

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

ConocoPhillips, Santa Maria Refinery¹

Employer

and

Case 31-RC-068107²

**United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial,
and Service Workers International Union,
AFL-CIO, CLC, Local 534**

Petitioner

APPEARANCES:

John D. McLachlan, Attorney, of San Francisco, CA, for the Employer
Elizabeth M. Chipinski, Attorney, of Houston, TX, for the Employer
Gary Francis Holloway, of Carson, CA, for the Petitioner

DECISION AND DIRECTION OF ELECTION

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

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record³ in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.

¹ The names of the parties appear as amended at the hearing, as set forth in Board Exhibit 2.

² This case was transferred to the undersigned pursuant to the Interregional Assistance Program for decision writing only, under OM 03-77.

³ Both parties timely filed briefs, which were carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

The Petitioner seeks a self-determination election to include five health and safety shift specialists (hereafter referred to as HSS specialists) at its Santa Maria Refinery in its existing bargaining unit of 79 employees, which is currently described in the most recent collective bargaining agreement, effective from February 1, 2009 to January 31, 2012,⁴ as follows:

All operating, maintenance and laboratory employees at the Employer's Santa Maria Refinery; but excluding all executive, administrative and professional employees, guards, technical employees, salaried health and safety employees, janitors, metallurgical and reliability inspectors, supervisors, as defined in the National Labor Relations Act, mail room and copy room employees, and telephone operator.

The Employer contends that the HSS specialists are supervisors within the meaning of Section 2(11), managers, and its agents within the meaning of Section 2(13) of the National Labor Relations Act (the Act) and should not be included in the existing unit. The Employer further contends that the HSS specialists do not share a sufficient community of interest to be appropriately included in the bargaining unit described above.⁵

I find that the HSS employees are not supervisors, managers, or agents within the meaning of the Act, and share a sufficient community of interest with the existing unit to be included therein if they so vote.

⁴ Neither party contends that the existing collective bargaining agreement constitutes a bar to this proceeding.

⁵ The Employer asserts that the HSS specialists may constitute only a stand-alone unit. In the event the Regional Director concludes that the HSS specialists may constitute only a stand-alone unit, the Petitioner does not seek to represent them.

The Employer's Operations

The Employer operates a Refinery in Santa Maria, California (Santa Maria Refinery) which processes 44,000 barrels a day of crude oil and semi-refines that into two products. The Santa Maria Refinery, along with the Employer's Rodeo Refinery, is part of its San Francisco Refinery System. Tim Stubenvoll is currently the human resources, business partner, and labor relations specialist for the Santa Maria and Rodeo Refineries. Stubenvoll is responsible for all labor relations issues with the local unions, including processing of grievances, arbitrations, and any local bargaining issues. He also handles employee relations issues, investigations, and training and development.

The Santa Maria Refinery includes several buildings, including the refinery itself, a Carbon Plant which sits south and adjacent to the refinery, office buildings, maintenance shops or laboratories, and other support-type buildings. Inside the refinery there are marked areas which hold the refinery process units. Inside those refinery process units are areas which house operations and where the majority of equipment is located, and where a majority of maintenance work is performed. There is also a more centralized control room where the operators do their shift relief and conduct much of their daily activities. The health and safety department is located in a building referred to as the Firehouse.

There are currently 137 employees working at the Santa Maria Refinery, of whom approximately 79 are currently in a bargaining unit represented by the Petitioner. About two-thirds of the bargaining unit consists of operators, and the remaining one-third includes maintenance workers and two health and safety employees. The remaining employees not currently in the bargaining unit include 48 exempt employees (including the five HSS specialists in dispute) and four salaried, nonexempt employees. There are also six employee operators in a separate unit represented by a different union (IAM) who work exclusively at the Carbon Plant.⁶ The IAM employees perform operator work and also perform minor maintenance. Major maintenance at the Carbon Plant is performed solely by contractors.

Tim Seidel is the site manager at the Santa Maria Refinery, and as such is the chief management representative at the site. The Santa Maria Refinery has three departments which currently employ bargaining unit employees: maintenance, operations, and health and safety. Reporting directly to Seidel are superintendents of each of the three departments: James Anderson, superintendent of maintenance; Jason Glislason, superintendent of operations and technical services; and Kristen Kopp, superintendent of health and safety and environmental. Maintenance employees in the bargaining unit report directly to a maintenance supervisor, who in turn reports directly to Anderson. Similarly, operations employees in the bargaining unit report to operations supervisors

⁶ The operators represented by the Petitioner no longer perform any work at the Carbon Plant and work exclusively at the refinery as a result of a settlement of a 2007 grievance.

who in turn report directly to Glislason. The five HSS specialists at issue, Bernie Gallizio, Andy Garcia, Alan Lanier, Steve McNeil, and Lionel Senes,⁷ report directly to Anthony Dibernardo⁸, supervisor of safety and emergency response, who in turn reports directly to Kopp. One bargaining unit employee, John Lujano, health and safety representative, also reports directly to Dibernardo. An environmental engineer, an HSE programs coordinator, an industrial hygienist, and another bargaining unit employee, Kathy West, VPP coordinator, also work in the safety department and report directly to Kopp.

The Santa Maria Refinery is a 24/7 facility. HSS specialists and operators work on 12-hour shifts. There are four groups which rotate day, night and weekend shifts: A shift, B shift, C shift, and D shift. To ensure 24-hour coverage, there is one HSS specialist on every shift. The fifth HSS works as a “vacation breaker,” covering vacations. The “vacation breaker” shift is rotated among the HSS specialists. There are about 12-13 operators on each of the shifts. On the night shift and on weekends, the only salaried workers are the HSS specialist and an operations shift supervisor. The vast majority of salaried employees work eight-hour shifts, as do the maintenance bargaining unit employees. Maintenance employees typically work Monday through Friday.

There is no history of collective bargaining between the Employer and the Petitioner, or any other labor organization, with respect to the HSS specialists. The Petitioner has represented employees at the facility for more than 20 years.

HSS Specialists

All HSS specialists⁹ are certified emergency medical technicians (EMTs). The majority of HSS specialists are hired with an extensive background in emergency response. They essentially act as the organizer of the Employer’s emergency response crew in the event of emergencies, and also help oversee general safety issues in order to help prevent such emergencies. Their presence on the job is necessary due to the nature of the Employer’s business and the dangers involved. Crude oil is highly flammable, and includes several components, including hydrogen sulfide and benzene, which are hazardous and require extra precautions. In addition, the crude oil processing is machinery intensive, and is performed at high temperatures or pressures.

⁷ Senes acted as supervisor of safety and emergency response from approximately mid February 2011 through about mid September 2011, when Dibernardo took over the position.

⁸ The record does not include supervisory stipulations. However, Stubenvoll, Seidel, Anderson, Glislason, Kopp, and Dibernardo are not in dispute and all appear to be statutory supervisors within the meaning of Section 2(11) of the Act.

⁹ It is noted that in the record that the job title of “safety and emergency shift specialist,” for which there is a written job description, is the same as HSS Specialist.

