

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

MARINE TERMINALS CORP-EAST)
d/b/a PORTS AMERICA,)
)
Employer,)
and)
)
SOUTH ATLANTIC & GULF COAST)
DISTRICT, INTERNATIONAL)
LONGSHOREMEN'S ASSOCIATION,)
)
Petitioner.)

CASE NO: 10-RC-080061

**PETITIONER'S BRIEF IN OPPOSITION TO
EMPLOYER'S REQUEST FOR REVIEW**

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I. INTRODUCTION

On June 20, 2012, the Regional Director for Region 10 issued his *Decision and Direction of Election* in the above-captioned case, directing an election in a unit of all hourly part-time stevedores employed by the Employer at its Garden City Terminal. The Employer filed a timely *Request for Review*, but does not raise any issues other than whether the unit consists of supervisory employees as defined by the Act. Employer's only contentions are that the Regional Director misapplied Board precedent and ignored a wealth of record evidence. Employers grounds for review have no merit inasmuch as there is no absence of, nor departure from reported Board precedent upon which said decision is based. Furthermore, the Regional Director carefully considered their arguments in his lengthy decision and his decision is reasonably based upon facts placed in evidence during the hearing of this matter. Therefore, the Regional Director’s decision that all hourly part-time stevedores are not supervisors under the Act should be upheld.

II. STATEMENT OF FACTS

A. Employer's Terminals in the Port of Savannah

Employer operates out of three (3) facilities in the Port of Savannah, the Ocean Terminal, the Garden City Terminal, and the Savannah Foods Terminal. (Tr. P. 61, L. 17-22). The actual terminals and equipment are owned by the Georgia Ports Authority. (Tr. Pg. 302, L. 12-17).

B. The Management Structure at Garden City Terminal

Chris Garbarino is the General Manager for the Garden City Terminal, which is a dedicated container terminal (Tr. P. 59, L. 20-21) where Employer loads and discharges container ships, and has held that position just over a year. (Tr. P. 59, L. 4-14). Garbarino exercises autonomy concerning day to day supervision and direction of employees at the Garden City Terminal. (Employer Ex. 1).

Four (4) people report directly to Garbarino: Todd Glaize, Planning Manager, Jack McDermott, Line Manager, Greg Olmanns, Line Manager, and Casey Dexter, Site Manager. (Tr. P. 62, L. 11-22). Todd Glaize, Planning Manager, has four (4) people who report directly to him: Pat Yaccarino, Planner, Stephen Cowart, Planner, Joseph Hurst, Planner, and Jon Lefcourt, Planner.

Casey Dexter, Site Manager, has eleven (11) Lead Stevedores who directly report to him: Sonny Mujezin, Wes Winter, Toby Conner, Clay Conner, Joel Goodwin, Matthew Hardy, Mike Hightower, Tommy Buchan, Sergio Orozco, Bubba Palmer, and Dan Church. (Employer Ex. 1).

C. The Container Operation at Garden City Terminal

It takes approximately one work day to work a vessel at the Garden City Terminal (Tr. Pg. 74, L. 8-14), where containers (or boxes), which are generally 20 or 40 feet long, are shipped after being discharged from the vessel by crane or moved from trucks to the dock and then to the vessel by crane for shipment if being loaded on the vessel. The Garden City Terminal is moving around Eighty-Thousand (80,000) containers a month. (Tr. Pg. 24-25, L. 15-25 and L. 1-6). The average number of ships worked per week is 18 to 20 and on average handle close to 80,000 containers per

month. (Tr. Pg. 24, L. 12-17). The average number of gangs on a container ship is two and a third (2 1/3). (Tr. Pg. 288, L. 2-10).

