

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

AMBASSADOR SERVICES, INC.

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,  
LOCALS 1922 AND 1359, AFL-CIO

Cases 12-CA-26758  
12-CA-26759  
12-CA-26832

and

ERIC SWANSON, an Individual

Party in Interest

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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## **I. STATEMENT OF THE CASE AND INTRODUCTION**

On March 27, 2010, Ambassador Services, Inc. (the Respondent) began providing stevedoring services to Disney Cruise Lines (DCL) at Port Canaveral, Florida. (ALJD 2:45-3:8; Tr. 27-29; R. Ex. 14).<sup>1</sup> At all material times prior to March 27, 2010, Florida Transportation Services, Inc. (FTS) provided stevedoring services to DCL at Port Canaveral, Florida. (ALJD 2:45-3:8; Tr. 27-29). On March 22, 2002, the Board certified International Longshoremen's Association, Locals 1922 and 1359, AFL-CIO (the Union) as the collective-bargaining representative of all full-time and regular part-time porters/longshoremen employed by Southern Labor Services, Inc. and FTS at Port Canaveral.<sup>2</sup> (ALJD 2:37-43; GC Ex. 2). The Union was also certified as the collective bargaining representative of the same unit of FTS employees on August 6, 2003, July 19, 2007, and November 18, 2008, following elections held pursuant to the filing of decertification petitions.<sup>3</sup> (ALJD 2:37-45; GC Exs. 3-5). The Union remained the collective-bargaining representative of the FTS unit employees until March 27, 2010.

Sometime prior to March 2010, DCL awarded the contract for stevedoring services at Port Canaveral to Respondent, and Respondent replaced FTS and began providing those services on March 27, 2010. (ALJD 2:45-3:8; Tr. 27-29; R. Ex. 14). Respondent hired most of the former FTS unit employees to work on its contract with DCL, and as of March 27, 2010, a majority of Respondent's porters/longshoremen working on the DCL contract were former FTS bargaining unit employees represented

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<sup>1</sup> As used herein, the numbers following "ALJD" refer to the page and line number of the Administrative Law Judge's Decision, and the numbers following "Tr." refer to the page and line numbers of the transcript. For example, "Tr. 68:19-22" refers to transcript page 68, lines 19 to 22. In addition "GC" refers to General Counsel's exhibits and "R" refers to Respondent's exhibits. "R. Br." refers to Respondent's brief in support of exceptions.

<sup>2</sup> In 2002, Southern Labor Services, Inc. and FTS were joint employers of the porters/stevedores working at Port Canaveral and the initial certification included both employers.

<sup>3</sup> As of July 19, 2007, Southern Labor Services, Inc. was no longer a joint employer of the unit employees. On July 19, 2007 and November 18, 2008, the Union was certified as the bargaining representative of the unit employees employed by FTS.

by the Union.<sup>4</sup> (Tr. 29-30; GC Exs. 1(s), 1(u); R Exs. 13, 14). The services provided to DCL by Respondent are essentially the same as the services that FTS provided to DCL. (Tr. 29). Thus, as Administrative Law Judge George Carson II (the ALJ) found, and as Respondent admits, Respondent is a successor employer to FTS. *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). (ALJD 2:45-3:8; GC Ex. 1(u)). As a *Burns* successor to FTS, Respondent had an obligation to recognize and bargain with the Union upon request.

On May 19, 2010, by facsimile and regular mail, the Union sent a letter to Respondent demanding recognition and bargaining, and Respondent received the letter that day. (ALJD 3:29-32; Tr. 339-340; GC Ex. 6). On May 20, 2010, former FTS employee Donald Bartlett distributed copies of the Union's demand letter to employees in Parking Lot A. (ALJD 3:34-39; Tr. 34-36). The record evidence also establishes that Bartlett returned to the parking lot and distributed literature on May 27, 2010, and possibly on other dates as well. (ALJD 8:15-42; Tr. 164-165, 174, 215). On June 2, 2010, Respondent's counsel informed the Union by letter that Respondent would not recognize and bargain with it based on a petition to decertify the Union that had been signed by a purported majority of Respondent's employees servicing the DCL contract. (ALJD 3:41-47; GC Exs. 7 and 8).

Following an investigation of the unfair labor practice charges filed by the Union, the Regional Director of Region 12 of the National Labor Relations Board issued a Consolidated Complaint and Notice of Hearing. (GC Ex. 1(a)-1(s)). The hearing in this case was held on June 8 and 9, 2011, at Cocoa Beach, Florida, and the ALJ issued his decision on September 13, 2011.

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<sup>4</sup> As used herein, the term "employees" refers to Respondent's employees who were specifically hired to perform work pursuant to Respondent's contract with DCL, and does not include employees employed by Respondent at other locations in Port Canaveral.

The ALJ concluded that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation rule; informing employees that it had assisted with a petition to decertify the Union; soliciting employees to sign a petition to decertify the Union; and informing employees that they could not solicit or distribute literature on the property at which they were working. (ALJD 15:24-29). The ALJ also concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union. (ALJD 15:31-32). On October 11, 2011, Respondent filed exceptions to the ALJ's decision.<sup>5</sup>

Respondent's exceptions raise the following questions:

1. Did the ALJ err by concluding that John Martin is not a supervisor within the meaning of the Act?
2. Did the ALJ err by concluding that Respondent, by undisputed supervisor Donald May, violated Section 8(a)(1) of Act?
3. Did the ALJ err by concluding Respondent's unfair labor practices and other conduct tainted the employee decertification petition?
4. Did the ALJ err by concluding that Respondent failed to prove that the Union had lost majority support as of the time Respondent withdrew recognition from the Union?
5. Did the ALJ err by concluding that Respondent violated Section 8(a)(5) of the Act by failing and refusing to recognize and bargain with the Union?

The answer to each of these questions is no, and the ALJ's findings and conclusions regarding these issues should be affirmed. Section II of this brief sets forth the record evidence, law and argument showing that the ALJ correctly concluded that John Martin is not a supervisor within the meaning of the Act. Section III of this brief sets forth the record evidence, law and argument supporting the ALJ's finding that Respondent violated Section 8(a)(1) of the Act and tainted the employee decertification

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<sup>5</sup> The Acting General Counsel is filing cross-exceptions to certain aspects of the ALJ's decision and a brief in support of cross-exceptions simultaneously with the filing of this Answering Brief.

petition, and violated Section 8(a)(5) of the Act by failing and refusing to bargain with the Union. Section IV concludes the brief.

**II. THE ADMINISTRATIVE LAW JUDGE CORRECTLY CONCLUDED THAT EMPLOYEE JOHN MARTIN IS NOT A SUPERVISOR WITHIN THE MEANING OF THE ACT. (Response to Exceptions A(1)-A(6)).**

**A. Introduction**

The ALJ correctly concluded that employee John Martin is not a supervisor within the meaning of Section 2(11) of the Act. (ALJD 6:14-17). Section 2(11) of the Act defines the term 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.

Possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment and not in a routine manner. See *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *American Commercial Barge*, 337 NLRB 1070 (2002); *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), *cert. denied*, 338 U.S. 899 (1949). The burden of proving supervisory status lies with the party asserting that status. See *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003). Mere inferences or conclusory statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. See *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Any lack of evidence in the record is construed against the party asserting supervisory status. See *Williamette Industries, Inc.*, 336 NLRB 743 (2001) *citing Elmhurst Extended Care Facilities*, 329 NLRB 535, 526 fn.8 (1999); *Michigan Masonic Home*, 332 NLRB 1409 (2000).

The ALJ credited Martin's testimony that he has no authority to hire, discharge, transfer, suspend, promote, reward, or adjust grievances. (ALJD 4:25-28; Tr. 126-128). Furthermore, the ALJ concluded that there was no probative evidence to the contrary. (ALJD 4:25-28). This conclusion means that the ALJ discredited testimony offered by Donald May regarding Martin's authority to discharge employees.<sup>6</sup> The Board will only overrule an ALJ's credibility determinations if the clear preponderance of all the evidence establishes that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Respondent has not established a basis to overrule the ALJ's credibility determinations.

Having concluded that Martin did not have authority to hire, discharge, transfer, suspend, promote, reward, or adjust the grievances of employees, or to lay off or recall employees, the ALJ went on to correctly conclude that Respondent failed to establish that Martin had authority to discipline employees, or to responsibly assign or direct employees using independent judgment.<sup>7</sup> The ALJ also correctly concluded that Martin does not make effective recommendations to take supervisory actions. (ALJD 5:8-22).