Safety Incidents

Whenever there is any sort of safety “incident” at the refinery, the Employer invokes a policy which it has in place to investigate the incident. This policy is entitled “SMF 9.4.1 Incident Notification and Investigation.” Safety incidents happen about 75 to 100 times per year. An incident can be several different things, including a process incident, an auto accident inside the refinery gates, a significant process upset, a fire, property damage, an on-the-job injury, etc. (A “near-miss,” which is an event with no consequences, does not typically trigger an investigation.) Typically these incidents are reported by the people involved, supervision on site at the time, etc. Anyone at the plant can report an incident and start the investigation process. The database the Employer uses to track such incidents is referred to as “IMPACT.” HSS specialists are responsible for entering the initial incident into IMPACT and for other key decisions regarding the initial assessment, including the risk ranking. Any employee who reports an incident can also enter it into IMPACT.

Under the Employer’s procedures, when an incident is reported, it is assigned an “owner,” which according to the Employer in every case is an HSS specialist. The incident owner is responsible for determining the basis for the incident, and establishes, with supervision, the investigation team. As the incident owner, the HSS specialist ensures that the entire site is secured, and approves any movement in and out of the site. The incident owner’s primary role is to mitigate and document any hazard. After assessment, the HSS specialist assigns an initial risk ranking of 1 to 4 (4 being most severe) to the incident. A risk ranking is determined by evaluating the frequency and the potential severity of the incident. After input from the responsible supervisor, the initial risk ranking may be evaluated for change. If for some reason something has been misclassified as an “incident,” the HSS specialist may make the decision to declassify it.

Incident Command

Approximately 10% of the safety incidents that occur each year are sufficiently severe such that “incident command” is invoked. The primary trigger for an incident command is the activation of the emergency alarms. The alarms can be triggered manually by someone who witnesses an incident (such as a fire or serious injury), or by automatic monitors which measure contaminate levels. When an incident command is invoked, an emergency response team (ERT) led by an incident commander who, according to the Employer, is always an HSS specialist, responds. The ERT is composed of bargaining unit employees and management volunteers. The HSS specialist evaluates the incident, sets up a command center if necessary, establishes an entire organization underneath him or her for planning and execution, and communicates as needed with outside entities, such as the media or press. According to the Employer, these types of incidents can affect hundreds of people, and the incident commander is solely responsible for all decisions. The Employer asserts that the incident commander is the only person

qualified to give the all clear when the incident is over, and while an incident command is invoked, everyone in the plant, including management, answers to the incident commander.

The Employer's witnesses testified that the incident commander has complete authority to contact an outside agency for help, and carries a radio that ties the incident commander into these agencies. After the all clear is given, the incident commander is required to do a full evaluation of the incident, including how everything went from the tactical response to the interaction with management, the accountability, i.e., could the incident commander account for every single person inside the refinery gate, etc. According to the Employer, some of these incidents potentially could affect human life within the plant or within the surrounding communities. Incident commanders can be relieved of their duties only if either an outside agency determines they are not competently managing the incident, or if the incident is of such a severe magnitude or expands so far that a corporate team is brought in to handle the incident.

The Employer's witnesses testified that within the past two years, there have been about eight or nine incidents where incident command was invoked. The Employer asserted that none of those situations resulted in personal injury or damage to the community, but they did result in equipment damage. The Employer asserts that on average the incidents lasted about an hour (some were longer, some shorter).

The Petitioner asserts that the Employer's description of the role the HSS specialist plays in an incident command situation differs from the written procedure described in its "Emergency Respondent Plan – Incident Command System." Specifically, according to the written procedure, HSS specialists would act as an incident commander only in the initial stages of an incident, and that at a more advanced stage, the safety and emergency response supervisor (Dibernardo), would take over. Further, according to this written procedure, "outside assistance" is only part of an advanced response.

The record does not provide any specific, descriptive examples of actual incident commands, and how they were carried out.

Meetings

Every weekday morning the Employer holds two meetings, one at 7:00 a.m. and one at 7:30 a.m. These meetings are usually attended by operations and maintenance supervision, key maintenance employees, environmental employees, engineers, equipment inspection employees, and the maintenance turnaround superintendent. HSS specialists and the bargaining unit health and safety representative (Lujano) often attend, and sometimes the VPP coordinator (West) attends. Any incidents that have occurred are discussed at this meeting by the HSS specialist. About half the time, the HSS specialist

speaks at this meeting about a safety topic. Lujano presents safety topics on occasion as well.

Telemedicine

The HSS specialists are the primary responder for work place injuries, and make the determination as to whether an ambulance is needed. They are the only employees in the facility qualified to conduct telemedicine and operate telemedicine equipment. Telemedicine involves a video camera with audio, which is located in the Carbon Plant, and is hooked up to the Long Beach Medical Clinic. A doctor at the clinic views the patient (employee) via the equipment and directs the HSS specialist as to how to help the patient (employee) through exercises or procedures (such as stretching exercises, etc.). Telemedicine is utilized about once or twice a quarter. HSS specialists also complete patient (employee) assessment forms.

Confined Space Rescue Plans

HSS specialists are also responsible for writing confined space rescue plans, which are posted outside of a confined space prior to an entry by maintenance or operational personnel. In the event that something should occur within the confined space and a rescue would need to take place, the document could be referenced for equipment needed, recommended entry procedures, and recommended personal protection equipment. No one else writes these plans, but the HSS supervisor may assist. Most months, about 3-5 confined space rescue plans are drawn up. But once or twice a year, a “turnaround” occurs, which is where a unit is brought offline, cleared of any gasses and opened for entry as well as utilized for maintenance purposes. If there is a turnaround, there could be more than 100 confined space entries necessary in a month.

HSS specialists also sometimes conduct safety inspections of areas where maintenance work is to be done. This usually occurs with a more complicated maintenance repair including a confined space entry. The HSS specialist may be involved in ensuring that both the maintenance and operation employees understand the involved work. Also, in situations where an employee is required to go into a piece of equipment and needs to have retrieval devices attached to him/her, the HSS specialist would in many cases write and manage a safety plan.

Audits

HSS specialists also audit the work permits. There are two different types of audits. A field audit can occur at any time by anyone in the facility. Any employee, including hourly personnel, can approach someone doing repair work and ask to see the work permit. If the employee believes a job is unsafe, the employee can shut it down.

The employee would then ask the individuals conducting the job to meet with him/her and the supervisor to explain why the job was shut down.

HSS specialist Lionel Senes testified that when performing field audits, if he sees something wrong he talks to the people doing the work and asks them to comply with the policy. According to Senes, this happens on a daily basis. He may walk through a unit and see someone without hearing protection or working on a scaffold that is not properly tied off. Senes testified that, generally, he asks the employees to correct the situation and they usually comply. However, he has had situations where employees have not complied. If it is an operator, he would go to the head operator (a bargaining unit employee), explain the situation, and ask him or her to take care of it. Senes could not recall any situation involving unit employees where the situation was not resolved at that point.

The second type of audit involves a work permit audit for a specific job. When work is performed in the field, a job order is submitted with a job safety analysis (JSA). The HSS specialist reviews the job order and the JSA and logs it online. After the job is completed, the maintenance person takes the job order and the JSA back to the maintenance building. Senes testified that he does not know what happens to the job order and JSA after that – they do not return to the HSS specialists. Senes testified that each day they try to do five work permit audits, which include hot work, confined space, vehicle entry, and job order.¹⁰ Senes estimated that he does approximately one to two job order audits per day.

