

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

<b>SANSON COMPANY<sup>1</sup></b>	
<b>Employer</b>	
<b>and</b>	
<b>JAYMIE JON ODORCICH</b>	<b>Case No. 8-RD-2121</b>
<b>Petitioner</b>	
<b>and</b>	
<b>COMMISSION HOUSE DRIVERS, HELPERS AND</b>	
<b>EMPLOYEES UNION, LOCAL 400, AFFILIATED WITH</b>	
<b>INTERNATIONAL BROTHERHOOD OF TEAMSTERS<sup>2</sup></b>	
<b>Union</b>	

**DECISION AND DIRECTION OF ELECTION**

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

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

<sup>2</sup> The 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. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. The Employer and the Union filed post-hearing briefs which have been duly considered. References to exhibits of the Employer and the Union shall be noted as EX-\_\_\_ and UX-\_\_\_ respectively. In addition, references to the parties' joint exhibit, an agreement between the Employer and the Union effective August 24, 2005 to August 23, 2010 shall be noted as JX-1. The parties stipulated that it was actually executed after the effective date, on August 24, 2006. The parties also stipulated to an appropriate unit which differs from the description contained in the current agreement, JX-1, Article 1-4.

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 full-time and regular part-time salesmen including department heads, drivers, warehousemen, order pullers and dock loaders employed by the Employer at its 3716 Croton Ave, Cleveland, Ohio, facility but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

## **INTRODUCTION**

The Employer, an Ohio corporation with its principal offices at 3716 Croton Avenue in Cleveland, Ohio is a wholesale produce distributor. There are approximately 75 employees in the unit. The unit includes warehouse employees, drivers and sales personnel. Of the sales personnel, seven employees hold the title of department head. Historically, the department heads have been in the bargaining unit and these employees are listed in the Union's November 2008 check-off list as being Union members.

## **ISSUE**

The parties disagree over the supervisory status of the Employer's seven department heads. Notwithstanding the historic inclusion of department heads in the unit, the Union contends that they are statutory supervisors pursuant to Section 2(11) of the Act and ineligible to vote in the election.<sup>4</sup> The Employer contends that the department heads are essentially "team leaders", not statutory supervisors, and should be eligible to vote.<sup>5</sup> The Petitioner did not take a position regarding the supervisory status of the seven department heads.

## **DECISION SUMMARY**

I conclude that the seven department heads do not possess the indicia of supervisory authority and accordingly, they are eligible to vote in the election directed herein.

## **FACTS**

Three witnesses testified during the hearing; Employer President Salvatore Zingale, Department Head Frank Miranda and the Union's President, John A. Lawson. Zingale testified that he was responsible for all of the Employer's operations and activities including sales, corporate activities and maintenance.

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<sup>4</sup> In a footnote within its brief, the Union alternately argues that in the event that I determine that not all department heads possess supervisory authority, at minimum department heads Matt Fritz and Frank Miranda should be found to be supervisors.

<sup>5</sup> The Employer argues that if I find the department heads to be supervisors, then the salesmen must also be excluded from the unit because the scope of their authority is identical to that of the department heads. Since I have concluded that the department heads are not statutory supervisors, a discussion of this alternative argument is unnecessary.

There are seven other stipulated statutory supervisors including: Jeffrey Sanson, CEO/Owner; Mike Gentile, Human Resource Director; Jim Murawski, Operations Manager; Pauline Wolanski, Office Manager; and, Maintenance Managers Steve Kolek, George Thorne and Joel Lloyd.

Zingale testified that the Employer's facility is a 155,000 square foot warehouse with offices on the second floor. The shipping, receiving and storage areas encompass approximately 100,000 square feet and the remainder is referred to as the store area where merchandise is displayed and inventoried. Customers purchase and pick up produce in the store area. Located upstairs are the corporate and accounting offices, as well as the sales office. All salesmen including department heads have offices in the upstairs area. In addition, certain warehousemen work at tables in the sales office.<sup>6</sup>

Zingale described the facility as a continuous operation. He testified that warehousemen arrive at various times, the earliest generally at 10:00 p.m. Others report between midnight and 2:00 p.m. with most warehousemen arriving between 3:00 and 4:00 a.m. These employees' shifts vary from eight to twelve hours in length depending on business. Operations Manager Jim Murowski arrives at 3:00 a.m., six days per week.