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<sup>6</sup> For example, Donald May testified that both he and his father, co-owner Randall May, told Martin that it was part of Martin's job to discharge employees if necessary. (Tr. 381-382). By crediting Martin's testimony that he had no authority to discharge employees and finding that there was no probative evidence to the contrary, the ALJ discredited May's testimony that Martin had such authority. In fact, the ALJ specifically noted that Randall May did not testify and found that there was no probative evidence that Martin had authority to send employees home for disciplinary reasons, thereby discrediting Donald May's testimony to the contrary. (ALJD 4:40-46). By so finding the ALJ also properly gave little weight to Martin's conclusory testimony on cross-examination that he performed the duties listed under "Porter Supervisor" in Respondent's "Rules for Operation at Disney Cruise Line Terminal," which includes having responsibility for enforcing rules. (Tr. 99-101; R Ex. 2). Even if the ALJ credited this general testimony, it is conclusory and as such is insufficient to establish supervisory status. See *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

<sup>7</sup> The ALJ, relying on *Pacific Coast M.S. Industries*, NLRB No. 226 (2010), correctly concluded that secondary indicia of supervisory status cannot establish that an individual is a supervisor within the meaning of the Act unless the putative supervisor possesses at least one of the primary indicia of supervisory status. (ALJD 4:9-15). Because the evidence is insufficient to establish that Martin possesses even one of the primary indicia of supervisory status, Respondent's argument regarding the secondary indicia is unavailing, and is not further addressed in this brief.

**B. The Administrative Law Judge correctly concluded that Martin does not possess the authority to discipline employees.**

In its Brief in Support of Exceptions, Respondent contends that the ALJ erred by concluding that Martin does not have authority to discipline employees. However, the credited evidence supports the ALJ's conclusion to that effect. (ALJD 4:37-5:6).

Supervisor Donald May testified that Martin has the authority to discipline and discharge employees, and that he told Martin to get rid of employees if they did not want to work. (Tr. 373-374, 381-382). However, as noted above, the ALJ credited Martin's testimony to the contrary, and concluded that he did not have authority to discharge employees, suspend employees, or issue written warnings. (ALJD 4:25-5:6; Tr. 126-128). Even if credited, May's testimony in this regard is merely conclusory, and conclusory evidence is not sufficient to establish supervisory status. See *Beverly Enterprises*, 348 NLRB 727, 731 (2006).

In its Brief in Support of Exceptions, Respondent points to the testimony of several employees in an attempt to bolster its argument that Martin has authority to discipline employees. (R. Br. 12-13). Employee Jason Roschen testified that he assumed that Martin could discharge him and he just assumed that Martin could discipline him. (Tr. 289:21-22; 290:17-19). Similarly, employee Hunt testified that he assumed that Martin could discipline him, but Hunt further testified that if he refused an instruction from Martin, Martin would report his refusal to supervisor May and May would decide what to do. (Tr. 297:23-298:6). Employee Laura Priest initially testified that Martin could issue her a written warning if she refused to follow his instructions, but later testified that she just assumed that Martin could discipline her, and admitted that she thought that Martin would have to speak with Donald May to issue her a warning. (Tr. 325:12-326:7). Additionally, as set forth in Respondent's brief, employee Cody Scholer testified that May probably told him that "you are to do what [Martin's] told you, or you

are answering to me.” (Tr. 273:9-18). Scholer further testified that if he failed to follow Martin’s instructions, he had to answer to May. (Tr. 273:19-21).

Contrary to Respondent’s contention, the testimony of Roschen and Hunt, even if viewed in the light most favorable to Respondent, merely shows that those employees did not know whether or not Martin could discipline them. As with Roschen and Hunt, Priest’s testimony regarding Martin’s authority was based on a mere assumption. Moreover, the testimony of employee Priest tends to show that Martin cannot independently discipline employees since she believed that Martin would be required to speak with May in order for a warning to be issued. Furthermore, the testimony of employee Scholer also suggests that Martin could not independently discipline employees, but had to bring any refusal to perform work as directed to the attention of May. In any event, the ALJ specifically credited the testimony of employees Tamara Kelley, who testified that Martin doesn’t issue written warnings, and Robert Ford, who testified that Martin could not issue discipline, and “had to take it up a level.” (ALJD 5:3-6; Tr. 183, 429). By explicitly crediting Kelley and Ford, the ALJ implicitly discredited any testimony to the contrary.<sup>8</sup>

Martin testified that he has no authority to issue written discipline, but can “discipline” employees for minor infractions of policy, such as failing to wear a name tag. (ALJD 4:37-40; Tr. 128-129). If Martin notices an employee not wearing a name tag, he will tell the employee to put on a name tag. (Tr. 128-129). If an employee refuses Martin’s instructions, Martin will simply report it to May. (Tr. 129). Martin also testified that he verbally reprimanded employee Will Evans for being disrespectful to Martin’s daughter, Dana Davis. (ALJD 4:49-5:6; Tr. 116). Martin informed May about what Evans had done, and May indicated that he would follow up on the reprimand. (ALJD

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<sup>8</sup> Respondent has failed to demonstrate any basis to overrule the ALJ’s decision to credit employees Martin, Kelley, and Ford, and the ALJ’s credibility findings should not be disturbed.

4:49-5:6; Tr. 116). Such mere reporting of incidents to a superior does not constitute discipline as contemplated in Section 2(11) of the Act.

In order for an action such as a written or oral warning to be considered “discipline,” the action must have an effect on the employee’s job status and lay the foundation for future discipline. Thus, in *Promedica Health Systems, Inc.*, the Board concluded that coachings issued to employees constituted discipline because the coachings were considered in future disciplinary proceedings. 343 NLRB 1351, 1352 (2004). See also *Pacific Coast M.S. Industries*, 355 NLRB No. 226 at 4 (2010); *Berthold Nursing Care Center*, 351 NLRB 27 (2007), citing *Promedica Health Systems, Inc.*, supra.

In *Ohio Masonic Home, Inc.*, the Board found that the employer’s charge nurses issued oral reprimands and written warnings, but concluded that the reprimands and warnings were not discipline. 295 NLRB 390, 393 (1989). The warnings, which did not contain any recommendation for disciplinary action, were merely placed in the employees’ personnel files. *Id.* The Board determined that the record failed to establish that the warnings automatically led to any further discipline or adverse action against an employee, and that the verbal reprimands were “too minor a disciplinary function to constitute statutory authority.” *Id.* at 394 citing *Passavant Health Center*, 284 NLRB 887 (1987).

Similarly, in *Willamette Industries, Inc.*, the Board concluded that an individual who had issued a written warning for excessive absenteeism was not a supervisor within the meaning of the Act where there was no evidence that the warning had any effect on the employee’s job status, or that the warning was part of the progressive disciplinary policy. 336 NLRB 743, 744 (2001). The Board also noted that holding out an individual as a supervisor to other employees does not establish supervisory status within the meaning of the Act. *Id.*

Here, the Employee Safety & Environmental Handbook describes Respondent's disciplinary policies and procedures in the "Code of Conduct for Employees." (GC Ex. 9, pgs. 11-16). Respondent divides rule infractions into classes. (GC Ex. 9, pgs. 11-16). The first incident of a Class I infraction requires that the supervisor issue an oral warning and record the date and subject of the oral warning. As additional incidents occur, and as the violations become more severe, the level of discipline imposed increases accordingly. (GC Ex. 9, pg. 15).

Although Martin testified that he "verbally reprimanded" a single employee, Will Evans, for being disrespectful to Martin's own daughter, the record does not contain a description of the "reprimand," there is no evidence that it was recorded pursuant to Respondent's handbook policy, that it affected Evans' job status, or that it will be considered if Evans is disciplined in the future. The evidence also fails to establish that supervisor May took any further action against Evans after being informed of the reprimand by Martin. Thus, Respondent failed to show that this "reprimand" constituted discipline. Even assuming for the sake of argument that the "reprimand" constitutes discipline for the purposes of the Act, the exercise of supervisory authority on one occasion is insufficient to establish that an individual is a supervisor within the meaning of Section 2(11) of the Act. See *Browne of Houston*, 280 NLRB 1222, 1225 (1986) (the exercise of supervisory authority on an irregular or sporadic basis is insufficient to establish supervisory status under the Act).

Inasmuch as Respondent's progressive disciplinary policy requires that oral warnings be recorded, it can only be concluded that the routine corrections issued by Martin do not constitute discipline pursuant to Respondent's progressive disciplinary policy. There is no evidence that Martin's instructions affect employees' job status or are considered as part of employees' disciplinary records.

