

Oakwood—The Strategic and Tactical Implications

by W. Melvin Haas, III

Although unions have certainly overreacted to the recent *Oakwood* decision, even threatening to seek legislative changes with the Democrats' new majority in Congress, the decision actually only clarifies existing law and is not a significant demarcation from the principles the National Labor Relations Board has applied to determining supervisory status in representation cases for years.*

Modern day organizing campaigns are often spearheaded by "team leaders," or "leads," who perform very similar work as their peers, yet have a higher level of authority and responsibility. Today, more than ever, the supervisory status of these "leads" can affect the outcome of an election. In years past, companies often had both a foreman position and a leadman position. Typically the "foreman" was a salaried supervisor and the "leadperson" was an hourly paid bargaining unit, or non-supervisory, employee. But many companies have now reduced their salaried head count and significantly reduced the number of supervisors, or foremen. As a result, there are more lead persons, or as they are often called now, "team leaders," or in healthcare, "charge nurses."

Obviously, if the team leaders are not "supervisors under the Act" then they can be involved in the campaign from the union side, and they can be very effective in convincing other employees to support the union because of the respect they already have due to their positions of leadership. On the other hand, the employer has the right to expect "supervisors" to be loyal to the company, can control their behavior since they can commit unfair labor practices for which the company will be held responsible, and can demand employees not engage in or promote union activity or not encourage employees to sign union cards.

From a strategic standpoint, an employer should consider whether it wants team leaders to have sufficient

authority and responsibility to be a "supervisor under the Act." Factors to consider are whether there are sufficient number of employees for which they can be responsible, whether they have the skills and qualifications to function effectively as supervisors, and whether the company is prepared to empower the individuals with supervisory authority.

The *Oakwood* case focuses on the indicia of supervisory authority relating to "responsibly directing" employees and "assigning" work to employees as well as when "independent judgment" is involved.

Many companies are reluctant to give team leaders discipline authority. It is a mistake not to empower and trust the individuals you place in authority. Practically, the NLRB looks very closely at an individual claimed by the company to be a supervisor when that individual has no authority to discipline the people under him or her.

Team leaders' authority need not be without appeal or review by higher management. But when "team leaders" have the authority to and actually exercise independent judgment when they discipline employees, team leaders tend to identify with management, feel part of supervision and want to do the things that make the company successful.

In making the decision as to whether these team leads should be supervisors, there are a number of factors to consider. Not only is the ratio to employees important for supervisory status, but closely related is the "coverage" issue. That is, how many employees a person is expected to supervise also has a significant effect on the outcome of an election. When a company has a salaried supervisor responsible for any more than 25 employees, it is very difficult for that supervisor to have a relationship with employees or give them the attention they deserve. This significantly affects management's ability to communicate with employees during a campaign and creates an advantage for unions.

Companies should make these decisions in advance of any union activity,

and perform an audit as to the status of team leaders. This audit should include a careful review of job descriptions, as well as an assessment of:

What role do team leaders have in setting schedules, location of work, or other division of tasks? Are there work rules governing the division of tasks by the team leaders? Are these rules rigid or do they provide a framework within which team leaders make independent decisions that take into account employees' individual skills? How does the organization document decision-making by team leaders? When do team leaders tell other employees to perform discrete tasks and/or are the team leaders held accountable for the outcome? Do team leaders have the authority to discipline their employees, i.e., verbal warnings, written warnings, final warnings, suspension, or termination? Can team leaders effectively recommend such discipline?

Are team leaders required to attend supervisory meetings and are they given supervisory training with regard to managing and disciplining employees? Is there any documentation showing whether team leaders have in fact disciplined employees? Is there any documentation showing whether team leaders were personally held accountable if the tasks done by their employees were not performed correctly? How do the team leaders exercise independent judgment in telling employees how to perform their work, holding them responsible when they fail to perform and discipline their employees? In sum, do team leaders feel part of management/supervision?

In conclusion, I recommend that your company determine if your organization functions most effectively by having team leaders who are "supervisors under the Act." If so, make sure team leaders have the requisite authority and training. This strategic analysis will go a long way in preserving your union-free status.

