UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

ROAD WORKS, INC.

Employer

and Case 21-RC-21306

SOUTHERN CALIFORNIA DISTRICT COUNCIL
OF LABORERS AND ITS AFFILIATED LOCAL
LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 1184

Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

This report contains my findings of fact, conclusions and recommendations regarding the 3 determinative challenged ballots cast in the election in the above matter. Following a hearing where all parties presented witnesses and evidence, I conclude that the challenges to the ballots of Daniel Blocker and Javier Castro be sustained, the challenge to the ballot of Mike Wessel be overruled, and that a certification of representative should be issued.

I. Procedural Background

Pursuant to a Stipulated Election Agreement approved on July 29, 2011,[1] an election by secret ballot was conducted on August 18, among the employees in the unit agreed appropriate for the purposes of collective bargaining.[2] The tally of ballots which was served

[1] All dates herein are in 2011 unless otherwise specified.
[2] All field construction employees, including foreman, performing asphalt and concrete crack filling and sealing, by any method on any surface, employed by the Employer at or out of the Employer's facility located at 303 Short Street, Pomona, California; excluding all other employees, officers, guards and supervisors as defined by the Act.

upon the parties immediately following the election showed that of approximately 13 eligible voters, 6 cast ballots for, and 4 against, the Petitioner. There were no void ballots and 3 challenged ballots, which are sufficient in number to affect the results of the election.[3] The Acting Regional Director investigated the determinative challenged ballots and, on September 12, he issued and served upon the parties his Report on Challenges and Order Directing Hearing and Notice of Hearing, in which he concluded that the 3 determinative challenged ballots could best be resolved by a hearing. Pursuant thereto, a hearing on the 3 determinative challenged ballots was held in Los Angeles, California, on September 26 and 27. All parties were given a full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues.

Upon the entire record of the hearing and my observation of the witnesses, their demeanor and testimony, I make the following findings of fact, conclusions, and recommendations[4]:

The parties agreed, in the Stipulated Election Agreement, that the *Daniel/Steiny* formula would apply to determine voter eligibility in this election. I have taken administrative notice of the fact that July 23 is the related payroll cut-off date for voter eligibility, which is listed in the Stipulated Election Agreement.

[3] On August 25, 2011, the Employer timely filed one objection to the election. After investigation, the Acting Regional Director recommend, in his September 7, 2011 Report on Objection, that the Employer's objection be overruled in its entirety. No exceptions were filed to the Report on Objection.

[4] It is noted that the recitation of facts in this report is, unless otherwise noted, based on a composite of the credited aspects of the testimony of all witnesses, unrefuted testimony, supporting documents, undisputed evidence, and careful consideration of the entire record, including each party's oral argument on the record. Although each iota of evidence, or every argument of counsel, is not individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Rather, it has been rejected as incredible or of little probative value. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of witnesses at hearing. *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 111 LRRM 2881, 2881, (9th Cir. 1982); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49, 76 LRRM 2224, 2226 (9th Cir. 1970). Failure to detail all conflicts in testimony does not mean that such conflicting testimony was not considered. *Bishop and Malco, Inc., d/b/a Walkers*, 159 NLRB 1159, 1161 (1966). Further, the testimony of certain witnesses has been only partially credited. *Kux Manufacturing Co. v. NLRB*, 890 F.2d 804, 132 LRRM 2935 (6th Cir. 1989); *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754, 25 LRRM 2256 (2nd Cir. 1950), *rev'd on other grounds,* 340 U.S. 474, 27 LRRM 2373 (1951).

II. The Challenged Ballots

The Employer is engaged in the business of asphalt and concrete crack filling and sealing, on roads and parking lots. The Employer is owned by three brothers: Nathan Blocker, Larry Blocker, and Michael Blocker.

During the election, the ballots cast by Javier Castro, Daniel Blocker, and Mike Wessel were challenged. The ballot cast by Javier Castro (herein "Castro") was challenged by the Board agent on the grounds that his name did not appear on the eligibility list provided by the Employer. The ballot cast by Daniel Blocker (herein "Blocker") was challenged by the Petitioner's observer on the grounds that he is a confidential employee and a nephew of an owner. The ballot cast by Mike Wessel (herein "Wessel") was challenged by the Petitioner's observer on the grounds that he is a supervisor.

Regarding Castro, the Employer asserts that he quit his employment with the Employer prior to the election, while the Petitioner disagrees with that fact and argues that he is eligible to vote. At hearing, the Petitioner contended that Blocker was ineligible to vote because he is a close relative of owners of the Employer and because he quit his employment with the Employer prior to the election.[5] The Employer disagrees with those contentions. Regarding Wessel, at hearing, the Petitioner maintained its position that Wessel should be excluded as a supervisor under Section 2(11) of the Act, and the Employer continued to assert that he is a unit foreman and his vote should be counted.[6]

[5] At hearing, the Employer contended that the issue of Blocker having quit the Employer was not raised in a timely manner. The Board has held that a party may raise and litigate at a hearing an alternative ground for a properly challenged ballot, even if that alternative ground was not raised in a timely challenge. *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936 (1978); *Anchor-Harvey Components, LLC*, 352 NLRB 1219 (2008); *CHS, Inc.*, 357 NLRB No. 54 (August 12, 2011). Accordingly, all grounds raised regarding the challenge to Blocker's ballot were litigated at hearing and will be considered herein.