Finally, supervisor May testified that Martin has sent sick employees home on two occasions. (ALJD 4:45-48; Tr. 410-411). Although May further testified that he and Martin together had had sent employees home for disciplinary reasons, he admitted that Martin had never independently sent an employee home for disciplinary reasons. (Tr. 410-411). In any event, the ALJ found that there was no probative evidence that Martin had authority to send employees home for disciplinary reasons, thereby discrediting any testimony to the contrary. (Tr. 410-411). Thus, at most, the evidence shows that Martin sent home sick employees on two occasions. In *Webco Industries*, 334 NLRB 608, 610 (2001), the Board explained that sending a sick employee home does not require the use of independent judgment. Relying on that case, the ALJ correctly concluded that Martin's sending home sick employees does not establish that he is a supervisor within the meaning of the Act. (ALJD 4:45-49).

In summary, Respondent failed to establish by a preponderance of the evidence that Martin has authority to discharge, suspend, issue written warnings to employees, or to otherwise discipline employees, or to effectively recommend such action. The ALJ's finding that Martin does not have authority to discipline employees should be affirmed, and Respondent's exceptions to that finding should be denied.

**C. The Administrative Law Judge correctly concluded that Martin does not have authority to assign employees to work.**

The ALJ held that Martin does not have authority to assign employees. (ALJD 4:30-35). Respondent excepts to that finding. As the Board explained in *Oakwood Healthcare*, the term "assign" refers to the "assignment of an employee to a certain department . . . , or to a certain shift . . . , or to certain significant overall tasks . . ." 348 NLRB 686, 689 (2006).

In *Croft Metals, Inc.*, the Board rejected the employer's argument that its lead persons, specialty lead persons, and lead supervisors were supervisors within the

meaning of Section 2(11) of the Act. 348 NLRB 717 (2006). The leads at issue in *Croft Metals, Inc.*, did not “assign employees to production lines or to shifts or to departments or overtime periods.” *Id.* at 718. The employees under each lead generally performed the same tasks each day. *Id.* However, the leads, who spent most of their time working on the line, did switch tasks among employees “in order to finish projects or achieve production goals . . . .” *Id.* at 722. The Board concluded, “the occasional switching of tasks by the lead persons here does not implicate the authority to ‘assign’ . . . .” *Id.* at 722.

The porters/stevedores employed by Respondent are relatively unskilled and require very little training. (Tr. 186, 259, 411-412). Just a few porters are certified by OSHA to operate forklifts. (Tr. 143). The porters/stevedores are assigned to teams by vessel supervisor Donald May. (ALJD 4:30-35; Tr. 136). May makes the roster that sets forth daily job assignments for the five teams of porters. (ALJD 4:30-35; Tr. 135-36). The teams rotate functions, so, for example, the team that works the curb one day works the busses or ship the following day, and x-ray the next day. (Tr. 83-84).

Respondent’s contention that pursuant to its “Rules for Operations at the Disney Cruise Line Terminal” Martin is responsible for scheduling and assigning positions to porters and for designating acting supervisors is without merit.<sup>9</sup> (R. Br., p. 6). Thus, the ALJ credited Martin’s testimony, which was not disputed by May, that May makes the

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<sup>9</sup> Respondent’s argument that Martin is a supervisor because he drafted the “Rules for Operations at the Disney Cruise Line Terminal” and other documents is also without merit. Martin testified that he provided input into the “Rules for Operations at the Disney Cruise Line Terminal,” but the evidence fails to reveal the extent of his input. (Tr. 98-99; R. Ex. 2). Martin also testified that Respondent prepared the document entitled “Disney Magic Dry Dock Prep 2010” based on his handwritten notes. (Tr. 101-02; R Ex. 4). Although that document sets forth various job assignments, there is no evidence that Martin actually made those assignments, or did anything other than act as a scrivener to record assignments made by someone else, most likely by vessel supervisor May. Martin also testified that he prepared a document titled “Duties and Responsibilities” sometime during 2010. (Tr. 103-04; R Ex. 5). The evidence fails to establish that Martin assigned employees to the duties set forth in that document, or that he did anything other than record job assignments and duties determined by May or someone else. Respondent Exhibits 6 and 9 are simply forms completed by Martin, and Respondent Exhibit 7 is a page of notes made by Martin of items that he wanted to bring to supervisor May’s attention.

team assignments and sets the schedules. (ALJD 4:30-35). Martin's testimony during cross-examination that he performs the duties set forth in the aforementioned rules is merely conclusory and as such is insufficient to establish supervisory status. See *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

Respondent also argues that Martin assigns employees to operate forklifts. (R. Br., p. 6). There is some evidence establishing that Martin may instruct forklift operators to perform discrete tasks during the course of a work day. (Tr. 82-83; 384). However forklift operators must be OSHA certified, thereby defining who will and will not be an operator, and there is no probative evidence to suggest that Martin determines which employees will work as forklift operators on a regular basis. Rather, as stated above, May hires employees, determines the team to which each employee will be assigned, and schedules the work to be performed by each team on a daily basis. (ALJD 4:30-35; Tr. 136).

The facts of this case are similar to the facts in *Croft Metals, Inc.* with regard to the assignment of work. The evidence fails to establish that Martin assigns employees to shifts or teams. Rather, vessel supervisor Donald May assigns employees to teams and sets the team rotation, which is used to determine the tasks that each team performs on a given day. As discussed below, Martin merely instructs employees to switch tasks occasionally as needed in order to ensure that Respondent meets its obligation to get the DCL ships loaded in a timely manner. However, such ad hoc instructions issued in order to meet production goals do not rise to the level of an assignment of work within the meaning of the Act. See *Id.* Respondent has failed to establish by a preponderance of the evidence that Martin assigns work within the meaning of Section 2(11) of the Act, and the ALJ's findings and conclusions in this regard should be affirmed.

**D. The Administrative Law Judge correctly concluded that Martin does not use independent judgment to responsibly direct the work of employees.**

Respondent contends that the Administrative Law Judge erred by concluding that Martin does not use independent judgment to responsibly direct the work of employees. However, the record evidence and the ALJ's credibility resolutions fully support his conclusion that Martin does not exercise independent judgment to responsibly direct employees, and that he is not a supervisor within the meaning of Section 2(11) of the Act. (ALJD 5:24-6:16).

In order for direction of work to be responsible for the purpose of establishing supervisory authority:

[t]he person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequences may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . .

Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

See *Oakwood Healthcare*, 348 NLRB at 692.

To establish that an individual responsibly directs employees and is a supervisor within the meaning of the Act, the party asserting that such status exists must also show that the putative supervisor exercises independent judgment while directing employees.

To establish the existence of independent judgment:

[A]n individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. *Id.* at 693.

In *Croft Metals, Inc.*, the Board held that the lead persons at issue “responsibly directed” their employees where they were accountable for the performance of employees and were “required to manage their assigned teams, to correct improper

performance, move employees when necessary to do different tasks, and to make decisions about the order in which work is to be performed . . .” 348 NLRB 717, 722.

The employer established that the leads were accountable by showing that the employer issued written warnings to the leads because of the failure of employees to perform up to standards. *Id.* However, the Board concluded that the employer failed to establish that the leads exercised independent judgment because the work was generally dictated by the employer’s policies, the employees generally performed the same job or repetitive tasks, and there was almost no evidence to show the factors used by the leads to make decisions regarding the direction of employees. *Id.*

During the hearing, Martin explained that he directs employees’ work to a small degree. (Tr. 136:9-10). For example, if passengers are backing up, Martin can move employees from one task to another. (ALJD 5:24-32; Tr. 84, 136). In other instances, Martin uses a rotation list to assign employees to tasks, such as the curb team, or simply asks for volunteers until someone agrees to do the job, or he decides to do it himself. (ALJD 5:34-41; Tr. 137-138). The porters have the same skills, are equally capable of moving luggage, and can essentially be used interchangeably. (ALJD 5:24-32, Tr. 186, 259-260, 290, 411-412). Martin explained that most of the porters know what needs to be done, and that he moves employees between tasks based on porter availability and proximity. (ALJD 3:27, 5:24-32; Tr. 112-113, 136-137). Martin usually speaks with supervisor May prior to moving employees from one task to another, but occasionally informs May after the fact. (ALJD 5:24-32; Tr. 84, 111-112).

Martin might also reassign forklift drivers during the course of the day. (Tr. 82-83). In response to a leading question, Martin agreed that when he has to move a forklift operator from one end of the ship to the other, he tries to get more experienced people. (Tr. 83:1-5). Martin also agreed that he is familiar with the forklift operators’ experience. (Tr. 83:1-5). Martin offered no further explanation regarding how he determines which

forklift operator to ask to perform a task. This testimony could mean that Martin knows who has been operating a forklift the longest and asks that person, or that he knows who operates a forklift in a certain area most frequently and asks that individual. It does not establish that Martin uses independent judgment that is not of a merely routine or clerical nature to discern which forklift operator's skills are most suitable for a particular job.