(see *Implications of Oakwood*, pg. 7)



Implications of Oakwood

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* Section 2(11) of the National Labor Relations Act defines "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. ■

Mel Haas is a managing member of Constangy, Brooks & Smith and head of the Macon office. Constangy Brooks & Smith has over 100 labor and employment lawyers nationwide. Mel has practiced management labor law for over 30 years, including 2 years as a trial attorney with the National Labor Relations Board, as

well as two years as in-house counsel for a major corporation. A fellow of the American Bar Foundation, Mel has been a contributing editor and chapter editor to Developing Labor Law for over 20 years and has spoken to national meetings of the Labor Law Section of the American Bar Association. He is a co-author of the Labor and Employment Annual Review of the Mercer Law Review of the Walter F. George School of Law. He has successfully handled over 100 elections, hundreds of campaigns, numerous arbitrations, NLRB trials, appeals, and oral arguments before the United States Courts of Appeals. He has also handled hundreds of EEOC charges and other Title VII matters.

Mel is a Vice President of the Georgia Defense Lawyers Association, a Board member of the Georgia Employers' Association and the Georgia Chamber of Commerce. He is a Fellow of the American Bar Association and is also listed in The Best Lawyers in America, 2007.

'Stewards Army'

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CIO's Organizing Committee, Cohen already has helped spearhead efforts to create a steward-based education and mobilization program for thousands of local union activists. The so-called Stewards Army would be on the front lines of every CWA effort, helping support organizing and contract campaigns, and building political support.

But, according to Cohen, members of this "army" won't all be stewards in the traditional sense of handling grievances and enforcing contracts at the job site. He says it is about "stewardship" in a broader sense.

Cohen's idea was well received at the Braintree strategy meeting, especially by union activists frustrated by the labor movement's labyrinthine structures and bureaucracy. ■

ULP CHARGE OF THE MONTH - OPERATING ENGINEERS

UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS		FORM EXEMPT UNDER 44 U.S.C. 3512 DO NOT WRITE IN THIS SPACE Case: 28-CB-6265 Date Filed: May 12, 2005	
INSTRUCTIONS: File an original and 4 copies of this charge and an additional copy for each organization, each local, and each individual named in Item 1 with the NLRB Regional Director of the region in which the alleged unfair labor practices occurred or is occurring.			
1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT			
a. Name International Union of Operating Engineers, Local Union No. 351, AFL-CIO		b. Union Representative to contact Randy Griffin, Business Manager	
c. Telephone No. (806) 274-4501		d. Address (street, city, state and ZIP code) 111 East Coolidge, Borger, Texas 79007	
e. The above-named organization(s) or its agent(s) has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(a), subsection(s) (list subsections) (NLRB) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.			
f. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)			
Beginning on or about Tuesday, May 3, 2005, and as of the date of this charge, Victor Aguirre, a Business Agent of IUOE Local 351, has engaged in bribery and extortion in an effort to secure and control the Holiday Inn Airport El Paso to voluntarily recognize the Union as the exclusive bargaining representative for certain employees of the Hotel. In particular, Aguirre threatened that he would file a lawsuit against the Hotel seeking potentially hundreds of dollars of damages unless the Hotel relinquished its lawful right to an election under the supervision of the National Labor Relations Board, and instead agree to enter into a voluntary recognition agreement through which the Hotel would recognize the Union as the representative of certain employees of the Hotel. By the above acts, IUOE Local 351 has engaged in acts of restraint and coercion in violation of the National Labor Relations Act.			
3. Name of Employer Holiday Inn Airport El Paso		4. Telephone No. (915) 342-5501	
5. Location of plant involved (street, city, state and ZIP code) 6655 Gateway West, El Paso, Texas 79925		6. Employer representative to contact Mike Shoffit, General Manager	
7. Type of establishment (factory, mine, wholesaler, etc.) Service Provider		8. Identify principal product or service Lodging	
9. Full name of party filing charge Stephen G. Taylor		10. Number of workers employed approx. 115	
11. Address of party filing charge (street, city, state and ZIP code) 1156 Fifteenth Street, N.W., Washington, D.C. 20005		12. Telephone No. (202) 467-2499	
13. DECLARATION I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.			
By: <i>[Signature]</i> (signature of representative or person making charge) Address: 1156 Fifteenth Street, N.W., Washington, D.C. 20005		(Telephone No.) (202) 467-2499 (Date or office, if any) May 12, 2005 (date)	

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1007)
 U.S. GPO: 2000-661-602/2004

Unions are currently pushing hard for voluntary recognition agreements with employers. And why not? All the union has to do is convince enough workers to sign authorization cards and recognition is automatic. But first, the union must get an employer to accept a card-check agreement. This charge—filed by an employee—describes "bribery and extortion" tactics used against the worker's employer by an organizer from the Operating Engineers. Specifically, the organizer allegedly threatened to file a lawsuit seeking damages unless the employer surrendered the legal right of certain employees to vote in a secret ballot election conducted by the NLRB. Card-check agreements invite union coercion against both employers and employees. These agreements are poor substitutes for ballot box democracy.

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