Within the store area, there are seven sales departments, divided by the type and geographic location of the produce. One salesman within each of the seven departments is designated as the department head. Department heads report to Zingale or CEO Jeffrey Sanson. Department A, including melons and strawberries, has three salesmen.<sup>7</sup> Department C, including wet vegetables, has three salesmen.<sup>8</sup> Department D, with two salesmen, includes potatoes, onions and dryer vegetables. Department E, with two salesmen, includes tomatoes and peppers. Department F, with three salesmen, covers fruits. Three salesmen in Department G handle specialties. Finally, two salesmen in Department H deal with organic produce.<sup>9</sup> In addition to the seven departments organized by type of produce and proximity, there is a general sales department with four salesmen. The latter, including the Petitioner, make sales calls from the office and do not interact with bargaining unit order pullers.<sup>10</sup>

Department D head, Frank Miranda, described his duties and those performed by the other salesman in his department.<sup>11</sup> He also generally described the duties of the warehousemen,

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<sup>6</sup> Zingale testified that a few of the departments have their warehousemen come up to the office on a daily basis to get information, take inventories and communicate product availability. Zingale specifically referenced warehousemen Mike Kafesak and Chuck Malec as making these visits to the office.

<sup>7</sup> Each department purchases more items than their names indicate. The designations are merely short-hand descriptions. The number of salesmen in each department includes the department head.

<sup>8</sup> Former Department B, including Hispanic products was eliminated and merged into Department G.

<sup>9</sup> The seven department heads are: Bob Czaplinski, Department A; Irwin Peters, Department C; Frank Miranda, Department D; Pat Piscura; Department E; Dave Morell, Department F; Jeff Wynbrandt, Department G; and Matt Fritz, Department H.

<sup>10</sup> The four general salesmen include Odorcich, Allan Wood, Frank Teriaca and John Campanello.

<sup>11</sup> Miranda and Peter Moutoux are the two salesmen in Department D. Moutoux did not testify but evidence showed that he signed a disciplinary document dated April 3, 2006, described more fully below. The record demonstrated that Moutoux is a current bargaining member and has been paying dues by check-off to the Union.

sometimes referred to as order pullers or selectors.<sup>12</sup> There are a total of approximately three to four warehousemen in Department D.

Miranda testified that his duties include purchasing produce from growers and/or shippers and selling it to customers on the floor or by telephone. When asked how his duties differed from those of the other salesmen in Department D, Miranda testified that in his department, he does most of the buying. He further testified that he arrives at work at 3:30 a.m. and concludes business at 11:00 a.m.<sup>13</sup> Miranda stated that when he is absent, salesman Peter Moutoux and warehouseman Ron Clifford fill in for him. He noted that he spends his entire day on the floor, except when he goes upstairs for one weekly sales meeting each Wednesday and on Thursdays when he fills out price sheets. In response to questions by the Hearing Officer, Miranda explained that he and Moutoux prepare price lists for their respective customers and exercise discretion regarding the mark-up. With respect to the Wednesday sales meetings, Zingale acknowledged that in addition to the department heads, four or five salesmen regularly attend.

Miranda testified that a ticket is generated after each sale. He indicated that sometimes he hands the ticket to a warehouseman, while at other times members of the department work as a team to get the order to the trucks. Employer President Zingale testified that order pullers also grab tickets from the desk or board. According to Zingale, order pullers, utilizing a motorized pallet jack, then assemble a customer's order and bring it to the customer's truck. When there are no orders to be pulled, warehousemen perform housekeeping tasks, straighten coolers, restack pallets and perform maintenance.

Zingale testified that generally the department head is the salesman with the most experience in the department. Zingale also acknowledged that the department heads usually handle larger purchases. Department heads do not need to obtain Zingale's authorization for purchases. According to Zingale, purchases are handled by telephone with salesmen talking directly to shippers and/or growers. When merchandise arrives at the facility, a salesman generates the price sheets. Salesmen, but not department heads, sometimes fill in at other departments depending on the circumstances.