[6] At hearing, the parties stipulated that the other two foremen employed by the Employer, Raphael Camarena and Mario Castillo, are unit employees.

III. Evidence Presented

A. Javier Castro

It is uncontroverted that Javier Castro worked for the Employer as a field construction employee since about 2001 through March 2011.[7] Castro had at least one break in his employment with the Employer, when rain caused a decrease in work and Castro secured work elsewhere. Castro returned to the Employer in about 2005. Since about 2003, Castro has also done freelance photography and video work on the weekends.

Castro testified that in about March, he asked Employer Office Assistant Ali Tran for a couple days off, then told Tran that he "was going to leave for a while" to work at a new job. Tran said that was fine. Nothing was said about when or if Castro would return to the Employer.[8] At that time there was work for Castro and other field construction employees at the Employer. A couple weeks later, Castro told Tran that he had started a new business folding cardboard boxes. This was the last contact between Castro and the Employer. During the same time frame, Castro made similar comments to others at the Employer, including Employer Owner Nathan Blocker. Castro denies telling the Employer that he was "quitting" from the Employer.[9]

Tran testified that in about early 2011, Castro did not appear for a couple scheduled shifts.[10] Tran stated that when he asked Castro about this, he told him that he was working at his other job at the time, could not make it to work at the Employer, and because of his other business he was no longer going to be working with the Employer. About two weeks

[7] The parties stipulated that Castro worked a sufficient number of days as a unit employee to be eligible to vote under the *Daniel/Steiny* formula.
[8] Castro states that employees, including Mike Wessel, Jose Cervantes, and Foreman Mario Castillo, have taken time off from work for foreign travel and then returned to their jobs, but he provided no further details about this.
[9] The hearing record indicates that there are no written documents describing or confirming Castro's departure from the Employer.
[10] Tran testified that he is responsible for handling all office paperwork for the Employer, schedules the unit employee work crews, and deals with customers.

later, when Castro returned to pick-up a pay check, he told Tran about his new business folding cardboard boxes, that he and his business partner took out a big loan to buy machines for his new business, and that he was making more money than he made at the Employer. Tran confirms that this was the last contact between Castro and the Employer. Tran also confirms that Castro did not use the word "quit" or say anything about returning to work at the Employer.

Nathan Blocker testified that sometime before Castro left the Employer, Castro told him that he was excited about his new business and that he planned on doing that full-time. Nathan Blocker testified that other than vacations, employees have not left the Employer for weeks, then returned to their jobs. Regarding Mike Wessel, Nathan Blocker stated that he continued to work for the Employer, while he also worked for another employer.

Employer Foreman Raphael Camarena testified that in March, Castro told him that he was going to be leaving the Employer to work on his cardboard folding business.

Analysis

To be eligible to vote in a Board election, the employee must be in the appropriate unit (1) on the established eligibility date, which is normally during the payroll period immediately preceding the date of the direction of election, or election agreement, *and* (2) in employee status on the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969). In order to be eligible to vote in a Board election, an employee must be employed and working on the established eligibility date, unless absent for reasons specified in the direction of election, such as illness, vacation, temporary layoff status, and military service. *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973); and *Amoco Oil Corp.*, 289 NLRB 280 (1988).

Eligibility to vote in the construction industry elections is determined by the use of the *Daniel/Steiny* formula. *Daniel Construction Co.,* 133 NLRB 264 (1961), as modified at

167 NLRB 1078 (1967) (Excluded from voting eligibility under the *Daniel/Steiny* formula are those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed); and *Steiny & Co.,* 308 NLRB 1323 (1992).

The record evidence establishes that Castro left his employment with the Employer at a time when unit work was ongoing. There is no evidence or contention that Castro was laid-off or granted a leave of absence by the Employer. Although Castro did not tell the Employer that he was "quitting" the Employer, his own testimony establishes that he chose to leave his employment with the Employer in order to work in his own business, and he never discussed, sought, or arranged any return to his employment with the Employer at any time, including the six months following his departure. The specific circumstances of other employees taking leave from their employment with the Employer are not revealed in the record and are not relevant. What is relevant is that Castro made it clear to the Employer that he was voluntarily leaving his employment with the Employer prior to the completion of the last job for which he was employed, without any discussion or arrangement for his return.

Based on the foregoing and the record as a whole, I find that Javier Castro voluntarily quit his employment with the Employer prior to the completion of the last job for which he was employed. Accordingly, I recommend that the challenge to the ballot cast by Javier Castro be sustained.

