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**DIRECTV U.S. DIRECTV Holdings LLC and International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 947, Petitioner.** Case 21–RC–21191

December 22, 2011

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

The National Labor Relations Board has considered objections to an election held on April 16, 2010, and the hearing officer’s report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 85 ballots cast for, and 80 ballots cast against, the Petitioner, with 2 challenged ballots, a number insufficient to affect the outcome of the election.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer’s findings and recommendations<sup>1</sup> only to the extent consistent with this decision.

The Board conducted the election in the stipulated unit of technicians, warehouse employees, dispatchers, and quality control employees at the Employer’s Rancho Dominguez, California facility. A majority of the employees voted for representation by the Petitioner. At issue here is the Employer’s objection alleging that its field supervisors are supervisors within the meaning of the Act, and that the field supervisors’ prounion activities during the preelection period interfered with the employees’ free choice in the election.<sup>2</sup> The hearing officer recommended sustaining the Employer’s objection. First, the hearing officer found that, based on their authority to effectively recommend discipline, the field supervisors are statutory supervisors. Second, the hearing officer found that, pursuant to *Harborside Healthcare, Inc.*, 343

<sup>1</sup> In the absence of exceptions, we adopt pro forma the hearing officer’s recommendations to overrule Objections 2 and 3.

<sup>2</sup> The Employer filed two objections alleging that the field supervisors engaged in improper prounion activity. Objection 1—which is the sole objection before the Board for consideration—alleges that the field supervisors engaged in improper *prepetition* prounion activity; Objection 2 alleges that the field supervisors engaged in improper *postpetition* prounion activity. The hearing officer recommended overruling Objection 2, on the ground that the Employer failed to present any evidence that the field supervisors actually engaged in any postpetition prounion activity. We have adopted that recommendation in the absence of exceptions.

NLRB 906 (2004), the field supervisors’ prounion activity constituted objectionable conduct warranting a new election.

For the reasons set forth below, we find, contrary to the hearing officer, that the field supervisors do not possess supervisory authority.<sup>3</sup> Accordingly, we find that the field supervisors’ prounion activity did not constitute objectionable conduct, and we conclude that a certification of representative should be issued.

I. FACTS

The Employer provides digital television services to residential and commercial customers. At its Rancho Dominguez facility, the Employer employs approximately 215 employees in the following classifications: field technicians, warehouse employees, and dispatchers. The vast majority of these employees are field technicians, who install or repair digital equipment at customers’ locations. In addition, the Employer employs a site manager, 3 operations managers, and 22 field supervisors. Of the 22 field supervisors, 13 are designated “field supervisors with a team” [hereinafter referred to as “field supervisors”], and 9 are designated “field supervisors without a team.” Each field supervisor oversees a team of approximately 10 to 15 field technicians. In contrast, “field supervisors without a team” do not oversee anyone; rather, they primarily perform installation and repair work on complex jobs or jobs for important customers.

Field supervisors respond to their team members’ telephone calls seeking answers to technical questions, requesting additional equipment, or reporting problems with particular job assignments (e.g., a customer is unavailable or a site is inaccessible). In addition, field supervisors monitor the productivity of the field technicians on their team, examine their work, and inspect their vehicles. Field supervisors have the authority to give verbal warnings to technicians for performance issues or for tardiness, such as being late to a team meeting. Such verbal counselings are documented by field supervisors in “manager notes,” which are not reviewed by management and not retained in employees’ personnel files.

If a field supervisor determines that a technician’s performance or infraction warrants more than a verbal counseling, he has the authority to initiate the disciplinary process associated with an employee consultation form (ECF).<sup>4</sup> Field supervisors do not have the authority to

<sup>3</sup> We note that our conclusion in this regard provides an additional basis upon which to overrule Objection 2. See fn. 2 above.