Zingale testified that vacations are approved by him and not by individual department heads. He explained that members of each department make vacation requests which are then forwarded to him for approval. He testified that scheduling is done by Operations Manager Jim Murawski. Zingale acknowledged that a warehouseman may request permission from a department head to leave early if the latter is on the floor, but otherwise the request is directed to

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<sup>12</sup> The parties stipulated that the job duties and responsibilities held by the remaining six department heads, as sales personnel are the same as those pertaining to Miranda. The parties also stipulated that the six department heads other than Miranda spend more time (approximately five or six hours) than Miranda in the upstairs sales office. In addition, the parties stipulated that Miranda's testimony regarding the job duties of other personnel in his department is accurate and common to the job duties of employees in other departments. However, the parties also stipulated that no evidence exists that other department heads were involved in any written disciplinary situation other than described by Miranda. Moreover, the parties stipulated that the only department heads involved in the grievance process were Matt Fritz (Department H) and Miranda.

<sup>13</sup> Miranda testified that other salesmen have the same authority to buy and sell.

a salesman. He added that non-sales employees are not required to get the approval of a department head before they leave.

According to Zingale, department heads are not involved in the hiring process. In addition, they have no authority to transfer employees. There is no evidence in the record that department heads have the authority to suspend employees. Zingale testified that he and CEO Sanson exercise this authority. Zingale further testified that while the Employer has never experienced layoffs, he or CEO Sanson would make any layoff or recall decisions, if necessary. Both Zingale and Miranda testified that department heads do not recommend discharge or make the decision to discharge.

According to Zingale, the current collective bargaining agreement allows for discretionary bonuses. All bonuses for salesmen, including department heads, are determined by their annual sales. Zingale determines the amount of these bonuses and does not consult with department heads in determining the amount of a salesman's bonus. According to Zingale, in some instances, department heads may receive smaller bonuses than salesmen who are not heads. Zingale indicated that a department head's bonus is reflective of his own sales, not the performance of the entire department.<sup>14</sup>

While Miranda testified that Sanson and Zingale asked him about the performance of one of the department's warehousemen, he acknowledged that there has never been a promotion in the department since he has been a department head.

## **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.

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. **Ten Broeck Commons, 320 NLRB 806, 809 (1996)**; **Clark Machine Corp., 308 NLRB 555 (1992)**; **Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986)**. The Board analyzes the enumerated statutory indicia on a case-by-case basis to determine the supervisory status of employees. In addition, the party asserting supervisory

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<sup>14</sup> While Article 12.2 of the current agreement lists top wage rates for salesmen, various drivers, warehousemen and helpers, there is no specific reference to department heads.

status has the burden of proving that the individual is a supervisor. **NLRB v. Kentucky River Community Care, Inc.**, 532 U.S. 706 (2001). Mere assertions of authority are not sufficient to establish supervisory status. **Chevron U.S.A.**, 309 NLRB 59 (1992). Further, the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. **Chicago Metallic Corp.**, 273 NLRB 1677, 1689 (1985), **aff'd in relevant part 794 F.2d 527 (9<sup>th</sup> Cir. 1986)**. 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).

The Board has explained that “[i]n enacting Section 2(11) Congress emphasized its intention that only truly supervisory personnel...should be considered supervisors and not ‘straw bosses, lead men, set-up men, and other minor supervisory employees.’” **Chicago Metallic Corp.**, **supra**, at 1688-89. Indeed, the Board has noted its duty not to construe the statutory language of Section 2(11) too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. **Hydro Conduit Corp.**, 254 NLRB 433, 437 (1981); **St. Francis Medical Center-West**, 323 NLRB 1046 (1997).

The Union maintains that the Employer’s department heads discipline other employees, adjust employees’ grievances and assign other employees. Moreover, the Union contends that the presence of certain other secondary indicia of supervisory status supports the conclusion that the department heads are supervisors under the Act.<sup>15</sup>

The Employer argues that the evidence demonstrates that department heads have no supervisory duties, but are simply the most experienced salesmen in the various departments. The Employer also argues that prior to the recent decertification petition, the Union never contended that the department heads were statutory supervisors. The Employer maintains that Miranda and Fritz’s attendance at two grievance meetings and Miranda’s reportorial completion of written discipline constitutes sporadic activity insufficient to confer supervisory status under Board law. Finally, the Employer argues that the Union has not introduced evidence sufficient to establish that department heads either responsibly direct or assign work to other employees.

