

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

NORTH LAWRENCE DAIRY, INC.

Employer

and

Case 3-UC-522

TEAMSTERS LOCAL 687

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated that North Lawrence Dairy, Inc., hereinafter referred to as the Employer, is a corporation, with an office and place of business in North Lawrence, New York, where it is engaged in the manufacture and distribution of dairy products. During the past 12 months, a representative period, the Employer, in conducting its business operations, purchased and received goods and services valued in excess of \$50,000 directly from points

located outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The parties stipulated, and I find, that Teamsters Local 687, hereinafter referred to as the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act. The Petitioner claims to represent certain employees of the Employer.

The Petitioner proposes to clarify a bargaining unit of employees employed by the Employer, by excluding facilitators from the existing bargaining unit. The Petitioner contends that facilitators are supervisors within the meaning of Section 2(11) of the Act, because they have the authority to assign, responsibly direct, recommend discipline and/or assign and authorize overtime. The Employer opposes such clarification. The Employer argues that facilitators are not supervisors within the meaning of Section 2(11) of the Act and should remain in the existing bargaining unit.

The record establishes that the Petitioner reserved its right to file a unit clarification petition with the Board during the parties' most recent collective-bargaining negotiations. More specifically, in a side agreement to the collective-bargaining agreement, the parties agreed that "[t]he Union may file a Unit Clarification petition with the NLRB to obtain a determination as to whether Facilitators should be excluded from the bargaining unit. The Company and Union agree that following a hearing on the Unit Clarification petition, neither party may appeal the NLRB Regional Director's determination regarding the status of Facilitators and that the Regional Director's determination will be final and binding on both parties." This side agreement was executed on September 27, 2006.

Based on the evidence adduced during the hearing and the relevant case law, I conclude that facilitators should not be excluded from the existing bargaining unit, as the Petitioner has not met its burden of establishing that facilitators are supervisors as defined in Section 2(11) of the Act. I will therefore order that the instant unit clarification petition be dismissed.

FACTS

Overview of the Employer's Operations and the Unit at Issue

The Employer operates a dairy facility in North Lawrence, where it manufactures and distributes dairy products.¹ Products distributed to its customers include yogurt, cottage cheese and bulk dairy commodities such as cream. The Employer operates its dairy facility 24 hours per day, 7 days per week.

The Employer's facility consists of several departments, including production, distribution and maintenance. Each of these departments are staffed with employees who report to supervisors and a department manager. For example, the production department consists of a manager, two operations supervisors and five production supervisors; the distribution department consists of a manager and a supervisor; and the maintenance department consists of a manager and two supervisors. Each department manager reports directly to Douglas Dornbier, the Employer's vice-president of operations. At the hearing, Dornbier testified that there is a production, operations and/or maintenance supervisor scheduled for each shift.

The Petitioner and the Employer, and the Employer's predecessors, have been parties to successive collective-bargaining agreements and are presently parties to a collective-bargaining agreement effective October 1, 2006 through September 30, 2009. The recognition clause, contained in Article 2 of the collective-bargaining agreement, states that "[t]he Employer

¹ The record establishes that in January 2007, the Employer purchased from CoolBrands Dairy, Inc. and began operating the instant facility. The evidence also shows that in March 2005, CoolBrands Dairy, Inc.(CoolBrands) purchased the instant facility from Kraft Foods North America, Inc. (Kraft Foods).

recognizes the Union as the sole and exclusive bargaining representative for its employees in the Employer's plant at North Lawrence, New York." Schedule A of the parties' collective-bargaining agreement includes a list of all job classifications in the bargaining unit in existence as of October 1, 2006, which expressly includes facilitators. At the hearing, the parties stipulated that all terms and conditions of employment in the parties' collective-bargaining agreement apply to facilitators. There are a total of approximately 143 bargaining unit employees covered by the parties' collective-bargaining agreement, of which approximately 110 employees work in the production department, 20 work in the maintenance department, and 13 work in the distribution department.

