represent certain employees of the Employer.[3]
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 following employees of the Employer constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described below:

All full-time and regular part-time general labor employees including dockbuilders, pile drivers, divers, tenders, marine

[1] In support of its position, the Petitioner relies on the August 23, 2007 Decision and Direction of Election in Structural Preservation Systems LLC, 22-RC-12793, which it submitted in lieu of a brief. The Petitioner's submission and the brief filed by the Employer have been duly considered.

[2] The Employer is a New Jersey Corporation engaged in general marine construction at its Perth Amboy, New Jersey facility, the only facility involved herein. During the preceding 12 months, the Employer has purchased and caused to be delivered to its Perth Amboy facility goods and supplies valued in excess of $50,000 from points outside the State of New Jersey.

[3] The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

foundation workers, operating engineers, shop hands and truck drivers employed by the Employer at its Perth Amboy, New Jersey facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.[4]

II. CONTENTIONS OF THE PARTIES

The parties disagree with regard to the eligibility of nine (9) individuals. The Petitioner contends that five of these individuals, Derrick Plunlett, Douglas Wolfe, Douglas Wolfe, Jr., James Lebansky and Wayne Conroy, should be excluded from the unit because they are operating engineers who perform a separate craft. The Petitioner also contends that Hilario Soto should be excluded because he is a shop hand who does not share a sufficient community of interest with the employees in the sought after unit. Further, the Petitioner contends that three individuals, Kaziminer Augustyn, Sydney Lawrie and Thomas Hoffman, should be excluded from the unit because they are supervisors.

The Employer contends that all nine individuals are field personnel who share a community of interest with the other general labor employees the Petitioner seeks to represent. In addition, regarding the individuals who the Petitioner asserts are supervisors, the Employer maintains they are working foremen who are not supervisors within the meaning of Section 2(11) of the Act, and thus should be included in any unit found appropriate by the Board.

Petitioner has expressed its desire to proceed to an election in any unit found appropriate.

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[4] There are approximately 20 employees employed in the unit.

III. FACTS

The Employer is a general marine construction contractor, engaged in the business of dockbuilding and performing various general contracting functions - salvage work, marine towing work, pile driving work, maintenance and new construction primarily on the waterfront in the Tri-state area. The Employer is engaged in approximately 100 marine construction projects a year.

There are 26 individuals on the Employer's payroll, including its two owners, John Brown and Bruce Edmonds, its two office workers, and its two admitted statutory supervisors, Arthur Edmonds and James McHeffey, who carry the title of Job Superintendent. The remaining 20 individuals do not carry specific titles, but rather, are hired with the expectation that they will perform various functions for the Employer, as needed and as their skills allow. The Employer categorizes these 20 employees as general labor employees.

The record reveals that the majority of these employees' work time is spent in the field on jobsites, though they also will perform work at the Employer's shop as needed or when work is slow. In the case of Hilario Soto, the breakdown is closer to 50-50. When in the field, they are assigned to crews by the Job Superintendents, with each crew being assigned a working foreman. The makeup of each crew changes from day to day based on the requirements of the jobsite, with the Job Superintendents being charged with assembling crews with the necessary skills for the day's assignment, be it welding or machine operation, or something else.

Although the employees are assigned to different crews for each job site, the Employer employs its employees on a long-term, not on a job, basis. Employees with multiple skills are considered the most valuable, and a number of employees have developed some of their skills over the course of their employment with the Employer, having been hired without those skills. All employees are expected to and do participate in whatever job functions are required at a particular job site.

The Employer uses many types of equipment in its field operations, including cranes, piledrivers, air compressors, air hammers, welding machines, generators, track excavators, hanging box leads, hydraulic power pack units and a small aluminum work boat. The Employer also uses equipment in its yard, including a fork truck, a rubber tire loader, a backhoe and a dump truck. Though not every employee has operated every piece of equipment, every employee has operated at least the air compressor, the hydraulic power pack unit, the fork truck and the boat. This is true both of the employees Petitioner seeks to exclude as operating engineers as well as those it does not.

For example, Doug Wolfe, whom Petitioner seeks to exclude as an operating engineer, and who frequently operates the crane, also operates the backhoe, the tractor trailer and the air compressor. Another operating engineer, James Lebansky, runs the backhoe, the dozer loader and the boat. Similarly, operating engineer Wayne Conroy runs the air compressor, the power pack unit and the backhoe and spends as much as 25% of his time driving the boat. Indeed, no employee is exclusively assigned to only operate equipment, or to only operate certain pieces of equipment. The operating

engineers are expected to perform the other functions of the Employer's operations, whether in the field or at the shop.

At the same time, employee Curt Fuerstenberger, who Petitioner does not label an operating engineer, has operated the crane, as well as the fork truck, the backhoe, and the track excavator. Working foreman Sydney Lawrie also runs the boat. Hilario Soto, the shop hand, operates the fork truck, the loader and the dump truck. Splitting time in the field and at the yard, Soto assists and works alongside both the petitioned-for unit employees and the operating engineers.

Among the functions performed by the Employer in its field operation is pile driving, which requires employees to work in tandem to accomplish the task. Typically, this would involve a crew of four to five employees, consisting of a person in the crane, a person starting and stopping the air hammer, a person directing the hose, and a person to spot the piling. Though not every employee can operate a crane, nearly every employee has worked in one or more of the other roles on a pile driving job for the Employer. Pile driving, a critical function of the Employer's operations, cannot be accomplished without the collaboration of employees filling these various roles together.

The Job Superintendents spend large portions of each day in the field at the sites, and on most job sites they assign one of the crew members to be foreman. Most often, the employees chosen to be foremen are Sidney Lawrie, Kazimierz Augustyn and Thomas Hoffman, though as many as ten different employees have filled this role. The Job Superintendents provide the foremen with work directions, instructions and

assignments for the job site at the start of each day, and when not on site, remain in close telephone contact with the foreman throughout the day. The record revealed that working foremen have no authority or responsibility for hiring, firing or making other decisions concerning terms and conditions of work.

The Employer maintains the same personnel policy for all of the general labor employees, including the working foremen. Each is paid hourly and receives time and a half when working over 40 hours during a week. All are subject to the same sick day, vacation day, and holiday pay policies. Each has the same eligibility and contribution rates for the Employer's health plan and its 401(k) retirement plan. When the Employer conducts meetings and/or holds training for its employees, all the general labor employees are included. All of the employees work out of Perth Amboy, and most begin and end their day at the Employer's Perth Amboy facility.

IV. ANALYSIS

Section 9(b) of the Act confers upon the Board the discretion to establish a unit appropriate for collective bargaining and to decide whether such unit shall be an employer unit, craft unit, plant unit or subdivision thereof. A craft unit is defined as consisting of a distinct and homogenous group of skilled journey persons who are primarily engaged in the performance of tasks that are not performed by other employees and that require the use of substantial craft skills and specialized tools and equipment. *Burns and Roe Services Corp*., 313 NLRB 1307, 1308 n.6 (1994) citing *Phoenician*, 308 NLRB 826 (1992).

To determine whether a petitioned-for unit constitutes a separate craft, the Board examines various factors including: (1) whether the petitioned-for unit employees participate in a formal training or apprenticeship program; (2) whether the work is functionally integrated with the work of the excluded employees; (3) whether the petitioned-for employees' duties overlap with the duties of the excluded employees; (4) whether the employer assigns work according to need rather than along craft lines; and (5) whether the petitioned-for employees share common interests with other employees, including wages, benefits and cross-training. *Id.* (citations omitted).

It is well established that the Act requires only that a petitioner seek an appropriate unit, and not the most appropriate or comprehensive unit. *See Capital Bakers*, 168 NLRB 904 (1967); *Morand Brothers Beverage Co*. 91 NLRB 409, *enf'd*, 190 F. 2d 576 (7th Cir. 1950). In determining whether a unit is appropriate, the Board first considers the union's petition and whether the unit sought is appropriate. *Overnite Transportation Company*, 322 NLRB 723 (1996). A petitioner's desire concerning the composition of the unit which it seeks to represent constitutes a relevant consideration. *Marks Oxygen Company of Alabama*, 147 NLRB 228 (1964). As has so often been noted by the Board, the unit sought does not have to be the only appropriate unit, the most appropriate unit or the ultimate appropriate unit, only that it be an appropriate unit. *Bartlett Collins Co.,* 334 NLRB 484 (2002).