<sup>4</sup> The format and content of the ECF are described in detail at pp. 11–12 of the hearing officer’s report. In brief, the ECF requires the initiator to identify the employee involved, the date, the supervisor, and the category of offense; to describe the incident for which discipline is being imposed; to provide information regarding expectations for the

prepare and issue ECFs directly to technicians; rather, ECFs are subject to management review. More specifically, after a field supervisor prepares a draft ECF, the ECF is reviewed, first, by the operations manager to whom the field supervisor reports; next, by the site manager;<sup>5</sup> and, finally, by the human resources department.<sup>6</sup> At each stage of review, the reviewer may alter the language of the ECF, change the proposed level of discipline, or decide that the ECF should not be issued.<sup>7</sup> Following that review, the field supervisor meets with the technician to present and explain the ECF. The field supervisor thereafter affords the technician the opportunity to set forth his version of events, or add other comments, on the ECF form. Finally, the field supervisor asks the technician to sign the ECF form and then signs it himself, after which the ECF is placed in the employee's personnel file.<sup>8</sup>

## II. HEARING OFFICER'S REPORT

The hearing officer concluded that the Employer's field supervisors are supervisors within the meaning of Section 2(11) of the Act. Although the hearing officer rejected the Employer's contentions that the field supervisors possess authority to assign, discipline, suspend, or

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future and the possibility of future discipline; and to identify an appropriate level of discipline.

<sup>5</sup> Site Manager Mike Schultz testified that, in deciding whether to approve an ECF, he reviews—possibly in consultation with the operations manager and/or the field supervisor—the employee's past performance and any prior corrective measures. Additionally, Schultz indicated that he might look at the employee's file or ask questions about the employee.

<sup>6</sup> With respect to recommendations for discharge, however, the field supervisor typically consults with his operations manager *before* he prepares the draft ECF. In this regard, Field Supervisor Juan Flores testified that a discharge recommendation has "to go through [the operations manager] first." Also with respect to discharge recommendations, management and human resources review and consider a technician's overall performance in deciding whether to approve the recommendation.

Although the record is not free from ambiguity, testimony from Field Supervisor Flores suggests that the review process when an ECF recommends suspension is identical to the above-described process for discharge recommendations.

<sup>7</sup> Site Manager Schultz testified that, per week, the Employer issues 15 to 20 ECFs and rejects 3 to 5 ECFs initiated by field supervisors. Field Supervisor Flores testified that management rarely declines to issue ECFs that he initiates (i.e., only about 1 percent of the time); more commonly, management modifies his ECFs to correct errors or make stylistic changes.

<sup>8</sup> The Employer submitted into evidence 16 ECFs, all but 2 of which were designated "verbal warnings." The two ECFs that were designated "written warnings" do not specify whether or how many verbal warnings preceded them. With the exception of one ECF that reflects a safety (driving) violation, all of the ECFs in evidence relate to attendance or productivity. Each of the eight productivity-based ECFs in evidence states, using identical boilerplate language, that the designated employee failed to satisfy the Employer's minimum standard of productivity (an average of four jobs per day).

discharge the technicians, or to adjust their grievances,<sup>9</sup> he found that they possess authority to effectively recommend discipline, up to and including discharge, by virtue of their initiation and ultimate issuance of ECFs. The hearing officer found that field supervisors exercise discretion in exercising this authority, by deciding whether to initiate an ECF and by making recommendations regarding the appropriate level of discipline. The hearing officer further found that, although various levels of management review the ECFs initiated by field supervisors, they do not conduct an independent investigation. Rather, he found that management reviewers accept the field supervisors' version of events at face value and do not afford the technicians an opportunity to provide input or comments until after the ECF is issued.