Inspection of Safety Equipment

HSS specialists are responsible for maintaining and testing safety equipment throughout the refinery. Specifically, they are responsible for checking fire water lines; periodic detailed testing of self-contained breathing apparatus (SCBA) equipment; testing of foam samples, fire engine recertification, fire pump and flow tests; fire hose testing and annual fire extinguisher inspection; terminator testing; and ensuring that air cylinders are hydrostatically tested. HSS specialists are authorized to inspect SCBA equipment pursuant to a specific certification they hold. HSS specialists are responsible for conducting an inventory of chemicals at the plant. Supervisors in other departments also conduct a chemical inventory and report their findings to the health, safety and environmental health department.

Revision of Safety Procedures

HSS specialists are responsible for reviewing and updating all safety policies and procedures on an annual basis for consistency with federal and state regulations.

¹⁰ Although Senes testified that there are five types of work permit audits, he testified only to four.

Dibernardo also personally reviews safety procedures. The Employer presented examples of several safety policies that were either written, reviewed, or updated by HSS specialists. Dibernardo testified that there are about 30 to 40 different policies to be reviewed, of which he takes a portion and assigns the rest to the HSS specialists. The HSS specialists' updates are subject to higher review and approval.

Certifications

HSS specialists are required to be EMT certified either at the time of hire or acquire the certification shortly thereafter. In addition, they maintain numerous other certifications. Trainings and certifications reflected in the record include: PICS Field Audit Training Course (PICS is an outside contractor safety database utilized by the Employer), which instructs on ways to field audit and office audit contractors; confined space and high angle rescue training; computer-based training courses from the Federal Emergency Management Agency (FEMA) regarding the Incident Command System (ICS); an OSHA 511 General Industry Safety Course (computer based); a 40-hour Process Safety Management Course; a refresher course for maintaining certification as a hazardous material specialist; a 24-hour rope rescue refresher course; a frame, tube and coupler and system scaffolding competency off-site 8-hour course; a Cal-OSHA safety for refineries four-day course on hazard recognition; and a 40-hour training course to become a hazardous material technician. They also have a certification from the California Emergency Management Agency as an industry technician handling hazardous material certification for maintaining SCBA equipment, which is kept in the refinery, and worn by the HSS specialist in the event of an incident.

Training of Other Employees

HSS specialists are responsible for training of other employees regarding safety issues/use of safety equipment. They are required to maintain the training certifications of all emergency response teams, including live fire training, CPR, first aid, etc.. They provide an orientation to transportation vendors that come into the facility with deliveries. They also do a monthly emergency response training drill with their respective shift. The Employer asserts that once a year HSS specialists are required to create the training calendar of topics for these drills. HSS specialists critique the performance at the emergency drill of the emergency response team, along with the shift supervisor. There is a debriefing with the team after the drill is complete, and then written comments are included in a report prepared by the HSS specialist. The record is silent as to the effect of these reviews on bargaining unit employees, if any.

Supervisory Indicia

The Employer asserts that HSS specialists have served as witnesses or company representatives in disciplinary situations involving bargaining unit employees. The only

example presented involves a written warning issued to an operations employee in 2009, after she was caught sleeping on the job. In connection with the disciplinary action, the HSS specialist presented a written statement. According to his statement, the shift foreman approached the HSS specialist and asked him to witness the employee sleeping in her vehicle, which the HSS specialist did. The disciplinary action was signed only by the foreman, not the HSS specialist, and there is no further evidence in the record suggesting the HSS specialist recommended discipline or otherwise played a part in the decision to discipline the employee, aside from acting as a witness.

There are no examples of disciplines issued by HSS specialists to the Employer's employees, and no situations were described in the record which suggest that an HSS specialist has ever recommended discipline for an employee. HSS specialist Lionel Senes testified that he has been at the plant for 10 years, and did not recall ever sitting in on a discipline, acting as a witness to a discipline, or being involved in the disciplinary process in any way. HSS specialists do not have the authority to hire or fire employees. Senes testified that he has contacted contractors to come in to teach classes, but with the approval of his supervisor.

Tim Stubenvoll testified that HSS specialists "can" administer discipline, and have done so, to contractor employees who are not employees of the Employer. However, the record is absent as to any specific instances where discipline has issued. Dibernardo testified to being familiar with past instances where HSS specialists were instrumental in causing a contractor to be removed from the site, or threatened removal. Dibernardo also testified to another instance where a HSS specialist asked an inspector from an outside agency to shave and come back the next day. HSS specialists are responsible for fitting refinery employees for respiratory equipment, and can also direct employees to shave to ensure they can maintain a proper seal for the respirator.

Senes testified that the HSS specialists make sure the contractors perform work safely, and he has had situations, the most recent being in 2009, where contractor employees were not wearing their personal protection equipment (PPE). Senes testified that he asks them to put their PPE on, and if after a second check the contractor employees still are not wearing their PPE, he has gone to their supervisor and asked the supervisor to please instruct their employees to wear their PPE. If the contractors fail to comply then, he would go to the maintenance supervisor overseeing the contractor who would handle it from there. Senes described another situation in 2006 where he reported to the maintenance supervisor that a contractor employee was reading the newspaper, and the person was asked to leave. Senes testified that he does not have authority to remove anyone from the facility.

Senes further testified that he has not approved overtime, directed an employee to work overtime, or granted time off, and he has not observed any other HSS specialist do these things either. He does not adjust employee grievances, and he does not attend

management meetings on a regular basis. However, on an irregular basis he has been invited to management meetings for certain situations, such as when there is a turnaround. He and other HSS specialists have also attended 2-3 “bridging agreements” with outside contractors. At these meetings, they go through a checklist of safety items to make sure the contractor is familiar with all safety issues and procedures, and answer any questions.

HSS specialists do not have any role in promoting or rewarding employees, aside from their participation in the Employer’s special recognition program. Under this program, any employee can write on a small form that he or she observed another employee doing something good, and that employee will receive a small trinket as a reward.

The record does not contain evidence that HSS specialists assign work to bargaining unit employees or direct them in their work, aside from the routine direction they may give with respect to safety issues or during emergency response team drills, or in the rare instance of an incident command.

Bargaining Unit Employees

Operators in the bargaining unit represented by the Petitioner operate machinery in the refinery in assigned units. They generally work in one general area and do not travel throughout the plant. They have some responsibilities related to safety. Specifically, they are required to inspect their work area and in connection with this complete “Kardex” forms, which are basically a check or inspection of their safety equipment. According to the forms, operators must, among other things, inspect fresh air, check containers for proper labeling, inspect fire extinguishers and inspect ladders, and verify that the store hoses, ladders and fire extinguishers are in the proper location.

Maintenance employees work throughout the refinery, depending on their job assignment. They are provided with a truck, which they use to pick up materials for jobs throughout the refinery. Although maintenance employees generally work on the day shift, Monday through Friday, they sometimes are called in at night if there is a problem.

Incident Command Emergency Response Team (ERT) unit members, who are mostly junior operators, are CPR trained but do not perform telemedicine. They participate in drills and training in order to be prepared for any potential emergency.