Nevertheless, for a bargaining unit to be appropriate, it has to be based on a community of interest shared by the employees. Nomenclature notwithstanding, what

sought after employees do, how functionally integrated it is with what other employees do, and the commonality of the conditions under which they work are essential in establishing a community of interest. The unit to be established has to fit the facts and not vice versa, *Kalamazoo Paper Box Co.*, 136 NLRB 134 (1962).

The Board generally attempts to select a unit that is the "smallest appropriate unit" encompassing the petitioned-for employee classifications." *Overnite Transportation Co.*, 331 NLRB 662 (2000). In the circumstances here, I find that the operating engineers, along with the shop hand, share a community of interest with the petitioned-for unit. *Dick Kelchner Excavating Co.,* above. In this regard, the operating engineers and the shop hand are all laborers working together in the field with the petitioned-for unit employees on a day-to-day basis. They are commonly supervised. The Employer requires neither classification to have prior experience. They receive on-the job training in the Employer's specialized work. Indeed, many of the employees developed the various skills they use on a day-to-day basis over the course of time that they have worked for the Employer. The Employer does not maintain a formal training program or apprenticeship program for any of its employees.

The Employer's operations require a significant level of functional integration that leads to my conclusion that the unit here should include all general labor employees. The pile driving example is instructive, demonstrating the degree to which employees whether sought or not by the Petitioner work in tandem to accomplish the job. Combined with the evidence of overlapping job functions,

including operating engineers performing tasks other than machine operation, and non-operating engineers performing work up to and including crane operation, I find that the unit sought by the Petitioner cannot stand alone. In reaching this conclusion, I have noted that there is insufficient evidence that operating engineers participate in a formal training or apprenticeship program, that their work is functionally integrated with and they share overlapping duties with the work of the other sought after employees, that the employer assigns work according to need rather than along craft lines, that they share common supervision and that they share a community of interest with other employees with regard to terms and conditions of employment.

Based upon the above and the record as a whole I find, therefore, that the appropriate unit must include not only the general labor employees sought, but also the operating engineers and the shop hand.[5]

B. The Supervisory Status of the "Working Foremen"

I find that the Petitioner has not sustained its burden to show that the individuals it identifies as working foremen are supervisors.

> Section 2(11) of the Act defines a supervisor as: Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or

[5] By including the shop hand in the unit found appropriate, I note that were the shop hand to be excluded from the unit, he would be left to stand alone in a potential unit of one, thereby stripping him of the possibility of obtaining collective bargaining rights through a Board conducted election.

> clerical nature, but requires the use of independent judgment.[6]

As the Board has noted in numerous cases, the statutory indicia outlined in Section 2(11) are listed in the disjunctive; only one need exist to confer supervisory status on an individual. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989); *Ohio River Co*., 303 NLRB 696, 713 (1991); *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Groves Truck & Trailer,* 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer statutory status unless such power is exercised with independent judgment and not in a routine or clerical manner. *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981). In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held: "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" Id. at 724, citing *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The Supreme Court has stated: "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of … judgment or discretion … as would warrant a

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[6] Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any of the 12 listed supervisory functions; 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 exercised "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc., et al.*, 532 U.S. 706, 713 (2001); *Oakwood Healthcare*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.,* 248 NLRB No.38 (2006); *Golden Crest Healthcare Center*, 248 NLRB No. 39 (2006).

finding' of supervisory status under the Act." Id. (citing *Weyerhaeuser Timber Co.,* 85 NLRB 1170, 1173 (1949)).

The Board's *Oakwood* trilogy decisions[7] clarified the circumstances in which it will find that individuals exercise sufficient discretion in performing two of the supervisory functions listed in Section 2(11) – assignment and responsible direction of work. In addition to defining critical terms, the Board concluded that assignment and responsible direction must have "a material effect on the employee's terms and conditions of employment" in order to confer supervisory status. *Oakwood Healthcare*, 348 NLRB No. 37, slip op. at 10.