Facilitators

The Employer employs five employees who currently serve as facilitators. There are three facilitators in the production department, one in the maintenance department and one in the distribution department. The evidence establishes that the facilitator classification was created in or about December 1999, in order to facilitate the success of departmental teams. The evidence establishes that the first collective-bargaining agreement that included facilitators in the bargaining unit was the October 1, 2002 through September 30, 2006 agreement between Kraft Foods and the Union.²

The Employer's written job description for the production facilitator,³ last revised on May 9, 2000, states, in pertinent part:

² The record establishes that in April 2001, representatives from Kraft Foods and the Petitioner, along with some employees, attended a meeting the purpose of which was to obtain an understanding of what expectations the parties' had for facilitators. The record establishes that the participants agreed that facilitators would be responsible for, among other things, ideas and suggestion tracking, "green room" meetings, working on the floor, picking up samples, handling call-ins, guiding employees to areas where work is needed on the floor, assigning work orders, completing paperwork, and coordinating and analyzing data.

³ The only job descriptions in evidence are for production facilitators.

- I. Primary Function:**
Lead direct filling and packaging Teams according to Kraft Foods standards, in order to meet organizational requirements. The person needs to have strong technical/leadership skills, to help our team towards HPWS.⁴ Must be able to optimize lines for Continuous Improvement.
- II. Technical Maintenance Duties:**
 - A) Writes work orders
 - B) Assists in project/experimental work
- III. Quality Duties:**
 - ...
 - B) Provides leadership in QCD [Quality, Cost, Delivery] teams
 - C) Responsible & coordinates sample taking
 - ...
 - E) Monitors product quality, explains deviations in procedures, performs on line checks
 - ...
 - G) Responsible for properly identifying defective supplies
 - H) Monitors temperature, weights, codes, and packaging integrity
- IV. Sanitation Duties:**
 - A) Monitors sanitary condition of line during production
 - ...
- V. Cost Effectiveness**
 - A) Understand key cost drivers and packaging product costs
 - B) Monitors line cost on a continuous basis by reducing waste, lost time, and supplies
 - C) Maximizes line effectiveness to achieve plant vision of low cost producer
 - D) Minimizes costs through innovation and initiative
- VI. Safety Duties:**
 - A) Monitors condition of lines as pertains to safety
 - B) Leads in the training of the line personnel
 - ...
- VII. Production Duties:**
 - A) Takes leadership in production problem solving
 - B) Performs line personnel scheduling
 - C) Maintains production charts as required
 - D) Provide line reports to supervisor as required
 - E) Prepares daily production paperwork/Daily put-up
 - F) Performs other duties as assigned by supervisor
 - G) Assist in implementing QCD Ideas & Suggestions
- VIII. General Duties Requirements:**
 - A) Promotes Total Quality through Continuous Improvement
 - B) Possess/obtain computer skills
 - C) Demonstrates leadership through attitude, communication skills, initiative and team work

⁴ The record does not include an explanation of HPWS.

The record also establishes that since the advent of the facilitator position, the Employer and its predecessors have posted job bids for facilitator openings, consistent with all other bargaining unit positions. Facilitator openings are bid on by bargaining unit employees. There is no record evidence that non-bargaining unit employees bid on facilitator openings.

The Employer's job-bid notice for production and distribution facilitators, which lists certain job duties, states, in pertinent part:

Operations:

- Knowledge of basic operations and equipment
- Work with computers and have computer skills
- Work with maintenance systems – SAP⁵ (applies only to production facilitator)
- Knowledgeable of both MATRICS⁶ (applies only to production facilitator)
- Possess or obtain fork truck license (applies only to distribution facilitator)

Leadership:

- Good verbal and written communication skills and be able to speak in front of co-workers
- Able to give guidance and support through coaching skills
- Lead QCD meetings as necessary for the improved performance of the operation
- Demonstrate strong initiative/good judgment. Coordinating line activities and employees in their daily job responsibilities.
- Provide follow up to employees regarding "Ideas and Suggestions"

Skills:

- Demonstrate computer-keyboarding skills, typing skills and literacy in computer business applications. Demonstrate strong analytical, organizational, administrative, interpersonal and problem solving skills. Strong written and oral communication skills will be required also.

The Employer's job-bid notice for the maintenance facilitator, which also lists certain job duties, states, in pertinent part:

Technical/Maintenance duties:

- Computerized maintenance management system:
 - Reporting
 - Preventive maintenance plans
 - Work orders

⁵ The record does not establish the meaning of SAP.

⁶ The record does not establish the meaning of MATRICS.