Kathy West is the VPP coordinator, and is one of the two bargaining unit employees who works in the health and safety department along with the HSS specialists. West is responsible for helping facilitate the process of the Employer becoming an OSHA VPP star certified site. A VPP Star certification provides recognition in the industry that the Employer has achieved a certain level of joint safety effort between

union and management, and OSHA. There is no known or expected date that the facility might be VPP certified. West works on the OSHA application, which is a significant process and requires information about the health and safety programs in place at the refinery. She also audits for regulatory compliance, i.e., any abnormalities in the refinery are written up on a recurring, recycling audit program. West was previously a unit maintenance mechanic but in her current position spends all of her work hours performing VPP work. Her position is not defined by the collective bargaining agreement and there is no known end date.

John Lujano is the other bargaining unit employee working in the health and safety department. His position is defined in the collective bargaining agreement as the health and safety representative. The position is aimed towards improving the health and safety of all refinery employees. The position performs many of the same tasks as those performed by HSS specialists, including being a member of the Joint Health and Safety Committee, participating in the development and delivery of safety training programs, participating in the inspection, investigation and review of health and safety conditions and practices, performing field audits, and providing assistance in emergency response situations.

The record reflects that Lujano and West hold many of the same certifications that the HSS specialists hold, and have attended some of the same training. The record further reflects that similar to HSS specialists, West and Lujano have written and approved confined space plans. They have also performed revisions on safety policies and procedures. Senes testified that he believed Lujano did about 1-2 job audits per day, the same number that he does.

Interaction Between HSS Specialists, Other Employees, and Outside Agencies

HSS specialists, as well as Lujano and West, work in the Firehouse, which is a separate building from the refinery, flanked by two apparatus bays. In the center of the Firehouse is a meeting room, where health and safety employees including HSS specialists, Lujano and West eat lunch. There are also lockers in that area. Directly in front of the meeting room is Dibernardo's office. On one side of the building, there is an HSS specialist office,¹¹ which is next to an office shared by West and Lujano. On the other side of the building is an equipment room, a bathroom, and a kitchen which is adjoined to the meeting room.

In addition to the HSS specialists, and Lujano, West, and Dibernardo, there is also an industrial hygienist and an environmental programs coordinator in the health and safety department. There is very little detail in the record regarding these two positions. Stubenvoll testified that there is some overlap between the industrial hygienist job and

¹¹ There is usually only one HSS specialist per shift, but if there is more than one, they share Dibernardo's office.

the HSS specialist job. More specifically, because the industrial hygienist works only during the day, the HSS specialist performs some of the hygienist's tasks during the night shift.¹²

Lionel Senes testified that the HSS specialists work in the units where the operators work quite frequently, and on a daily basis. Senes approximated that they spend about two thirds of their day in the units, and the remaining one third of their day is spent at the Firehouse. About a third of the time that the HSS specialists are in the unit, they are doing audits and talking to the operators. The remainder of that time they are walking around the unit doing inspections. On a normal day, Senes testified that he would go to the various units and talk to the head operator about what is going on in the unit, and sit down and talk about what the operators are doing or what maintenance is being done in that unit on that day. Senes testified that his interaction with maintenance employees included auditing their jobs, or watching them work to make sure that they were working safely and following procedures. Senes explained that when he stops by a job, he may watch the work for 10 or 15 minutes, and on most occasions, during that time, he will talk to the people doing the work. Senes testified that it is a learning experience for the HSS specialists as well, since they do not have the process knowledge, so they are always trying to learn what each piece of equipment is, why various things are being done, and they may ask questions.

HSS specialists perform audits and oversee work in both the refinery and the Carbon Plant. Bargaining unit members on the health and safety committee have also volunteered to go to the Carbon Plant to do safety audits, and have been allowed to go. Specifically, one occasion was noted in the record where a unit employee performed an audit at the Carbon Plant.

Senes testified that on the days their schedules overlap, he interacts with bargaining unit employees John Lujano and Kathy West.¹³ Senes testified that he has worked on projects with Lujano in the past. Specifically, he explained that the industrial hygienist has asked Lujano to do personnel monitoring, i.e., noise monitoring, exposure to gasses, etc. Senes has assisted Lujano with this project. Senes is also on a safety enhancement committee with Lujano, who is the committee lead, West, HSS specialist Lanier, several operators, maintenance employees, and members of management. The committee holds meetings and works together to prepare for upcoming safety days. A safety day occurs every three months, to promote safe work practices. Generally, safety days include safety-related vendors for demonstrations, a safety meeting within each department, and a facility barbeque.

¹² The record is silent with respect to any specific tasks.

¹³ Because the 12-hour shifts for HSS specialists varies, Senes testified he may work only five day shifts in a 28-day period, whereas Lujano generally works Monday through Friday on days.

None of the current HSS specialists are former bargaining unit employees, but some in the past have come from the unit. There is no evidence of interchange between HSS specialists and bargaining unit employees. Temporary vacancies in HSS specialist positions are filled by supervision; the record is silent as to any specific examples or with respect to the frequency that this has occurred. There is no evidence of any HSS specialist transferring to a bargaining unit position.

The Employer's witnesses testified that HSS specialists regularly communicate with outside agencies, including fire and emergency response organizations. For example, HSS specialist Gallizio coordinated a presentation in March 2011 with the San Luis Obispo County Regional Hazardous Materials organization. On November 16, 2011, HSS specialists Garcia and Lanier coordinated an ICS drill with approximately 70 outside responders.

Senes testified that as an HSS specialist he has had contact with outside agencies in certain situations. In particular, he has contacted Cal-Fire and Los Angeles Fire to coordinate fire school training. The fire departments are needed to assist with the engines and provide breathing air units for their classes. According to Senes, both West and Lujano have also contacted outside vendors to seek their participation in safety days.

Personnel Policies

Basic Pay

The HSS specialists are salaried FLSA exempt employees and are paid semi-monthly. They may be paid according to an assigned salary grade of either 13 or 14, which ranges from a minimum of \$73,000 per year to a maximum of \$121,000 per year. (The higher amount would be received at salary grade 14.) Currently all five health and safety shift specialists are paid at salary grade 13. The record does not specify the maximum salary grade for 13, but it does provide a formula which appears to put it just above \$100,000 per year. There is also testimony from Stubenvoll that all five currently have a salary that is less than \$100,000 per year. With other compensation included, at least four of the five HSS specialists earn less than \$100,000 per year.

Bargaining unit employees are hourly and paid bi-weekly. According to the collective bargaining agreement, operators classified as "head operator" earn \$37.67 per hour. Those classified as "operator 1" currently earn \$36.13 per hour, while those classified as "operator 2" earn anywhere from \$26.03 (a trainee) to \$34.59. Maintenance employees receive \$35.94 per hour.¹⁴ According to Side Letter 2 of the collective

¹⁴ The collective bargaining agreement also references laboratory employees; however, record testimony indicates that there are no laboratory unit employees at the Santa Maria Refinery. The collective bargaining agreement notes that it covers the Employer's Los Angeles, Rodeo, and Santa Maria Refineries, although each location is a separate bargaining unit.

bargaining agreement, the health and safety representative, Lujano, is paid at an increase of 14% plus \$0.50 over the existing rate of his original classification. Neither the contract nor the record set forth West's rate of pay. Regardless, it appears, not including overtime or other benefits, and assuming a 40 hour work week, bargaining unit employees earn anywhere from \$54,142.40 to \$78,353.60. Two bargaining unit employee pay stubs were entered into evidence which reflect total year-to-date earnings of \$116,087.78 and \$72,420.55.