The hearing officer also determined that various secondary indicia of supervisory status support the conclusion that field supervisors are statutory supervisors: the ratio of supervisors to nonsupervisory employees would be unusually high if the field supervisors were not deemed to be supervisors; field supervisors are held out to the technicians as their supervisors; field supervisors hold weekly meetings with their teams, during which they convey information on behalf of the Employer; and field supervisors attend management meetings with the site manager and operations managers.<sup>10</sup>

## III. DISCUSSION

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 well established that the burden to prove supervisory authority rests with the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001)). Here, as set forth above, the hearing officer concluded that the Employer satisfied that burden by establishing that field supervisors possess one indicium of supervisory status—the authority to effectively recommend discipline.

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<sup>9</sup> No party excepted to the hearing officer's findings that the field supervisors lack these indicia of supervisory authority.

<sup>10</sup> The hearing officer rejected the Employer's contention that the "field supervisors without a team" are also statutory supervisors. In the absence of exceptions, we adopt the hearing officer's findings in this regard.

The authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Children’s Farm Home*, 324 NLRB 61, 61 (1997). Contrary to the hearing officer, we conclude that the evidence in this case fails to demonstrate that the field supervisors’ authority to recommend discipline satisfies that standard.

Although Field Supervisor Flores testified that management declined to issue only about 1 percent of the ECFs that he initiated, and Site Manager Schultz testified that, in an average week, the operations managers reject 3 to 5 of the 15 to 20 ECFs recommended by field supervisors, the record does not establish what weight, if any, the various managers accord field supervisors’ recommendations or the extent to which their approvals are based on their own independent analyses. Accordingly, this evidence demonstrates, at most, that the supervisors’ recommendations are “ultimately followed” in the majority of instances, not that the recommended action is taken without independent investigation by the managers.

Indeed, it is undisputed that *all* of the ECFs that are initiated by the field supervisors are subject to three levels of review: by the operations manager, the site manager, and the human resources department. Further, the evidence establishes that, at the site manager level, ECFs are subject to independent investigation. Site Manager Schultz testified that, in deciding whether to approve an ECF, he reviews—possibly in consultation with the appropriate operations manager and/or the field supervisor—the employee’s past performance and any prior corrective measures issued to the employee. He also indicated that he might look at the employee’s file or ask questions about the employee. This evidence concerning the nature of review at the site manager level is uncontradicted.

Even if we were to assume that Schultz’ review of the ECFs does not constitute an “independent investigation,” it is merely one step in a three-level review process. The Employer adduced no evidence regarding the extent, or the components, of the review processes utilized by the operations managers or the human resources department. In the absence of any such evidence, we cannot find that the field supervisors effectively recommend discipline.<sup>11</sup>

<sup>11</sup> Contrary to our dissenting colleague’s contention, we do not suggest that the mere fact that the field supervisors’ ECFs are subjected to a three-level review process necessarily forecloses a finding of effective recommendation of discipline. Rather, we merely emphasize that, as discussed above, the absence of evidence that the managers at each level of review accept the field supervisors’ recommendations without conducting an independent investigation warrants a conclusion that the field supervisors do not effectively recommend discipline. Indeed,

See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999) (any lack of evidence in the record is to be construed against the party asserting supervisory status).<sup>12</sup>

Equally important, there is no evidence whatsoever regarding the impact of field supervisors’ ECFs on the technicians’ job status or tenure. As the Board has consistently held:

[T]he issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority.

...

[F]or the issuance of reprimands or warnings to constitute supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.

*Phelps Community Medical Center*, 295 NLRB 486, 490 (1989) (quoting *Passavant Health Center*, 284 NLRB 887, 889–890 (1987)) (quotation marks omitted)(ellipsis in original); accord, *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007). Here, the Employer did not introduce evidence establishing the existence of a progressive disciplinary system or otherwise explain how the verbal or written warnings contained in ECFs in the record were linked to future disciplinary action.<sup>13</sup> Moreover, the Employer has presented no

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regardless of how frequently field supervisors’ recommendations have been followed, under our prior precedent such evidence alone would be insufficient to establish the authority to effectively recommend within the meaning of Sec. 2(11). See *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994); *Hawaiian Telephone Co.*, 186 NLRB 1, 2 (1970).