Supervisor May testified that if something special that needs to be moved with a forklift, Martin will find the employee with the most experience and best skills to move the item. (Tr. 384). Employee Joseph Hunt testified that only supervisor May, leadman Martin, Hunt and one or two other employees are permitted to operate the specialized forklifts (the long lift and 15 grand lift) because they are more experienced, and have proven that they can operate those lifts. (Tr. 299-300). Hunt went on to testify that the decision regarding who can drive the lifts was made by Martin and May. (Tr. 299-300). However, Hunt did not testify as to when this decision was made, what specific factors were considered, how he knows Martin made this decision, or who, as between Martin and May, made this decision. Hunt also testified that everyone knows who is authorized to operate the larger lifts, and that the operators get the keys for the lifts from Martin or May. (Tr. 299-300) On the other hand, forklift operator Scholer testified that although some forklift operators are more experienced than others, all of them can move a cage of luggage and the certified forklift operators are used interchangeably. (Tr. 274-275, 276-277). Moreover, forklift operator Laura Priest, who described herself as the most skilled forklift operator, testified that although some operators are better than others, all of the forklift drivers are can operate a forklift in the same places. (Tr. 323-324).

Martin expects employees to follow his instructions and it is his impression that employees are required to follow those instructions. (Tr. 87-88). As Respondent correctly notes, most of the employees who appeared at the hearing testified that Martin could issue work instructions to them. However, many of these employees

acknowledged that if they refused to follow Martin's instructions, he would have to bring the issue to May's attention. (Tr. 272-274, 283, 298, 305-306, 325-326). For example, employee Cody Scholer, whose testimony is relied on by Respondent in its Brief in Support of Exceptions, explained that if he refused one of Martin's instructions, Martin's recourse would be to report the refusal to May, and May would take appropriate steps. (Tr. 272-274).

Employee Laura Priest, whose testimony is also cited by Respondent, testified that if she had to fill in on a job, supervisor May or leadman Martin would tell her what to do. Priest further testified that hypothetically, if she refused Martin's request to fill in, he would get another employee to fill in. Priest testified that Martin would go to supervisor May if she refused Martin's request to fill in, and speculated that Martin could give her a written warning if she refused, but ultimately conceded that was only her assumption, and that she had not been told that Martin had the authority to issue a warning. Finally, Priest testified that Martin might have to talk to supervisor May in order to write her up if she refused to comply with Martin's his instruction. (Tr. 324:22-326:7).

Priest's testimony, viewed in a light most favorable to Respondent, merely shows that Priest understands that she is supposed to follow Martin's instructions. This of course would be true of instructions issued by any leadperson to the employees working under him or her. Priest's testimony fails to establish that Martin actually has the authority to compel her or other employees to perform any task, and tends to show that Martin's only recourse in the event of a refusal to follow his instruction is to report the incident to supervisor May. Thus, Priest's testimony fails to show that Martin is anything more than a leadman, or as the ALJ put it, a "strawboss." (ALJD 6:16).

Vessel supervisor May testified that Martin is accountable if an employee fails to follow Martin's instructions, and for mistakes made by employees. (Tr. 373-374) May also testified that Martin knows that he is accountable for employee mistakes because

he has been told to reprimand or send employees home if they are not doing their job right. (Tr. 373-374). May further testified that both he and his father, Respondent co-owner Randall May, told Martin that it is part of his job to discharge employees if need be.<sup>10</sup> (ALJD 4:37-44; Tr. 381-382). However, as stated above, Martin's credited testimony establishes that he does not have authority to discharge or suspend employees, and that he has never recommended the discharge or suspension of an employee. (ALJD 4:37-5:6, 5:8-22; Tr. 126-128). Furthermore, May conceded that Martin has never disciplined an employee by sending the employee home without May's involvement. (Tr. 410-411). In fact, there is no evidence that Martin has ever been involved with the discharge, suspension or written discipline of an employee, except for the three occasions discussed below, when Martin simply witnessed May suspend two employees and discharge a third.

Martin inspects employees' work during the course of the day by observing employees as Martin drives by on the forklift he operates. (139-140). However, Martin has never disciplined an employee for making a mistake or failing to perform to standard, and he has never been told that he would be disciplined if a porter made a mistake or failed to perform up to standard.<sup>11</sup> (Tr. 140). Although May claimed that he told Martin to be more assertive when he instructs employees, there is no evidence that May ever disciplined, or threatened to discipline, Martin because work did not get done in a timely manner. (Tr. 374-376).

Martin's only recourse is to contact May if an employee refuses his direction to perform a task, and there is insufficient evidence to establish that Martin is accountable

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<sup>10</sup> The ALJ apparently discredited at least portions of May's testimony in this regard stating, ". . . the record reflects what Donald May recalled, not what Randall May actually said." (ALJD 4:37-44). As noted above, the ALJ also correctly found that there is no probative evidence that Martin had authority to send an employee home for disciplinary reasons. (ALJD 4:45-46).

<sup>11</sup> Respondent contends that Martin disciplined employee Will Evans by issuing him a verbal reprimand, and that he recommended the suspensions of employees Michael Hayes and Tamara Kelley. However, as discussed above and below, the facts and law do not support such contentions.

for the performance of the employees under him. First, as discussed above, Martin does not have authority to discipline employees. Second, May's testimony fails to show that Martin faces adverse consequences for failing to take steps to correct employees' work. Furthermore, Martin credibly testified that he has never been disciplined because an employee failed to perform to standards, and he has never been told that he could be disciplined for such a failure. Respondent is required to present evidence of actual accountability to prove responsible direction and May's testimony, even if credited, is insufficient to establish supervisory status. See *Rockspring Development, Inc.*, 353 NLRB 1041 (2009) citing *Alstyle Apparel*, 351 NLRB 1287 (2007); *Beverly Enterprises*, 348 NLRB 727, 731 (2006). Accordingly, the evidence fails to establish that Martin responsibly directs employees within the meaning of Section 2(11) of the Act.

Even if it were to be somehow determined that Martin responsibly directs employees, the evidence fails to show that he utilizes independent judgment when he does so. Respondent's employees perform repetitive, routine tasks that require little training and no special skills. Thus, porters assist cruise line passengers with luggage and send luggage through an X-ray machine. Although the forklift operators, including Martin, are certified, and some have more experience than others, it appears that they are all authorized to perform essentially the same tasks. Furthermore, May's conclusory testimony regarding Martin's direction of forklift operators based on his knowledge of their experience is insufficient to establish that Martin evaluates operators' skills and suitability for particular tasks in a manner that is not of a merely routine or clerical nature.

Martin exercises no real discretion in the direction of work. Rather, Martin uses the "double dip" list, which is nothing more than an employee rotation list, to select additional employees to work the curb when needed. Martin also uses a rotation to decide which employees to ask to go to deck 3 to help passengers with luggage. Notably, employees can refuse Martin's request to go to deck 3 and if they do, Martin

performs the work himself. If Martin needs to move a porter from one task to another due to a back-up, he makes his decision based on availability and proximity. May's conclusory testimony that Martin directs forklift operators to perform certain tasks based on experience and skill is not sufficient to establish that Martin uses independent judgment in connection with the responsible direction of work. Thus, there is insufficient evidence to show that Martin compares employee strengths, weaknesses, or suitability for particular tasks.

*Alter Barge Line, Inc.*, 336 NLRB 1266 (2001) and *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002), relied on by Respondent to argue that Martin uses independent judgment in deciding on employee reassignments, are inapposite. In *Alter Barge Line*, the Board affirmed that administrative law judge's conclusion that the pilots were supervisors within the meaning of the Act. In that case, the pilots were the highest ranking individuals on duty for 12 hours out of each day and were responsible for the safety and navigation of the vessel during that time, and crew members who failed to follow orders from the pilot were subject to discharge. *American Barge Line Co.*, 337 NLRB at 1270. Pilots had discretion to decide how to wire barges together, and gave crew members instructions regarding how to wire the barges together. *Id.* at 1271. The pilots also had discretion to decide when to post lookouts and how many to post. *Id.* at 1271. The pilots directed all of the crew members, including the mate and leadman, who directed crewmembers in routine maintenance work. *Id.* at 1271. The pilot at issue in the case did not contact the captain for direction during the year 1998. *Id.* at 1271. The administrative law judge determined that the pilot used discretion in determining how to direct the mate, leadman, and other crew members by judging how best to apply skills of employees to handle situations caused by weather, currents, river traffic and other factors. *Id.* at 1271.