B. Daniel Blocker

It is uncontroverted that Daniel Blocker worked for the Employer as a field construction employee in 2004 and/or 2005 and again from March through late June.[11] The Employer's job for the City of San Diego, on which Blocker had been working, stopped in about

[11] The hearing revealed no contention or evidence that Daniel Blocker worked a sufficient number of days as a unit employee to be eligible to vote under the *Daniel/Steiny* formula.

late June.[12] Between late June and late September, the City of San Diego job did not resume and no resumption date was confirmed, but the Employer did perform work on other jobs in San Diego and elsewhere during this time period. Prior to late June, Blocker moved to San Diego and started bartending at night, while still working for the Employer during the day.[13] Others, including Castro and Wessel, have also had outside employment while working for the Employer. Blocker had the same work duties as other unit employees, was paid hourly as other unit employees, had no special duties or privileges, and had to wait several months after requesting work until he started work in March. Blocker is a nephew of the three Employer owners, but his parents, Willie and Linda Blocker, are not owners. Willie Blocker has never had any affiliation with the Employer.

Regarding his separation from the Employer, Blocker testified that in June he discussed with Office Assistant Tran that he needed to cut back on his hours, but denies that he quit his employment with the Employer in 2011.[14] Blocker talked to Tran and Owner Nathan Blocker about resuming his work for the Employer when the City of San Diego job started again. When Blocker left the Employer, he increased his hours bartending to 20 to 30 hours a week during August and September 2011. Between his separation from the Employer and the date of the election (August 18), Blocker inquired with the Employer regarding the resumption of the City of San Diego job. Blocker testified that as of August 18, it was his understanding that the City of San Diego job had not resumed. Blocker testified that in September, Tran and Nathan Blocker told him that the Employer was having problems with the City of San Diego, the job should resume after the problems were resolved, and the Employer would notify him at that time.

[12] A wage complaint caused the cessation of the City of San Diego job, but work did not resume when the complaint was resolved in about September 2011.
[13] San Diego, California is about 100 miles south of the Employer's facility and base of operations located in Pomona, California.
[14] Blocker did not apply for unemployment benefits after he stopped working for the Employer.

Tran testified that Blocker worked with the Employer until the end of the City of San Diego job and was an "active" employee, although he had not worked for the Employer since late June. Tran stated that he was not aware of Blocker quitting the Employer. Tran asserts that Blocker was not laid-off or terminated by the Employer. Tran testified that Blocker told him that because City of San Diego job ended, he decided to only work at his bartending job until the City of San Diego job resumed. Tran testified that Blocker called him once or twice to inquire about the status of the City of San Diego job. In about early September, Tran found out that the City of San Diego job would be resuming, but as of late September the restart date and work locations were still unknown. Tran testified that the Employer hired unit employees after Blocker stopped working and that if Blocker had not ended his work with the Employer, he would have worked for the Employer between late June and late September.

During his testimony, Nathan Blocker confirmed that Blocker worked with the Employer until the end of the City of San Diego job. He contends that Blocker did not quit the Employer. Nathan Blocker stated that in about August or September he spoke with Blocker about returning to the Employer whenever the City of San Diego job resumed, but Nathan Blocker did not know when that would be. Nathan Blocker testified that Blocker indicated that "if he got a better job or whatever, he was going to go where work is better."

Unit employee Jose Cervantes testified that in 2011 he worked with Blocker, who told him that he had a job interview with a different employer and that he was leaving the Employer because it was not paying him what it should be.[15] Cervantes stated that Blocker left the Employer soon thereafter.

[15] Blocker denies making such statements.

Analysis

The statutory definition of an employee in Section 2(3) of the Act specifically excludes "any individual employed by his parent or spouse." Excluded from bargaining units are children and spouses of individuals who have substantial stock interests in closely held corporations. *Scandia*, 167 NLRB 623 (1967). An individual in question may also be excluded if his or her job duties reflect a special relationship. *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991).

The Board has consistently held that an employee's actual status as of the eligibility date and the date of the election governs that employee's eligibility to vote, irrespective of what occurs after the election. See, e.g., *Dakota Fire Protection, Inc.*, 337 NLRB 92 (2001); *Columbia Steel Casting Co.*, 288 NLRB 306 fn. 4 (1988); and *Plymouth Towing Co.*, supra. When an employee quits their employment and stops working prior to the election day, they are not eligible to vote. See *Roy N. Lotspeich Publishing Co.*, supra at 518; and *Ralph H. Baker d/b/a Birmingham Cartage Company*, 193 NLRB 1057 (1971).

First, I shall consider the challenge to the ballot cast by Blocker on the grounds that he is a confidential employee and a nephew of the Employer owners. The hearing record revealed no evidence that Blocker assisted or acted in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or regularly substituted for employees having such duties. *Waste Management de Puerto Rico,* 339 NLRB 262 (2003). Therefore, the basis for the challenge that Blocker is a confidential employee has not been established. Additionally, inasmuch as Blocker is not employed by his parent or spouse and enjoyed no special duties, benefits or relationship with the Employer, such does not provide any ground for that challenge to his ballot.