<sup>12</sup> *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), cited by the hearing officer, is not to the contrary. Although the Board majority in that case concluded that a manager did not conduct an independent investigation of a purported supervisor’s disciplinary recommendation in circumstances in which the record was silent regarding the scope of the manager’s “review,” the majority’s finding of effective recommendation rested heavily on the manager’s testimony that he routinely “signed off on” the purported supervisor’s recommendations, as well as evidence that the manager had approved *all* of the alleged supervisor’s recommendations during the prior year. No comparable evidence exists in this case.

<sup>13</sup> In *Progressive Transportation Services*, 340 NLRB 1044 (2003), the Board cited disciplinary notices that are similar to the ECFs in this case as evidence in support of its finding that the employer maintained a progressive discipline policy. In that case, however, the Board additionally relied on the fact that suspension notices issued to employees by the alleged supervisor *expressly referenced* prior, lesser disciplinary sanctions meted out to those same employees by the supervisor. There is no similar evidence here. Indeed, the highest level of discipline reflected by the ECFs submitted into evidence is a “written warning”; neither of the two “written warnings” in the record refers to any prior infraction by the recipient. Moreover, the documentary evidence re-

documentary evidence of suspensions or discharges issued or recommended by field supervisors. Neither Site Manager Schultz' testimony that there have been terminations based on the recommendation of field supervisors, nor Field Supervisor Flores' testimony that he has initiated ECFs for suspensions and discharges, is sufficient to demonstrate that field supervisors possess the authority to make effective recommendations, for there is no evidence that management has suspended or discharged any technicians without an independent investigation.<sup>14</sup> For all the foregoing reasons, we find that the Employer's field supervisors do not possess the authority to effectively recommend discipline.

In sum, the Employer has failed to establish that the field supervisors possess any statutory indicia of supervisory authority. In the absence of such evidence, the secondary indicia of supervisory authority on which the hearing officer relied are immaterial. See *Ken-Crest Services*, 335 NLRB 777, 779 (2001) (secondary indicia are insufficient by themselves to establish supervisory status). For all these reasons, we find that the field supervisors are not supervisors within the meaning of Section 2(11) of the Act.

In light of that finding, *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), is inapplicable here,<sup>15</sup> and we conclude that the field supervisors' prounion activity did not constitute objectionable conduct. Accordingly, we reverse the hearing officer and overrule the Employer's objection.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 947, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time production installation technicians, field technicians, service technicians, piece work technicians, who service and install satellite dishes, warehouse employees, dispatchers, and quality control employees, employed by the Employer at, or out of its facility located at 19335 South Laurel Park Road, Rancho Dominguez, California; excluding all

veals that, although one employee received two ECFs for the same infraction (attendance violations), the employee received two verbal warnings, the latter of which made no reference to the first.

<sup>14</sup> Indeed, Field Supervisor Flores' testimony that he must first speak to his operations manager before even preparing a draft ECF recommending termination (or, apparently, suspension) suggests that the field supervisors cannot even recommend those levels of discipline without the prior review and approval of a manager.

<sup>15</sup> We therefore find it unnecessary to consider the Petitioner's exceptions urging the Board to overrule *Harborside*.

other employees, administrative clerical employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. December 22, 2011

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Mark Gaston Pearce, Chairman

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Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I would affirm the hearing officer's findings that the field supervisors are statutory supervisors and that their prepetition prounion conduct was objectionable under *Harborside Health Care, Inc.*, 343 NLRB 906 (2004). In particular, I disagree with my colleagues that the Employer has failed to meet its burden of proving that the prounion field supervisors in dispute have statutory supervisory authority to use independent judgment in effectively recommending discipline.