Bargaining unit employees receive pay raises through collective bargaining negotiations. HSS specialists receive annual salary adjustments based on their annual performance appraisal ratings. They are also eligible for grade promotions, which they are evaluated for and receive based on strong performance over a period of time.

Overtime

HSS specialists do not receive overtime pay. Instead they receive "high intensity pay," which provides for straight time pay for any days worked in excess of their regular schedule. Their straight time pay is determined by dividing their yearly salary by the typical number of hours worked by a 12-hour shift employee over the course of a year.

Bargaining unit employees are eligible for overtime pay. If they are working an 8-hour shift, they receive time and a half at a factored rate set forth in the collective bargaining agreement. If they work 12-hour shifts and work beyond their shift, they receive time and a half at an unfactored rate. Bargaining unit employees do not receive the same "high intensity pay" received by the HSS specialists.

Pay Bonuses

Both bargaining unit and salaried employees, including HSS specialists, are eligible for a bonus program referred to as VCIP, or variable compensation incentive program. The target for bargaining unit employees is set at 7.5% of their gross pay under this program, while salaried employees, including HSS specialists, are set at a rate of 10% of their salary. All employees receive the bonus based on the business unit performance, and the corporation's overall performance. However, for salaried employees, including HSS specialists, there is an additional individual component, which adjusts the amount based on individual performance. Bargaining unit employees do not receive the individual component.

HSS specialists are also eligible for a special recognition pay program where a supervisor can nominate an employee for special recognition, and that employee receives a one-time bonus. Bargaining unit employees do not receive this.

Benefits

The vacation policy for HSS specialists and bargaining unit employees is the same. However, HSS specialists can carry over up to 10 days of vacation, while bargaining unit employees cannot carry over any vacation days. Both groups of employees receive the same sick leave (short-term disability) benefits, except that salaried employees, including HSS specialists, are eligible for a paid leave of up to five days during a calendar year for serious illness in the family. Bargaining unit employees are not eligible for this paid leave.

Both groups of employees receive the same medical benefits, including choice of health care plans and contribution amounts. The Employer also offers a flexible spending plan, an employee assistance plan, employee accidental death and dismemberment insurance, long term disability insurance, for which all employees, including bargaining unit employees and HSS specialists, are eligible. However, there may be some differences in some of these plans, particularly with respect to the plans for employee accidental death and dismemberment insurance.

HSS specialists do not receive holiday pay. If they work on a holiday, they do not receive additional pay; however, they do receive one day of paid time off as compensation. Bargaining unit employees receive holiday pay, and if they work on a holiday, they also receive one and a half times their regular pay.

Under the collective bargaining agreement, bargaining unit employees receive one week of severance pay for every year of service, with no maximum limit. All non-bargaining unit employees receive three weeks for every year of service, with a cap of 60 weeks.

Other Factors

The HSS specialists and their supervisor Dibernardo wear coveralls that are a darker blue than what is worn by bargaining unit employees and they wear a red hard hat. HSS specialists also wear fire and safety insignia and EMT patches on their coveralls. Operators wear orange hard hats and maintenance employees wear blue hard hats. All refinery employees park in the same common area. HSS specialists have a credit card for work-related purchases, similar to maintenance employees.

Analysis

Supervisory status

Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor.” 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 direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend the same. The burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Accord *Kentucky River*, 532 U.S. at 711-712. Purely conclusory evidence is not sufficient to establish supervisory status. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

The Employer asserts that the HSS specialists exercise supervisory indicia under Section 2(11) of the Act with respect to their ability to responsibly direct employees and assign tasks regarding safety issues at the refinery, and, in particular, while acting as an incident commander, and training an emergency response team (ERT) to prepare for such events. The Employer further asserts that HSS specialists have disciplined bargaining unit employees, and have authority to remove contractors from the Employer’s facilities.

In *Oakwood Healthcare*, supra, the Board interpreted the 2(11) language “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible ... and carried out with independent judgment.” *Oakwood Healthcare*, supra, at 691. The Board further held that, for direction to be responsible under Section 2(11), the person directing the performance of a task must be accountable for its performance. *Id* at 691-692. 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.” *Id* at 692. Evidence of actual accountability must be presented to prove responsible direction. See *Alstyle Apparel*, 351 NLRB 1287, 1287 (2007); *Golden Crest Healthcare Center*, supra.

In *Oakwood Healthcare*, supra, the Board held that “assign,” for purposes of Section 2(11), means the “designation of significant overall tasks to an employee, not ... ad hoc instruction that the employee perform a discrete task.” *Oakwood Healthcare* at 689. As the Board has noted “[t]o establish the authority to assign, moreover, it must be shown ‘that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken.’” (emphasis in original). *Rockspring Development, Inc.*, 353 NLRB No. 105 (Feb. 27, 2009) quoting *Golden Crest Healthcare Center*, supra, at 729.

There is some evidence in the record that HSS specialists may, when acting as an incident commander, direct the work of bargaining unit employees participating on the ERT. However, there appears to be a conflict in the record between the testimony of Employer witnesses and the written procedures for incident command, with respect to the situations in which HSS specialists act as incident commander, and with respect to their level of authority. Employer witnesses testified that the HSS specialist is the incident commander at all stages, and is only removed if the event is so severe that either a corporate team is called in or if an outside agency takes over. The written Incident Command Procedure appears to suggest that HSS specialists act as incident commander only in an initial response, and that the Safety and Emergency Respondent Supervisor or designee acts as incident commander in an “advanced response.” According to the written procedure, it appears an initial response may require less direction of employees than an advanced response. The record is devoid of specific past examples of HSS specialists acting as incident commanders. Such examples would likely have provided the most reliable evidence as to what actually happens in these situations and exactly how much authority is held by the HSS specialists.

Assuming that HSS specialists do responsibly direct the work of the ERT during an incident command, it does not appear that this occurs frequently. According to the record, these incidents have occurred only approximately 8-9 times within the past two years, and, on average, have lasted about an hour. ERT drills are also held about once a month. An employee acting as a supervisor is considered to be a supervisor within the meaning of the Act “only if the individual’s exercise of supervisory authority is both regular and substantial.” *Hexacomb Corporation*, 313, NLRB 983, 984 (1994). In *Gaines Electric Company*, 309 NLRB 1077 (1992), the Board held that an employee may not be excluded from the unit on the presumption that he was a supervisor, where he spent between 15 % and 20% of his time in a supervisory capacity. The Board further noted that the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his working time in a supervisory position or whether such work is merely sporadic and insignificant. See, e.g., *Canonie Transportation Co.*, 289 NLRB 299, 300 (1988); *Latas de Aluminio Reynolds*, 276 NLRB 1313 (1985); *Aladdin Hotel*, 270 NLRB 838, 840 (1984). In this case, HSS

specialists spend a very small percentage of their overall work time acting as incident commander or directing incident command ERT drills. The majority of their work time is spent performing their other duties.

