

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

OHIO STRUCTURES, INC.

Employer

and

CASE NO. 8-RC-16925

**IRON WORKERS SHOPMEN'S LOCAL UNION NO.468
A/W INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL, ORNAMENTAL & REINFORCING IRON
WORKERS (AFL-CIO)**

Petitioner

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS

This report contains my findings, conclusions and recommendations regarding five determinative challenged ballots.

The Petitioner challenged the ballots of Frederick Olinger, Frank Olinger and James Anthony. The Petitioner contends they are not employed by the Employer but rather by DOT Construction, Incorporated. The Employer contends that these three men are its employees and are members of the bargaining unit.

The Petitioner challenged the ballots of John Boyles and Gary Metts because the Petitioner contends they are supervisors within the meaning of the Act. The Employer denies Boyles and Metts are supervisors within the meaning of the Act.

For the reasons set forth below, I find that Frank Olinger, Frederick Olinger, James Anthony, John Boyles and Gary Metts are eligible voters. I recommend that the challenges to their ballots be overruled and that their ballots be opened and counted.

PROCEDURAL HISTORY

Pursuant to a Stipulated Election Agreement approved by the Regional Director on October 23, 2007, an election was conducted on November 16, 2007, among the employees in the following described unit:

All full-time and regular part-time production and maintenance employees including all welders, fitters, laborers, blaster/painter/metalizers, material handlers and lift truck drivers, maintenance and material preparation employees, but excluding all office clerical, confidential, professional and managerial

employees, guards, and supervisors as defined by the Act, and all other employees.

The tally of ballots issued after the election shows that of approximately 32 eligible voters, 32 cast ballots, of which 14 were cast for and 12 were cast against the Petitioner. No objections were filed. The five remaining challenged ballots were sufficient in number to affect the results of the election.¹

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, an administrative investigation of the challenged ballots was conducted. Based on the investigation, the Regional Director determined that the challenges raise substantial and material issues of fact and law that should be resolved at a hearing. An Order Directing Hearing on Challenged Ballots and Notice of Hearing issued on December 14, 2007.

Pursuant to the Order Directing Hearing on Challenged Ballots, a hearing was held before me on January 3, 2008 and January 4, 2008 in the Regional Office in Cleveland, Ohio. All Parties were afforded the opportunity to appear and participate at the hearing. All Parties and their counsel were present at the hearing and were given full opportunity to be heard, to examine and cross examine witnesses and to introduce evidence bearing on the issues. Both Parties filed timely briefs in this matter, which I have carefully considered.

CHALLENGED BALLOTS OF FREDERICK OLINGER, FRANK OLINGER AND JAMES ANTHONY

The Petitioner challenged the ballots of Frederick Olinger, Frank Olinger and James Anthony, arguing that they are not employed by Ohio Structures, Inc. but rather by DOT Construction, Inc.² The Employer contends that they are employed by Ohio Structures and are members of the unit.

The Relationship between DOT Construction and Ohio Structures.

Ohio Structures' President, John Donadee, testified that Ohio Structures and DOT Construction are both wholly-owned subsidiaries of their parent corporation, J.A. Donadee Corporation.³ Donadee is President of all three entities. Ohio Structures fabricates steel used by various construction companies on highway projects, while DOT Construction is a construction company engaging in highway and heavy industrial construction. While DOT Construction is a customer of Ohio Structures at times, it is not Ohio Structures' only customer.

¹ There were initially 6 challenged ballots. The challenged ballot of Heath Hunsicker was resolved pursuant to a stipulation between the parties and approved by the Regional Director on December 14, 2007. In the stipulation, the parties agreed that Heath Hunsicker was ineligible to vote in the Board election on November 16, 2007.

² For the duration of this document, Ohio Structures, Inc. will be referred to as Ohio Structures and DOT Construction, Inc. will be referred to as DOT Construction.

³ While Petitioner's witness Adams testified that DOT Construction was the parent of Ohio Structures, he based this on only what he had "been told." Overall, I found Donadee to be a credible witness and find his testimony regarding the structure of his businesses more probative as he was the only witness who established that he was in a position to know the corporate structure of the entities at issue.

The Employer presented evidence that DOT Construction and Ohio Structures have separate filings and policy numbers for purposes of workers' compensation claims. Donadee testified that the companies maintain separate corporate filings with the Ohio Secretary of State's office. The Petitioner offered evidence that the two companies file separate quarterly federal tax returns. The companies maintain separate equipment lists and their payroll documents reflect minimal interchange of employees.