The facts of *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002) are similar to those in *Alter Barge Line, Inc.* The pilots were the senior individuals on duty for two 6 hour shifts each day. *Id.* at 1071. They rarely, if ever, woke the captain. *Id.* at 1071. The pilots determined when to post lookouts and how many to post. *Id.* at 1071. The pilots had the discretion to call a watch man even if doing so resulted in overtime work being performed. *Id.* at 1071. The pilots also “make navigation decisions based on their evaluation of nonroutine factors including the river condition, problems with the boat, . . .” *Id.* at 1071. The Board also concluded that the pilots were held accountable for the mistakes of other employees. *Id.* at 1071. Finally, the pilots had authority to stop the vessel based on their evaluation of conditions. *Id.* at fn.5.

Here, employees who refuse a direction from Martin may have to answer to May if Martin chooses to report the refusal to May, but there is no credible evidence establishing that employees are subject to discharge for refusing to comply with Martin’s direction. Furthermore, May is usually on duty. Thus, unlike the pilots in *Alter Barge Line, Inc.* and *Commercial Barge Line Co.*, Martin is only left in charge of the work site for brief periods of time while May is at lunch or picking up paychecks. Unlike the pilots in those cases who rarely, if ever, consulted with the captain about decisions, Martin regularly informs May of what actions he intends to take, or what he has done, thereby giving May the opportunity to veto or reverse his directions. Also, unlike the pilots in the aforementioned cases, there is no evidence that Martin can call in additional employees or approve overtime, and the evidence is insufficient to establish that Martin is held accountable for the mistakes of employees. In summary, whereas the pilots in *Alter Barge Line, Inc.* and *Commercial Barge Line Co.* weighed significant variables of a nonroutine nature that had serious safety consequences in making assignments, here May, not Martin, makes the work assignments and there is insufficient evidence to show that Martin exercises independent judgment by occasionally directing an employee to

temporarily move to another work area to get the job done. Thus, Martin's decisions do not require him to evaluate employee skills in a nonroutine manner, and, as noted above, there is insufficient evidence to show that Martin is accountable for the employees' failure to do their jobs properly. See *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

**E. The Administrative Law Judge correctly concluded that the record fails to establish that Martin effectively recommended supervisory actions.**

Respondent contends that the ALJ erred by concluding that Martin does not effectively recommend supervisory actions. The ALJ specifically concluded that Martin did not effectively recommend supervisory action, despite May's testimony to the contrary. (ALJD 5:8-22). Regarding May's testimony about following Martin's recommendations, the ALJ stated, "The revision of May's answer to 'pretty much' as it was being given confirms that Martin did not effectively recommend." (ALJD 5:15-18). As the ALJ found, "Martin gave advice and opinions when requested to do so. May made the decisions." (ALJD 5:20-22). The ALJ credited Martin's testimony over that of May, and found that Martin had no authority to discharge or suspend employees, or to effectively recommend supervisory actions. (ALJD 4:25-26; 5:8-22). The ALJ specifically discredited May's testimony that he follows Martin's recommendations and Respondent has not provided evidence that warrants the reversal of that credibility resolution. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

Despite the ALJ's credibility resolutions, Respondent argues that Martin effectively recommended the suspension of porters Tamara Kelley and Michael Hayes. Hayes and Kelley were suspended following an incident in which they accused vessel supervisor May of taking \$100 worth of tips from the porters. (Tr. 132-135). Martin's credited testimony establishes that May did not consult with him prior to suspending

Kelley and Hayes, that Martin did not recommend suspending the employees, and that Martin played no role in the decision to suspend the two employees. (Tr. 132-134). Although Martin attended the meetings where Kelley and Hayes were informed of their suspensions, he did not even speak. (Tr. 114; 132-135). Martin signed the suspension notices of employees Tamara Kelley and Michael Hayes as a mere witness to the discipline that was issued by vessel supervisor May. (Tr. 117-118; R Ex. 10, 11).<sup>12</sup>

With respect to the discharge of employee Andrea Cantrell, in May 2010, vessel supervisor May noticed that Cantrell appeared to be intoxicated. (Tr. 130-131). May asked Martin to watch her while he went to retrieve a breathalyzer. (Tr. 130-131). May administered the breathalyzer to Cantrell, and informed her that she was discharged when the test indicated that she was intoxicated. (Tr. 130-131). Martin's credited testimony establishes that May did not consult with him or ask for his opinion before deciding to discharge Cantrell. (Tr. 130-131). Further, contrary to the testimony of May, Martin's testimony establishes that May instructed Martin to write the report regarding Cantrell's discharge that is in evidence as Respondent Exhibit 8. (Tr. 115, 130-131, 417; R Ex. 8). That report contains no evidence that Martin took any steps to report the conduct of Cantrell or made a recommendation regarding action to be taken against Cantrell. Rather, the report shows that Martin merely recorded the events that occurred. (R Ex. 8).

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<sup>12</sup> Respondent relies on May's discredited and internally inconsistent testimony regarding the suspensions of Kelley and Hayes. May initially testified merely that he had Martin witness the suspensions. (Tr. 390-391). However, May embellished his testimony during cross-examination, and claimed that Martin recommended that Kelley and Hayes be suspended. (Tr. 412-413). May elaborated, testifying that he wanted to discharge Kelley and Hayes when he first learned of their accusations, and told Martin that he was not sure what to do; Martin told him that FTS had suspended employees in the past, and that FTS suspensions lasted three days, and May responded "that sounds fair, let's do it." (Tr. 412-413). Even if credited, this version would not establish that Martin recommended the suspensions, only that Martin answered May's question about FTS's disciplinary practice. However, May further embellished by testifying that he asked what Martin thought was a fair punishment, and that Martin suggested a three day suspension. (Tr. 412:18-413:1). During re-direct examination May embellished yet further, claiming that Martin told him that Respondent needed to establish a precedent. (Tr. 416-417).

May testified that before March 27, 2010, when Respondent started its operations for DCL and Martin and other former FTS employees became employees of Respondent, he asked Martin his opinion of Rodney Cantrell as a possible supervisor. (Tr. 378-380, 408-409). According to May, Martin opined that Rodney Cantrell would constantly ask May for direction, and based on Martin's statement, May decided not to make Rodney Cantrell a supervisor (though Respondent did hire Rodney Cantrell). (Tr. 378-380). May also testified that in October 2010, after contemplating the promotion of Dana Davis, Martin's daughter, to assistant supervisor, he asked Martin if she would be good in that position, Martin said let's do it, and May responded "perfect." (Tr. 366-367, 379). Martin credibly testified that he has not recommended the promotion of employees. (Tr. 126-128).

Even if the ALJ had credited May's testimony, it would show that Martin merely gave May his opinion concerning Rodney Cantrell and Dana Davis, not that Martin made an effective recommendation against the "promotion" of Rodney Cantrell. In any event, May's conversation with Martin regarding Cantrell took place before Martin began working for Respondent, and cannot be relied upon to establish supervisory status. In addition, the record fails to show how, if at all, Martin's opinions, including the one regarding his own daughter, influenced May's decision to promote Davis. The fact that May already had Davis in mind for a promotion suggests that he was merely asking Martin about it as a courtesy because Davis is Martin's daughter. In summary, even if May's testimony regarding his conversations with Martin concerning Rodney Cantrell and Dana Davis had been credited, the evidence would still fail to establish that Martin effectively recommended the promotion of employees.

Respondent, relying on testimony from Martin, contends that Martin makes recommendations to May during weekly meetings. (R. Br. 14). Respondent relies on Martin's explanation that he completes the "supervisor weekly checklist" by walking the

terminal and dock area. (Tr. 124; R. Ex. 6). The checklist lists seven work areas, and a number of inspections to be completed for each area. (R. Ex. 6). A review of the checklist shows that the inspections can be completed by doing nothing more than walking the area and making observations, which is consistent with Martin's testimony. If Martin notes a deficiency, he puts an X next to the deficient item. (Tr. 124). Martin discusses the deficiencies with May during the weekly meeting, and he testified that he assumed that May acted on the checklist to correct the deficiencies. (Tr. 124). In fact, Martin was not even certain that it was May's responsibility to correct the deficiencies. (Tr. 124). Nothing in this testimony suggests that by submitting the inspection sheet, Martin is making a recommendation that May take certain action, much less an effective recommendation. Rather, Martin simply performs a reportorial function and leaves it to May to decide what action, if any, to take.

Based on the above, there is insufficient evidence to establish that J.D. Martin has authority to effectively recommend the suspension, discharge, or promotion of employees, or other supervisor actions. (Tr. 114, 126-128, 130-134).

#### **F. Summary.**

In summary, Respondent failed to establish that Martin possesses any indicia of supervisory authority within the meaning of Section 2(11) of the Act, and the ALJ's finding and conclusions in that regard should be affirmed.

**III. THE ADMINISTRATIVE LAW JUDGE CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(A)(1) AND (5) OF THE ACT BY CONDUCT THAT TAINTED EMPLOYEE SIGNATURES ON THE DECERTIFICATION PETITION AND BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION.** (Response to Exceptions B(1)-B(2), C(1), and D(1)).