However, the record evidence establishes that Blocker voluntarily quit his employment and stopped working for the Employer about two months before the election date. Blocker left the Employer when the City of San Diego job stopped, in favor of increased work at his other job. Although witnesses assert that Blocker did not state that he was "quitting" the Employer, his own testimony and the testimony of the other witnesses referenced above establish that he told the Employer and others that he was leaving the Employer, and then did just that. Blocker could have continued to work for the Employer during that period on other jobs, but chose instead to quit the Employer. There is no evidence or contention that the Employer has a policy or practice of allowing employees to pick-and-choose the specific jobs on which they prefer to work. During the summer, the Employer hired new employees when it needed extra manpower, but it did not call Blocker to work. Blocker was not laid-off or granted a leave of absence by the Employer.[16] Additionally, there is no evidence or contention that Blocker was eligible to vote under the *Daniel/Steiny* formula.

Based on the foregoing and the record as a whole, I find that Daniel Blocker voluntarily quit his employment with the Employer prior to the voter eligibility date and the date of the election. Accordingly, I recommend that the challenge to the ballot cast by Daniel Blocker be sustained.

[16] The test applicable to the eligibility of laid-off employees is "whether there exists a reasonable expectancy of employment in the near future." *Higgins, Inc*., 111 NLRB 797 (1955); and *Madison Industries*, 311 NLRB 865 (1993). There is no evidence that a return date was ever discussed or set for Blocker. Assuming arguendo that Blocker was on layoff, inasmuch as no restart date for the City of San Diego job was known as of the date of the election (or for more than a month thereafter), and he had rejected other work with the Employer, Blocker could not have had a reasonable expectancy of employment in the near future at the time of the election, and therefore would not be eligible to vote as a laid-off unit employee. Moreover, Blocker's inquiries with the Employer and other events occurring after the election are not relevant areas on inquiry in determining voter eligibility. *Columbia Steel Casting Co.*, supra.

C. Mike Wessel

Mike Wessel was employed by the Employer as a foreman from about 1997 to 2006. Between 2006 and 2010, Wessel worked elsewhere, but performed equipment repairs and provided technical support to the Employer on an on-call basis, especially regarding custom equipment he designed and/or maintained for the Employer. In 2010, Wessel returned to work for RW Materials (herein RWM), which is a sister company of the Employer, owned by Nathan Blocker, Larry Blocker, and Kelly Blocker. Wessel currently spends about 80 percent of his work time working for RWM in the yard at the Employer's facility, and spends about 20 percent of his work time working for the Employer at job sites in the field. For RWM, Wessel manufactures materials, loads materials, repairs equipment operated by the Employer and by RWM, places routine orders for parts and equipment, answers calls to troubleshoot problems with equipment, and maintains the yard at the Employer's facility. When working in the yard for RWM, Wessel only spends a few minutes a day interacting with Employer foremen and unit employees. Wessel shares an office at the Employer's facility with RWM personnel. Almost all of the duties Wessel performs in the office are for RWM. Employer Foremen Raphael Camarena and Mario Castillo do not have offices and do not repair equipment. Unit employees and foremen generally do not use the tools and equipment which Wessel uses in his work for RWM.

Wessel also works for the Employer as a foreman on an irregular basis.[17] Wessel works in the field about three days a month, on jobs requiring special machinery or special materials, because these are his areas of technical expertise.[18] Each week, Foremen Camarena

[17] Employer Estimators Terry Blocker and Kelly Blocker tell Wessel and Office Assistant Tran when they are assigning Wessel to a field job site. There are times when Wessel is too busy with RWM work to accept the assignment to perform work for the Employer. Wessel also sometimes covers for Foremen Camarena and Castillo if they are out sick.

[18] Unit foremen and employees do not operate the special equipment that Wessel operates, because they lack the experience. Wessel has provided some training to unit foremen and employee on the use of new or special equipment and materials.

and Castillo average 30 to 40 plus hours working at job sites in the field. All foremen are responsible to make sure that the field crews which they oversee complete their work in a safe and timely manner. When working in the field, foremen drive the truck, which unit employees walk beside as they clean, fill and seal cracks. Typically, there are between 2 and 4 unit employees on a field crew. Foremen inspect, operate, monitor, and maintain the equipment systems. Foremen also make sure that they have the materials necessary to complete the jobs, fill-out paperwork for their jobs, and sign-off on timecards. Foremen interface with contractors, inspectors, and the general public. Foremen use cell phones provided by the Employer. Foremen wear the same uniform as other unit employees and perform unit work during about 30 percent of their time on field job sites. Foremen are paid more than other unit employees and, due to his skills and experience, Wessel is paid up to $5.00 per hour more than the other foremen. Wessel has the same wage rate at the Employer and RWM, but receives separate paychecks from each. Foremen Camarena and Castillo and all unit employees (with rare exception) work solely for the Employer. Foremen Camarena and Castillo have an Employer credit/debit card for use when working out-of-town, but Wessel does not because he rarely leaves town for work.

The Petitioner contends that Wessel has the authority to hire employees, adjust employee grievances, approve overtime, and possesses certain secondary indicia of supervisory status.