The companies occupy separate suites in the same building in Canfield, Ohio. The letterheads of the companies confirm that their addresses list separate suites, phone numbers and fax numbers as contact information. Donadee testified that J.A. Donadee Corporation's employees also occupy this building.

Petitioner presented evidence that the companies share three of their four corporate officers. Donadee testified that Billy Dillulo, an employee of J.A. Donadee Corporation, does payroll for Ohio Structures and DOT Construction. Ohio Structures' employee, Julie Habovy, handles sick leave requests, workers compensation, safety training, and accounting for Ohio Structures, while a J.A. Donadee Corporation employee, Maureen Russo, handles those areas for DOT Construction.

Donadee testified that Ohio Structures advertises openings and takes applications. Plant Superintendent Bill Burnside is in charge of interviewing. Burnside testified that he does all hiring at Ohio Structures. Donadee testified that DOT Construction hires almost exclusively through hiring halls.

Physical Lay-out of Berlin Center, Ohio Location

The Employer's Berlin Center, Ohio location contains the Employer's Fabrication Facility and Blasting, Painting and Metalizing Facility, both of which have Ohio Structures signs in front of them. Also on the site is a separate building known as the Maintenance Facility. A small structure known as the Shipping and Receiving Office and Inspectors' Offices is connected to the front of the Maintenance Facility. Government inspectors who inspect Ohio Structures' product use the Inspectors' Offices. The Maintenance Facility has a DOT Construction sign in front of it and is located between the Fabrication Facility and the Blasting, Painting and Metalizing Facility. The Fabrication Facility and the Maintenance Facility have separate parking lots. The site contains two material storage yards used by Ohio Structures as well as two storage facilities.⁴

Donadee testified that the storage facilities are shared by the two companies, while Petitioner's witness, Jeffrey Adams, an employee who works in the Fabrication Facility, testified that Ohio Structures minimally uses only one of the storage facilities. I credit Donadee's testimony in this regard due to the specificity with which he identified items stored in each

⁴ The Berlin Center, Ohio property is personally owned by Donadee and his wife. Donadee testified that DOT Construction originally was the only company at the Berlin Center, Ohio site. The Blasting, Painting and Metalizing Facility was built around 1992 and Ohio Structures moved to site in approximately 1993. The Fabrication Facility was built in approximately 2001. In 2001, DOT Construction downsized. Donadee testified that the DOT Construction sign in front of the Maintenance Facility was never taken down

storage facility. I cannot credit Adams on this point because of his testimony that he spends most of his time in the Fabrication Facility and has never been in one of the storage facilities.

Frederick Olinger, Frank Olinger and James Anthony

Frederick Olinger⁵, Frank Olinger⁶ and James Anthony work out of the Maintenance Facility. Frederick Olinger has an office in the Shipping and Receiving Office. All three perform maintenance on DOT Construction's equipment and Ohio Structures' trucks. Frank Olinger and James Anthony haul Ohio Structures' material to and from job sites on various size trucks including tractor trailers.

Donadee testified that Frederick Olinger acts as an escort when trucks haul material to a job site. Donadee further testified that Frederick Olinger uses the computer in his office to obtain state permits for hauling oversized loads and to determine the appropriate configuration of material on trucks to achieve legal weight limits.

Petitioner's witness, Donald Little, testified that the Olingers and James Anthony wear DOT Construction uniforms.⁷ Both Adams and Little testified that Anthony originally worked in the Fabrication Facility and later moved to the Maintenance Facility.⁸ Little testified that Anthony previously wore an Ohio Structures uniform and switched to a DOT Construction uniform when he moved.⁹

Adams and Little testified that the fabrication employees at Ohio Structures are not required to wear uniforms. However, according to Little, employees can choose to buy uniforms. Adams testified that Ohio Structures' employees working in the Blasting, Painting and Metalizing Facility wear Ohio Structures uniforms. The record reflects that the employees purchase their uniforms from Cintas.

Adams and Little testified that they believe that the Olingers and Anthony work for DOT Construction because they report and work out of a building (the Maintenance Facility) with a DOT Construction sign in front of it.

Adams and Johnny McAlhaney, a fitter welder in the Fabrication facility, testified that they punch a time clock in the Fabrication Facility. McAlhaney testified that he has seen the employees from Blasting, Painting and Metalizing punch the time clock. The Olingers and Anthony do not punch a time clock. Donadee testified that their time is recorded on time cards.

⁵ Frederick Olinger is also known as Jake Olinger.

⁶ Frank Olinger is the father of Frederick Olinger.