**A. Supervisor Donald May informed employees that he assisted with the preparation of the decertification petition, in violation of Section 8(a)(1) of the Act.**

An employer violates Section 8(a)(1) of the Act by "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an

employee petition seeking to decertify the bargaining representative.” *Mickey’s Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007), quoting *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998) enfd. sub nom. mem. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7<sup>th</sup> Cir. 2000).

In his decision, the ALJ found that Respondent violated Section 8(a)(1) of the Act by informing employees that it had assisted in the preparation of a petition to decertify the Union. (ALJD 8:44-45; 15:24-29). In reaching that finding, the ALJ specifically credited the testimony of Brian Postmus. (ALJD 8:37-42). Postmus testified that near the end of May or beginning of June 2010, he saw former employee Donald Bartlett in the parking lot distributing a copy of the Union’s May 19, 2010, demand for recognition.<sup>13</sup> (ALJD 8:15-25; Tr. 164-165). Later that same day, employee Eric Swanson, who subsequently filed a petition to decertify the Union with the Board’s Regional office, asked Postmus to sign the decertification petition. Postmus declined. (ALJD 8:15-25; Tr. 165-166; 196). That afternoon, Postmus informed supervisor May that he had been approached by Swanson and commented that it was a coincidence that the decertification petition was being circulated on the same day that Bartlett had been in the parking lot distributing the Union’s recognition demand. (ALJD 8:15-25; Tr. 165-167). Postmus testified that May replied, “It was no coincidence. Eric and I had been working on it [the petition] for a couple of weeks.” (ALJD 8:15-25; Tr. 165-167:2-4).

Respondent argues that the ALJ’s credibility resolution must be reversed. In support of its contention, Respondent asserts that former employee Bartlett distributed the recognition demand letter on May 19, 2010, that the petition was not circulated until May 27, 2010, that the testimony of Martin and May contradicts the testimony of

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<sup>13</sup> Based on the dates that the decertification petition was circulated and signed, and as found by the ALJ, Postmus saw Bartlett in the parking lot on May 27, 2010. (ALJD 8:15-35).

Postmus, and that therefore Postmus must be discredited. However, the record supports Postmus' testimony regarding the events of May 27, 2010.

First, supervisor May admits that he spoke with Postmus on May 27, 2010, and that during the conversation Postmus told him that he had been asked by Swanson to sign the decertification petition. (ALJD 8:27-35; Tr. 371-372). Second, the credited testimony of employee Robert Ford corroborated Postmus's statement about Bartlett distributing the recognition demand on the same day that Swanson solicited Postmus to sign the petition to decertify the Union. Thus, Ford testified that he saw former employee Bartlett in the parking lot distributing literature on May 27, 2010. (Tr. 174). Third, Swanson admitted that Bartlett was in the parking lot on "several days within . . . that time frame," although he subsequently equivocated and stated that he "heard" Bartlett was there. (Tr. 215). Finally, May conceded that Bartlett might have returned to the parking lot after May 20, 2010, without his knowledge. (Tr. 403). Thus, the record does not contradict Postmus' testimony that Bartlett was in the parking on May 27, 2010, distributing literature, and instead supports that testimony.

May admitted that employee Swanson told him that he (Swanson) intended to circulate a decertification petition prior to starting to circulate the petition, and May knew that Swanson was circulating the petition on May 27, 2010. (ALJD 11:29-41, 12:15-24; Tr. 39-40, 210, 304-305, 308, 396-397). Yet, May testified that when Postmus told him about Swanson asking him to sign the petition he (May) replied, in part, by stating, "if Eric is passing around [a] decertification petition . . ." (ALJD 8:27-35; Tr. 371:7-372:4). The ALJ reasoned that because May knew that Swanson was circulating the decertification petition he would not have responded to Postmus' statement by saying "if Eric is passing around . . ." (ALJD 8:37-42). Based in part on this logical finding, the ALJ credited Postmus' version of his conversation with May and concluded that May spontaneously admitted his involvement in the circulation of the decertification petition to

Postmus. (ALJD 8:37-42). Despite Respondent's argument to the contrary, the ALJ's reasoning is sound and there is no basis for overturning the ALJ's credibility resolution. See *Standard Drywall Products, Inc.*, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3<sup>rd</sup> Cir. 1951).

Accordingly, the ALJ's factual finding that supervisor May informed employee Postmus that he and Swanson had been working on the decertification petition for a couple of weeks and his legal conclusion that by doing so Respondent unlawfully informed employees that Respondent assisted with the circulation of the decertification petition should be affirmed. See *Mickey's Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007), quoting *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998) enfd. sub nom. mem. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7<sup>th</sup> Cir. 2000).

**B. The Administrative Law Judge correctly concluded that supervisor Donald May solicited employees to sign the decertification petition, in violation of Section 8(a)(1) of the Act.**

The Administrative Law Judge found that Respondent violated the Act by soliciting employees to sign the decertification petition. (ALJD 9:29-40, 15:24-29). It is not disputed that May solicited Martin to sign the decertification petition on May 27 and May 30, 2010, as found by the ALJ. (ALJD 9:29-40; Tr. 58-61). Respondent argues that the solicitation of Martin does not violate the Act because Martin is a supervisor within the meaning of Section 2(11) of the Act. However, as discussed at length above, the evidence is insufficient to establish that Martin is a statutory supervisor. Therefore, as found by the ALJ, May's solicitation of Martin to sign a petition to decertify the Union violated Section 8(a)(1) of the Act. See *Mickey's Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007), quoting *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998) enfd. sub nom. mem. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7<sup>th</sup> Cir. 2000).

**C. The Administrative Law Judge correctly concluded that supervisor Donald May assisted with the circulation of the decertification petition, encouraged employees to support the petition, and tacitly approved of the petition.**

As set forth by the ALJ, employee Eric Swanson testified, in part, that he decided to draft and circulate the decertification petition because he “just kind of wanted to find out where everybody stood,” and wanted to “just kind of find out what, you know, the census was . . . if they were for it or against it . . .” (ALJD 10:46-11:4; Tr. 197-198). Swanson then testified in response to a question about how former employee Bartlett’s distribution of the Union’s recognition demand letter influenced his decision to circulate the petition, that he “was already kind of in the middle of it, but it definitely pushed it along . . .” (ALJD 11:6-9; Tr. 199). This testimony suggests that Swanson had already taken steps to prepare to circulate the decertification petition by the time that Bartlett first distributed the demand letter on May 20, 2010. However, Swanson also testified that Bartlett’s distribution of the letter was “kind of the last straw,” and that he drafted the decertification petition around May 25, 2010. (Tr. 199). This testimony is inconsistent and provides a sound basis for discrediting Swanson.

Swanson admitted that he sought supervisor May’s permission prior to circulating the decertification petition. (Tr. 200-201). According to Swanson, May gave him permission to circulate the petition. (Tr. 200-201). Swanson and May both testified that May informed Swanson that he (May) could not be involved with the decertification effort. (ALJD 12:15-24; Tr. 40, 200-201). However, May signed the decertification petition, supposedly at Swanson’s request, May told employees that the petition was being circulated, May volunteered to mail the petition, May took possession of the petition, and May solicited Martin to sign the petition on two occasions. (ALJD 12:15-24;

Tr. 40-42, 58-61, 207-208, 301-305, 308:3-20, 395-399). The denials of Swanson and May that Respondent was involved in the decertification effort and their testimony that May informed Swanson that he could not be involved in the circulation of the petition is inconsistent with the aforementioned credited evidence. Therefore, the ALJ's decision to discredit the denials of Swanson and May is well supported by the record evidence and should not be disturbed. (ALJD 12:19-21).

In addition to discrediting May and Swanson in this regard, as noted above, the ALJ specifically credited the testimony of employee Postmus that when he informed May about Swanson soliciting the decertification petition, May replied that: "[it] was no coincidence. Eric [Swanson] and I had been working on it [the petition] for a couple of weeks." (ALJD 12:40-43; Tr. 165-167:2-4). Based on the totality of the evidence, including the credited testimony of employee Postmus, the ALJ concluded that Respondent was involved in the instigation of decertification petition. (ALJD 12:40-43, 13:25-28). The ALJ's conclusion should be affirmed.

Having found that Respondent, by May, instigated the petition, informed employees of his involvement in the petition, and solicited employees to sign the petition, the ALJ also found that Respondent encouraged employees to support the petition and tacitly approved the petition. (ALJD 13:52-14:7). The ALJ based this finding on the testimony of employees Robert Ford, Tracy Hance, Shane Lee, Kyle Dampier, and Chester Dampier. (ALJD 11:31-12:10, 13:30-43).