D. Deck Stevedores (Employer Ex. 9 - Job Description)

Deck Stevedores work near the crane and communicate information from the game plan to Georgia Port Authority crane operators, sometimes by hand signals (Tr. Pg. 94, L. 4-7), on which containers to take off the ship and which containers to put on a ship. (Tr. Pg. 93, L. 11-14). Deck Stevedores also work in conjunction with Lashers during both discharge and loading operations.¹

Deck Stevedores reference the game plan to determine where containers are intended to be loaded on a vessel during loading operations and what sequence they are intended to be removed during discharge operations. Deck Stevedores make sure cargo gets loaded in the correct position within the pre-determined parameters of the game plan. (Tr. Pg. 634, L. 4-7).

Deck Stevedores at the facility are paid hourly (Tr. Pg. 256, L. 8-10); are not accorded any paid vacation (Tr. Pg. 260, L. 24-25 through Pg. 261, L. 1-2); are not given paid holidays (Tr. Pg. 261, L. 6-9); are not provided health benefits (Tr. Pg. 123-24, L. 21-25 and L. 1-3); only become eligible for a 401(k) after working a threshold of hours worked in a year (Tr. Pg. 123, L. 23-25); and some received bonuses, of up to a maximum of One Thousand (\$1,000.00) Dollars last year, although there was no documentary evidence to this assertion. (Tr. Pg. 317-18, L. 23-25 and L. 1-5).

E. Dock Stevedores (Employer Ex. 7 - Job Description)

There are usually one (1) Deck Stevedore and one (1) Dock Stevedore per crane when loading or discharging a container vessel. (Tr. Pg. 117, L. 13-16). They report to the Lead Stevedore and are paid hourly. (Tr. Pg. 287, L. 13-18). After obtaining the game plan from the Lead Stevedore,

¹Lashers are ILA longshoremen who are hired by a Lasher Gang Foreman. The Lashers' primary job is to unlock the twist locks from the containers. (Tr. Pg. 200, L. 6-9). The Lasher Gang Foreman has a copy of the game plan (Tr. Pg. 184, L. 2-7) and during loading operations, Lashers use lashing rods and secure containers to the deck of the ships for times when the ship experiences heavy storms, to make sure containers stay on the ship. (Tr. P. 108, L. 18-24). During discharge operations, Lashers are responsible for unlocking twist locks to de-couple the containers from each other so that they can be lifted off by the crane operator. (Tr. Pg. 97, L. 16-21).

the Dock Stevedore goes to the lead² and relays information from the game plan to longshoremen jockey truck drivers on where containers are intended to be delivered to their point of rest in the field in discharge operations and what containers are needed from the field during loading operations. (Tr. Pg. 79, L. 11-12). Dock Stevedores also communicate with the Field Clerk who is individually assigned to a field crane, which is operated by Georgia Port Authority employees and is used to maneuver containers in the field. (Tr. Pg. 79, L. 12-15). Dock Stevedores also work alongside longshoremen pinmen who handle and deal with twist lock issues.³ Basically, a Dock Stevedore makes sure that everyone is going to the correct places to pick up containers and making sure that all the imports are going to the correct stacks. (Tr. Pg. 634, L. 7-10). Dock Stevedores also provide hourly counts of moves⁴ to the Lead Superintendent. (Tr. Pg. 205-6, L. 7-25 and L. 1-23).

Dock Stevedores at the facility are paid hourly (Tr. Pg. 256, L. 8-10); are not accorded any paid vacation (Tr. Pg. 260, L. 24-25 through Pg. 261, L. 1-2); are not given paid holidays (Tr. Pg. 261, L. 6-9); are not provided health benefits (Tr. Pg. 123-24, L. 21-25 and L. 1-3); only become eligible for a 401(k) after working a threshold of hours worked in a year (Tr. Pg. 123, L. 23-25); and some received bonuses of up to a maximum of One Thousand (\$1,000.00) Dollars last year, although there was no documentary evidence to this assertion. (Tr. Pg. 317-18, L. 23-25 and L. 1-5).

F. Field Stevedores (No Job Description)

A Field Stevedore supports an overall ship operation. (Tr. Pg. 179, L. 17-20). There is not always a Field Stevedore on duty at any one time. (Tr. Pg. 71, L. 7-9). If Employer uses three (3) or

²The lead is the position where the truck is placed for a container to be landed on it by the crane.