⁷ Petitioner's witness, Jeffrey Adams, also testified that the Olingers wear DOT Construction uniforms.

⁸ Little testified that the move occurred last summer, presumably 2007, while Adams testified that the move occurred about a year ago.

⁹ Donadee testified that the Olingers were once DOT Construction employees and may have never had their uniforms changed to Ohio Structures uniforms. Donadee's explanation of the uniforms was speculation and, furthermore, does not address the issue of Anthony's uniform, which was acquired within the last year.

Adams and Little testified that they attend safety meetings approximately once a month. Adams testified that the employees from Blasting, Painting and Metalizing Facility attend the meetings. Adams and Little testified that the Olingers and Anthony do not attend these meetings. On cross-examination, both confirmed that the meetings deal with safety issues as they relate to the fabrication process.

Adams testified that he has seen Frank Olinger drive a truck that says "DOT Construction, Inc." on it and has seen Frederick Olinger drive a truck that says "Ohio Structures, Inc." on it. Little testified that a lot of the trucks the Olingers and Anthony drive say "Ohio Structures, Inc." on them. McAlhaney testified that there are separate trucks for Ohio Structures and DOT Construction.

I found all three of the Petitioner's witnesses to be credible, in that they openly and directly answered questions on direct and cross as well as admitted when they did not know certain information. However, all three testified that they spend most of their time in the Fabrication Facility and have little reason to go to the Maintenance Facility. Accordingly, their exposure to the Olingers and Anthony's day-to-day activities is limited. They confirmed that there was little interchange between the employees. Little testified that sometimes Frederick Olinger comes to the Fabrication Facility so that they can go over the parts that are to be loaded onto a truck.

The Employer provided 2007 payroll records for DOT Construction and Ohio Structures. The records indicate that Frederick Olinger, Frank Olinger and James Anthony were on Ohio Structures' payroll throughout the year. The records also show that in 2007, Frederick Olinger and James Anthony each appeared on DOT Construction's payroll for seventeen hours of work and Richard Laird, an Ohio Structures employee, appeared on DOT Construction's payroll for ten hours of work.

Donadee testified that when help is needed on a DOT Construction job, Ohio Structures' employees are given the opportunity to work on the job. Donadee testified that this may occur a couple times a year and that Ohio Structures' employees appear on DOT Construction's payroll for that work.

Donadee testified that a charge-back system is used between DOT Construction and Ohio Structures for work either company does for the other. When an Ohio Structures employee works on a piece of DOT Construction's equipment, the employee keeps track of that time on a time card and Ohio Structures bills DOT Construction for that time. The Employer provided documentation including time cards reflecting the time employees had spent working on DOT Construction's equipment and deliveries, a bill sent to DOT Construction for that time and a copy of the check with which DOT Construction paid Ohio Structures for that time. The documents reflect that in a two week period in May 2007, Frederick Olinger, Jim Anthony and, Ohio Structures' employee Gary Metts performed work billed to DOT Construction. Petitioner's witness, Little, testified that he once performed fabrication work for DOT Construction and was instructed to document that his time was spent on a DOT Construction project.

Donadee testified that the Olingers and Anthony are covered by Ohio Structures' Policy Manual, which includes vacation, holiday and overtime policies. Additionally, Donadee testified that they fall under Ohio Structures' progressive discipline policy. Donadee testified that DOT Construction does not have a disciplinary policy outside of a drug-use policy.

Donadee testified that DOT Construction employees hired through hiring halls have health insurance coverage through those halls. However, DOT Construction's clerical, office and supervision employees are covered by the same group health insurance plan as Ohio Structures' employees. The Olingers and Anthony are covered by the plan. Donadee testified that the companies are billed separately for the coverage.

Jim Ingledue, an employee of J. A. Donadee Corporation, has an office in the Shipping and Receiving department. Donadee testified that Ingledue supervises the storage of construction materials and tools and the maintenance of all equipment.

Plant Superintendent Bill Burnside, whom I credit, testified that, due to his location at the Maintenance Facility, Ingledue supervises the Olingers and Anthony. However, Burnside noted that if an incident occurred in "my shop," then he would discipline the Olingers and Anthony. He further testified that any discipline by either Ingledue or himself would be coordinated with Donadee. Burnside considers Ingledue to be his equal at the facility. Donadee testified that Ingledue does not supervise any Ohio Structures employees other than the Olingers and Anthony and noted that Ingledue has the same authority over any DOT Construction employee who performs work in the Maintenance Facility.

The Petitioner's witnesses, who all work in the Fabrication Facility, identified Burnside as their supervisor. Burnside testified that he supervises the Blasting, Painting and Metalizing Facility as well.