Authority to Hire

Unit employee Jesus Lara testified that when he inquired about a job at the Employer, Wessel told him to complete a job application in the office, which he did. Lara testified that Wessel asked him about his skills and experience. In about March 2011, Owner

Nathan Blocker asked Lara about his experience and gave him a one day try-out. Lara has been employed by the Employer since that time. Lara told his friend Andrew Rodriguez that the Employer was hiring and that he should speak with Wessel.

Wessel testified that in about March, Lara came to the Employer's facility to apply for work and spoke to Wessel for about 15 to 20 minutes while he was working on equipment with which Lara was familiar. Wessel asked him if he knew anything about traffic control and working in the street, and Lara said he did. Lara asked if the Employer needed anybody. Wessel stated he told Lara that the Employer might be hiring, and he should go in the office and fill out an application. Wessel stated that no one asked his opinion about Lara, but he told Nathan Blocker about parts of their conversation. On one of Lara's visits to the Employer's facility, Wessel told Nathan Blocker that Lara was there, and confirmed with him that Lara had a driver license. Nathan Blocker then spoke with Lara.

Unit employee Andrew Rodriguez testified that when he inquired about a job at the Employer in May or June 2011, Tran gave him an application and directed him to see Wessel, because Wessel does the hiring. Rodriguez stated that he showed Wessel his job application, which Wessel looked over. Rodriguez asserts that Wessel told him that he was doing the hiring and asked Rodriguez about his work experience. Rodriguez described his past experience doing road repair work. According to Rodriguez, Wessel asked him if he could start immediately, told him to have Tran hold his application, and told him that he would call him within a week about starting work for the Employer. Rodriguez gave Tran his application, then spoke to Wessel again, at which time Wessel told him that he had the job and he would call him about starting work.[19] Rodriguez stated that later that day, he received a telephone message from

[19] Lara testified that he was present when Wessel told Rodriguez that he would call him about starting work, but Lara did not testify that he heard any other part of that conversation.

Tran telling him to start work the next day. Rodriguez asserts that no one else interviewed him or asked him about his background.

Wessel testified that he did not recall talking to Rodriguez about his background and experience, or about completing an employment application. Wessel denies interviewing Rodriguez, making any recommendations about hiring him, or telling him that someone from the Employer would call him or that he was hired. Wessel stated that Nathan Blocker makes the final decisions on hiring employees. Wessel denies that he has the authority to hire or recommend the hire of employees.

Nathan Blocker testified that Wessel has no authority related to hiring and he was not involved in the hiring of either Lara or Rodriguez. Nathan Blocker stated that only he has hiring authority. Nathan Blocker testified that he asked unit employees if they knew anyone he could hire, to which Lara replied, "I got a friend Andrew [Rodriguez] that can work." Nathan Blocker contends that he made the decision to hire Rodriguez based on Lara's recommendation.

Tran testified when they came in to fill out employment applications, Wessel spoke to Rodriguez (about unknown subjects) and spoke to Lara about his work history, but Tran maintained that Wessel is not involved in hiring employees. Tran confirms that Nathan Blocker makes the final decision on hiring employees, then tells Tran when to start scheduling them for work.

Foreman Mike Wessel testified that in about May 2011, unit employees complained to him about a unit employee named "Red," who appeared to be unfit for work in the field. Wessel spoke to Estimator Terry Blocker and Owner Michael Blocker about the situation. Michael Blocker asked if Red could work for RWM. Wessel asked RWM plant manager and scheduler Derrick Petit if Red could work for RWM: "I went over and talked to Derrick, Derrick

said go ahead and bring him on." Wessel stated, "[w]e thought, well, maybe he can just open boxes, make boxes for our production." Wessel also stated, "I went over and told Michael, I guess we could use him from time-to-time, but I don't know how long that we're going to be able to keep him busy."

In about June 2011, an employee of the Employer named Jesus asked Wessel if he could work some hours at RWM because he was not getting enough hours at the Employer. Wessel stated he asked Petit about this, who agreed to have him cleanup the plant for RWM.

Camarena testified that foremen are not involved in hiring, interviewing job applicants, accepting applications, or reviewing applications.

Adjustment of Grievances

Lara testified that in about March 2011, he complained to Foremen Camarena and Castillo about safety issues and about not getting their breaks or overtime pay, to which they replied that he should take his concerns to Wessel. According to Lara, Castillo also told him that he could not help with such problems, which should be taken to Wessel because he was a supervisor. Lara also testified that Wessel had told him to bring complaints about foremen to him and he would fix the problem. Lara stated that in about April, he brought his complaints to Wessel, who said he would take care of it. Lara asserts that he then started getting his breaks, but he did not know what Wessel did, if anything, to affect this. In about June or July, while on a job in Los Alamitos, California, Lara and Rodriguez again asked Wessel about not getting breaks, to which he replied that he would take care of it and that the Employer would not deny them work for having complained. Lara additionally stated that in about mid-June, Nathan Blocker told Lara to bring concerns like not getting breaks to Wessel because, "He will let me know, and it will be fixed." Lara also asserts that in about May, he complained to Wessel that

safety cones were not used to separate employees from the traffic, to which he replied that he would talk with the other foremen. Lara contends that this too improved for a period of time.