The cases relied upon by the Union regarding the contention that the department heads are statutory supervisors as a result of their involvement in the disciplinary process are distinguishable from the instant facts. In **Progressive Transportation Services, Inc.**, 340 NLRB 1044 (2003) the supervisor alleged to have the authority to recommend discipline exercised independent judgment by instituting disciplinary procedures in 33 instances which were thereafter upheld by the operations manager. Moreover, the operations manager did not conduct independent investigations of the incidents and the supervisor had the authority to decide on her own whether to recommend discipline. In **Mountaineer Park, Inc.**, 343 NLRB 1473 (2004) the “assistant supervisors” at issue not only had the authority to decide whether to

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<sup>15</sup> The Union contends the secondary indicia include: the job title itself, the perception of others regarding their supervisory status, higher compensation, attendance at sales meetings, personal desks in the sales office, the ability to authorize an early departure, and their increased buying authority and ability to set produce prices. The Union argues that this litany of secondary indicia supports the conclusion that the department heads are supervisors. Based on my conclusion that department heads do not possess the supervisory indicia articulated in Section 2(11) of the Act, I find it unnecessary to review each of the alleged secondary indicia **J. C. Brock Corp.**, 314 NLRB 157, 159 (1994).

trigger the disciplinary procedure, they additionally had the authority to write up proposed recommendations regarding a specific level of discipline. Furthermore, in **Mountaineer Park**, **supra**, when the employer's supervisors were off duty, two days per week, the assistant supervisors performed their duties. In addition, these assistant supervisors spent fifty percent of their work days performing supervisory tasks at the same time that the regular supervisors were on duty. In the instant case, the Union's evidence regarding the department's heads' exercise of disciplinary authority involves a few, sporadic incidents that are remote in time.

The Union introduced four documents relative to the issue of the supervisory status of department heads, particularly with respect to Frank Miranda, the head of Department D and Matt Fritz, the head of Department H. The exhibits include two documents that are both entitled "Sanson Company Employee Disciplinary Process Written Warning" and dated January 11, 2007 and April 3, 2006. (UX-1 and UX-2). These warnings concern the attendance problems of a single employee. Peter Moutoux, a salesman in Department D signed the earlier document in two places, once as the supervisor and again as the operations manager.<sup>16</sup> Moutoux has never held the title of department head. President Zingale testified that during his tenure, no department head has ever written discipline without being directed to by either CEO Jeffrey Sanson or himself. The record does not indicate why salesman Moutoux was the person who signed the April 3, 2006 discipline. The other disciplinary action, dated January 11, 2007, is executed by Miranda, who like Moutoux, signed both in the area designated as supervisor and also in the area designated for the signature of the operations manager.

Zingale testified that aside from UX-1 and UX-2, he has no recollection of any department head or salesman being involved in written discipline during his 23 years at Sanson. He confirmed that Department Head Frank Miranda signed UX-1 and Salesmen Peter Moutoux signed UX-2. The listed reasons for the warning in UX-1 include the failure to report to work January 11, 2007 and the failure to notify the Employer of the absence. Nevertheless, written in the section entitled Correction Action is the remark "Termination per Jeff Sanson-Second Warning in last year".

With respect to the April 3, 2006 discipline issued by salesman Moutoux, (UX-2) there is no actual corrective action noted, but rather the reminder that the employee should show up on time. Moutoux did not testify. There is no evidence that this warning, issued almost two and one half years before the filing of the instant petition affected the subject employee's job status. See **Children's Farm Home**, 324 NLRB 61 (1997), where the Board majority affirmed the Regional Director's finding that the employer did not meet its burden of establishing that team leaders were statutory supervisors. In reaching this conclusion, the majority noted that the Employer failed to establish that the warnings affected the employee's job status or that the subject team leader possessed the authority to discipline within the meaning of the Act. In addition, in order to meet the Board's legal standard governing supervisory determinations, an individual's supervisory duties can not be sporadic and insignificant but rather the individual must spend a regular and substantial portion of his workday performing supervisory functions. **Gaines Electric Company, Inc.**, 309 NLRB 1077, 1078 (1992).

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<sup>16</sup> The parties stipulated that at the time of the hearing, Tim Murawski held the position of operations manager. It is uncertain whether Murawski held the position when UX-1 and 2 were executed.

While the Union's second and final example of discipline, a termination, was signed by Department Head Miranda, the determination and rationale was dictated by CEO Sanson. This disciplinary action was also remote in time, occurring more than 17 months before the decertification petition was filed. While Miranda testified that he reported to Sanson that the employee was a no-call, no show, he specifically denied that he said or recommended that the employee should be written up or terminated. Even assuming that Miranda recommended discipline, this single, isolated and insubstantial involvement is insufficient to confer supervisory status. **Brown and Root, Inc., 314 NLRB 19, 21 (1994)**; **Gaines, supra**.

Accordingly, I find that the Union has not met its burden of proof and that the testimony and documentation it provided regarding department heads' exercise or recommendation of disciplinary action is insufficient to demonstrate supervisory authority under the Act.

The remaining two documents introduced by the Union are grievance forms dated respectively February 2, 2005 and January 26, 2007. (UX-3 and 4). The earlier grievance concerns a termination and lists Frank Miranda as the supervisor. The later grievance, another termination, also lists Frank Miranda as the supervisor. Miranda testified that he and department head Matt Fritz both attended the two grievance meetings. The earlier document concerns the discharge of a warehouseman who violated safety regulations by riding in a lift elevator which was clearly posted "no riding". In this instance, salesman Moutoux reported the infraction and Miranda observed the employee coming off the elevator. Miranda testified that he was asked by either CEO Sanson or President Zingale to attend the grievance meeting.

Miranda testified that with respect to the latter grievance meeting involving an attendance related termination, Sanson and Union President Jack Lawson asked him to attend the grievance meeting. According to Miranda, Sanson was out of town the day of the grievance meeting. In response to a question by the hearing officer, Miranda explained that he attended the meeting as a witness and he specifically denied being the Employer's designated representative at the meeting. Union witness Lawson testified that Miranda and Fritz represented the Employer at the grievance meetings. Moreover, Lawson testified that he thought Fritz denied the grievance at the meeting.<sup>17</sup>

I find that the evidence presented regarding department heads' participation in grievance meetings is insufficient to establish that Miranda, Fritz or any department head adjusted grievances. The evidence suggests that in both cases, Miranda was a witness to the alleged infractions. It is unclear whether either Miranda or Fritz were in attendance as a result of Sanson's unavailability. The grievance meetings occurred respectively over three and one-half and one and one-half years prior to the filing of the petition. There is no more recent evidence that department heads are involved in the adjustment of grievances. I conclude that any involvement by Miranda and Fritz in the grievance process is, at best, sporadic and that

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<sup>17</sup> I am unpersuaded by the Union's reliance on **Verizon New York, Inc., 339 NLRB 30 (2003)** and **Paragon Paint Corp., 317 NLRB 747 (1995)**. In these unfair labor practice charges the Board discussed an Employer's obligation under Section 8(a)(5) to cloak its representative in grievance meetings with sufficient authority. To argue that department heads Miranda and Fritz actually possessed the authority to adjust grievances because of this obligation under Section 8(a)(5) is a faulty analysis. The question of whether the Employer violated Section 8(a)(5) of the Act is not an issue in this proceeding.



department heads do not perform such activities on a regular basis. Accordingly, I find that the Union has not met its burden of proof and that the evidence it provided regarding grievance handling is insufficient to demonstrate supervisory authority on the part of the department heads.

The Union maintains that the department heads have the authority to assign employees. Specifically, the Union argues that when department heads are physically on the floor, they have the authority to direct warehousemen to assist other departments as needed or when there are no orders, the department heads direct warehousemen to perform housekeeping or maintenance tasks such as straightening coolers, stacking pallets, emptying trash and bringing equipment back to the charging stations. The Union maintains that department heads explain job responsibilities to new employees. The Union acknowledges that when department heads are off the floor, salesmen may assist a new employee, direct warehousemen in assisting other departments or instruct warehousemen to perform the above-described housekeeping duties.

Miranda testified that if an employee is off work in his department, Zingale sends someone to fill in. He stated that scheduling is done by seniority. Miranda testified that he does not assign or approve overtime. He further testified that he or CEO Sanson approve vacations and transfers between departments. No evidence was presented that a department head would be held accountable in the event that a salesman or warehouseman did not perform a task properly. Moreover, as previously noted, bonuses for department heads do not depend on the performance of other members of their departments. Miranda further testified that he has never informed a member of his department that they could not go to lunch or on a break.

Finally, while Miranda sometimes prioritizes the sequence in which orders are completed, he noted that warehousemen are familiar with their tasks and in the event there are no orders, they know which housekeeping tasks to perform.

The Board in **Oakwood Healthcare, Inc., 348 NLRB 686 (2006)** determined that the term “assign” refers to: (1) “the act of designating an employee to a place (such as a location, department, or wing), [(2)] appointing an employee to a time (such as a shift or overtime period), or [(3)] giving significant overall duties, i.e., tasks, to an employee.” **Oakwood, supra at 689.** The Board further explained:

The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign’.

**Oakwood, supra at 689.**

The Board also clarified that a putative supervisor’s ad hoc instruction that an employee perform a discrete task does not constitute “assign.” Rather, “assign” for 2(11) purposes only

refers to the putative supervisor's assignment of significant overall duties or tasks to an employee. **Id.**

Here, department heads do not prepare work schedules, designate employees to departments or shifts, mandate overtime or give significant overall job duties to employees. Any order priority instruction is that of an ad hoc instruction, insufficient to establish supervisory status. See also **Croft Metals Inc., 348 NLRB 717 (2006)**. Accordingly, I conclude that there is no evidence that department heads assign work to employees within the meaning of the Act.

I also conclude that the department heads do not responsibly direct other employees. There was no evidence that department heads would suffer an adverse job action in the event a salesman or warehouse employee failed to adequately perform their job duties. Moreover, there was evidence that department heads' bonuses are based on their own sales and not on the performance of other members of the department. Under these circumstances, I find department heads are not held accountable for and do not direct other members of the department. **Oakwood, supra at 692.**

Finally, I note that while the record reflects that department heads exercise discretion in purchasing produce and deciding mark-ups, the record also indicates that salesmen, whom the Union does not seek to exclude as 2(11) supervisors, exercise similar authority and discretion. Thus department head Miranda testified that while he did "most" of the department's buying, salesman Peter Moutoux and warehousemen Ron Clifford filled in for him in his absences and both he and Moutoux routinely prepared price lists and mark-ups. Moreover, Employer President Zingale testified without contradiction that individuals in the general sales force, like department heads, have authority to purchase and that commodity buying is split up depending on the department and the expertise of individuals in the department. Indeed Zingale was unable to quantify any greater buying authority of department heads relative to general salesman.

Based on the foregoing and the record as a whole, I find that the Union has failed to satisfy its burden that the department heads are statutory supervisors. I find that the examples relative to disciplinary authority are remote in time and sporadic in nature. Similarly, I find that the testimony regarding department heads Miranda and Fritz's remote and sporadic involvement in grievance meetings to not be probative of their alleged status as supervisors. Further, assignments made by the department heads consist of ad hoc instructions regarding discrete tasks, rather than a supervisor's assignment of significant overall duties or tasks to an employee.

Since the Union has failed to meet its burden of proof, I find that the department heads are eligible to vote in the election.

In addition, the parties have stipulated that the following named individuals occupy the positions set forth opposite their respective names and agree that these individuals are supervisors within the meaning of the Act and are ineligible to vote in the election:

Jeffrey Sanson, CEO/Owner  
Salvatore Zingale, President  
Mike Gentile, Human Resource Director  
Tim Murawski, Operations Manager

Pauline Wolanski, Office Manager  
Joel Lloyd, Maintenance Manager  
Steve Kolek, Maintenance Manager  
George Thorne, Maintenance Manager

### **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 **Commission House Drivers, Helpers and Employees Union, Local 400, Affiliated with International Brotherhood of Teamsters.**

### **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 (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 January 21, 2009. 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 7<sup>th</sup> day of January 2009.

/s/ [Frederick J. Calatrello]

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