The Employer asserts that looking only at the total number of hours that the HSS specialist serves as incident commander misses the point. The Employer argues that regardless of the number of incidents that occur, when incident command is invoked, the HSS specialist's authority as incident commander must be followed without question or the Employer risks a potential escalation of emergency. The Employer does not cite any cases for the proposition that the nature of the situation in which an employee directs employees, as opposed to the amount of time spent on supervisory tasks, is controlling. Further, as stated above, the record evidence is conflicting as to whether the more severe situations that require an advanced response may be handled by their supervisor.

Regardless, the Employer further argues HSS specialists do not only act in a supervisory capacity when acting as an incident commander. The Employer asserts that the record evidence demonstrates that HSS specialists exercise leadership by training employees on safety issues, by acting as an incident owner, by directing employees with respect to safety issues (doing field audits, preparing confined space rescue plans, directing employees to wear their personal protection equipment, etc.), by acting as a liaison with outside agencies,¹⁵ and by being generally responsible for the safety program of the entire refinery.

According to the record evidence, when the HSS specialists train employees regarding safety issues, this training is routine and according to established procedure. Further, according to the established procedures, the Supervisor of Safety and Emergency Response, Dibernardo, is responsible for the development of emergency training at the facility. To the extent that HSS specialists are developing their own training, it appears Dibernardo is ultimately responsible for the curriculum content. The training is also usually attended by the employees' supervisor. Although the HSS specialists provide feedback to the employees after the training and complete an evaluation of the training, there is no evidence in this record that this evaluation is used to discipline, reward, or promote employees. Where an evaluation does not, by itself, affect the wage and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. See *Williamette Industries, Inc.*, 336 NLRB 743 (2001).

The record provides insufficient evidence to conclude that HSS specialists are responsibly directing employees or otherwise acting as a supervisor when serving as an incident owner. The incident owner is securing the scene, mitigating the hazard, performing an investigation, and assigning a severity rank to the incident. The record

¹⁵ Communications with outside agencies does not appear to fall under any criteria for establishing supervisory status, and will be discussed in the next section addressing the managerial status of the HSS specialists.

contains no examples of any responsible direction an incident owner may give to an employee while performing these tasks.

HSS specialists, in performing field audits, preparing confined space rescue plans, and in generally walking around the plant making sure employees are performing their jobs safely and wearing the correct PPE, do not appear to exercise supervisory authority. Although HSS specialists may ask an employee to fix a problem or put on the proper PPE, any direction they are giving in this situation is routine. If an employee refuses to comply, which according to the record does not happen often, it appears the course of action the HSS specialist follows is to report the issue to the employee's supervisor. The supervisor handles the situation from that point forward. HSS specialists also cannot discipline employees for noncompliance with safety procedures. Further, any employee at the plant can do a field audit at any time, and any employee at the plant can shut down a job deemed unsafe. Although field audits are a regular part of the HSS specialists' daily job, bargaining unit health and safety employee, Lujano, also regularly performs field audits, as frequently as the HSS specialists. Similarly, confined rescue plans are routine and prepared pursuant to established guidelines, and according to the record evidence have also been prepared by bargaining unit employee Lujano.

The record is devoid of evidence that the HSS specialists hire, transfer, suspend, lay off, recall, promote, discharge, discipline employees, or adjust their grievances. The only evidence that HSS specialists reward employees is with respect to an incentive program that all employees participate in, whereby any employee can recognize a co-worker for good work, and the coworker receives a small trinket in return. The only evidence of employee discipline involves a situation where an HSS specialist acted as a witness to an employee infraction, which led to that employee's discipline. There is no evidence that the HSS specialist sought or recommended the employee's discipline. The discipline was not issued by the HSS specialist. The record is absent of any examples of disciplinary actions issued by, or effectively recommended by, HSS specialists towards other employees.

The Employer asserts that HSS specialists have on occasion removed, or attempted to remove, contractors who have not followed plant procedures. The details of these incidents lack the specificity to determine whether the HSS specialists actually exercised authority over the contractor, or merely set the chain of events in motion by reporting the incident to higher supervision. The evidence does not clearly establish that they exercised independent judgment in such situations. It also appears these situations have occurred infrequently.

There is some evidence that HSS specialists receive different pay and enjoy different benefits than bargaining unit employees. It appears that at least, in part, the differences can be attributed to the fact that the bargaining unit's pay and benefits are the result of collective bargaining. Regardless, the existence of secondary indicia, such as

title and higher pay, standing alone, is insufficient to demonstrate supervisory status. *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996); *Billows Electric Supply*, 311 NLRB 878, fn.2 (1993).

Managerial and Agency Status¹⁶

Although the Act makes no specific reference to “managerial employees,” under Board policy this category of personnel is excluded from coverage of the Act, and is not entitled to bargaining rights. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). See also *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Managerial employees are defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. To be considered managerial, an individual must exercise discretion within, or even independently of, established employer policy and be aligned with management. *NLRB v. Yeshiva University*, supra, at 682-683. The determination of an employee’s managerial status depends on the extent of his or her discretion, and an employee who exercises limited discretion, bordering on routine performance, will not be deemed managerial. *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963).

I find that the Employer has failed to establish that HSS specialists are managerial employees. Although HSS specialists review and revise the Employer’s health and safety policies and procedures, and prepare confined space rescue plans, they must do so according to, and consistent with, established policy as devised by either the Employer or federal or state agencies. It does not appear that they have the discretion to set policies according to their own independent discretion, and any revisions they make are reviewed by supervision. The routine performance by employees of largely predetermined policies does not warrant finding them to be managerial employees. See *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963); *Kitsap County Automobile Dealers Assn*, 124 NLRB 933, 934 (1959). Further, the record evidence establishes that health and safety bargaining unit employees Lujano and West also perform these same tasks. HSS specialists do not attend management meetings on a regular basis. The meetings they attend are also usually attended by Lujano and West, and sometimes by other bargaining unit members, including maintenance and operations employees.

The Employer asserts that the fact that there is only one HSS specialist on each shift suggests that they are managerial. In particular, on nights and weekends, there are

¹⁶ The Employer did not contend managerial status of the HSS specialists as an issue at the hearing or in the Stipulation it entered at the outset of the hearing, but it raises it in its brief. The Employer did raise agency status in the Stipulation and during the hearing, but did not address it in its brief. Although the Petitioner did not have the opportunity to argue with respect to the asserted managerial status of the HSS specialists because the Employer raised it for the first time in its post-hearing brief, as it appears that the underlying facts were fully litigated during the hearing, and, given that my decision herein is not adverse to the Petitioner’s interests, for purposes of full consideration of all arguments advanced, I am addressing both the managerial status and agency status of the HSS specialists.

only two salaried employees usually working – the operations supervisor and the HSS specialist. According to the record, the operations supervisor is overseeing the 12-13 operators who are working these shifts. There is no evidence in the record suggesting that the HSS specialist assists the operations supervisor in overseeing these employees. The record is also unclear whether, on these occasions, the operations supervisor is directly overseeing the HSS specialist or whether he/she is working independently without direct supervision. Regardless, the evidence in this respect does not establish the HSS specialist to be acting as a managerial employee.