- Troubleshooting
- Training others
- Time tracking

Administrative:

- Purchasing utilizing computerized system
- Receiving
- Service contracts
- Idea track
- Maintain maintenance library

Leadership:

Good verbal and written communication skills and be able to speak in front of co-workers

Able to give guidance and support through coaching skills

Lead QCD meetings as necessary for the improved performance of the operation

Strong initiative/good judgment

Coordinating line activities and employees in their daily job responsibilities.

At the hearing, three facilitators testified including Arthur Niles, Terry Stark and Matthew Trim. Arthur Niles testified that he has served as a facilitator since May 2000, first as a production facilitator and then as maintenance facilitator beginning in the Spring of 2002. According to Niles, his job duties include researching and ordering maintenance parts and supplies, entering computer-related data such as work orders in the computer system, running reports out of the computerized SAP program, performing minimal maintenance work on the floor, preparing work schedules, posting overtime lists, calling employees for overtime and call-in opportunities,⁷ and conducting “green room” meetings.⁸

⁷ As discussed below, the record establishes that overtime and call-in opportunities are not mandatory unless there is an insufficient number of employees to fill open shifts. In such cases, employees are required to work based on reverse seniority, in accordance with the parties’ collective-bargaining agreement.

⁸ The record establishes that “green room” meetings are attended by facilitators and employees, and occur at the beginning of each shift. All facilitators are responsible for leading “green room” meetings, the purpose of which is to share information about the prior shift, such as noting any problems that may have occurred, announcing any line shutdowns, or reviewing any announcements from management. During “green room” meetings, employees are also encouraged to communicate ideas and suggestions for improving the productivity of the facility. Facilitators are then asked to relay these ideas and suggestions to management. Attendance is mandatory at “green room” meetings for all employees including facilitators.

Terry Stark testified that he has served as a facilitator in the production department for approximately five years. According to Stark, his job duties include setting up the seven production lines with production orders, pulling samples from production lines for quality testing, reviewing sample results from quality control, communicating ideas and suggestions from employees to supervisors, troubleshooting computer glitches, posting overtime notices when requested by supervisors, receiving call-ins from sick employees, and contacting employees with overtime and call-in opportunities. Stark further testified that he works approximately 50 percent of the time in an office performing computer-related duties and the remainder of the time on the production floor picking up samples and performing other related duties.

Matthew Trim testified that he has served as a facilitator in the distribution department for approximately two years. According to Trim, a majority of his time is spent maintaining the inventory of raw products, such as cups, fruit, and inside label lids. Trim also testified that he is responsible for vendor returns of defective products, filing fork truck inspection sheets and posting weekend overtime opportunities when requested by supervisors.

As noted above, facilitators' terms and conditions of employment are covered by the parties' collective-bargaining agreement. In this regard, facilitators are paid hourly, consistent with other bargaining unit employees and facilitators are paid their base rate of pay plus \$0.75 an hour. The record also establishes that facilitators have regularly scheduled work hours, they report directly to supervisors and managers, and they are entitled to earn overtime.

The record further reveals that facilitators perform a majority of their job duties in offices away from the production floor. The record also establishes that production and distribution

facilitators share offices with production supervisors, while the maintenance facilitator works in his own office.

Assignment of Work

The record establishes that Karen Fukes, one of the Employer's production supervisors, prepares the weekly work schedules for all employees, including facilitators, in the production and distribution departments. Work schedules are posted on Thursdays for the following week. There is no record evidence that production or distribution facilitators play any role in preparing work schedules.

The record reveals that Facilitator Arthur Niles prepares the weekly work schedule for the maintenance department. In this regard, Niles testified that while he prepares the work schedule for the maintenance department, shifts are pre-determined and the schedules do not change from week to week, unless a mechanic is on vacation. Niles further testified that if a mechanic is on vacation, he continues to schedule the remaining employees into their regular shifts. Niles testified that when production lines are running, the maintenance department has a minimum staffing level of four employees per shift. Minimum staffing levels are set by Leonard Wiegandt, the Employer's maintenance department manager. According to Niles, if the number of scheduled employees falls below the minimum staffing level, Niles will post a sign-up sheet to cover the shifts. These shifts are subsequently awarded to mechanics, who voluntarily sign-up, based on seniority in accordance with the parties' collective-bargaining agreement. The record establishes that if an insufficient number of employees sign-up, employees are forced to work by reverse seniority, which is also dictated by the parties' collective-bargaining agreement. Niles further testified that he reviews the work schedule with Manager Wiegandt, before he posts it.

The record establishes that mechanics in the maintenance department receive their daily assignments, also known as work orders, by logging into the computerized SAP program. The record reveals that the SAP program is designed to keep track of work orders. Work orders include, for example, preventative maintenance checks, safety checks, fixing an entire line due to a malfunction, fixing individual machines for not delivering cups, or snowplowing roads around the Employer's facility.

Work orders are generated by employees, facilitators, supervisors or managers. When a work order is created, a facilitator will enter the work order into the SAP program. The work order is then submitted to a supervisor or manager for their approval. Niles testified that he does not approve work orders. Once approved, the work order is given a priority, by either a facilitator, supervisor or manager, and assigned to an employee to complete.⁹

At the hearing, production employee Gil Gomes, also a former mechanic, testified that once a supervisor or manager approves a work order, the maintenance facilitator assigns the work order to the mechanic who is responsible for that particular production line or area covered by the work order. The evidence establishes that since mechanics generally work on the same production lines, when a work order is created for a particular line, the mechanic responsible for that line is assigned the work order.

Facilitator Arthur Niles testified that in some instances, for example, when work orders involve safety, employees call the appropriate mechanic directly, and ask the mechanic to fix the safety problem on their line. Niles testified that this occurs on a daily basis. Otherwise, according to Niles, Manager Wiegandt assigns all work orders to mechanics. Once Wiegandt makes the work assignment, Niles is responsible for entering the work order, with the

⁹ The record does not reveal any other levels of priority besides emergency or non-emergency and does not establish the percentage of orders in each category.

appropriate assignment, into the SAP program.¹⁰ The record establishes that once mechanics receive routine work orders they determine the order in which they are processed.

Production employee Gomes testified that the maintenance facilitator assigns preventative maintenance work orders to mechanics. For example, Gomes testified that Niles assigned him a preventative maintenance work order on a different production line than his scheduled line. Gomes testified that this preventative maintenance assignment, which included greasing or lubing a piece of equipment, was assigned to him because none of the Employer's production lines were running at that time. Gomes further testified that the assignment had nothing to do with his experience or skill on the piece of equipment, and that any mechanic on his shift could have performed this preventative maintenance work order.

Facilitator Niles testified that preventative maintenance work orders are initially assigned by a supervisor or manager. In fact, Niles testified that he has never assigned a preventative maintenance work order to a mechanic without consulting with Manager Wiegandt. The record further establishes that when the same preventative maintenance comes due, the SAP program will automatically assign the work order to the same mechanic.

In the production department, employees receive their assignments from production sheets. Production sheets are posted orders, drafted by the distribution department, which inform the production department what product will be running on the seven production lines.¹¹ For example, Facilitator Stark testified that a production sheet would identify which of the production lines will be running four product flavors selected for that day. Stark testified that it is his responsibility to coordinate and set up the lines according to the production sheets. In this

¹⁰ When Niles enters the assignment into the SAP program, the program automatically designates Niles as the person making the assignment. This information is available for all mechanics accessing the SAP program for their assignments.

¹¹ The record is silent as to who in the distribution department drafts the production sheets.

regard, Stark testified that he is coordinating the line operators and the products that they are running, with the stockers and identifying products that the production department will need for the next day. Stark further testified that he is not involved in deciding which product to run.

The record also establishes that some facilitators have asked employees to perform certain discrete tasks, such as rework, fixing a snowplow, fixing a boiler, or throwing away mislabeled products.¹² Facilitators Stark and Niles testified that they ask employees to perform certain discrete tasks. Stark testified that when a production line is down, and employees are standing idle, he will ask them to do rework. The record reveals that this decision is made because employees are available to do the work, not based on any skill or qualification. Similarly, Niles testified that he will ask employees to assist other mechanics or to perform discrete tasks such as fixing a snowplow. Niles testified that he asks the mechanics who do not look busy to perform these types of tasks, rather than making such assignments based on the skills of the mechanics. Niles further testified that he cannot force an employee to perform a certain task, nor has he threatened an employee with discipline in order to change a work assignment.

Employees are free to refuse these types of work assignments, without fear of discipline. For example, employees Matthew Susice and Joseph St. Hilaire testified that they have refused work assignments from facilitators. In fact, Susice testified that in the past 5 years, he has refused work assignments from Niles approximately 25 to 50 times, without being disciplined. Niles testified that when an employee refuses his work assignment, he moves on to ask another employee.

¹² In its post-hearing brief, the Petitioner acknowledged that Facilitator Matthew Trim does not assign or responsibly direct employees in the distribution department.

Responsibly Direct

As noted above, employees in the production department receive their assignments through production sheets. There is no record evidence that any of the facilitators in the production department direct employees as to which line or product to run. There is also no record evidence that production facilitators are responsible for directing the order in which production assignments are completed. Stark testified that he is not held accountable for the work of employees in the production department. Stark further testified that he does not receive any rewards if employees perform well, nor has he brought any employee mistake to management's attention.

The employees in the maintenance department receive their assignments through work orders. Absent emergency situations, individual mechanics decide which work orders to do first. In fact, employees Susice and Gomes testified that they decide the order in which to complete their work assignments. Facilitator Niles testified that he is not held accountable for the work of other mechanics and he does not receive any rewards for good performance. The facilitators do not receive performance evaluations.

Discipline

There is no record evidence that any of the facilitators have the authority to discipline or recommend the discipline of employees. Facilitators Niles, Trim and Stark testified that they have never disciplined or recommended the discipline of any employee, and they do not have the authority to discipline employees. In fact, employee Joseph St. Hilaire, who is also the

Petitioner's chief steward, testified that he has never seen a facilitator issue a disciplinary write-up and facilitators do not attend disciplinary meetings between the parties and employees.¹³

Overtime

The record establishes that overtime is authorized and approved by supervisors or managers. There is no record evidence that facilitators independently authorize or approve overtime. Stark, Trim and Niles testified that their roles regarding overtime are limited to posting sign-up sheets and calling employees about overtime opportunities, in order of seniority, as required by the collective-bargaining agreement. The record also reveals that if there is an insufficient number of employees for the overtime work, employees are forced to work overtime by reverse seniority. This procedure is also dictated by the parties' collective-bargaining agreement.

ANALYSIS

Unit Clarification

The Board generally will not clarify a bargaining unit during the term of a collective-bargaining agreement when the objective is to change the composition of a contractually agreed-upon unit by the exclusion or inclusion of employees. See, e.g., Edison Sault Electric Co., 313 NLRB 753 (1994); San Jose Mercury, 200 NLRB 105 (1972). However, a bargaining unit may be clarified during the term of a collective-bargaining agreement where the procedure is invoked to determine the unit placement of employees performing a new operation or where an existing

¹³ At the hearing, Hilaire testified that he believes facilitators influence discipline. For example, Hilaire testified that an employee was disciplined for "putting base to the drain" so that the employee did not have to keep running to get another tote. (The record does not explain what "putting base to the drain" means.) Hilaire testified that although he did not see a facilitator inform management of this incident, he believes one did. However, Hilaire further testified that he believes other bargaining unit employees, besides facilitators, have reported mistakes by fellow employees to management.

classification has undergone recent, substantial changes. See, e.g., Crown Cork & Seal Company, 203 NLRB 171 (1973); Union Electric Company, 217 NLRB 666, 667 (1975).

The Board described the purpose of unit clarification proceedings in Union Electric Company, supra, at 667:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

As noted above, the Petitioner reserved its right to file a unit clarification petition with the Board during the parties' most recent collective-bargaining negotiations. Both parties agreed to the Board's unit clarification procedure, which is reflected in the parties' side agreement executed on September 27, 2006. The Petitioner filed the instant unit clarification petition with the Board on April 16, 2007.¹⁴

Supervisory Status

The issue presented is whether the five facilitators are supervisory employees under Section 2(11) of the Act. The Petitioner contends that the existing bargaining unit should be clarified to exclude facilitators because they are supervisors. The Employer disagrees and argues that facilitators are not supervisors and should remain in the existing bargaining unit.

¹⁴ Neither party asserts that the unit clarification petition was untimely because it was not filed "shortly after" the execution of the collective-bargaining agreement. See Baltimore Sun Co., 296 NLRB 1023 (1989); St. Francis Hospital, 282 NLRB 950 (1987).

Based on the record herein and extant Board law, I find that facilitators are not supervisors under Section 2(11) of the Act and accordingly, they shall remain in the existing bargaining unit.

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

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statutory indicia outlined in Section 2(11) are listed in the disjunctive, and 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). 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. See, e.g., J. C. Brock Corp., 314 NLRB 157, 158 (1994).