³Pinmen, shipside men, or shoe men are all terms used to refer to a group of four (4) ILA longshoremen overseen by a Gang Foreman that work underneath the crane and handle and deal with twist lock issues, taking twist locks out of the containers and putting twist locks in a container. (Tr. Pg. 283-84, L. 23-25 and L. 1-5).

⁴This refers to the hourly count of the numbers of container boxes moved from truck to vessel or vessel to truck.

more cranes on a ship,⁵ as a general rule of thumb, a Field Stevedore is utilized as support. (Tr. Pg. 268, L. 3-8). Field Stevedores report to the Lead Stevedore. After obtaining the game plan from the Lead Stevedore, they take a company-provided vehicle into the field. (Tr. Pg. 179, L. 2-4). Their primary duty is to ensure coordination of equipment as instructed by the Lead Stevedore. (Tr. Pg. 81, L. 3-13). The Field Stevedore also interacts with the Georgia Port Authority employees and the Lead Stevedore. (Tr. Pg. 267, L. 3-24). A Field Stevedore does not need more experience than a Deck or Dock Stevedore, but does need to have a familiarity with the Georgia Port Authority's physical facility. (Tr. Pg. 179, L. 5-11). Field Stevedores are paid the same hourly rate and receive the same benefits as Deck and Dock Stevedores. (Tr. Pg. 521, L. 22-24).

G. Lead Stevedores (Employer Ex. 8 - Job Description)

There is one (1) Lead Stevedore assigned to each vessel. (Tr. Pg. 41, L. 14-21). The Lead Stevedore is in charge of the overall operation of the container ship that he is assigned to. (Tr. Pg. 73, L. 4-6 and Tr. Pg. 115, L. 3-25). The *Collective Bargaining Agreement* provides a definition of the Lead Stevedore (Tr. Pg. 605, L. 18 through Pg. 607, L. 5).⁶ Lead Stevedores are on salary (Tr. Pg. 123, L. 11-15) and because of this work minimally within other classifications (Tr. Pg. 218-19, L. 21-25 and L. 1-6; and Tr. Pg. 272-3, L. 14-25 and L. 1-23), but typically only do so periodically when individuals are sick, not showing up, taking a break, etc. (Tr. P. 658-9, L. 24-25 and L. 1-2).

According to the Garden City Terminal, General Manager, Mr. Chris Garbarino, Lead Stevedores could potentially get involved with some recommendations on actual gang manning, which is outside of what Deck, Dock, or Field Stevedores would be involved in. (Tr. Pg. 119, L. 2-5). Lead Stevedores have computer access (Tr. Pg. 181, L. 1-20), are assigned computers, and must

⁵If there are three (3) cranes being utilized by the Employer, that means that there are three (3) gangs being used because for each crane there is corresponding set of longshoremen gangs.

⁶"A Superintendent is that person designated by management to direct the labor force in the performance of their designated task. He is responsible for the safety of all personnel assigned to his control, proper stowage and handling of cargo, the coordination of the assignment of labor with the Chief Clerk and Gang Foreman."(Employer Ex.3, Pg. 142).

be familiar with the operation of the computer system, which takes quite a bit of training to understand. (Tr. Pg. 240, L. 17-23). Lead Stevedores also have a designated area in the office. (Tr. Pg. 241, L. 14-16).

Also as testified to by Mr. Garbarino, General Manager of Garden City Terminal, Lead Stevedores have cell phones (Tr. Pg. 236, L. 7-25), business cards (Tr. Pg. 639, L. 1-14), are paid salary (Tr. Pg. 255, L. 9-16); accorded vacation per company policy (Tr. Pg. 258, L. 18-20); paid holidays (Tr. Pg. 259, L. 7-9); health benefits (Tr. Pg. 123, L. 18-20); a 401(k) with a match percentage (Tr. Pg. 123, L. 18-20); and received bonuses from between Two Thousand (\$2,000.00) Dollars to Ten Thousand (\$10,000.00) Dollars last year (Tr.Pg.317, L. 17-22).

Lead Stevedores obtain information from Dock Stevedores regarding hourly move counts and use it to create a vessel activity report. (Tr. Pg. 622, L. 16-23). Lead Stevedores then pass that information onto the Port Captain (who is an employee of the Shipping Line), who makes decisions regarding manning levels required to complete the vessel and whether or not to work the longshoremen gang past the meal hour (Tr. Pg. 623-4, L. 3-25 and L. 1-7) or whether ordering an emergency gang to the vessel is necessary. (Tr. Pg. 545-46, L. 12-25 and L. 1-9). Additionally, whether or not to initiate discipline is based on a discussion between a Lead Superintendent and a Gang Foreman (or “Header”) and not the Deck and Dock Stevedores. (Tr.Pg.627-8,L.2-25and L.1-3).

H. Pre-Stow Planning a Vessel

The container operation at Garden City Terminal utilizes bay plans, which are plans for the stowage of containers, in which each bay on a vessel is represented in a cross-sectional plan of the ship from bow to stern. A bay plan shows all possible positions for stowage on the vessel. The securing scheme for a ship is incorporated into the design of the vessel and stowage issues must be properly planned in order for containers to be effectively secured. Containers in the holds under the deck are usually secured in cell guides. Containers carried on deck are secured in a vertical direction

by twist locks, which are placed between the containers and fastened on the container corners.

i. Planners

The Stow Chief is in charge of the Planners that stow the vessels. (Tr. Pg. 47, L. 21-25).⁷ Planners use the stowage plan, which is sent by the shipping line (customer), to determine what position each container is to be loaded aboard the ship or how the ship is to be unloaded. (Tr. Pg. 309, L. 1-10). Planners determine the position for each container, while taking into account information received from the shipping line regarding each vessel, (Tr. Pg. 629, L. 1-22) including the container number, weight, port of discharge, and hazardous identification. (Tr. Pg. 307, L. 1-6).

ii. BAPLIE; Shipping Line Requirements; Stowage Instructions; and Game Plan

When a given ship starts to approach the Port of Savannah, the shipping line will electronically send a key document called a BAPLIE along with stowage instructions about where they require containers to load on their ship (Tr. Pg. 131, L. 8-16), through an email distribution list that includes the Planners, managers, and Lead Stevedores. (Tr. Pg. 305-6, L. 20-25 and L. 1-2).

More specifically, the BAPLIE and stowage instructions contain vessel specifications with respect to the proper stowage and securing of containers and a schematic of the ship to show what it looks like (Tr. Pg. 130, L. 14-25). Planners utilize these requirements to create the game plan, which is generically referred to herein to describe the bay plan, sequence sheet, and other assorted documentation that is created by the Planners on how to work the ship. (Tr. Pg. 131-2, L. 17-25 and 1-10). The game plan is then given to Deck, Dock, Field, and Lead Stevedores; ILA Clerks and Gang Foremen. (Tr. Pg. 135, L. 5-8; Pg. 183-84, L. 25 and L. 1-12). The Shipping Line and Employer's managers decide how many gangs are needed to load or discharge a vessel. (Tr. Pg. 303, L. 16-22).

⁷As shown on Employer's Ex. 1, Todd Glaize is the Planning Manager (i.e., Stow Chief). Additionally, the Planners are referred to as Superintendents on Employer's Ex. 1, but are the following four (4) people: Pat Yaccarino, Planner, Stephen Cowart, Planner, Joseph Hurst, Planner, and Jon Lefcourt, Planner.

III. ARGUMENT AND CITATION OF AUTHORITY

A. EMPLOYER HAS FAILED TO MEET ITS BURDEN TO SHOW THAT HOURLY PART-TIME STEVEDORES ARE SUPERVISORS UNDER THE ACT

i. Introduction

Based on the record as a whole and for the reasons more fully described below, Petitioner asserts that the record establishes that Employer has failed to meet its burden to show that hourly part-time stevedores are supervisors under the Act. More specifically, Deck, Dock, and Field Stevedores have no role in hiring, transferring, suspending, laying off, recalling, promoting, assigning, rewarding, or disciplining other employees, or responsibly directing them, or adjusting their grievances. It is telling that during the direct examination of Derrick Miles, General Manager of Ocean Terminal, Mr. Miles stated that he will occasionally fill in as a Deck or Dock Stevedore and occasionally as a Lead Stevedore, but that he did not like to fill in as Lead Stevedore as much because he “normally like(s) to go into ranking instead of being the boss...”, presumably referencing the Deck, Dock, and Field Stevedore classifications. (Tr. Pg. 379-80, L. 17-25 and L. 1-6).

ii. Deck, Dock, or Field Stevedores Are Not Involved in the Assignment or Direction of Work by Employees

The authority to “assign” refers 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 overtime period), or giving significant over-all duties, i.e., tasks, to an employee.” In sum, to ‘assign’ for purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.⁸

The power to assign refers to employees’ authority to make immediate, autonomous workforce decisions in connection with employers’ business needs. The focus is on what, where, and

⁸*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689 (2006).

when work is performed, not on how it is performed.⁹ If employees are empowered to assign, they must still have significant discretion to do so; their decisions may not be predetermined by the employer's orders.¹⁰ Employers who institute instructive procedures keep the independent decision-making power in their hands. The Board has even stated that business decisions based on "preexisting priorities--[like] a customer out of [a product]--or commonsense considerations--[like] a sick driver must be replaced" are equally excluded from independence.¹¹ Also, if the assignment is solely based on "equalizing workloads," it too may be deemed routine and clerical.¹²

a. Work Assignments Are Made by the Gang Foreman in Accordance with the *Collective Bargaining Agreement*

Deck, Dock, or Field Stevedores do not make determinations regarding assignment or reclassification of ILA employees. (Tr. P. 628, L. 4-15). Rather, much of this function is governed by the *Collective Bargaining Agreement* (Employer's Ex. 3), which establishes work assignments are made at the hiring hall by the Gang Foreman who hires the ILA employees, which tells them *who* will be working *where* and doing *what*. ILA employees come to the vessel with assignments which are dependent on, and guided by, the *Collective Bargaining Agreement*. (Employer's Ex. No. 33).¹³

⁹*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689: "[C]hoosing the order in which the employee will perform discrete tasks within those assignments . . . would not be indicative of exercising the authority to 'assign.'"

¹⁰*Nat'l Labor Relations Bd. v. Monroe Tube Co.*, 545 F.2d 1320, 1324-25 (2d Cir. 1976); *Nat'l Labor Relations Bd. v. J.W. Mays, Inc.*, 675 F.2d 442, 444 (2d Cir. 1982): employees "collect[ed] information so that others can make decisions, and routinely direct[ed] nontitled guards to do the jobs others [had] assigned them"; *Nat'l Labor Relations Bd. v. Meenan Oil Co.*, 139 F.3d 311, 321 (2d Cir. 1998): the dispatchers "decisionmaking is directed and circumscribed by clearly established Company policy, and they exercise no authority that transcends the routine or clerical, or that requires the use of independent judgment"; *Schnurmacher Nursing Home v. Nat'l Labor Relations Bd.*, 214 F.3d 260, 266 (2d Cir. 2000): nurse's exercise of nominal discretion too little to establish assigning authority.

¹¹*B.P. Oil, Inc.*, 256 N.L.R.B. 1107, 1109 (1981).

¹²*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 693.

¹³Employer Ex. 33, § 6 (A through I): Hiring; Change of Gang Foreman (Pg. 86-89); and Employer Ex. 3, § 13(C) Hiring of Gang Foreman (Pg. 21-22).

Deck, Dock, and Field Stevedores do not evaluate ILA employee skills to determine which employee is most able to perform the job. Such assignments are already made when longshoremen, clerks, checkers, and Georgia Port Authority employees report to duty. In *Brown*, the Board held that a leadman who assigns employees tasks, such as hanging iron, based on “the skills required to do the job” does not exercise independent judgment.¹⁴ Here, the longshoremen, clerks, checkers, and Georgia Port Authority employees all perform the same job or repetitive tasks on a regular basis, and once trained in their positions, require minimal guidance.¹⁵

b. Deck, Dock, or Field Stevedores Do Not Reassign Employees

Employer argues that Section 13(D)(2) of the *Collective Bargaining Agreement* clearly authorizes Deck, Dock, or Field Stevedores to reassign employees. However, the record evidence does not show one specific instance of this occurring.¹⁶ Deck, Dock, or Field Stevedores do not have authority to recommend or make a decision regarding shifting an individual ILA longshoreman or a gang of longshoremen. (Tr. Pg. 624-5, L. 8-25; L. 1-5). The decision to shift a gang of longshoremen is usually made the night before the vessel is worked and is made by management taking into consideration preexisting circumstances. (Tr. Pg. 624-5, L. 8-25; L. 1-5). Additionally, the shifting of a longshoremen gang must be accomplished pursuant to the guidelines of the *Collective Bargaining Agreement*,¹⁷ which requires that gang integrity be kept and that an individual

¹⁴*Brown & Root Inc.*, 314 N.L.R.B. 19, 20 (1994): “[I]t is well established that the exercise of authority on the part of more skilled and experienced employees in order to assure the technical quality of the job does not in itself confer supervisory status.”

¹⁵*Croft Metals, Inc.*, 348 N.L.R.B. 717, 722 (2006).

¹⁶*Alternate Concepts, Inc.*, 358 N.L.R.B. No. 38 (April 27, 2012), Citing *Lynwood Manor*, 350 N.L.R.B. 489, 490 (2007): “Mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority.”

¹⁷Employer Ex. 3, § 13(D)(2) Shifting/Transferring (Pg. 22).

longshoreman not be transferred to a different position than the position he began with. (Tr. Pg. 624-5, L. 8-25; L. 1-5; and Tr. P. 628, L. 4-15).

c. Deck, Dock, and Field Stevedores must Follow the Game Plan and must Obtain Approval for Decisions Not Involving Routine Occurrences

Tables of organization (Employer Ex. 1-2), job descriptions (Employer Ex. 7, 8, and 9), or notices of management purporting to establish supervisory status do not per se vest power and will not suffice to establish supervisory status,¹⁸ but are nothing more than naked designations of paper power, unless substantiated by tangible examples evidencing the existence of the claimed authority.

Employer argues that all Stevedores are authorized to assign ILA labor to different places and times. In support of this argument, Employer cites to a letter to Mr. Benny Holland, Jr. (an official with the ILA) that is signed by James P. Lamb and is attached to the *Collective Bargaining Agreement*.¹⁹ Employer's own Garden City General Manager, Mr. Chris Garbarino, testified that it was quarterbacks (or lead stevedores) that were referred to as a superintendents and that they were the ones who communicated with the Chief Clerk, not Deck and Dock Stevedores.²⁰

¹⁸*N.L.R.B. v Security Guard Service, Inc.*, 384 F.2d 143, 149 (5th Cir. 1967).