The Employer further contends that the HSS specialists' contact with outside agencies conveys managerial status to them. The dealings by HSS specialists with outside agencies as described in the record appear to be limited to the organizing of training and other safety-related events at the refinery. There is no evidence in the record suggesting that the HSS specialists deal with outside agencies beyond this, or that they are involved, for example, in regulatory compliance issues. Similarly, the record evidence regarding the HSS specialists' dealings with contractors is limited. It appears they may report problems to contractors with their employees' compliance with safety rules of PPE, and they may meet with contractors at the start of a job to review the Employer's safety rules. As discussed above, it does not appear that the HSS specialists have specific authority to remove a contractor without approval from higher management. Regarding the review of safety rules with outside contractors, and their potential to accept contractors' safety rules if they are more stringent than the Employer's, this appears routine in nature and according to the Employer's established procedures.

The Employer also contends that the HSS specialists are agents of the Employer within the meaning of Section 2(13) of the Act because they regularly speak on behalf of the Employer when dealing with contractors as well as with state and county emergency response organizations; when they modify Employer safety policies; when they enforce safety policies; and with respect to their ownership and ranking of incidents that occur at the refinery.

Under Section 2(13) of the Act, whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. The Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for a party, and the burden of proving the agency relationship is on the party that asserts its existence. See *Pan-Oston Co.*, 336 NLRB 305, 305-306 (2001). The factors relied on by the Employer to argue agency status of the HSS specialists, i.e., their dealings with outside agencies and modification and enforcement of safety policies, etc., are described above. "Agency" is not a category expressly excluded by the Act from a collective bargaining unit, unlike, for example, guards or supervisors. Regardless, there is insufficient

evidence in the record to establish that the HSS specialists act as the Employer's "agent" within the meaning of Section 2(13).

Community of Interest

It is well established that a certifiable unit need only be an appropriate unit, not the most appropriate unit. ***International Bedding Company***, 356 NLRB No. 168, slip op. at 2 (2011), citing ***Morand Bros. Beverage Co.***, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). The Board determines unit appropriateness by evaluating whether the petitioned-for employees have a sufficient community of interest, including the degree of functional integration of operations, the differences in the types of work and the skills of employees, the extent of centralization of management and supervision, the extent of interchange and contact between groups of employees, general working conditions and fringe benefits, and bargaining history. See e.g., ***International Bedding***, supra, slip op. at 2; ***NRLB v. Paper Mfrs. Co.***, 786 F.2d 163 (3rd Cir. 1986); ***Phoenician***, 308 NLRB 826 (1992); ***Rinker Materials Corp.***, 294 NLRB 738 (1989). The petitioner's position regarding the scope of the unit is also a relevant consideration, but not controlling. ***International Bedding Company***, supra, slip op. at 2, citing ***Marks Oxygen Co.***, 147 NLRB 228, 230 (1964); ***E.H. Koester Bakery & Co.***, 136 NLRB 1006 (1962).

In the instant matter, the HSS specialists have much in common with the bargaining unit employees. The HSS specialists share immediate first-level supervision with bargaining unit employee Lujano. Bargaining unit employee West reports to Kopp. Dibernardo, the supervisor of the HSS specialists and Lujano, also reports to Kopp. Although the shared supervision is with only 2 out of 79 bargaining unit employees, shared supervision is not dispositive in this case, as operators and maintenance employees also do not share supervisors. Further, there appears to be common managerial control in Stubenvoll, who oversees the Santa Maria and Rodeo Refineries and who testified that he is responsible for all labor relations matters with the local unions.

Regarding the type of work, bargaining unit employees Lujano and West perform many of the same tasks as HSS specialists. They perform field audits, prepare confined space rescue plans, and review and revise the Employer's health and safety policies and procedures. They attend many of the same meetings and trainings, work in the same area, the Firehouse, and eat lunch in that same area.

The remainder of bargaining unit employees work in the refinery units, and typically eat their lunch in areas separate from the Firehouse where the HSS specialists eat. However, HSS specialists spend a significant part of each day in the units performing field audits. While the HSS specialists are performing different tasks from operators and maintenance employees, as the operators and maintenance employees do from each other, the HSS specialists must interact on a regular basis with the bargaining

unit employees in the performance of their jobs. Further, due to the nature of the Employer's operation, the Employer places an extremely high emphasis on safety with respect to all jobs in the refinery. As such, there is some overlap between the performance of tasks by operators and HSS specialists, in that they are both responsible for ensuring they perform their work safely and the work area is safe. To that end, operators and HSS specialists both have some of the same responsibilities with respect to checking on the safety of equipment on a daily basis. Also, because of the high safety emphasis, every employee at the refinery has the authority and ability to perform a field audit and shut down a job whenever he or she notices a potential safety issue. Operators also serve on the ERT, and work with the HSS specialists when performing drills and in the event of an incident command.

Although the HSS specialists are required to be EMTs, which does not appear to be a requirement of any other classification, other employees, and in particular those who serve on the ERT, are required to be trained in CPR and have knowledge of other safety-related procedures. The record cites numerous other certifications and trainings held by HSS specialists, but a number of those certifications and trainings have also been obtained by bargaining unit employees Lujano and West.

Although there appears to be no interchange between the HSS specialists and bargaining unit employees, this is not dispositive. In *Marks Oxygen*, supra, the union petitioned to represent a unit composed of truck drivers and production employees. In finding such a unit to be appropriate, the Board noted that while the two groups of employees had different job functions, separate supervision, and there was no interchange between the two groups, there was some interaction and, moreover, there was an inherent community of interest between the truck drivers and production employees in relation to the flow of materials into and out of the plant. Supra at 229-230. In *International Bedding*, supra, slip op. at 2-3, the Board relied on *Marks Oxygen* in finding that the employer's drivers and yard jockeys could be appropriately included in a single unit with the employer's production and warehouse employees, as requested by the union.

In *Wah Chang Albany Corporation*, 171 NLRB 385 (1968), the union petitioned to sever the maintenance employees from the overall production unit and sought a separate unit of maintenance employees on the basis that the unit sought was a functionally distinct maintenance department. The Board found the unit sought by the union to be inappropriate. Although the maintenance employees had certain skills not necessarily possessed by production employees, the Board found they had a sufficient community of interest with the production employees based on their time spent working in production areas, and the relation of their work to the production process. The Board took note of the work performed by maintenance employees, finding it to be "obviously an integral part of the continuous flow of the Employer's various production processes" as well as their "close functional integration in the plant's operations." Id. at 386.

The Employer, citing *Power, Inc.*, 311 NLRB 599 (1993), enf'd 40 F.3d 409, 421 (D.C. Cir. 1994), contends that HSS specialists are key safety employees who do not share a community of interest with operations and maintenance coworkers. In *Power Inc.*, the Board concluded that the safety director of a mining corporation did not share a sufficient community of interest with bargaining unit employees where he had daily contact with them, but his duties bore "little relation to the production of coal." Id. at 608. Unlike the HSS specialists at issue here, the safety director in *Power, Inc.*, shared a separate office with engineers, away from the bargaining unit. He did not work with a safety team and did not have any direct safety supervision, but rather reported directly to the Employer's chief executive officer. The safety director had the authority to direct employees to correct safety problems and from the limited facts available in the case, it appears he was the sole person responsible for safety compliance. He acted as the employer's representative at all meetings with federal and state safety authorities. The bulk of his time and efforts was spent exclusively on matters pertaining to compliance with federal safety laws and state environmental regulations.