Donadee identified himself and Dave Spurio, manager and Vice-President of DOT Construction,¹⁰ as the individuals responsible for disciplining DOT Construction's employees.

Analysis

The Petitioner alleges that Frederick Olinger, Frank Olinger and James Anthony work for DOT Construction. A determination of where they work begins with an analysis of whether the companies act as a single or joint employer. Once that analysis is completed, the questions regarding which company employs them and whether they are members of the bargaining unit can be addressed.

Single Employer/ Joint Employer Status

There are four criteria for determining whether two entities are in reality a single employer. These include "common ownership, common management, functional interrelation of operations and centralized control of labor relations." Park Maintenance, Palisades Maintenance & Park View Towers, Alter Egos, 348 NLRB No. 98, slip. op. at 20 (2006). All four criteria are

¹⁰ Spurio is also Vice President of Ohio Structures.

not necessary to find two entities are a single employer. Centralized control of labor relations is considered the most important factor. Overall, the analysis must include an evaluation of whether an arms-length business relationship exists between the two businesses. Id. at 20-21.

I note that John Donadee is the President of both companies and they share common officers. However, with the exception of Donadee, the testimony establishes that the companies have separate supervision. Other than payroll, the human resources activities of the companies are kept separate.

While both companies share space at the Maintenance Facility in Berlin Center, Ohio, their operations are not functionally interrelated. DOT Construction engages in construction with its work occurring at the construction sites. While Ohio Structures does at times fabricate steel for DOT Construction, it also fabricates steel for a number of other customers. The companies maintain separate equipment lists and bill each other for work one company completes for the other.

Bill Burnside is in charge of hiring employees at Ohio Structures. Outside of office and supervisory staff, DOT Construction hires its employees through hiring halls. The employees hired through hiring halls have different benefits and fall under a different disciplinary system than Ohio Structures' employees. Based on these facts and for the purposes of this decision, I find that DOT Construction and Ohio Structures do not constitute a single employer.

A finding that two entities are not a single employer does not preclude a finding that they are a joint employer for purposes of their labor relations.

In order to establish that two otherwise separate entities operate jointly for the purposes of labor relations, there must be a showing that the two employers "share or codetermine those matters governing the essential terms and conditions of employment." The employer in question must meaningfully affect "matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." The determination of whether two entities are joint employers "is essentially a factual issue." Riverside Nursing Home, 317 NLRB 881, 882 (1995) (citations omitted).

Again, while I note that John Donadee is President of both companies and has supervisory authority over both companies' employees, I find that the overall evidence demonstrates that the two companies do not act as joint employers. In this regard, I again note that the companies use different methods to hire their employees and the employees fall under separate disciplinary systems. Many of the employees have different benefits. On a day-to-day basis, the employees' work is overseen by different individuals. Thus, the record establishes that the companies do not act as joint employers.

Which company employs Frederick Olinger, Frank Olinger, and James Anthony?

The record demonstrates that the Olingers and Anthony wear DOT Construction uniforms. In addition, they work in a building with a DOT Construction sign in front of it. As

Petitioner's witnesses noted, this leads to an inference that the employees work for DOT Construction.

However, the Employer provided sufficient documentation and explanation of its business practices to overcome this inference. The record establishes that the Maintenance Facility, Shipping and Receiving Offices and Inspectors' Offices are used by both DOT Construction and Ohio Structures. Payroll records establish that the Olingers and Anthony were on Ohio Structures' payroll throughout 2007.

The Employer offered documentation establishing that when Ohio Structures' employees complete work for DOT Construction it is charged by Ohio Structures to DOT Construction. While James Anthony and Frederick Olinger appear on DOT Construction's payroll for seventeen hours of work each in 2007, Ohio Structures' employee, Richard Laird, also appears on the payroll for ten hours of work. Not only does this represent an unsubstantial amount of time, Laird's appearance gives credence to Donadee's explanation that Ohio Structures' employees are occasionally given the opportunity to work for DOT Construction when a project calls for more men.

Overall, the record establishes and I find that Frederick Olinger, Frank Olinger and James Anthony worked for Ohio Structures throughout 2007.

Are Frank Olinger, Frederick Olinger and James Anthony in the Bargaining Unit?