Rodriguez testified that in about June or July 2011, he complained to Wessel about not get paid and about Foremen Camarena and Castillo not giving employees proper breaks and lunches. Rodriguez stated that Wessel said that he would take care of it and would talk to the other foremen. Rodriguez asserts that employees then started getting their breaks a little bit more often. According to Rodriguez, Wessel later inquired of him if things were going well with the other foremen. Rodriguez testified that Wessel never said that he did not have authority to adjust the concerns about breaks or any other workplace issues, or that he needed to speak to someone else.

Wessel testified that Lara and Rodriguez complained to him that Foreman Castillo was not giving employees their breaks. Wessel replied that all the crews should be getting their breaks, all the crews should be working the same way, and he would look into it, but did not tell them that he'd fix the problem. Wessel stated that he told them that they may always bring concerns to him, but they should first bring their concerns to their foremen. Wessel asserts that employees did not complain to him about safety. Wessel stated that he did not investigate the concerns or relay them to Foremen Castillo or Camarena. Wessel did mention the concerns to Employer Estimators Kelly Blocker and Terry Blocker, but doesn't know what action they took, if any.

Nathan Blocker testified that in 2011, Lara complained to him about payroll, safety, and breaks. Nathan Blocker contends that he corrected the payroll issues. Nathan Blocker denies that he told Lara or Rodriguez to discuss their problems with Wessel. Rather,

Nathan Blocker stated that on about July 5, he told employees to call him directly with any problems.

Camarena testified neither unit employees nor Wessel spoke with him about complaints about break times.

Approval of Overtime

Lara testified that on or about September 1, at about 3:00 a.m., Foreman Castillo discovered that material had not been loaded a machine for that day's work. Castillo told Lara, "I'll get in trouble if I tell you to load without authorization." Castillo called Wessel and told Lara, serving as a translator, to ask Wessel why the machine was not loaded, tell him that it was too much material for him to load himself, and ask for authorization for Lara and unit employee Manuel Ochoa to start work early to load the machine. Lara stated that Wessel said, "It's an okay. I give you authorization to start working and loading the machine." Unit employees normally do not start work until they arrive at field job sites.

Wessel testified that on September 1, at 3:00 a.m., Castillo called him, with Lara's assistance, and said that his truck was not filled, it was too much work for him to do alone, and asked if unit employees could help him fill the truck. Wessel stated that he suspected that Castillo had told the employees to report for work early so they could help load the truck, so Wessel simply told him, "Just do what you need to do." Additionally, Wessel contends that he has no role in the assignment of overtime work to employees.

Castro testified that Foreman Castillo has told him to translate for him and ask Wessel if a job needed to finish that same day or could be left for the next day. Castro stated that Wessel would say it depended on how much work was left, it was too much work to finish that day, or that he would call them back. Other times, the crew finishes after checking with

Employer sales representatives, or without checking with anyone. Castro asserts that Wessel also tells the other foremen if they should stay at the end of the day to fill trucks with fuel and materials for the next day, who in turn tell employees to work overtime to assist with that.

Nathan Blocker and Foreman Camarena testified that when a job is not complete at the end of a shift, overtime is only approved by Employer Estimators Terry Blocker and Kelly Blocker. Wessel testified that he gets approval from one of the Employer owners before his crew works overtime, and gave specific examples of such. Nathan Blocker testified that Tran is also consulted to see if work can be rescheduled to avoid incurring overtime. Tran testified that Wessel is not involved in authorizing overtime. Camarena testified that foremen are not involved in assigning overtime.

Kelly Blocker testified that foremen contact him and Terry Blocker to get approval for overtime to be worked if a job is not completed on time. Regarding the September 1 incident, Kelly Blocker testified that Wessel did not call him to get authorization for employees to clock in early.

Additional Indicia of Supervisory Status

Wessel, Rodriguez, Lara, Castro, and Nathan Blocker variously testified that Wessel gives routine instructions to employees and the other foremen regarding material handling and application, traffic control, safety, equipment care, reporting broken equipment (so he can repair it), where to park vehicles, working faster, and job task assignments.[20] Wessel denies that he has the authority to discharge employees, recommend discharge, or discipline employees. Wessel testified that no one from the Employer or RWM has ever told him that he might be subject to discipline if employees he oversaw were not meeting expectations.

[20] Generally, unit employees know, without being told by the foreman, what job tasks to do, but the foreman will assign tasks if they do not know. For special tasks, such as traffic control, the foreman assigns the person with the most experience with that task.

Castro testified about one day in 2010, when Wessel was in charge of a crew on a job site in La Verne, California and dealt with three incidents. In the first incident, Foreman Camarena, who was also on the job, got into an argument with a person who was driving past the job site. According to Castro, Wessel intervened and told the driver that he was the supervisor, he was going to take care of the situation, and apologized to the driver. On the same day, a passerby saw a heating fire on some Employer equipment and the smoke which is typically generated by the equipment, which compelled them to call the fire department. When the fire department arrived, Wessel spoke to them. In the third incident, an Air Quality Management District (AQMD) regulator visited a job site and wanted to shut it down due to the smoke coming off the burner machine. According to Castro, Wessel intervened with the regulator, said that he was a supervisor, and promised to fix the equipment, if his crew could keep working, to which the regulator agreed.