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 listed supervisory functions; if 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).

The burden of proving supervisory status lies with the party asserting that such status exists—in this case the Petitioner. *Id.* at 710-711; Oakwood Healthcare, Inc., 348 NLRB No. 37, slip op. at 3 (September 29, 2006). Lack of evidence is construed against the party asserting supervisory status. See Michigan Masonic Home, 332 NLRB 1409, 1409 (2000). “Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory

authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” Phelps Community Medical Center, supra, at 490. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. See Avante at Wilson, Inc., 348 NLRB No. 71, slip op. at 2 (October 31, 2006); Sears, Roebuck & Co., 304 NLRB 193 (1991). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. See Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003); Bethany Medical Center, 328 NLRB 1094, 1103 (1999).

There is no contention by any party that facilitators have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or to adjust employee grievances, or that they effectively recommend such actions. The Petitioner contends that facilitators have the authority to assign, responsibly direct, discipline and/or assign and authorize overtime, or to effectively recommend such actions.

In Oakwood Healthcare, supra, the Board clarified the criteria for finding that a purported supervisor “assigns” and “responsibly directs” the work of others, and uses “independent judgment” in doing so. The Board held that the authority to assign refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” Oakwood Healthcare, Inc., supra, slip op. at 4.

The Board further noted that for direction to be responsible, the person performing the oversight must be held accountable for the actions of others. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if

necessary. . . . and a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id., slip op. at 7.

Finally, the Board stated that in order to exercise independent judgment, the direction “must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” Id., slip op. at 8.

Assign and Responsibly Direct

I find that the Petitioner has failed to meet its burden of showing that facilitators have the authority to assign and/or responsibly direct the work of others, within the definition of Section 2(11) of the Act.

Addressing first the Petitioner’s contention that facilitators assign work to other employees, I note that the record evidence does not establish that facilitators make assignments using independent judgment. The record establishes that work schedules for employees in the production and distribution departments are prepared by production supervisor Karen Fukes. The record is devoid of evidence that production or distribution facilitators, which account for four of the five facilitators at issue, play any role in preparing work schedules. The record also fails to show that production or distribution facilitators assign significant overall duties to employees. Rather, the record establishes that production employees receive their work assignments from production sheets, which are drafted by the distribution department.¹⁵ Moreover, the Petitioner, in its post-hearing brief, acknowledges that Matthew Trim, the only facilitator in the distribution department, does not have the authority to assign or responsibly direct employees in the distribution department.

¹⁵ The record is silent as to who in the distribution department drafts the production sheets.

While the record establishes that Facilitator Arthur Niles prepares the weekly work schedule for the maintenance department, I find that the record fails to show that Niles does so using any independent judgment. Based on the record evidence, I conclude that in preparing work schedules, Niles does not exercise a degree of discretion that rises above the “routine or clerical” level. See Oakwood Healthcare, Inc., supra, slip op. at 8. In this regard, Niles testified that shifts are pre-determined and work schedules do not change from week to week, unless a mechanic is on vacation. I also conclude that Niles is not “free of the control of others” in preparing these weekly work schedules. *Id.* Specifically, Niles testified that if the number of scheduled employees fall below the minimum staffing level, which is set by the Employer, he posts a sign-up sheet to cover the remaining shifts. In such cases, shifts are then awarded by seniority, according to the parties’ collective-bargaining agreement. Niles also testified that he reviews the work schedule with a manager before he posts it. For these reasons, I conclude that in preparing work schedules, Niles does not exercise independent judgment within the meaning of Section 2(11) of the Act.

The Petitioner argues in its post-hearing brief that Niles assigns maintenance department employees significant overall duties, when he assigns them their work orders and identifies their priorities. In support of its position, the Petitioner relies on the testimony of production employee Gomes who testified that Niles decides which work orders are assigned to each mechanic. This testimony is based, in part, on the fact that when Niles enters the work order in the Employer’s computerized tracking program, his name is designated as the person making the assignment. However, Niles provided un rebutted testimony that this designation occurs automatically and that, absent emergency situations, a manager assigns all work orders to

mechanics.¹⁶ In fact, Niles testified that he has never assigned a preventative maintenance work order to a mechanic without first consulting with a manager.