In *Oakwood*, the Board construed the term "assign" as "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Id*., slip op. at 4. To "assign," for purposes of Section 2(11), "refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task." *Id*. slip op. at 4.

In *Oakwood,* the Board explained "responsible direction" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible'. . . and carried out with independent judgment." *Id.* slip op. at 6 (internal quotations omitted). "Responsible direction," in contrast to

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[7] See cases cited in ftn. 6 above.

"assignment," can involve the delegation of discrete tasks as opposed to overall duties. *Id.,* slip op. at 5-6. An individual will be found to have the authority to responsibly direct other employees only if the individual is *accountable* for the performance of the tasks by those employees. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Id.*, slip op. at 7.

Assignment or responsible direction will produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Id.*, slip op. at 8. Independent judgment requires that the decision "rise above the merely routine or clerical." Ibid.

The legislative history instructs the Board not to construe supervisory status too broadly, because an employee who is deemed a supervisor loses the protection of the Act. See *Providence Hospital, supra,* 320 NLRB at 725*; Warner Co. v. NLRB*, 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express,* 275 NLRB 1063, 1073 (1985). The burden of proving that an individual is a statutory supervisor rests with the party asserting it. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1863 (2001). Absent detailed, specific evidence of independent

judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadres Environmental Co.,* 308 NLRB 101, 102 (1992) (citing *Sears Roebuck & Co.,* 304 NLRB 193 (1991)). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990) (quoting *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989)).

The Petitioner claims that three individuals - Kazimierz Augustyn, Sidney Lawrie and Thomas Hoffman - should be excluded from the petitioned-for unit based on the testimony of its witness, Martin Coffeen, a former employee who worked for the Employer from February to April 2007. According to Coffeen, both Augustyn and Hoffman had made a comment to him that they were going to send him to the office for discipline. It is undisputed that Coffeen was not disciplined. Notably, Coffeen did not testify that either of these individuals, or Lawrie, ever disciplined him or anyone else, or that any of these three exercised any of the other indicia of supervisory authority.

The Petitioner, which asserts that these individuals are statutory supervisors and therefore bears the burden of proving supervisory status, presented no evidence that these three adjusted the grievances of employees as supervisors, held themselves out to employees as such or were perceived as supervisors by other employees.

Accordingly, based upon the foregoing and the record as a whole, I find that

the individuals identified as working foremen are not supervisors as defined by the Act and I shall include them in the unit found appropriate.[8]

V. DIRECTION OF ELECTION[9]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and 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 that 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 Government 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 engaged in an economic strike which commenced more than 12 months before the election date

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[8] Petitioner's reliance on a previous Decision issued by this Office in *Structural Preservation Systems, LLC,* Case 22-RC-12793 (R.D. # 010-07) is misplaced as there, unlike here, there was evidence supporting the conclusion that operating engineers were traditional craft employees and, most significantly, another labor organization which traditionally represents such craft employees petitioned to represent them in a separate unit.

[9] As indicated above, Petitioner has expressed its desire to proceed to an election in any unit found appropriate. As the unit found appropriate is larger than that petitioned for, the Petitioner is accorded a period of 14 days in which to submit the requisite showing of interest, if necessary, to support an election. In the event the Petitioner does not wish to proceed to an election, it may withdraw its petition without prejudice by notice to the undersigned within seven (7) days from the date of the Decision and Direction of Elections. *Folger's Coffee*, 250 NLRB 1 (1980).

and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Dockbuilders, Shorers, Piledrivers, Divers, Tenders and Foundation & Marine Constructors, Local Union #1456.**

VI. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966*); NLRB v. Wyman-Gordon Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility,* 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **June 4, 2008**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the

documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.Gov . On the home page of the website, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

VII. RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by June 11, 2008.

Signed at Newark, New Jersey this 28th day of May, 2008.

/s/ J. Michael Lightner

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J. Michael Lightner, Regional Director
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