Eligibility to vote in a Board election requires that an employee be employed on the eligibility date and on the date of the election. Plymouth Towing Co., 178 NLRB 651, 651 (1969); Sweetener Supply Corp., 349 NLRB No.104, slip op. at 1 (2007). Payroll records establish that Frederick Olinger, Frank Olinger and James Anthony were employed by Ohio Structures throughout 2007 and, thus, on the applicable dates of October 13, 2007¹¹ and November 16, 2007. However, eligibility to vote requires that the employees were performing bargaining-unit work on those dates. Sweetener Supply Corp. 349 NLRB No.104, slip op. at 1 (2007).

In order to determine whether Frederick Olinger, Frank Olinger and James Anthony should be included in the stipulated unit, the Board would apply the test found in Desert Palace, Inc. d/b/a Caesars Tahoe, 337 NLRB 1096 (2002):

[T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community of interest test.

Id. at 1097.

¹¹ I take official notice that the payroll period for eligibility was that ending Saturday, October 13, 2007.

The Board compares the express language of the stipulation to the disputed classifications to determine whether the stipulated unit is ambiguous. USF Reddaway, Inc., 349 NLRB No. 32, slip op. at 2 (2007). “The Board will find a clear intent to include those classifications that match the express language, and will find ‘a clear intent to exclude those classifications not matching the stipulated bargaining unit description.’” Id. at 2 (quoting Kim/Lou, Inc. d/b/a Bell Convalescent Hospital, 337 NLRB 191, 191 (2001)). When a classification is not included and the stipulated unit includes an exclusion of all other employees, the Board will read the stipulation to exclude that classification. 337 NLRB at 191.

Adams identified himself as a welder. Adams further testified that employee Doug Heasley is a material handler. McAlhaney described himself as a fitter welder. Donadee testified that employee Craig Peaco does material preparation.

The record establishes that there is a Blasting, Painting and Metalizing Facility with four employees working in it. Donadee testified that one of these employees, John Boyles¹² is a lead painter and metalizer. Adams testified that of the other three employees, one is a blaster and the other two are metalizers and painters.

The stipulated unit includes all full-time and regular part-time production and maintenance employees and then goes on to list specific job titles which the record establishes as actual job titles used by the Employer.

It is unclear what specific job titles encompass the Olingers and Anthony’s duties. Donadee testified that Frederick Olinger does not have a job title while Frank Olinger and James Anthony are truck driver mechanics and maintenance mechanics,¹³ neither of which appears in the stipulated unit description. The record indicates that all three perform maintenance on DOT Construction’s equipment as well as Ohio Structures’ fleet of trucks. Additionally, they work out of the Maintenance Facility. However, the record also establishes that Frank Olinger and James Anthony drive material to and from job sites and Frederick Anthony is responsible for obtaining permits to transfer these materials. This work is not encompassed in the unit description.

Further, the Olingers and Anthony are not the only employees identified as doing maintenance work. Donadee testified that Gary Metts¹⁴ is the head mechanic and is in charge of fixing all the equipment for both DOT Construction and Ohio Structures. In addition, on the relevant dates, Ryan Kirkpatrick worked with Metts as an apprentice. The Petitioner’s witnesses testified, and Donadee confirmed, that Metts has an office in a trailer in front of the Blasting, Painting and Metalizing facility. Donadee testified that Metts keeps maintenance records there as well as orders parts for equipment. The witnesses did not identify Metts as working out of the Maintenance Facility. However, Little did identify his trailer as the Maintenance Trailer. All the Petitioner’s witnesses identified Metts and Kirkpatrick as the individuals who repair items in the

¹² Boyles status as an eligible voter is discussed later.

¹³ The Employer’s introduced an employee list for Ohio Structures that identifies the Olingers and Anthony’s titles as Truck Driver/Maintenance. However, Donadee testified that the list was created by his accountant about two days before the hearing. As this was not a normally kept record, I find that the list does not credibly represent the employees’ job titles as of October 13, 2007 and November 16, 2007.

¹⁴ Metz’s eligibility status will be discussed at a later point.

Fabrication Facility, whereas there is no evidence that the Olingers or Anthony regularly work in the Fabrication Facility.¹⁵ Little and McAlhaney identified Metts and Kirkpatrick as doing maintenance work.

Thus, the unit description lists job titles that are held by employees except in the case of employees performing various types of maintenance work. As opposed to listing titles such as head mechanic or maintenance mechanic, the unit description lists maintenance employees as a title. I find the description ambiguous in that it does not clearly identify whether it refers to the employees who perform maintenance on the machines in the Fabrication Facility and work out of the trailer by the Paint, Blasting and Metalizing Facility, or those employees working on construction equipment and trucks in the Maintenance Facility, or both.