Regarding the incidents in La Verne, Wessel stated that Camarena was in charge of the truck and Wessel was assigned to handle the difficult traffic control situation. A person drove into the work area and Camarena yelled at him to stop. Wessel saw the driver run toward Camarena in the street, so Wessel told Camarena to not engage the driver. Wessel spoke to the driver and apologized, in order to diffuse the situation. Wessel later told Camarena that he should not lose his temper and yell at drivers. Wessel reported about the incident to Terry Blocker, who said he would speak to Camarena himself. Regarding the fire department visit, Wessel stated that he explained that all was fine, which satisfied the fire department. Regarding the AQMD regulator, Wessel stated that Camarena asked him to intervene. Wessel spoke to the regulator for about 30 minutes about excessive smoke coming from the burner machine. Wessel called Nathan Blocker who told him to not talk to the regulator, and he would handle it from

there. Nathan Blocker then spoke to the regulator. Wessel adjusted the burner machine and the regulator allowed the job to continue.

Camarena testified that Wessel intervened with the upset driver and spoke to fire department. Camarena stated that he asked Wessel to deal with the AQMD regulator because Wessel was the most knowledgeable about the burner machine. Additionally, Camarena stated that he also called Nathan Blocker about the AQMD regulator.

Nathan Blocker testified that he also spoke to the AQMD regulator about smoke coming off of the burner machine.

Analysis

Section 2(11) of the Act defines a "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.

It is generally acknowledged that the enumerated functions in this section are to be read in the disjunctive, and the existence of any of them, regardless of the frequency of their performance, is often sufficient to convey supervisory status. *NLRB v. Yeshiva University*, 444 U.S. 672, 103 LRRM 2526 (1980); *Butler-Johnson Corp. vs. NLRB*, 608 F.2 1303, 1306 at fn.4 (9th Cir. 1979).

The party alleging supervisory status – in this case the Petitioner – must prove not only possession of at least one of the supervisory authorities enumerated above, but also that the putative supervisors use independent judgment in the exercise of that authority. *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006). The evidentiary burden is both a significant and

substantial one, in that "purely conclusory" evidence is not sufficient to establish supervisory status; a party must present evidence that the employees at issue actually possess the authority set out in the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006) (finding no supervisory status where the testimony was "utterly lacking in specificity" and the employer therein failed to show that the individuals at issue actually possessed the authority asserted). Moreover, testimony merely asserting as a general matter that individuals exercised particular supervisory indicia is insufficient. Rather, in order to meet the burden of proof, testimony must include specific details or circumstances making clear that the claimed supervisory authority exists and is exercised. See *Avante,* supra, at 1056 (testimony regarding certain employees' authority to discipline other employees was found to be insufficient were it lacked specifics regarding asserted incidents of exercise of such authority). Further, asserted supervisors will not be found to have such authority if they were not informed that they possessed it or if they exercised it only sporadically. *Golden Crest Healthcare Center*, 348 NLRB 727, 739 at fn. 9 (2006).

Finally, the Employer noted that the burden of providing supervisory status falls on the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Oakwood Healthcare*, supra.

No party herein contends and the record did not establish that Wessel has authority to transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them in more than a routine manner, or to effectively recommend such action.

With regard to the authority to hire employees, the record did not establish that Wessel hired Lara, effectively recommended that he be hired, or conducted an interview which determined that he would be hired. Participation in the interview process, even where opinions

or recommendations are given, is not necessarily sufficient to establish effective recommendations to hire, particularly, as admitted her by Lara, the decision maker (Nathan Block) conducted his own interview with Lara. *Ryder Truck Rental*, 325 NLRB 1386, 1387 fn. 9 (1998); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989).

Similarly, the record did not establish that Wessel hired Rodriguez, effectively recommended that he be hired, or conducted an interview which determined that he would be hired. I credit the testimony of Nathan Blocker that he has the authority to hire employees, and that he hired Rodriguez based on his reliance on Lara's recommendation that Rodriguez should be hired, which testimony was detailed and consistent with that of other witnesses, including portions of Lara's testimony.[21]

Regarding the employment of Red and Jesus at RWM, the record did not establish that Wessel hired them for RWM or effectively recommended that they be hired. Rather, Wessel was a mere conduit of information between Manager Petit, Michael Blocker, and employee Jesus. Moreover, these decisions were made at RWM, which is not the employer involved herein.

Based on the foregoing and the record as a whole, I conclude that Wessel does not have the authority to hire employees or to effectively recommend that employees be hired.

The hearing record has not established that Wessel actually adjusted any grievances. While there are several instances of Wessel telling employees that he would look into or take care of their problems, there is little evidence that he did anything thereafter.

[21] It is noted here that Wessel engages in a lot of small talk with folks who pass through the Employer's yard, including potential job applicants, whom he sometimes asks about their qualifications, experience, and character. Wessel's testimony further established that he sometimes inserts himself into situations that others would avoid and where he has no actual authority. I therefore conclude that Wessel's impromptu "interviews" are a pastime for him, and not part of the Employer's hiring process.

Again, Wessel at best served as a conduit of information to Employer Estimators Kelly Blocker and Terry Blocker. Additionally, the undetailed and unquantified testimony regarding temporary improvements in working conditions cannot serve as a basis for concluding that Wessel took action to adjust grievances.

With regard to the approval of overtime, evidence was presented about the September 1 incident, and general practices. Regarding the September 1 incident, the record failed to establish that Wessel exercised independent judgment when he told Foreman Castillo, "Just do what you need to do." Additionally, this is clearly an isolated incident. Regarding the typical procedure for authorizing overtime, the fact that Employer Estimators Kelly Blocker and Terry Blocker make such decisions has been well established. The record has revealed no evidence that Wessel has exercised independent judgment in the assignment of overtime, or that he would be in any position to know about work schedules or commitments to clients, which information is necessary for making decisions about when work needs to be completed. Kelly Blocker and Terry Blocker have this information. Accordingly, I credit the testimony of Tran, Wessel, Camarena, Kelly Blocker and Nathan Blocker that Kelly Blocker and Terry Blocker are authorized to approved overtime, and Wessel is not. Wessel's concern appears to be limited to assisting with the logistics of getting equipment loaded for the next day, which is the responsibility of the Employer foremen, so that he does not get complaint calls at 3:00 a.m. Moreover, the undetailed and unquantified testimony regarding Wessel's approval of overtime cannot serve as a basis for concluding that he possesses any such authority.

With regard to the three incidents in La Verne, Wessel acted to defuse situations, but took no additional actions, other than adjusting the smoking burner machine. It is Wessel's expertise with this equipment that lead to his involvement with the fire department and AQMD.

Moreover, Owner Nathan Blocker stepped in to handle whatever management level decisions would need to be made with the AQMD. Wessel's comment to Camarena about keeping his cool was good advice, which came without threat of discipline or other consequences if not followed. Accordingly, these isolated incidents from 2010 do not serve as a basis for establishing that Wessel is a supervisor.

No party herein contends and the record did not establish that Wessel gives instructions to employees which are anything but routine.

Finally, the fact that in a couple of isolated incidents Wessel was held out as a supervisor is not necessarily dispositive of supervisory status. If Wessel referred to himself at the La Verne job site as a "supervisor," it was likely done to gain the confidence of the angry driver and concerned regulator with whom he was dealing. *Williamette Industries,* 336 NLRB 743 (2001); *Pan-Oston Co.,* 336 NLRB 305 (2001); and *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991). In *Carlisle Engineered Products*, 330 NLRB 1359 (2000), the Board stated: "It is well established that rank and file employees cannot be transformed into supervisors merely being invested with that title."

Based on the foregoing and the record as a whole, I find that Mike Wessel is not a supervisor as defined in Section 2(11) of the Act. Accordingly, I recommend that the challenge to the ballot cast by Mike Wessel be overruled.[22]

[22] In its post-hearing brief, the Petitioner raised for the first time the argument that the challenge to the ballot cast by Mike Wessel should sustained because he is employed in a job category which does not share a sufficient community of interest to warrant inclusion in the unit involved herein. Therein, the Petitioner contends that the challenge to Wessel's ballot should be sustained because he spends a small fraction of his work time employed by the Employer, has manufacturing, repair and yard duties and skills which are nonexistent in the collective-bargaining unit, uses tools and equipment not used by unit employees, and has limited contact with unit employees. However, inasmuch as the Petitioner did not raise this issue in a timely manner, and the Employer has not had an opportunity to present evidence regarding the same, I cannot consider this late-filed basis for the challenge. *Coca-Cola Bottling*, supra; *Anchor-Harvey Components*, supra; *CHS, Inc.*, supra.

IV. Summary of Recommendations

Having made the above findings and conclusions with respect to the 3 determinative challenged ballots, I recommend that challenges to the ballots of Daniel Blocker and Javier Castro be sustained, and that the challenge to the ballot of Mike Wessel be overruled. It is further noted that inasmuch as the challenges to the ballots of Daniel Blocker and Javier Castro have been sustained, the remaining challenged ballot cast by Mike Wessel is no longer determinative of the outcome of the election, for which the tally of ballots showed 6 cast ballots for, and 4 against, the Petitioner. Thus, because a majority of the valid ballots have been cast for the Petitioner, it is unnecessary to open the challenged ballot cast by Mike Wessel. **Accordingly, I recommend that a certification of representative be issued to the Petitioner.**

V. Right to File Exceptions

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's. Rules and Regulations, Sections 102.111 - 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **December 30, 2011**, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's Government initiative, parties are encouraged to file exceptions electronically.**

If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations preclude acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[23] A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at *www.nlrb.gov*. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED at Los Angeles, California, December 16, 2011.

/s/John J. Hatem, Hearing Officer
National Labor Relations Board, Region 21

[23] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.