As recounted by the hearing officer in the appended report, the record clearly establishes that the field supervisors have the independent discretionary authority to issue ECFs to field technicians for a variety of work infractions. Merely because an ECF initiated by a field supervisor is subject to a three-level review process does not negate that the field supervisor "effectively recommends" discipline and does not reflect a lack of Section 2(11) authority. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004) (putative supervisor effectively recommended discipline even though reviewed by manager before issuance to employee).<sup>1</sup> Accord: *Caremore, Inc. v.*

<sup>1</sup> The majority contends that in *Mountaineer Park, Inc.* the majority's finding of effective recommendation "rested heavily" on the manager's testimony that he routinely signed off on the purported supervisor's recommendations. The evidence here, as in *Mountaineer Park, Inc.*, shows that the review of the disciplinary recommendations by higher authorities is not an independent investigation. Further, the finding of "effective recommendation" in *Mountaineer Park, Inc.* turned, not on the manager's testimony, but on his "weighty" reliance on the supervisor's recommendation as the record showed the manager consistently followed them. *Mountaineer Park, Inc.*, supra at 1476. Similarly here, the evidence shows that the field supervisors' disciplinary recommendations are routinely followed by the Employer 70 percent or more of the time. *Venture Industries*, 327 NLRB 918, 919 (1999) (finding supervisory authority to discipline where employer followed such recommendations 75 percent of time).

The cases cited by my colleagues, *Brown & Root, Inc.*, 314 NLRB 19 (1994), and *Hawaiian Telephone Co.*, 186 NLRB 1 (1970), are inapposite. In neither case was there evidence that the employers followed the safety inspectors' written citations (*Brown & Root*) or the

*NLRB*, 129 F.3d 365, 369–370 (6th Cir. 1997) (rejecting the Board’s argument that LPN charge nurses did not effectively recommend discipline because their recommendations were subject to review by a higher authority). Indeed, multiple levels of review are a virtual necessity to assure procedural compliance of proposed disciplinary actions with myriad Federal and State employment law regulations. The existence of such a review process certainly does not preclude finding that a front-line supervisor who initiates the process does not effectively recommend discipline, particularly where, as here, the ECFs include specific recommendations for disciplinary action that have ultimately been followed in all but a few instances.

I also disagree with my colleagues that there is a lack of evidence that ECFs affect a field technician’s job status or tenure. The record establishes that different

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traffic supervisors’ initial warnings (*Hawaiian Telephone*). Instead the evidence showed that the citations and warnings simply reported incidents or problems to higher-level supervisors who independently conducted an investigation and then decided whether to take disciplinary action. Here, there is no evidence of any independent investigation as part of the three-level review. Furthermore, inasmuch as the vast majority of the time the discipline issued after review follows the field supervisor’s recommendation, the recommendation is plainly “effective.” Even if the recommendation was subject to investigation, that would not detract from the field supervisor having effectively recommended discipline using independent judgment. See, e.g., *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 89 (6th Cir. 1964) (dispatchers effectively recommended discipline using independent judgment despite recommendations being subject to independent investigation before final action).

levels of discipline are listed on the ECF, up to and including discharge. The field supervisor initiating the ECF process recommends a level of discipline on this form. The hearing officer credited uncontradicted testimony that field supervisors’ ECF disciplinary recommendations, up to and including discharge, have been approved and implemented. With respect to lesser degrees of discipline, it is undisputed that at the end of the review process, the field supervisor explains the discipline to the technician and a copy is placed in the personnel file, where it may be used as the basis for future disciplinary action.

In sum, the hearing officer correctly found that the field supervisors have supervisory authority within the meaning of Section 2(11) of the Act. He also correctly found that authorization card solicitation and other prepetition prounion activity by certain field supervisors materially affected the outcome of an election decided by a 5-vote margin. Accordingly, I dissent from my colleagues’ failure to adopt the recommendation to sustain the Employer’s Objection 1, set aside the election results, and direct a second election.

Dated, Washington, D.C. December 22, 2011

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Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD