

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Twenty-first Region

NATIONAL STEEL & SHIP BUILDING COMPANY

Employer

and

INTERNATIONAL BROTHERHOOD OF  
BOILERMAKERS, IRON SHIP BUILDERS,  
BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Petitioner

Case 21-RC-064502

**DECISION AND DIRECTION OF ELECTION**

Petitioner seeks to represent a unit of all full-time and regular part-time employees of the Employer's fire department. The Employer contends that the fire department employees are "guards" within the meaning of the Act and therefore that, based on the parties' stipulation that Petitioner admits nonguards to membership, Petitioner is precluded by Section 9(b)(3) of the Act from representing employees of the fire department. But for the guard issue, the parties stipulate that all employees of the fire department, excluding office clerical employees, and guards and supervisors, is an appropriate bargaining unit. However, in dispute is the unit placement of the classification of fire fighter "leads." Petitioner argues that the leads should be included in the unit, while the Employer contends that the leads are supervisors and should be excluded from the unit.

Based on the record and the relevant Board cases, I find that the fire fighters are not guards, and that the fire fighter leads are not supervisors.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
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 herein.<sup>1</sup>
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.
5. The first part of this decision addresses the Employer's motion to have further processing of this petition transferred to another Region. I then explain the facts regarding the Employer's operations and supervisory hierarchy, as well as those facts particular to the guard issue, followed by application of Board law to the guard issue. Finally, the decision addresses general principles of supervision, followed by the facts regarding each specific supervisory indicia in issue and a legal analysis of each.

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<sup>1</sup> The Employer, National Steel & Ship Building Company, is a Nevada corporation with principal offices and a commercial shipyard located at Harbor Drive and 28th Street, San Diego, California, where it is engaged in providing ship overhaul services to the United States Navy. During the preceding 12 months ending October 31, 2011, a representative period, the Employer purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California.

## I. The Motion to Transfer

This petition was filed on September 6.<sup>2</sup> On September 9 and 14, Petitioner filed unfair labor practice charges, which the Region considered “blocking” further processing of this petition, pursuant to the Representation Casehandling Manual, Secs. 11730, et seq. Subsequently, on October 25, the Acting Regional Director informed the parties that he intended to resume processing of this petition in order to conduct a hearing on the issues of whether fire fighters are guards and whether the lead fire fighters are supervisors.

By letter dated October 26, and again on the record of the hearing in this case, the Employer requested that this petition be transferred to another Region for processing. The Employer’s claim is that the decision to resume processing of this petition indicates that the Acting Regional Director has prejudged the guard issue and deprives the Employer of due process. The prejudgment claim is that the Acting Regional Director’s October 25 letter, notifying the parties of the decision to resume processing of the petition and to resolve the supervisory issue, implicitly means that he already decided the guard issue against the Employer, because if the fire fighters are “guards,” it would moot the supervisory issue.

Section 11731.3 of the Manual provides an exception to the blocking charge policy when “processing the petition *will* resolve significant common issues . . . such as supervisory status” (emphasis added). Although resolution of the guard issue against the Petitioner’s position may, as the Employer suggests, moot the supervisory issue, it

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<sup>2</sup> All dates are in 2011 unless otherwise specified.

is prudent to try and resolve all contested issues. The choice of investigatory method under Section 11731.3 of the Manual presages nothing about the merits of any issue.

In any event, the Employer's due process claim is confusing, as well as premature. First, both the issues of guard status and supervisory status have been fully litigated and will be decided in this decision. While the Employer posits that it may suffer from the limited credibility resolutions permitted in a representation hearing as opposed to an unfair labor practice case hearing, should there be an unfair labor practice hearing, neither the parties nor an administrative law judge is bound by my conclusions. See, e.g., Extendicare Homes, Inc., 348 NLRB 1062, 1063 (2006). In addition, there is no question that the Board's general casehandling policies and procedures for representation cases comply with due process. Moreover, if the Employer believes it was deprived of any due process rights, it may raise the issue at the appropriate time. Finally, as will become apparent in this decision, few if any credibility resolutions are required to resolve the issues in this case.

Accordingly, the request to transfer the case is denied.<sup>3</sup>

## **II. General Operations and Guard Issues**

### **A. Facts**

The Employer operates a shipyard, covering about 80 acres of land and 40 acres of water, where it contracts with the United States Navy to build and maintain ships.

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<sup>3</sup> For reasons unconnected with the Employer's motion, the decision to direct an election in this case is not a decision issued by the Acting Regional Director of Region 21 who sent the October 25 letter. Rather, determining the issues in this matter was assigned to me.

Some of its production employees are represented by another local union affiliated with the Petitioner.

Fire Chief Paul Curtis supervises the Employer's fire department. The parties stipulated that he is a supervisor within the meaning of Section 2(11) of the Act. Curtis reports to Harry Penich, who is the plant security manager. Also reporting to Penich are three "security" supervisors, and a "safety" supervisor. During his testimony, Curtis referred to "safety" and "security" as departments, but there is very little evidence about these departments or their spheres of responsibility, except for the fire department.

Fire Chief Curtis normally works Monday through Friday, although his normal hours are not specified. Curtis has an "after hours" phone number listed in the Incident Command Manual, although there is no evidence establishing if or when employees might be expected to call Curtis after hours.

In addition to Curtis, the Employer currently employs eight fire fighters and four leads in the fire department (this is down from 18 fire fighters before a layoff in September, which is the subject of an unfair labor practice charge). There is at least one fire fighter on duty at all times. Shifts start at 8 a.m. (first), 4 p.m. (second), and midnight (third). There is a lead fire fighter on every shift. However, since the layoff, third shift weekdays and second and third shift weekends are normally staffed solely by a lead. First and second shifts Monday through Friday are normally staffed by four fire fighters and a lead. There is no specific evidence about what the Employer would do in the event of a fire or other incident in the off hours when only a lead fire fighter is present. Curtis merely testified that such incidents are rare.

There are four men regularly designated lead whenever they work: Andrew Casna, Christian Anderson, Tomas Alcantar, and Reginald Rhedrick. Since the layoff, which occurred in early September, Casna is normally scheduled as lead on first shift five days a week. Anderson is assigned lead on second shift five days a week. In addition, there are four fire fighters assigned to these same shifts. Rhedrick normally works third shift five days a week. He works by himself since the layoff, but is still designated as lead. Before the layoff, Rhedrick's shift included other fire fighters. Alcantar works alone on the third shift two days a week and leads the second shift two days a week (these shifts are on Anderson's and Rhedrick's days off). According to the Employer, Alcantar and Anderson share the lead designation second shift on Wednesdays. To cover for leads' vacations or illnesses, Curtis has subbed even on the late shifts, or he may ask one lead to stay four hours overtime at the end of a shift and another to come in four hours early.

Curtis referred to two other employees as "relief" leads. They are Mike Moore and Alex Martinez. The Employer contends that the relief leads are also supervisors within the meaning of Section 2(11) of the Act. Moore acted as lead in Rhedrick's place on the third shift for about a month while Rhedrick attended paramedic school. However, Fire Chief Curtis was hard pressed to estimate how often Moore has acted as lead since Rhedrick's return. The best Curtis could do is state that Moore is lead a "few times a month," or "hit and miss." With regard to Martinez, while at one point in the record Curtis testified that he (Curtis) is designated lead on first shift the two days a week Casna does not normally work, Curtis later testified that Martinez acts as lead "while I do my administrative duties . . . on the days when Andrew Casna is off."

Fire department employees report to the fire house. They have exclusive use of a fire engine and an ambulance, among other equipment. Fire department employees wear dark blue Nomex (fire resistant) uniforms. In contrast, security department employees wear light blue uniform shirts and have jackets emblazoned with the word "Security" on the back. Fire department employees have no crime detection or law enforcement training and do not carry weapons. There is no evidence whether the Employer's security employees carry weapons.

When the Employer began requiring searches of bags of all persons entering the facility about three years ago, fire fighters were initially engaged to help security department employees with the searches. However, this was a temporary assignment, and the record does not reveal how long the assignment lasted. Curtis did not know why his department was asked to help with searches of bags in the first place, or why the fire fighters stopped doing the searches. Fire fighters also help direct automotive traffic when a train enters the yard. There is no evidence on how often that happens.

The Employer also placed in the record evidence that fire fighters assisted security employees with perimeter checks and answered a bomb threat during a strike by a union sometime in the 1990's. According to Curtis, the perimeter checking was unique to the strike – that is, fire fighters have not conducted perimeter checks since the strike. On the other hand, the fire department employees would respond to a bomb threat with or without a strike occurring. During the time of the strike, fire fighters were told to report anything suspicious to the security department.

The Employer reorganized its security forces about three years ago – apparently after the period of time fire fighters searched bags and well after the strike. Before the

reorganization, fire fighters were supervised directly by “security” department supervisors. After the reorganization, Curtis started supervising the fire fighters. Before the reorganization, fire department employees reported directly to persons designated “lieutenant,” and the lieutenants reported to the security department supervisors. With the reorganization, Curtis suggested “downgrad[ing]” the position of lieutenant to “lead” and appointing more of them so there could be at least one on every shift.

Based on Curtis’ testimony and the job descriptions in evidence, fire fighters’ main duties include conducting fire safety inspections on the Employer’s property and on ships where the Employer is working; setting up and maintaining temporary fire safety systems on the ships; maintaining fire extinguishers and hydrants on the property; and responding to fires to put them out, as well as to medical situations, spills, and leaks – all as medical first-responders. As one employee more colorfully put it, the fire department is there to “check our fire systems, and if there's a fire we go put water on it.” Fire fighters also go along on ships undergoing sea trials in order to be available in the event of fires. There is no evidence establishing how long one of these trials might last or how frequently they occur. Routine standard inspection duties that recur on a regular basis occupy about 60 percent of the fire fighters’ time.

The lead fire fighter job description opens with the following description of “Essential Functions and Purpose”:

Assist Fire Department Supervisors to enforce department and company rules and regulations designed to protect personnel and company assets. In the absence of fire department supervisors, assumes the responsibility of supervising the daily operation of the fire department to ensure that fire fighters are performing the duties required to enforce department and company rules and regulations designed to protect personnel and company assets.

The fire fighter job description opens with the following description of “Essential Functions and Purpose”:

Perform fire protection and prevention within the shipyard and ships at NASSCO. Provide emergency medical service. Be first responders for hazardous material spills and be a member of the rescue team. Be a member of the shipboard fire, medical and rescue team for ships on sea trials.

The fire fighter job description adds that they must “[w]ork well with others in a team environment. Must be able to work with minimal supervision.”

The Employer’s security department – not the fire department – monitors three types of alarms on the property. All alarms are wired to ring at the security station at Gate 6. First are fire alarms, which of course go off when a fire is suspected. Second is an intrusion alarm. While the perimeter is not alarmed, a few buildings within the property are access-controlled because they contain hazardous materials. Third are flood alarms on ships. All the alarms are relayed by security department personnel to the fire department for first response. If there is a fire or a medical incident, the fire fighters are responsible to address it directly; in case of a spill, they clean it up if they can or report it for further action; in other situations, such as an intruder or an open door in a restricted building, they report their findings to the security department.

It is not clear whether spills are connected to any of the alarm systems or how else the fire department might be notified of them. The main reason fire fighters are called to spills is to check for medical issues, but fire fighters may also be asked to assist in clean-up.

## **B. Conclusion on the Guard Status of Fire Fighters**

Section 9(b)(3) of the Act defines a guard as “any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises.” The significance of the issue in this case is that the same section of the Act prohibits certification of any labor organization as representative of a unit including guards if that labor organization admits non-guards to membership. It is stipulated in this case that Petitioner admits non-guards to membership.

The Board limits application of Section 9(b)(3) to employees “charged with traditional police and plant security functions,” as distinguished from employees charged with protection of the employer’s property from fire and other safety hazards. *Boeing Co.*, 328 NLRB 128, 130-131 & fn. 11 (1999) (quoting *Burns Security Servs.*, 300 NLRB 298, 300 (1990), enf. denied, 942 F.2d 519 (8th Cir. 1991)). Traditional police and security functions require responsibility for enforcement in areas other than those solely related to fire and related safety issues, such as theft, vandalism, and stranger intrusion. The statute, after all, segregates “any individual employed as a *guard* to enforce” etc., not just “any individual employed to enforce” etc.

In making this distinction, the Board will consider

enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer’s premises; and wearing guard-type uniforms or displaying other indicia of guard status.

*Boeing Co.*, 328 NLRB at 130.

In this case, the fire fighters' responsibilities are limited to fire safety, prevention, and suppression, and medical first response. This is supported by the clear separation of the Employer's security employees from its fire fighters, emphasized by the reorganization three years ago. In addition, the Employer's fire fighters are not trained in security procedures or weapons; they do not participate in security rounds or patrols, at least not since the 1990's strike; they do not currently assist with monitoring or controlling of access to the premises; and they wear a uniform distinct from the security force.

Fire fighters do have some responsibility to detect and investigate some rule violations. For example, they tell other employees to comply with the no-smoking rules, and they advise the security department of the causes of events within their purview, as well as identify names as part of their fire investigations. I conclude, however, that they do not possess authority to compel compliance with rules within the meaning of the *Boeing* test because these responsibilities are incidental to their fire prevention duties, and there is no evidence they have authority to actually do anything to a suspected miscreant other than report to a supervisor or the security department. For example, as Director of Labor Relations, Benefits and Compensation Tom Fawcett testified, a fire fighter would not be expected to respond to a fight between two employees unless there was a call for medical assistance, and even then, responsibility for separating the combatants and meting out consequences would be the responsibility of a supervisor or a security department employee.

There is no evidence whether the "security" duties assumed during the strike in the 1990's were an ad hoc response to that incident, like checking bags at the gates

was, or part of the job description. Since then, the Employer reorganized its security department to segregate the fire department under the fire chief. Also significant to finding that fire fighters are not guards is the fact that the Employer will still have a substantial security force who are clearly guards within the meaning of the Act.

### **III. Supervisory Issues**

#### **A. General Principles**

Section 2(11) of the Act defines a “supervisor” as:

[A]ny 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.

The Act’s definition sets forth a three-part test for determining supervisory status. Under Section 2(11) an individual is a statutory supervisor if: 1) he holds the authority to engage in any one of the above functions; 2) his exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and 3) his authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001), citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994).

Because Section 2(11)’s definition is read in the disjunctive, possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, is sufficient to confer supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. at 713. Additionally, supervisory status may be established if the individual has the authority to effectively recommend one of the

powers. See, e.g., *Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The requirement of independent judgment applies to each indicia of supervisory status. This requires that "an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006). Independent judgment "must involve a judgment, and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Id.*

The burden of proving supervisory status rests on the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). This burden is substantial. Because the Act excludes supervisors from its protection, the Board has been careful to avoid construing the statutory language too broadly. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686). The Board thus requires supervisory status be established by a preponderance of the evidence. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Lack of evidence is construed against the party with the burden. *Id.* at 1048.

The party bearing the burden must establish that an individual "actually possesses" a supervisory power; mere inferences or conclusory statements of such power are insufficient. *Golden Crest*, 348 NLRB 727, 731 (2006). Conclusory agreement to leading questions does not establish supervisory status. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004). Moreover, where evidence is in conflict

or otherwise inconclusive for a particular 2(11) indicia, the Board will decline to find supervisory status for that indicia. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003).

## **B. Specific Alleged Supervisory Functions of the Leads**

There is no claim or evidence that lead fire fighters have authority to transfer, recall, promote, or discharge employees. However, the Employer contends that leads have authority to act or at least effectively recommend, in the areas of assignment and responsible direction of work, discipline (including suspension), hiring, adjustment of grievances, and, by conducting annual performance evaluations, rewarding employees and determining which employees may be laid off.

### ***(i) Assign and Direct***

Conspicuous in the record is the absence of evidence about how fire fighters' routine daily assignments are distributed. Fire Chief Curtis did say that he sets the basic schedule for things like fire extinguisher and hydrant inspection, alarm testing, and "general tasks like that." One employee testified that Curtis also sends the crews a list of tasks he wants accomplished over the weekend by e-mail, and the employees divide the tasks among themselves (when there is more than one of them on the shift).

The Employer designates an incident commander for fires, drills, and other incidents. When Curtis is on duty, he takes that role; when he is not on duty and it is necessary to have one, the job goes to a lead. Incident commanders' authority extends even to employees in other departments. No witness described in any detail the lead

fire fighter's performance as an incident commander. Curtis testified that the last time he could remember a lead being designated an incident commander was "a couple years ago," except that a lead was designated incident commander for a drill in August. Why Curtis was not present for the drill is unexplained.

Any fire or medical call prompts response by the entire crew on duty, including both rank-and-file fire fighters and the lead, unless two or more calls come at the same time, in which case the lead divides the crew. Fire Chief Curtis testified that "it could possibly happen" that leads would have to make a judgment about the peculiar skills and abilities of each fire fighter when making such assignments. There is no specific evidence, however, that this has happened, or that fire fighters' skills and abilities differ in any substantial respect. On the contrary, they are required to have similar background experience, undergo similar training, and spend most of their time working together, apparently interchangeable with one another.

At the end of every shift someone on the shift produces a shift log describing each shift's events. The log may be completed by either a lead or a rank-and-file fire fighter. In addition, any fire department response to a call requires a written report. These reports may be written by a rank-and-file fire fighter. There is no evidence leads have any different or greater responsibility for incident reports or shift logs than employees have.

Regarding the schedule, Fire Chief Curtis testified that Lead Fire Fighter Alcantar "issues out a schedule weekly letting the fire fighters know which shift they are on, and, if somebody's on vacation, he adjusts the schedule accordingly." Curtis agreed with leading questions from Employer counsel that Alcantar makes the determination of

whether an employee asking for time off will get it or not, and that there have been instances in which Alcantar refused a request. Curtis did not, however, describe any specific examples. Curtis added that Alcantar has consulted with him about a vacation request “upon occasion, but generally it’s his decision.” However, it appears that Alcantar is required to meet a management directive regarding the number of fire fighters to assign to each shift, such as four for each weekday first shift.

There is virtually no evidence regarding how employees are assigned to a particular shift in the first place or how shift changes are made, if at all. After explaining some negative comments written by Casna on a particular fire fighter’s evaluation, including lack of initiative and resistance to assignments, Curtis was asked if he (Curtis) took any steps to address that situation. He answered, “eventually [that fire fighter] was unsuccessful on first shift, so we moved him to third shift.” Curtis later explained that “we” meant Penich and himself.

The term "assign" in Section 2(11) of the Act "refer[s] to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or an overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare*, 348 NLRB at 689. Responsible direction is established "[i]f 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,' . . . provided that the direction is both 'responsible' . . . and carried out with independent judgment." *Id.* at 691. “[T]he phrase was not meant to include minor supervisory functions performed by lead employees, straw bosses, and set-up men.” *Id.* at 690. In addition,

for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the

task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.

Id. at 691-692.

Assignment regarding tasks and direction share some similarities, and may even overlap to an extent. Assignment refers to the delegation of general or overall tasks, basically creating the job description; direction is the ad hoc instruction to perform discrete tasks within that overall assignment at a particular time or in a particular order.

Id. at 689.

I find no evidence of assignment to a place (a location, department or wing) – all the fire fighters report to the same place and make rounds and respond to incidents all over the grounds. Regarding assignment to a time, there is no evidence establishing who makes the general assignments to specific shifts and no evidence that fire fighters are assigned overtime (Curtis only said he assigns leads to stay over on occasion to cover for sick calls by other leads).

There is evidence that Alcantar writes the schedule on a weekly basis and has some control over vacation requests. The cursory testimony offered does not rule out the possibility that the time Alcantar consulted with Curtis was the only time he had an issue that needed anything but a rubberstamp. Thus, the Employer's evidence is not sufficient to establish use of independent judgment. I find particularly telling the absence of evidence of how the schedule changed after the September layoff, when several employees changed shifts, and I am unwilling to infer that Alcantar independently adjusts schedules based only on the conclusory testimony that he "issues" the weekly schedule.

I find no evidence that leads have any role in "assignment" of tasks – the overall responsibilities to do inspection tours, test and maintain the equipment, respond to alarms and spills, and go on sea trials. They do have some authority to "direct" tasks, such as dividing the crew when two alarms come in at the same time or deciding who gets to check out a spill. There is no evidence, however, that there is any "independent judgment" involved – Curtis' conclusory testimony that leads consider fire fighters' various skills and experience does not establish judgment when there is no evidence that the fire fighters' skills and experience vary materially.

There is also no evidence that leads are accountable for the rank and file's performance. When asked if a lead has ever gotten into any trouble for something a rank-and-file fire fighter did, Curtis cryptically said, "Not yet." On the contrary, Curtis testified that if a fire fighter is derelict in his inspection duties, the fire fighter, not the lead, is the one held responsible.

Curtis fills out the same evaluation form for leads as the leads fill out for rank-and-file fire fighters, which includes no distinct ratings on any supervisory skills. None of the leads' evaluations was offered on the record, so there is no evidence of any narrative comments on their supervisory skills. On the other hand, some of the rank-and-file fire fighters' evaluations include comments such as, one "has no problems delegating tasks to other fire fighters during emergencies"; another "established himself as a leader on second shift. He can delegate with authority and work well with his team"; another "works as an effective and useful team member. He will delegate on emergency situations requiring assistance." Leads were chosen at least in part

because they were the high scorers on the skills tests – thus, their higher wages as likely result from their skills and experience as any higher “status.”<sup>4</sup>

***(ii) Discipline and Suspend***

The Employer contends that lead fire fighters have the authority to discipline and suspend fire fighters.

The Employer’s personnel handbook describes a progressive discipline policy that includes “verbal warnings, written warnings, suspension and termination.” It also notes that “The system is not formal, and the [Employer] may, in its sole discretion, utilize whatever form of discipline is deemed appropriate under the circumstances, up to and including immediate termination of employment, with or without a previous verbal or written warning.”

One issue is whether leads have the authority to discipline employees of the Employer who are not fire fighters. The record reveals that fire fighters are responsible for post-accident drug testing of persons involved in incidents when the Employer’s medical department is not staffed. The record also reveals that the medical department is staffed Monday through Friday daylight hours (exact hours not specified). Thus, fire fighters make assessments for drug and alcohol use and administer urine tests during other times.

In addition, as noted above, incident reports and daily logs include a description of events and identification of participants, as well as analysis within the area of a fire

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<sup>4</sup> I conclude that whatever responsibilities accompany the position of incident commander, lead fire fighters do not act in that capacity with sufficient regularity to make them supervisors when the rest of the evidence is to the contrary. As Curtis testified, leads only act in this capacity when he is not around, and the last time it happened was a couple years ago. Accordingly, leads essentially act as “relief” incident commander, on a sporadic basis. See Sec. III.B.(vi) below on “relief” duty.

fighter's expertise. This includes, for example, the fire fighter's assessment of the cause of a fire, or of whether a participant in an incident was intoxicated or violated a fire safety standard. These reports are submitted to the security department and, if the incident involved a ship, the ship's project manager, among others. Fire Chief Curtis testified that participants may be disciplined based on the fire fighters' reports. However, fire fighters do not make any recommendation for or against discipline in the report. Thus, at most, these reports are accounts of what occurred, including use of fire fighters' skills not involving supervisory functions.

A second issue is whether leads have the authority to discipline or suspend fire fighters. Fire Chief Curtis testified that he delegated to leads the authority to issue verbal warnings (not recorded for the employee's file) and "written verbal"<sup>5</sup> warnings (verbal warnings recorded for the file). The Employer offered 18 different "written verbal" warnings into the record – five signed by Curtis, one by Rhedrick (over a year ago), and 12 by Casna, dating back to October 2010. There is no evidence of whether this is a sampling or a total or, if a sample, how they were chosen. Five of the warnings signed by Casna were for a single incident – failure to document a gas meter test for four consecutive days, March 24-27, 2011. Casna wrote up each of the five fire fighters who were on duty on any of those days for violation of the same rules (whether they were on duty two or four of the four days). The write-up classifies the incident as "[An] act that might endanger the safety or lives of others or interfere with the proper completion of the work, as well as unsatisfactory or negligent job performance." The warning refers to an announcement regarding the issue to the entire shift the day before

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<sup>5</sup> "Written verbal" is my characterization, not the Employer's.

the omissions cited and “numerous issues regarding the completion of the test and documentation as required.”

Among Casna’s other seven citations is one dated August 29, 2011, for similar conduct – failure to document the gas meter test for three consecutive days, issued to one of the same fire fighters who was cited in March. The August citation does not refer to the prior warning. Another one of Casna’s citations was for an employee who reported to work late in January 2011. It is the only warning in the record that refers to what might have been a prior verbal warning – it mentions that the employee had failed to show for work twice and been late “numerous” other times in the last two months, and says “your supervisor” (not named) raised this issue previously.

Five citations written by Casna were for failing to perform or document a fire extinguisher or other equipment check, classified as unsatisfactory or negligent job performance. The only citation issued by Rhedrick was issued for similar failure to perform or document a fire extinguisher or other equipment check.

Curtis also testified regarding other steps in the progressive discipline system. He stated that once misconduct is serious enough to warrant more than a “written verbal” warning, “it turns into a written warning which starts involving HR and management, and termination beyond that involves HR, management, and employee relations.” There is no specific evidence in the record of any disciplinary incident that merited more than a “written verbal” warning.

In his testimony Curtis agreed with the leading question of whether leads have been given authority to send an employee home without pay. He described an incident in which Casna sent Harris home for not wearing the proper uniform. Other than losing

a day's pay, Curtis did not otherwise describe the consequences for Harris. Curtis added that both he and Casna had previously given Harris "a number of mulligans" – apparently verbal warnings over the same issue.

Fire Chief Curtis has also issued write-ups to fire fighters. One was for property damage caused by an accident in the ambulance (issued to lead Martinez); one was for taking a sick day without notice directly to the chief (issued to lead Rhedrick); and three were for "unsatisfactory or negligent performance" with regard to documentation and/or performance of routine inspections (two issued to leads Alcantar and Anderson on the same day, and one to an employee two weeks later).

Employees testified that they believe there will be "consequences" if they don't do what a lead tells them. There is no evidence of what these consequences might be, or what employees even believe will be the consequences, other than the fact that they might receive "written verbal" warnings.

The Employer's evidence is insufficient to prove that lead fire fighters have the authority to discipline or to suspend employees within the meaning of Section 2(11) of the Act. "The authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority. . . . However, if such authority is limited to instances of egregious misconduct, the Board does not consider the authority meets statutory supervisory indicia." *Astyle Apparel*, 351 NLRB 1287, 1298 (2007) (citations omitted). First, the incident reports and logs clearly are not "discipline" at all, and they contain no recommendations for or against discipline. Second, they can be completed by leads or fire fighters.

With regard to leads' authority to discipline fire fighters, in the only incident of a lead sending an employee home in this record, the misconduct appears "egregious" inasmuch as Harris had "a number of" prior warnings from Fire Chief Curtis and lead Casna on the issue. The evidence also does not support a finding that Casna exercised independent judgment, or that sending Harris home was considered "discipline" within the meaning of the Employer's progressive discipline policy since, according to Curtis, any discipline beyond a written verbal warning must involve HR and management.

Moreover, oral warnings and "written verbal" warnings issued by leads were not shown by the Employer to have any meaningful effect on employees' terms and conditions of employment. In this regard, I note that the Employer does not even follow its progressive discipline policy, and that employees are given more than one discipline at the same step. For example, one employee was given a second "written verbal" warning for apparently identical conduct less than six months after the first "written verbal" discipline, with no indication that there might be cumulative consequences. There is no evidence that there is any limit on how many of these warnings an employee can get before facing more serious consequences or that these warnings have any predictable effect on progressive discipline.

Curtis testified that there is not even a specific consequence from "written written" warnings, which can only be issued at his level of supervision or higher. Nor is there any limit on how many of them an employee can amass before facing any more serious consequences. Thus, the incident reports and the logs, and the oral and "written verbal" warnings, establish a mere reporting function, not supervisory authority.

*Willamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393-394 (1989).

**(iii) Effectively Recommend Hiring**

There is no evidence about who screens job applications to select candidates for interview. After that winnowing process, Fire Chief Curtis attends every interview, more often (but not always) with a lead fire fighter or two present. There is one interview checklist (developed by Casna) on which each interviewer scores the candidate on a standard list of six questions (including “what is your biggest weakness;” “define work ethic”). There are four interview score sheets in the record for three employees, each of whom was hired.

After passing the interview, applicants are subject to a skills test that may include a “drill”-like situation in which one fire fighter is a patient in a medical case and another fire fighter watches and rates the candidate’s handling of the situation. This test may be administered and scored by a lead or rank-and-file fire fighters. Finally, applicants take a written test based on EMT protocols established by San Diego County, which is scored objectively.

Curtis testified that he ultimately decides whom to hire. He adds up the scores compiled in the interview, but does not necessarily proceed based on score alone. He described one case by applicant name in which he acceded to a strong recommendation from Alcantar despite his own preference for another candidate. There is no evidence that in any other case a lead recommended that a specific applicant be hired, other than how the lead scored the candidates interviewed. The single example where Curtis acceded to Alcantar reflects the use of discretion by Curtis,

but it does not establish that leads effectively recommend the hiring of employees, or that most or even any other recommendations are “effective” within the meaning of the Act.

In light of Curtis' testimony that he makes the hiring decisions, I cannot find that leads have authority to hire. Furthermore, the evidence is not sufficient to establish that leads have authority to effectively recommend hiring. Effective recommendation requires that the Employer establish a pattern of Curtis acquiescing in leads' recommendations without doing his own independent investigation. *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), enf. denied on other grounds, 712 F.2d 40 (2d Cir. 1983), cert. denied, 466 U.S. 978 (1984).

An interview score is a report, not in itself a recommendation at all. There is no evidence Curtis has ever relied on a lead's recommendation without sitting in on an interview and adding up the scores, including scores on other objective measures. When a stipulated supervisor consistently participates in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Section 2(11). *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1388 (1998).

***(iv) Adjustment of Grievances***

Curtis testified that he expected fire fighters to take “gripes” such as “somebody's not pulling their fair share of work, somebody got a day off, they don't like working with somebody” to their leads. Without offering specific examples, Curtis said leads “can try to fix whatever the gripe is, . . . they can be a mediator and try to fix the situation or

maybe change the days off so they're not working with a person as much," and he agreed with the leading question of whether leads use discretion in doing so.

Authority to adjust grievances implies some ability to change the relationship between the employee and the employer in some meaningful way. Merely talking employees into getting along is not statutory adjustment of grievances. *Ken-Crest Servs.*, 335 NLRB 777, 779 (2001); *Ohio Masonic Home, Inc.*, 295 NLRB 390, 394 (1989). The cursory and hypothetical testimony in this case does not support finding meaningful authority to adjust grievances.

**(v) Evaluations**

"Evaluation" is not a supervisory function included in Section 2(11). *Williamette Industries*, 336 NLRB 743 (2001). I address it discretely as it is part of the leads' job to complete evaluations of fire fighters, and because the Employer claims that lead fire fighters effectively recommend merit raises and layoff decisions. An evaluation may be an effective recommendation for a supervisory action if it, "by itself," affects the wages or job status of the employee being evaluated. *Id.* at 754.

The record is clear that leads annually fill out an evaluation form for each employee, which includes a 1-5 score on various categories such as "knowledge of job assignment," "work ethic," and "initiative," as well as space for narrative comment. After twice denying ever editing a lead's score, Fire Chief Curtis acknowledged giving a fire fighter an extra point in a recent evaluation. The last section of the evaluation form is for a statement of "goals and objectives," and Curtis testified that he fills that out for each evaluation. Curtis also testified that he alone fills out the evaluations for the leads, using the same form as the leads use for employees.

The Employer maintains a list of fire fighters ranked by their evaluation scores. According to the Employer, the scores and/or the rankings are considered by higher management in making decisions regarding annual merit wage increases and for layoffs – although the only layoff described in the record is the September layoff.

Labor Relations Director Fawcett testified that the last merit increase issued in February 2011. The Employer budgeted for a 3 percent “average” raise across the board, and evaluations completed the previous November were considered “so the people that were at the top of the [ranking] list in terms of performance received more than the average.” The four regular leads each got a 3.5 percent raise; two fire fighters got 3.25 percent; seven got the average raise; six got raises of 0.69 percent or less. Fawcett explained one of those, 0.5 percent for Harris, was a result of his poor evaluation, while some of the others were pro rata reductions for employees who started within the last evaluation year. Others are not explained at all. Fawcett further explained,

usually . . . there will be natural break points, I think, in terms of the evaluations. And so the people that are scored in the highest group will get a little bit more than the budget. People that are in the middle will usually get the budget, in this case three percent. And people that are below the average will get a below average increase.

I find insufficient evidence that evaluations in themselves affect merit increases. The evaluations contain no explicit recommendations for or against an increase, and there is no evidence leads even know that they are used in the merit review. If leads do not realize that evaluations are used for merit increases how can that be a “recommendation” at all, much less an “effective” one? There is also no evidence that leads have any input into whether a merit increase will be given at all in a particular

year, how many employees will be in each of the highest group, the middle, or below average, or the amounts due to any particular employee. In sum, the evaluations are merely one report about employee quality that upper management uses to make decisions about merit increases, not an effective recommendation.

Despite the Employer's reference to Harris' evaluation score as a factor that contributed to his layoff, there is insufficient evidence that evaluations are an effective recommendation regarding layoffs. It appears that Harris had longstanding problems, well known to management. For example, on Harris' September 2010 evaluation, Curtis wrote that Harris "has a mistaken approach of what it takes to be successful in the workplace. Jonathan must completely transform his attitude and work habits to retain his employment at NASSCO." Evaluations are done regularly and annually, not for the purpose of determining a layoff. The evaluation forms contain no explicit recommendation regarding an employee's tenure (although, as noted earlier, Curtis' narrative might), and there is no evidence leads have any reason to suspect that the evaluation would contribute to a layoff decision. None of the other laid off fire fighters' evaluations was offered into the record to see where they fell on the ranking list. The fact that Harris got a low evaluation score and was laid off may be coincidental, but on this record is not proven causal.

***(vi) "Relief" Leads***

In the event the Board reverses my conclusion on the supervisory status of the regular leads, I consider it prudent to independently address the supervisory status of "relief" leads, Moore and Martinez. As a matter of fact, Rhedrick falls under this category as well, considering the fact that he no longer has any subordinates on his

regular shift, and only “leads” when covering another shift for absenteeism. See, e.g., *Balsam Village Management Co.*, 273 NLRB 420, 421 (1984) enfd. 792 F.2d 29 (2d Cir. 1986); *Pennsylvania Coal & Coke Corp.*, 70 NLRB 1182, 1184 (1946).

“[I]t is clearly established that an employee who substitutes for a supervisor may be deemed a supervisor only if that individual's exercise of supervisory authority is both regular and substantial,” rather than “irregular and sporadic.” *Hexacomb Corp.*, 313 NLRB 983, 984 (1994). Substituting only for unscheduled absences such as vacation and sick leave of regular supervisors is not “regular and substantial.” *Id.*

There is no evidence of how often Rhedrick fills in on other shifts since the layoff. There is no evidence about how much time Curtis spends on “administrative duties” on days when he is acting lead, leaving Martinez to act in his place. As noted above, Moore acted as lead on third shift for a couple months when Rhedrick attended paramedic school, and still acts as relief “a few times a month,” on a “hit and miss” basis. The Employer’s attorney led Curtis into describing that as “sporadic.” Accordingly, there is insufficient evidence to support finding Rhedrick, Martinez or Moore spend a “regular and substantial” portion of their duty acting as lead. Thus, even if the regular leads are considered supervisors, the record fails to establish that Rhedrick, Martinez and Moore are also supervisors within the meaning of Section 2(11) of the Act.<sup>6</sup>

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<sup>6</sup> I also note that if the relief leads are 2(11) supervisors, then the Employer has seven supervisors for six unit employees – a remarkable ratio where there is greater than one supervisor for each employee.

## **DIRECTION OF ELECTION**

An election by secret ballot will be conducted by Region 21 among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently by Region 21, subject to the Board's Rules and Regulations. The appropriate collective-bargaining unit is:

All full-time and regular part-time employees of the fire department employed by the Employer at its San Diego area shipyard operations; excluding office clerical employees, and guards and supervisors as defined in the Act.

### **A. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, and who meet the eligibility formula set forth above. 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. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in

an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>7</sup>

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.**

## **B. Employer to Submit List of Eligible Voters**

To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

### **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 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **January 6, 2012.**

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<sup>7</sup> To ensure that all eligible voters 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 that may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with Region 21 within seven (7) days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). Region 21 shall make the list available to all parties to the election. In order to be timely filed, this list must be received in Region 21's Regional Office, 888 South Figueroa Street, Los Angeles, California 90017-5449, on or before close of business **December 30, 2011.** No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

*The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>8</sup> but may not be filed by facsimile.*

Signed at Minneapolis, Minnesota, this 23rd day of December, 2011.

/s/ Marlin O. Osthus

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Marlin O. Osthus, Acting Regional Director<sup>9</sup>  
Region 21  
National Labor Relations Board  
330 South Second Avenue, Suite 790  
Minneapolis, MN 55401-2221

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<sup>8</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

<sup>9</sup> This case was transferred to me, pursuant to the interregional assistance program, for purposes of issuing a decision only. All further processing of this case, including scheduling and conducting an election, will be performed by Region 21.