Employee Tracy Hance, who found the petition sitting on a table near the table where the worksheets are kept, testified that May told employees during a group briefing at the end of the day with about 25 to 30 employees present that, "the Union stuff is on, and there's a petition here, you know. If you want decertification, just to let you know its here. You know, we are not pushing you either way. You know, make your own decision." (ALJD 11:31-41, 13:36-39; Tr. 301-305, 308:3-20). Hance signed the petition

near the end of her shift, but did not testify regarding whether or not May made his comments before or after she signed the petition. (Tr. 301, 304-309; GC Ex. 7 – 8<sup>th</sup> signature on 2<sup>nd</sup> page). Employee Shane Lee, who signed the petition at Swanson's request, also testified that May mentioned the petition and, while telling employees to do what they wanted, May also told employees that Respondent did not like the idea of a secondary party getting between Respondent and employees. (ALJD 11:31-41, 13:36-39; Tr. 395-399; GC Ex. 7 – 7<sup>th</sup> signature on 2<sup>nd</sup> page).

Respondent argues that even if these comments were made, they could not have tainted the petition because they were made after 23 of the 24 employees signed the petition. However, Hance, whose signature immediately follows Lee's signature on the petition, testified that around the end of the day and near the end of her shift, she came up and saw the petition on a table and signed it. (Tr. 304). Inasmuch as the ALJ credited Hance's testimony regarding the comments made by May at the end of the day, her testimony regarding the time that she signed the petition should also be credited. Eleven employees, including Martin, signed the petition after Hance. Since Hance signed the petition at the end of the day on May 27, 2010, and May made his comments at the end of that day, it stands to reason that it is likely that some of the 25 to 30 employees present only signed the petition after they heard May's comments encouraging them to sign it. It also stands to reason that some of those employees may have been influenced to sign the petition by May's comments.

Employee Robert Ford, whose testimony was specifically credited by the ALJ, testified that sometime between 4:00 p.m. and 5:00 p.m. on May 27, 2010, he, Swanson, and May were standing at a table in the blue section of the terminal when Swanson asked Ford for a second time to sign the decertification petition. (ALJD 8:51-9:17, 13:41-43; Tr. 176). After Swanson asked Ford to sign the decertification petition, May straightened, turned around, and stepped to the table immediately behind the table

where he had been leaning. (ALJD 8:51-9:17; Tr. 177-178). Ford said “fine” and retrieved the petition, which was sitting on the table almost directly in front of the spot where May had been leaning, read it, and then signed it. (ALJD 8:51-9:17; Tr. 178-179; GC Ex. 7 – 4<sup>th</sup> signature on the 3<sup>rd</sup> page).

Porter Kyle Dampier, who was the first person to sign the petition, testified that he found the petition on a table with the day’s paperwork.<sup>14</sup> (ALJD 11:50-12:2; Tr. 30, 250-251; GC Ex. 7 – 1<sup>st</sup> signature on the 1<sup>st</sup> page). The table where Dampier found the petition is also the table where Respondent keeps the tip out sheet, the early release list (which apparently is no longer in use), and the documents that detail where employees are assigned to work on any given day. (ALJD 11:50-12:2; Tr. 253-254). It is also the table that May uses to complete his paperwork. (Tr. 251-252).

Chester Dampier also testified that he found the petition on the table where the manager’s paperwork is kept, including sign-out sheets documenting work time and paycheck stubs for distribution to employees whose pay is directly deposited. (ALJD 12:4-8; Tr. 328-331). Chester Dampier further admitted that vessel supervisor Donnie May works daily at the table where he (Dampier) found the petition. (Tr. 331). “Chet” Dampier’s signature is the next to last signature on the petition. (GC Ex. 7).

May’s comments to employees during the May 27, 2010, group meeting sent the clear message that Respondent opposed Union representation of its employees, and informed employees that the decertification petition was there for them to sign, thereby effectively soliciting employees to sign the decertification petition. Furthermore, by allowing the petition to remain on the table where all of management’s paperwork is maintained, Respondent further created the impression that Respondent supported the

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<sup>14</sup> The fact that first person to sign the petition found it on the table where Respondent keeps its paperwork, rather than in the possession of petitioner Swanson, suggests the possibility that May prepared the petition and then gave the petition to Swanson to circulate, and lends further support to the ALJ’s finding that Respondent instigated the petition.

petition.<sup>15</sup> See *Narricot Industries, L.P.*, 353 NLRB 775, 787 (2009), *enfd.* 587 F.3d 654 (4<sup>th</sup> Cir. 2009), *cert. dismissed* S.Ct. (2010) citing *Placke Toyota, Inc.*, 215 NLRB 395 (1974). After allowing the petition to be circulated and maintained on the work table, May signed the decertification petition himself and volunteered to take the petition to the post office. Finally, May directly solicited employee Martin to sign the petition, which, in addition to being an unfair labor practice, sent the message to employees that Respondent approved the decertification effort. The ALJ's findings and conclusion that Respondent instigated, encouraged, and tacitly approved the petition should be affirmed.

**D. The Administrative Law Judge correctly concluded that Respondent refused to recognize and bargain with the Union, in violation of Section 8(a)(1) and (5) of the Act.<sup>16</sup>**

**1. Respondent's refusal to recognize and bargain with the Union violated the Act because it was based on the tainted decertification petition .**

As admitted by Respondent, it is a successor to FTS. *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). (ALJD 3:1-2). As such it was required to recognize and bargain with the Union, upon request. On May 19, 2010, the Union demanded recognition and bargaining. Shortly after Respondent received the demand for recognition, employee Swanson, with Respondent's assistance, started the circulation of the decertification petition. Respondent did not reply to the Union's demand until two weeks later on June 2, 2010, when it refused to recognize and bargain

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<sup>15</sup> Although keeping the petition on the table is not itself alleged as a violation of Section 8(a)(1) of the Act, it is proper to consider this evidence in deciding whether or not the Union in fact lost majority support because this evidence shows that Respondent supported and assisted in the decertification efforts, and that the petition is tainted.

<sup>16</sup> In this answering brief the Acting General Counsel contends that Respondent, as a *Burns* successor employer, violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union (and withdrawing recognition from the Union) because the decertification petition was tainted and because Respondent failed to establish that the Union actually lost majority support. In the Acting General Counsel's cross-exceptions and brief in support thereof, which are being submitted simultaneously with this answering brief, the Acting General Counsel further contends that there was a successor bar to Respondent's withdrawal of recognition from the Union as set forth in *UGL-UNICCO Services, Inc.*, 357 NLRB No. 76 (2011), and that the successor bar rule set forth in that case should be applied retroactively herein.

with the Union based on the decertification petition that was tainted by Respondent's unfair labor practices and other conduct.

Inasmuch as the Union became the collective-bargaining representative of Respondent's employees as of May 19, 2010, when it requested recognition, Respondent's refusal to recognize and bargain with the Union should be analyzed as a withdrawal of recognition, as was done by the ALJ. (ALJD 12-15). Under Board law, an employer may unilaterally withdraw recognition from a union if the union has actually lost majority support among the bargaining unit employees. *See Levitz Furniture Company of the Pacific*, 333 NLRB 717 (2001). An employer who withdraws recognition does so at its own peril, and must prove by a preponderance of the evidence that the union had in fact lost majority support at the time it withdrew recognition. *See Id.* Such evidence could include a petition to remove the union that has been signed by a majority of the unit employees. *See Id.*

However, an employer who engages in conduct designed to undermine employee support for the union, or who impermissibly assists the anti-union effort, cannot lawfully withdraw recognition from the union if the loss of majority support was caused or tainted by the employer's unfair labor practices. *See SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 (2011); *Narricot Industries, L.P.*, 353 NLRB 775 (2009) *enfd.* 587 F.3d 654 (4<sup>th</sup> Cir. 2009), *cert. dismissed* S.Ct. (2010); *Hearst Corp.*, 281 NLRB 764 (1986), *aff. mem.* 837 F.2d 1088 (5<sup>th</sup> Cir. 1988). The Board uses different tests to determine if an employer's unfair labor practices tainted a decertification petition depending on the situation. In situations where there is no direct link between an employer's unfair labor practices and the decertification effort, the Board applies the four part test set forth in *Master Slack*, 271 NLRB 78 (1984). On the other hand, "when an employer has engaged in unfair labor practices directly related to an employee decertification effort . . ." and the unfair labor practices are not "merely coincident with

the decertification effort,” then the Board applies the rule set forth in *Hearst Corp.*, 281 NLRB 764 (1996), aff. mem. 837 F.2d 1088 (5<sup>th</sup> Cir. 1988).

As the Board recently explained, “*Hearst* creates a conclusive presumption that an employer’s commission of unfair labor practices assisting, supporting, encouraging, or otherwise directly advancing an employee decertification effort taints a resulting petition.” *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 slip op. at 3. The Board further explained that “no direct proof of the unfair labor practices’ effect on petition signers is necessary to conclude that the violations likely interfered with their choice.” *Id.* at 4. Thus, when an employer commits unfair labor practices in connection with a decertification petition, there is no need to show how many employees were affected by, or were aware of, the violations. *See Id.*; *House of Good Samaritan*, 319 NLRB 392, 396 (1995); *Manhattan Hospital*, 280 NLRB 113, 115, fn.7 (1986) enf. granted, *NLRB v. Manhattan Eye, Ear & Throat Hospital*, 814 F.2d 653 (2nd Cir. 1987).

Respondent contends that *Hearst* should not be applied to this case, arguing that the facts here are similar to those in *Pacific Grove Convalescent Hospital*, 350 NLRB 518 (2007). In *Pacific Grove Convalescent Hospital*, the decertification petitioner gave the petition to the administrator after a majority of the bargaining unit employees had already signed the petition, told the administrator that two other employees said they would sign the petition, and asked the administrator to obtain the signatures of the two employees. *See Pacific Grove Convalescent Hospital*, 350 NLRB at 520-521. The administrator complied with the petitioner’s request, and solicited signatures from the two employees. *See Id.* In *Pacific Grove Convalescent Hospital*, the administrative law judge concluded that the only unfair labor practice committed by the employer was the solicitation of two signatures on the petition after a majority had already signed the petition. *See Id.* at 521-522. The Board affirmed the administrative law judge’s decision without comment. *See Id.* at 518. Contrary to Respondent’s argument, the facts

presented here are not similar to those in *Pacific Grove Convalescent Hospital*. Rather, as discussed above, the evidence here establishes that Respondent's unfair labor practices and conduct is directly linked to the decertification effort.

The unfair labor practices and conduct directly related to the decertification petition include the instigation of the decertification petition by Respondent; May's unlawful statement to employee Postmus that he worked on the decertification petition with Swanson, which conveyed to employees the message that Respondent assisted with the initiation and circulation of the decertification petition; the comments made by May on May 27, 2010, encouraging employees to sign the petition; Respondent's tacit approval of the decertification effort as demonstrated by May permitting Swanson to solicit employees to sign the petition in his presence and allowing the petition to be left on the table where Respondent keeps official documents; and finally, May's solicitation of employee Martin on May 27 and 30, 2010. Unlike *Pacific Grove Convalescent Hospital*, there is no evidence in this case that any employees asked supervisor Donald May to solicit additional employees to sign the decertification petition.<sup>17</sup>

Respondent, by its above-described unfair labor practices and related conduct, instigated, supported and encouraged employee efforts to decertify the Union. Because these unfair labor practices are directly connected to the decertification effort, there is no need to show how many, if any, of the petition signers were affected by the unfair labor practices to establish that the petition is tainted. See *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 (2011); *House of Good Samaritan*, 319 NLRB 392, 396 (1995); *Manhattan Hospital*, 280 NLRB 113, 115, fn.7 (1986). Because Respondent's unfair labor practices and conduct were directly linked to the decertification effort, the rule set forth in *Hearst* must be applied here. Thus, May's unlawful comments to Postmus, May's comments to

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<sup>17</sup> Moreover, as discussed below, Respondent failed to establish that the Union actually lost majority support either before May solicited employee Martin to sign the petition, or thereafter.

the group of employees on the afternoon of May 27, 2010 and his contemporaneous actions in allowing the petition to be left on his work table , the presence of May's own signature on the petition before employee Martin's signature, and May's direct solicitation of at least one employee, Martin, to sign the petition, fatally tainted the petition, without regard to the extent of dissemination of the evidence of taint among the unit employees.

**2. Respondent's refusal to recognize and bargain with the Union was unlawful because Respondent failed to prove that the Union actually lost the support of a majority of the bargaining unit employees.**

There were 37 employees in the bargaining unit when Respondent informed the Union that it would not recognize and bargain with the Union based on the tainted decertification petition.<sup>18</sup> (R. Ex. 13). It appears that twenty-five of the 37 bargaining unit employees may have signed the decertification petition. (GC Ex. 7). However, Respondent failed to authenticate six of the signatures on the petition in any fashion, including the signatures of Dana Davis, Dan Dombrowski, Michael Fiore, Curtis Jeffers, Bradley Riggs, and Jacob Vega. (ALJD 15:5-9). Excluding the six unauthenticated signatures and the tainted signature of Martin, only 18 of the 37 employees signed the petition, which is less than 50% of the unit. (ALJD 15:5-20; GC Ex. 7; R Ex. 13).

The ALJ, relying on *Flying Foods*, 345 NLRB 101 (2005), concluded that Respondent had to authenticate the signatures on the decertification petition in order to satisfy its burden of proving an actual loss of majority support pursuant to the Board's holding in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). (ALJD 14:24-48). The ALJ further found that because the signature of employee Martin is tainted and Respondent failed to authenticate six other employee signatures, Respondent failed to

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<sup>18</sup> This number includes both dock supervisor Christopher Justice and porter supervisor John Martin, neither of whom were shown to be supervisors within the meaning of the Act, but excludes undisputed supervisor Donald May.

prove by a preponderance of the evidence that the Union had actually lost majority support at the time Respondent withdrew recognition. (ALJD 14:24-48).

Respondent contends that the ALJ misapplied the Board's holding in *Flying Foods*. In support of its contention, Respondent sets forth the following partial quote from footnote 9 of that case:

after the General Counsel has established a withdrawal of recognition at the hearing, the Respondent meets its defensive burden by introducing a petition ostensibly signed by at least half of the unit employees. At that juncture, the burden shifts to the General Counsel to show that some of the alleged signatures should not be counted.

However, Respondent's quote omits the prefatory phrase, "In chairman Battista's view." *Flying Foods*, 345 NLRB 103, fn.9. Thus, the quote set forth by Respondent reflects the individual view of then Chairman Battista, not the holding of the Board.

In *Flying Foods*, the Board stated:

We agree, however, with the judge's alternative finding that the withdrawal of recognition violated Section 8(a)(5) and (1) because Respondent failed to show the Union's "actual loss" of majority status under *Levitz* (citation omitted). The Respondent's withdrawal of recognition rests solely on a multipage petition bearing 96 signatures. . . . It is undisputed that 6 of the 96 signatures should not be counted. The question remains whether at least 82 of the remaining 90 signatures are valid.

Three employee signatories left their employment with Respondent before April 18. Writing exemplars from Respondent's personnel records demonstrate that the signatures for seven other employees do not match their purported signatures on the petition. Absent any countervailing evidence, we find these signatures are not authentic. Disregarding these 10 signatures on the petition, a maximum of 80 of the signatures could be valid, an insufficient number to prove the Union's actual loss of majority status. Therefore, the petition does not demonstrate an actual loss of majority status and, accordingly, we find that the Respondent's withdrawal of recognition on the basis of that petition violated Section 8(a)(5) and (1).

*Id.* at 103-104.

While there is no requirement that an employer verify the authenticity of employee signatures prior to withdrawing recognition, the Board's holdings in *Levitz* and

*Flying Foods* make it clear that if such a withdrawal is challenged, Respondent must show that the signatures on which it is relying are authentic in order to establish an actual loss of majority support. Here, as found by the ALJ, Respondent failed to authenticate six of the signatures on the decertification petition, and the signature of employee Martin is tainted. (ALJD 14:50-15:20). Thus, only 18 of the signatures can be counted, and Respondent has failed to meet its burden of showing an actual loss of majority support as required by the Board's holding in *Levitz*. (ALJD 14:50-15:20). The ALJ's findings and conclusions in this regard should be affirmed.

### **III. CONCLUSION**

In summary, the record evidence supports the ALJ's findings and conclusions that Respondent violated Section 8(a)(1) the Act by informing employees that it had assisted with a petition to decertify the Union as its employees' collective-bargaining representative, and soliciting employees to sign a petition to decertify the Union. The record evidence also supports the ALJ's findings and conclusions that Respondent relied on a tainted decertification petition as its basis for failing and refusing to bargain with Union, and failed to prove by a preponderance of the evidence that the Union actually lost the support of a majority of the bargaining unit employees and thereby violated Section 8(a)(1) and (5) of the Act. Thus, the ALJ's findings and conclusions in this regard should be affirmed.

**DATED** at Tampa, Florida, this 30<sup>th</sup> day of November, 2011.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision in Cases 12-CA-26758 et al. was electronically filed this 30<sup>th</sup> day of November, 2011 as follows:

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