

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 8**

<b>SHAMY HEATING &amp; AIR CONDITIONING, INC.<sup>1</sup></b>	
<b>Employer</b>	
<b>and</b>	<b>Case No. 8-RC-16945</b>
<b>UNITED ASSOCIATION OF PLUMBERS AND STEAMFITTERS, LOCAL 50<sup>2</sup></b>	
<b>Petitioner</b>	

**DECISION AND DIRECTION OF ELECTION**

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

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

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees performing work related to HVAC-R service or installation, including HVAC installers, HVAC service technicians, refrigeration service mechanics, plumbers, pipefitters and sheet metal workers, but excluding all office clerical employees, salesmen, truck drivers and all professional employees, guards and supervisors as defined in the Act.

---

<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Petitioner/Union's name appears as amended at the hearing.

<sup>3</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction. The labor organization involved claims to represent certain employees of the Employer. The Employer and the Union filed post-hearing briefs which have been duly considered. Reference to the Board's exhibits shall be noted as BX-\_\_\_\_. References to the Employer's exhibits shall be noted as EX-\_\_\_\_. No documents were received as Union exhibits.

## **INTRODUCTION**

Shamy Heating and Air Conditioning, Inc., an Ohio corporation, with its principal place of business located at 6226 American Road, Toledo, Ohio 43612 is engaged in the sale and service of heating and air conditioning systems primarily on a retail basis. There are approximately 4 employees in the unit.<sup>4</sup>

## **ISSUE**

The sole issue for determination is whether employee Kevin Drouillard continued to be a supervisor within the meaning of Section 2(11) of the Act after a meeting held on or about the middle of December 2007.<sup>5</sup>

## **POSITION OF THE PARTIES**

The Union argues that Drouillard resigned his position as a supervisor in mid December 2007 during a meeting with the Employer's President Mark Shamy and the General Manager Christopher Williams. The Union argues that there is insufficient evidence to establish that Drouillard continued to be a supervisor after the meeting held on or about December 15, 2007.

The Employer does not dispute that a meeting occurred between Drouillard, Williams and Shamy on or about December 15, 2007 but denies that Drouillard resigned from his position as Production Supervisor.<sup>6</sup> Accordingly, the Employer argues that Drouillard's position, duties and responsibilities remain unchanged and that he continues to be a statutory supervisor within the meaning of Section 2(11) of the Act.

## **DECISION SUMMARY**

I find Drouillard's supervisory status unchanged subsequent to the meeting held on or about December 15, 2007 and I accordingly find that he is ineligible to vote in the election directed herein.

## **FACTS**

---

<sup>4</sup> The parties stipulated four named individuals were eligible to vote. Three of the four, Anthony Sheehan, Steve Brooks and Steve Ballou are service technicians, while Andrew Roesner is an installer. (DX-2)

<sup>5</sup> At the hearing, the parties stipulated that prior to mid-December 2007, Kevin Drouillard was a supervisor within the meaning of Section 2(11) of the Act. The Union stipulated that prior to the middle of December 2007, Drouillard exercised supervisory authority to assign work, discipline employees and send employees home. Drouillard's supervisory status before mid-December will be discussed herein. The Union, arguing that Drouillard was no longer a supervisor after mid-December maintained that he shared a community of interest with the four employees. In light of my conclusion that Drouillard continued to be a statutory supervisor, I find it unnecessary to undertake a community of interest analysis.

<sup>6</sup> During the hearing and within the documentation contained in the Employer's Exhibits, Drouillard's job title has been referred to as Residential Production Supervisor, Production Supervisor and finally Supervisor.

Records provided by the Employer indicate that Drouillard commenced employment as an installer on December 31, 2005. According to General Manager Chris Williams, Drouillard was employed as a lead installer directly supervised by former Supervisor Mark Foote for roughly four to five months.<sup>7</sup> Drouillard was promoted to the position of Residential Production Supervisor on or about May 22, 2006. According to Drouillard, starting in May 2006, he received a monthly separate check for an additional \$300 in supervisory compensation and a \$200 per month stipend for the use of his own vehicle.<sup>8</sup> Starting in May 2007, the additional monthly checks were eliminated and in their place Drouillard's hourly rate was increased by \$1.50 per hour.

During examination by the hearing officer, Drouillard confirmed that in the period between his promotion May 2006 and the mid-December 2007 meeting, he exercised various supervisory authority as described in Section 2(11) of the Act. Drouillard testified that in this period he was involved in the disciplinary process. He testified that in addition to verbally warning employees, he recommended to management that written discipline be issued. He further agrees that employees were then disciplined based on his recommendations. In one instance, Drouillard suspended employee Andrew Meinen at the direction of General Manager Williams after having recommended to Williams that disciplinary action be taken. Drouillard also acknowledged that prior to mid-December 2007 he laid off employee Larry Pollard. While Drouillard denies promoting, rewarding or granting wage increases to employees in the pre-December 2007 period, Williams testified that in August 2007, Drouillard was involved in the reviewing process for installers and made recommendations for wage increases. According to Williams, with one exception, Drouillard's recommendations were followed.<sup>9</sup> Additionally, Drouillard testified that when there was more than one crew, he was responsible for assigning installers to particular duties or jobsites. Drouillard's selection was based on his evaluation of the difficulties of the project and the expertise of the employee. He also testified that if an installer had a problem with a job, they would obtain his direction by telephone or in person. With respect to specifics, Drouillard recalled installer Steve Ballou sought his assistance with job problems by contacting him by telephone or in person.<sup>10</sup>

### **THE MID-DECEMBER MEETING**

Drouillard testified that he met with Chris Williams and Mark Shamy in Shamy's office on or about December 15, 2007. According to Drouillard, he approached Williams and Shamy

---

<sup>7</sup> The terms crew leaders and lead installers were used interchangeably during the hearing.

<sup>8</sup> Drouillard's hourly rate at the time was \$19 per hour. At the time of the hearing his rate was \$22 per hour.

<sup>9</sup> The Employer introduced a communication from Williams to Employer President Mark Shamy supporting Williams' testimony that Drouillard was involved in the installer reviews and raises. (EX-10) In addition, the job description (EX-3) for the position of Residential Production Supervisor includes a specific reference to providing feedback to managers prior to employee evaluations.

<sup>10</sup> The testimony elicited by the Hearing Officer with respect to direction or guidance with job problems appears to relate to the period before mid-December 2007. I conclude the witness' reference to Ballou refers to the period before December 15, 2007 because an examination of the "crew sheets" between December 2007 and February 2008 do not include Ballou. Employer's Exhibit 2 contains monthly scheduling documents in the period of May 2006 through February 2008 and were also referred to as "crew sheets". The names of installers appear along the top of each monthly page. The documents identify which project an employee is assigned to on any particular day and whether the job entails a one or two person crew. In addition, the document indicates whether an employee is on vacation, off work or working in the service department.

after learning that an anticipated bonus program was either abolished or under revision. In the hearing, Drouillard explains that he came into the office, dropped his company keys onto Shamy's desk and advised Shamy and Williams that he was "...finished being a supervisor...no longer wanted to do anything that had to do with supervising, anything that had to do with what happens in the office." Drouillard states that during the meeting he also mentioned that he had heard Shamy had criticized Drouillard for taking too long on jobs. However, Drouillard acknowledges that Shamy told him that he was doing a much better job than former Supervisor Mark Foote and denied that he had complained Drouillard was taking too long on jobs. Thereafter, Drouillard took back the keys and left the meeting.

Drouillard unequivocally testified that subsequent to this meeting, he never again told Shamy that he no longer wanted the supervisor job. There is no written document evidencing that Drouillard resigned his supervisory position. There is no written document describing any changes in Drouillard's duties. There is no testimony that the Employer announced to employees any changes in Drouillard's status. Drouillard testified that his pay was never reduced. After the meeting in mid-December, Drouillard continued his practice of completing his own daily time sheets, labeling certain time periods on numerous dates as "supervision".<sup>11</sup> Drouillard also agrees that the disputed bonus was paid in two installments in January and February 2008. In certain post mid-December time off requests completed by installer Andy Roesner, Drouillard is listed as Roesner's supervisor. When asked why Roesner might do so, Drouillard testified that "Andy was told that I'm supervisor. And no one ever came along afterward to tell him I wasn't..." Roesner testified that he listed Drouillard as his supervisor out of habit.<sup>12</sup>

## **ANALYSIS**

Section 2(3) of the Act excludes from the definition of "employee" an individual employed as a "supervisor." Section 2(11) of the Act defines supervisor as follows:

The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively 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 definition of Section 2(11) is phrased in the disjunctive such that the possession of any one of the enumerated supervisory criteria or the authority to effectively recommend it, so long as the performance of that function is not routine and requires independent judgment, provides a sufficient basis for finding supervisory authority. **Clark Machine Corp., 308 NLRB 555 (1992); Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986).** The Board analyzes the

---

<sup>11</sup> Regardless of the breakdown of each day between "supervision" or specific job assignments, Drouillard received the supervisory premium rate for the entire day.