Unlike the safety director in *Power Inc.*, the HSS specialists work with other bargaining unit employees, namely, Lujano and West, who perform some of the same tasks. They have a safety supervisor, Dibernardo, who oversees their work, who in turn reports to the superintendent of the health and safety department. While HSS specialists can ask employees to comply with safety regulations, they do not have the ability to give a direct order. Instead, if an employee does not comply, the HSS specialists take the matter up with a supervisor to handle. Most of the tasks performed by the HSS specialists, including training, are overseen by supervision, whereas in *Power Inc.* the safety director appeared to have no direct supervision regarding his safety tasks, aside from the chief executive officer. Most importantly, the HSS specialists spend the bulk of their time on the work floor, observing the work and interacting with bargaining unit employees. Although HSS specialists deal with outside agencies, the record evidence suggests these dealings have been limited to seeking the participation of those agencies in drills and trainings at the refinery.

Thus, contrary to the Employer's argument, I find that the HSS specialists have substantial and regular contact with bargaining unit employees. The significant amount of time the HSS specialists spend in the production area shows a high degree of interaction with the bargaining unit employees. *Blue Grass Industries, Inc.*, 287 NLRB 274, 298 (1987), citing *Raytee Co.*, 228 NLRB 646 (1977) (employees in the positions of production control clerk, expediter, and buyer had frequent contact with production employees by large amount of time spent on production floor). Moreover, as in *Marks Oxygen, International Bedding*, and *Wah Chang Albany*, cited above, the duties of all of the HSS specialists are an integral part of the Employer's overall production process, with any work stoppage likely to have an immediate and adverse impact on the Employer's production operations. See also, *Motor Wheel Corporation*, 234 NLRB 358, 361 (1978); *Beecham Products*, 251 NLRB 731, 732 (1980). The HSS specialists'

community of interest with the bargaining unit is not overcome by being under different supervision from the majority of bargaining unit employees as their duties are closely connected to the work of the bargaining unit employees. *Blue Grass Industries*, supra at 298-299, citing *Container Research Corp.*, 188 NLRB 586 (1971). The maintenance employees and operations employees, which classifications are both currently in the bargaining unit, also report to separate supervision. Further, the superintendents for the maintenance, operations, and health and safety departments all report to Tim Seidel, who oversees the entire plant. See *Beecham Products*, supra at 733.

Although HSS specialists are salaried and bargaining unit employees are hourly, their pay ranges overlap, and become even closer with the inclusion of overtime for bargaining unit employees. Both HSS specialists and bargaining unit employees are eligible for bonus pay, but the pay is calculated at different rates, and there is an individual component for HSS specialists that is not present for bargaining unit employees. There are slight differences in the vacation pay and sick leave received by HSS specialists and bargaining unit employees, and with respect to holidays. Both groups of employees receive the same medical benefits, flexible spending plan, an employee assistance plan, employee accidental death and dismemberment insurance (with minor differences), and term disability insurance. Both groups of employees receive severance, but it is calculated differently. I do not find the above described differences to be so substantial as to warrant the exclusion of HSS specialists from the bargaining unit. Further, some of the differences are likely the result of collective bargaining that has occurred on behalf of the bargaining unit.

Finally, there is no bargaining history between the Employer and the Petitioner or any union with respect to the HSS specialists. As noted above, the Employer and Petitioner have a lengthy bargaining history with respect to the bargaining unit. Although this unit has historically not included HSS specialists, and the current agreement excludes salaried health and safety representatives, this does not prevent the Petitioner from seeking to represent them at this time. The Employer asserts that the bargaining unit description represents the recognition by the parties of the manifest differences between the HSS specialists and the bargaining unit employees. This argument is conclusionary and not supported by any record evidence. The circumstances underlying the original formation of the bargaining unit are unknown. As noted above, the bargaining unit must be an appropriate unit, not necessarily the most appropriate unit. Therefore, I will not read anything into the original exclusion of salaried health and safety employees from the unit.¹⁷

¹⁷ The Employer also argues that it would be a conflict of interest to include HSS specialists in the unit because of jurisdictional disputes between the IAM in the Carbon Plant and the Petitioner at the refinery. In particular, the Employer cites a grievance which was settled by an agreement not to send bargaining unit employees to the Carbon Plant. It should be noted that the record is not fully developed regarding the alleged jurisdictional dispute, and the IAM did not intervene in this matter. Regardless, it does not appear that the alleged jurisdictional dispute relates to the appropriateness of including HSS specialists in Petitioner's bargaining unit.

Conclusion

Based on the above and the record as a whole, I conclude that the HSS specialists are not statutory supervisors or managerial employees, and the interests of the HSS specialists are not so disparate from those of the maintenance and operations employees that they cannot be included in the bargaining unit.

The Board has found self-determination elections appropriate in situations where an incumbent union seeks to add a previously unrepresented group of employees to its existing unit and where no other labor organization seeks to represent the unrepresented employees. In this situation, if a majority of petitioned-for employees votes for representation, this result is taken to indicate their desire to become part of the existing unit. *Warner-Lambert Co.*, 298 NLRB 993, 996 (1990).

A self-determination election in which the voting group is asked to choose only between representation in the current unit or for no representation is appropriate. *Carr-Gottstein Food Co.*, 307 NLRB 1318, 1319 (1992). Employees in the voting group will not be asked whether they prefer representation as a separate unit of HSS specialists inasmuch as the Petitioner has declined to participate in such an election, and the Board will not force a labor organization to assume the representation of employees in a unit when the labor organization has declined to do so. *Id.* at 1319.

If a majority of employees in the voting group casts ballots in favor of the Petitioner, the employees will be taken to have indicated their desire to be included in the unit currently represented by the Petitioner, and the Petitioner may bargain for such employees as part of that unit. If a majority of valid votes is not cast for representation, the votes will be taken to have indicated the employees' desire to remain unrepresented. Therefore, I find that a self-determination election among the HSS specialists to determine whether they desire representation by Petitioner as part of the existing unit is appropriate.

4. Accordingly, those in the Voting Group are:

INCLUDED: All health and safety shift specialists at the Employer's Santa Maria Refinery.

EXCLUDED: All other employees, guards and supervisors as defined in the Act.

The question on the ballot will be whether they desire representation by the Petitioner as part of the operations and maintenance unit, or whether they desire to

remain unrepresented. Should a majority vote in favor of representation, I find the following to constitute an appropriate unit for purposes of collective bargaining:

All operating, maintenance, laboratory employees, and health and safety shift specialists at the Employer's Santa Maria Refinery.

A Certification of Results of Election shall issue no matter the election results.

Dated at Detroit, Michigan, this 21st day of December 2011.

(SEAL)

/s/ Stephen M. Glasser

Stephen M. Glasser, Acting Regional Director
National Labor Relations Board, Region 31
11150 West Olympic Boulevard, Suite 700
Los Angeles, California 90064-1824

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL, AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL 534, as part of the existing unit of all operating, maintenance and laboratory employees at the Employer's Santa Maria Refinery.** The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the voting group who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Voting Group employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing

the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 28, 2011**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlr.gov,¹⁸ by mail, or by facsimile transmission at **310-235-7420**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election

¹⁸ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **January 4, 2012**. The request may be filed electronically through **E-Gov** on the Board's website, **www.nlr.gov**,¹⁹ but may **not** be filed by facsimile.

¹⁹ To file a Request for Review electronically, go to the Agency's website at **www.nlr.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.