If a unit description is ambiguous, the Board looks to extrinsic evidence to determine the parties' intent. However, the record does not offer any extrinsic evidence on the parties' intent when entering into the stipulation. Thus, a community of interest analysis is necessary.

In analyzing whether employees share a community of interest with the bargaining unit, the Board considers "common functions and duties, shared skills, functional integration, temporary interchange, frequency of contact with other employees, commonality of wages, hours and other working conditions, permanent transfers, and shared supervision." Aztar Indiana Gaming Co., LLC d/b/a Casino Aztar, 349 NLRB No. 59, slip op. at 3 (2007).

The record establishes that there is little interchange between the Olingers and Anthony and the rest of the employees at Ohio Structures. They do not attend the safety meetings with the other employees and the Petitioner's witnesses testified that they do not regularly go to the Maintenance Facility for work-related reasons. Outside of Frederick Olinger occasionally discussing a shipment with Little, the record reflects that the Olingers and Anthony do not regularly go to the Fabrication Facility.

While the Olingers and Anthony do not share job skills with the employees in the Fabrication Facility and the Blasting, Painting and Metalizing Facility, they do share job skills with the other two maintenance employees. They are all responsible for maintaining the equipment, with the difference being that the Olingers and Anthony repair mobile equipment and the other employees repair the machinery used in the fabrication process.

Since the Olingers and Anthony are covered by the Ohio Structures Policy Manual, they receive the same vacation, benefits and holidays as other Ohio Structures employees. While their hours are kept differently, they are paid on the same schedule as the other employees.

The Olingers and Anthony fall under the same progressive disciplinary system as the other employees. While they have a different immediate supervisor than the remainder of the

¹⁵ Donadee testified that Frank Olinger helps Metts in the shop, and there was some evidence from Petitioner's witness Little that this had occurred on an irregular basis before. However, both McAlhaney and Little testified that Frank Olinger had started working with Metts on a more regular basis only within the weeks immediately preceding the hearing. Given their experience in the Fabrication Facility and their forthcoming demeanor, I credit this testimony and find that there is insufficient evidence to establish Frank Olinger regularly worked in the shop during the time period before the election.

unit, all employees are ultimately accountable to John Donadee. Further, Burnside credibly testified that a disciplinary decision by either him or Ingledue would be made with Donadee.

There is significant functional integration between the Olingers and Anthony's work and the rest of the work completed at the facility. Frederick Olinger arranges for the transportation of the materials fabricated by the rest of the employees to construction sites. Frank Olinger and James Anthony transport the materials to the sites. All three perform maintenance on the fleet of trucks used to haul the material. In essence, they are the last link in the Employer's production process.

Overall, the shared maintenance skills, working conditions and the integration of their work with the rest of the unit's work leads me to conclude that Frederick Olinger, Frank Olinger and James Anthony share a community of interest with the rest of the bargaining unit.

Conclusion

Based on the above, I find that Frederick Olinger, Frank Olinger and James Anthony were employees of Ohio Structures on the relevant dates. Further, I find that all three employees share a community of interest with the bargaining unit. Thus, I find that the challenges to their ballots are without merit and recommend that they be overruled.

CHALLENGED BALLOTS OF JOHN BOYLES AND GARY METTS

The Petitioner challenged the ballots of John Boyles and Gary Metts based on its contention that they are supervisors within the meaning of Section 2(11) of the Act. The Employer denies Boyles' supervisory status. The Party asserting supervisory status has the burden of proving that status by a preponderance of the evidence. Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003). Meeting this burden requires offering more than conclusory statements without supporting evidence. Chevron U.S.A., Inc., 309 NLRB 59, 62 (1992). "Any lack of evidence in the record is construed against the party asserting supervisory status." Williamette Industries, Inc., 336 NLRB 743, 743 (2001).

In order to meet the definition of supervisor,¹⁶ an employee must hold authority to engage in one of the twelve supervisory functions, use independent judgment in doing so, and hold this authority in the employer's interest. Oakwood Healthcare, Inc., 348 NLRB No. 37, slip op. at 3 (2006). All three of Petitioner's witnesses testified that they have no knowledge of Boyles or Metts having authority to hire, transfer, suspend, lay off, recall, promote, or discipline employees or to recommend such action. The Petitioner offered no evidence that Boyles or Metts has authority to reward or discharge employees or to adjust their grievances. Thus, the supervisory

¹⁶ Section 2(11) of the National Labor Relations Act defines "supervisor" as

Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly 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.

NLRA, 29 U.S.C. §151 -169, §152(11).

functions at issue are whether Boyles or Metts have the ability to assign or responsibly direct the work of other employees.¹⁷

John Boyles

Donadee identified Boyles as the lead painter and metalizer in the Blasting Painting and Metalizing Facility. David Culver, Larry Culver and Derric Talley also work in this facility. Larry Culver paints. David Culver and Derric Talley both blast and metalize.

Adams testified that he had heard Boyles tell employees to blast, metalize or grind down an item. However, when asked if he had observed Boyles directing employees or assigning work, Adams testified that he is “not really up there enough to see a whole lot.”

While McAlhaney testified that he had been in the Painting, Blasting and Metalizing Facility for a week immediately before Christmas of 2007, he testified that he was not at that facility very much. McAlhaney testified that had seen Boyles tell David Culver, Larry Culver and Derric Tally “what to do,” without further explanation. McAlhaney testified that Boyles has responsibility for millage, which refers to the thickness of the paint or metalizer applied to a piece of steel. However, he provided no basis for this assertion. Based on Adams and McAlhaney’s limited exposure to Boyles, their testimony regarding his daily duties is of little probative value. Further, McAlhaney’s testimony included conclusionary statements without the necessary evidence to establish the type of activity Boyles engages in.

Petitioner’s witness, Little, testified that, although he spends most of his time in the Fabrication Facility, there was a seven week period in spring 2006 during which he was on light duty. During that time, he worked in the Maintenance Trailer where Boyles has an office. The Maintenance Trailer is located immediately in front of the Blasting, Painting and Metalizing Facility. During that period, Little was able to observe Boyles working.

Little testified that he had seen Boyles meet with Dave Culver, Larry Culver and Derric Talley and tell them what work to do that day. Little testified that Boyles would tell them which application to apply to a piece of steel, meaning whether it should be painted or metalized. Little testified that Boyles’ instructions were based on state codes, which appear on the print for the job. Little testified that Boyles checks the millage of a piece with a handheld meter and Boyles performs blasting, painting and metalizing work alongside the other employees.

Little testified that Boyles is held accountable for the employees work in the Blasting, Facility and Metalizing Facility. However, his basis for this assertion was hearing Boyles once say that his “butt was on the line.”¹⁸

¹⁷ The parties agree that Boyles and Metts receive a salary and have offices in the Maintenance Trailer. Further, Petitioner’s witnesses testified that they have keys to certain parts of the facility and have company cell phones. However, without evidence that Boyles and Metts have authority to engage in one of the twelve supervisory functions, such secondary indicia are not enough to establish supervisory status. Juniper Industries, 311 NLRB 109, 110 (1993).

¹⁸ I note that this is hearsay evidence and do not credit it.

Little testified that, while acting as an observer for the Petitioner during the Board conducted election, he heard Burnside identify himself as a supervisor to the Board Agent conducting the election.¹⁹

Burnside, whom I credit, testified that he determined which employee blasts, paints or metalizes and Boyles cannot change these assignments. Burnside further testified that he tells Boyles which jobs are to be done and in what order. Boyles then instructs the employees what order to perform their work in. Burnside testified that Boyles is not held accountable for other employee's work. Donadee testified that he has never disciplined Boyles for the work of another employee.

Burnside testified that Larry and David Culver also use the millage meter because they have to measure millage as they apply paint or metalizer to a piece of steel. Burnside testified that Terry Jacobs, who is in charge of quality control, does the final millage test and is ultimately responsible for it. Further, if a mistake occurs during the processing, he or Terry Jacobs can decide the piece needs redone.

Analysis

The authority to assign refers to the ability to designate an employee to a place, a time, or give significant overall duties. Oakwood Healthcare, Inc., 348 NLRB No. 37, slip op. at 4 (2006). The Petitioner offered no evidence that Boyles has authority to assign employees to a time or to a place. Burnside credibly testified that the Employer has one shift and that he is the individual responsible for scheduling the hours. Additionally, he is responsible for determining not only whether an employee works in the Blasting, Painting and Metalizing Facility, but also which of those tasks the employee performs.

The Board has distinguished the ability to give an employee significant overall tasks from the ability to instruct an employee to perform discrete tasks, with the later being direction. Id. at 5. Burnside credibly testified that the overall assignment is made by him. I find that Boyles does not have the supervisory authority to assign.

Boyles' instruction to employees regarding which application to apply to a piece of steel is more akin to direction, in that it provides instruction on a discrete task which is part of the employees' overall assignments as blasters, painters and metalizers. In order to be a supervisory function, direction requires the use of independent judgment and must be responsible. Id. at 7. To qualify as responsible direction, the alleged supervisor must have authority to take corrective action when the instructed employees' work is not acceptable and he must potentially suffer adverse consequences for not doing so. Id. at 8.

In order for judgment to be independent, it cannot be controlled by detailed instruction. Id. at 9. Little testified that Boyles bases his instruction on state codes that appear on prints accompanying a job. This does not suggest the use of independent judgment. However, even if Boyles was found to use independent judgment in directing employees, the Petitioner offered no

¹⁹ I note that this is hearsay evidence and I do not credit it. However, I also note that, even if credited, the statement does not establish whether Boyles' duties meet the definition of supervisor under the Act.

credible evidence that he is held accountable for such instruction. Further, the Employer provided evidence that Boyles is not held accountable for his direction and that it Burnside and Jacobs who take corrective action if a piece is done incorrectly.

Conclusion

I find that the Petitioner did not meet its burden of establishing Boyles's supervisory status and, thus, recommend that that the challenge to Boyles' ballot be overruled.

Gary Metts

Donadee identified Gary Metts as the head mechanic. The record establishes that he works out of an office in the Maintenance Trailer and has an apprentice named Ryan Kirkpatrick who works with him. Metts' job duties include ordering parts, fixing all equipment and keeping the maintenance records. Metts trains Kirkpatrick.

The Petitioner's witnesses described Metts as running the maintenance department and as being the maintenance supervisor. They all testified that Metts and Kirkpatrick both work on equipment.

Little, who worked with Metts when he was on light duty, testified he saw Metts order parts, schedule maintenance and talk to Donadee about what needs done at the plant. Donadee confirmed that he speaks with Metts about what is broken and testified that he must approve any parts purchase that is more than \$50.00.

Adams testified that Kirkpatrick reports to Metts, but provided no basis for this assertion. Little testified that Metts directs maintenance assistants on a daily basis.²⁰ According to Little, Metts tells his assistants what he wants done and how it is to be done. As examples, Little testified that Metts tells Kirkpatrick which points on equipment to lubricate and gives Kirkpatrick projects, such as to work on a hand grinder. Little testified that when equipment breaks, the operator attaches a red tag to the piece with a description of what went wrong with it. Little asserted that Metts bases his approach on how to fix equipment on these red tags. McAlhane testified that Metts carries a list with him that identifies what equipment needs repair, but he admitted he did not know where the list came from.

The only evidence Petitioner offered suggesting Metts is held accountable for Kirkpatrick's work was Little's testimony that he has heard Metts say he had been "reamed" by Donadee because something was not fixed and that he was "catching hell" because Kirkpatrick did not complete a task.²¹

Analysis and Conclusions

²⁰ The record reflects Kirkpatrick and, recently Frank Olinger, as the only assistants working with Metts.

²¹ I note that this is hearsay and I do not credit it. Further, such statements, even if credited, do not establish that Metts suffers actual consequences when Kirkpatrick fails to perform his duties.

I find that the Petitioner did not offer sufficient evidence to establish that Metts is a supervisor within the meaning of the Act. The evidence does not suggest Metts has authority to determine Kirkpatrick's hours or to change his overall duties. There is evidence to suggest that Metts tells Kirkpatrick which piece of equipment to work on, which would require Metts to tell Kirkpatrick which part of the facility to work in. However, there is insufficient evidence to establish that Metts uses independent judgment in making this assignment. Rather, it appears he sends Kirkpatrick to wherever a piece of equipment is broken. Thus, I find that the evidence does not establish that Metts has authority to assign, as defined in the Act.

Little's testimony regarding Metts' instructions to Kirkpatrick demonstrates that Metts directs Kirkpatrick to complete discrete tasks that are part of Kirkpatrick's overall duties. I find insufficient evidence to establish that Metts uses independent judgment when directing Kirkpatrick. However, even assuming that Metts does use independent judgment, the Petitioner still offered no credible evidence that Metts is held accountable for his direction of Kirkpatrick.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

I find that the challenges to the ballots of Frank Olinger, Frederick Olinger, James Anthony, John Boyles and Gary Metts are without merit for the reasons set forth above. I therefore recommend that the challenges to their ballots be overruled and that they be opened and counted.

RIGHT TO REQUEST REVIEW

Pursuant to 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. If a party wishes to file a request for review electronically, guidance for E-filing can be found on the National Labor Relations Board web site at 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. This request must be received by the Board in Washington by **February 12, 2008**.

Dated at Cleveland, Ohio this 29th day of January, 2008.

/s/ Kelly Freeman

Kelly Freeman
Hearing Officer
National Labor Relations Board
Region 8