<sup>12</sup> Roesner testified that he spoke with Drouillard after his meeting with Williams and Shamy. According to Roesner, Drouillard told him that he was done with being a supervisor.

enumerated statutory indicia on a case-by-case basis to determine the supervisory status of employees. In addition, the party asserting supervisory status has the burden of proving that the individual is a supervisor. **NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001)**. Moreover, mere assertions of authority are not sufficient to establish supervisory status. **Chevron U.S.A., 309 NLRB 59 (1992)**. Finally, conclusory evidence, “without specific explanation that the [disputed person or classification] in fact exercised independent judgment,” does not establish supervisory authority. **Sears, Roebuck & Co., 304 NLRB 193 (1991)**.

In the instant case, the parties affirmatively stipulated that prior to the mid-December meeting described above, Drouillard possessed various indicia of supervisory authority described in Section 2(11) of the Act. Consistent with the stipulation, the Union further stipulated that Drouillard’s status resulted from his supervisory authority to assign work, discipline employees and send employees home. Consistent with the parties’ stipulation, Drouillard testified without contradiction that during this period he verbally disciplined employees and provided input and recommendations resulting in the issuance of written discipline to employees, including a suspension. He also acknowledged that he laid off an employee during this period. In addition, Drouillard testified that during periods when there was sufficient work and more than one crew, he would assign specific employees to particular jobs on the basis of the employees’ respective abilities.<sup>13</sup> Moreover, he testified that he also handled installers’ job related questions either in person or via telephone conversations. While Drouillard disputes having the authority to promote, reward or grant pay increases, there is testimony by the Employer’s General Manager Williams, along with a internal document from Williams to the Employer’s President Mark Shamy establishing that in the period before mid-December, Drouillard was involved in the evaluation of installers.<sup>14</sup>

On the basis of the parties’ stipulation and related testimony and documentation, I agree that prior to mid-December 2007, Drouillard exercised supervisory authority as defined in Section 2(11) of the Act.

With respect to Drouillard’s supervisory status after the meeting with Williams and Shamy in mid-December, I conclude that the testimony and documentary evidence does not support the Union’s assertion that Drouillard’s supervisory status was changed. During the meeting, Drouillard discussed his concerns about the disputed bonus, received Shamy’s denial regarding the alleged criticism of Drouillard’s work rate, recovered the keys and left the meeting. Drouillard acknowledges that he never again discussed his supervisory status with Shamy despite the continuation of the premium rate of pay. There is no documentary evidence or testimony that Shamy or Williams acknowledged any resignation. There is no documentary evidence confirming a change in Drouillard’s status or assigned duties.

Further, I note the crew sheets submitted by the Employer for the months of December 2007, January 2008 and February 2008, along with various testimony, demonstrate that the

---

<sup>13</sup> I note that Employer’s Exhibit 11, an e-mail communication from Shamy to Chuck Westenbarger, the Employer’s Operations Manager at the time demonstrated Drouillard’s authority to make same day changes to scheduled job assignments. The testimony also revealed that Drouillard independently made such adjustments without management input and then completed the paperwork to reflect his changes.

<sup>14</sup> See EX-10

Employer's business slowed down and as a result only Drouillard and Andy Roesner were sporadically engaged in the installation process in this period. Nevertheless, during this period, Drouillard continued to record "supervision" in his daily timesheets and installer Roesner listed Drouillard as his supervisor in various requests for time off. Moreover, Drouillard continued to receive his premium rate of pay.<sup>15</sup>

Based on the above, I conclude that Drouillard's status as a statutory supervisor continued after the mid-December 2007 meeting. Accordingly, I conclude that Drouillard is ineligible to vote in the election directed herein.

The parties have also stipulated and the record supports that the following named individuals occupy the positions set forth opposite their respective names and are ineligible to vote.

Mark Shamy	President
Christopher Williams	General Manager
Nancy Lutman	Office Manager
Valerie Romero	Office/Dispatcher

### **DIRECTION OF ELECTION**

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 be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were 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. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Association of Plumbers and Steamfitters, Local 50**.

### **LIST OF VOTERS**

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.**, 394 U.S. 759

---

<sup>15</sup> Between May 2006 and mid-December 2007, when the parties agreed that Drouillard was a statutory supervisor, other slow periods occurred. During these preceding slow periods, Drouillard continued to be paid at the supervisory rate.

(1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **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 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by April 10, 2008. If a party wishes to file a request for review, guidance for E-filing can be found on the National Labor Relations Board website at <http://www.nlr.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.

Dated at Cleveland, Ohio this 27<sup>th</sup> day of March, 2008.

/s/ [Frederick J. Calatrello]

---

Frederick J. Calatrello  
Regional Director  
National Labor Relations Board  
Region 8