The Petitioner also argues that Niles assigns the priority to work orders. However, the record does not reveal any other levels of priority besides emergency or non-emergency. Moreover, the record clearly establishes that once a priority is placed on a work order, the individual mechanics decide which work orders to do first.

The Petitioner also argues, in its post-hearing brief, that facilitators assign employees certain tasks, such as rework or fixing a boiler. However, the record establishes that such tasks are assigned to employees who are standing idle, with nothing to do. There is no record evidence to suggest that these tasks are assigned based on an evaluation of any skill or qualification of the employee receiving the assignment. Accordingly, I find that these tasks are discrete tasks and do not constitute the designation of giving significant overall duties to employees. See Croft Metals, Inc., 348 NLRB No. 38, slip op. at 6 (September 29, 2006) (finding that “sporadic rotation of different tasks by the lead persons more closely resembles an ‘ad hoc instruction that the employee perform a discrete task’ during the shift and as such is insufficient to confer supervisory status on the lead persons pursuant to Section 2(11) under Oakwood Healthcare”). Moreover, the record clearly establishes that employees are free to refuse these types of work assignments, without fear of being disciplined. Based on the above, I find that the Petitioner failed to establish that facilitators have the authority to assign work to employees, using independent judgment, within the meaning of Section 2(11) of the Act.

The Petitioner also contends that facilitators responsibly direct employees. I conclude that the preponderance of the evidence does not support a finding that facilitators have the

¹⁶ The record establishes that in emergency situations involving safety, employees will contact mechanics directly and ask the mechanic to fix the safety problem on their production line.

authority to responsibly direct employees in accordance with Section 2(11) of the Act. As noted above, the Board in Oakwood Healthcare found that for a finding of direction to be responsible, the person performing the oversight must be held accountable for the actions of others. In the instant matter, there is no record evidence establishing that facilitators will be held accountable for the failures of other employees while performing their assigned duties.

The Board has long recognized that 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. See, e.g., Volair Contractors, Inc., 341 NLRB 673, 675 (2004); Sears, Roebuck & Co., 304 NLRB 193, 194 (1991). Consistent with this requirement, in determining whether accountability has been established, the Board requires evidence of demonstrable accountability. Under Oakwood Healthcare, to be held accountable means that there is a prospect of consequences to the alleged supervisor if the work is inadequately performed. In the instant case, there is no evidence that facilitators have a prospect of consequences if other employees fail to perform their assigned tasks. For this reason, I conclude that facilitators do not have the authority to responsibly direct employees within the meaning of Section 2(11) of the Act. Having found that facilitators do not responsibly direct other employees, it is unnecessary to address the issue of whether they exercise independent judgment in this regard. See Golden Crest Healthcare Center, 348 NLRB No. 39, slip op. at 6, n.14 (September 29, 2006).

Discipline

I conclude that there is no evidence that facilitators have the authority to discipline employees or effectively recommend such action within the meaning of Section 2(11) of the Act. There is no record evidence that facilitators have actually disciplined employees. At the hearing,

Facilitators Niles, Trim and Stark provided un rebutted testimony that they have never disciplined or recommended the discipline of any employee, and they do not have the authority to discipline employees. Thus, I conclude that the Petitioner failed to meet its burden of establishing that facilitators have the authority to discipline, or effectively recommend such action, in accordance with Section 2(11) of the Act.

Overtime

I also conclude that facilitators do not have the authority to assign and authorize overtime. The record establishes that the decision to authorize overtime is made by a supervisor or manager. The record further establishes that facilitators' roles regarding overtime are limited to posting sign-up sheets and calling employees about overtime opportunities, in accordance with established procedures and by seniority. Selection of employees for overtime opportunities are governed by the parties' collective-bargaining agreement, no matter whether selection is voluntarily or forced. Thus, I conclude that the Petitioner failed to meet its burden of establishing that facilitators have the authority to assign employees overtime in accordance with Section 2(11) of the Act.

Based on the above, I conclude that the bargaining unit should not be clarified to exclude facilitators. Accordingly, the Petitioner's request, and the instant petition, for clarification of the existing bargaining unit to exclude facilitators are to be dismissed.

ORDER

IT IS HEREBY ORDERED that the unit clarification petition be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **Thursday, July 26, 2007**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov, but may not be filed by facsimile.

DATED at Buffalo, New York this **12th** day of **July, 2007**.

HELEN E. MARSH Regional Director
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