¹⁹Employer Ex. 3, Pg. 142: "Dear Mr. Holland. During our recent negotiations the ILA asked that management provide the ILA with a letter defining the duties of a superintendent. The following definition of a superintendent is the one that was given verbally during the negotiations. A superintendent is that person designated by management to direct the labor force in the performance of their designated task. He is responsible for the safety of all personnel assigned to his control, proper stowage and handling of cargo, the coordination of the assignment of labor **with the chief clerk** and gang foreman. Should there be anything further required, let us know." (*Emphasis added.*)

²⁰Tr. Pg. 173, L. 2-25 through Tr. Pg. 174, L. 1-8: "[By Mr. Bignault:] Q. What was a quarterback called in Puerto Rico when you were there? A. [By Mr. Garbarino:] We didn't have the term there. They were just referred to as a superintendent. Q. They were like lead? A. Superintendent. Vessel superintendent I believe was the official name in Puerto Rico. Q. I'm going to refer you to Exhibit 3 for a minute. A. Okay. Q. You read in the record earlier -- it's on Page 142. You read in the record earlier described as the definition of a superintendent, and part of what you outlined responsibility for safety, and we'll talk a little more about safety later. It calls for him -- for the coordination to be part of his job, coordination of the assignment of labor with the chief clerk and the gang foreman, right?...Q. It talks about the coordination and assignment of labor with the chief clerk, right? Okay. Now, would it be fair to say that the chief clerk communicates mostly with the quarterback? A. That wouldn't be fair to characterize it in those terms. The chief clerk will communicate with the quarterback on a number of issues. He's going to be communicating just as much to his own clerks in the operation as well. Q. Okay. That makes sense. But **he doesn't communicate much at all with the deck man or dock man – A. The chief clerk? No.** (*Emphasis added.*)

Mr. Garbarino's testimony corroborates the testimony of Mr. Ricky Deloach, President of ILA Local 1475 (Checkers and Clerks), when he testified that the definition of the term from the letter referred only to the Lead Stevedore (or quarterback) and emphasized that they were the ones who communicated with the Chief Clerk, not Deck and Dock Stevedores.²¹ Employer points out that Mr. Deloach was not the President of ILA Local 1475 at the time the language in said exhibit was drafted. While this is true, it is of extreme importance that Mr. Deloach held the management position of Terminal Manager for MTC (Ports America - the Employer in this case) at that time and was therefore, in a position to know the exact understanding that the Employer had of this definition. (Tr. Pg. 605, L. 18 through Tr. Pg. 607, L. 24).

d. Any Assignment of Repetitive Tasks to Employees Who Perform the Same Job and Have Been Trained in Their Positions, Such as Jockey Truck Drivers, Requires Minimal Guidance and Does Not Involve the Exercise of Independent Judgment

An employee must have power to exercise independent judgment in performing supervisory functions; otherwise the employee cannot be deemed a supervisor.²² In other words, supervisors must have real power to act in the interests of their employer²³ "free of the control of others and form an opinion or evaluation by discerning and comparing data."²⁴ Employees who exercise independent

²¹Tr. Pg. 605, L. 18-25 through Tr. Pg. 606, L. 1-17: "[By Mr. Bignault:] Q. Let me move to something else. Let me show you Exhibit Number 3 of the respondent. There's a copy of a collective bargaining agreement, the ILA checkers, your contract. That's the contract that your local works under with Ports America, is it not? A. [By Mr. Deloach:] A. Yeah. This is a district contract we work under. Q. Could you turn to Page 142, please. A. Okay. Q. Now, that's entitled on the top superintendent definition, is it not? A. Yes. Q. Are you familiar with that? A. Yes. Q. All right, sir. The middle paragraph of the last fairly large paragraph starts out superintendent is that person. Do you see that? A. Yes. Q. Can you just read that for a minute to yourself. A. Yeah. Okay. Q. The superintendent that's being defined in there, can you tell us who that is? A. That's what I call the head foreman. Q. Is that what I would refer to in this hearing as the quarterback? A. Yes." and Tr. Pg. 607, L. 3-5: "[By Mr. Bignault:] Q. Who communicates most of the time with the chief clerk? Which stevedore would that be? A. [By Mr. Deloach:] It would be the head foreman."

²²*N.L.R.B. v. Security Guard Service, Inc.*, 384 F.2d 143, 147-48: stating that to be supervisor one must exercise "meaningful action" with respect to statutory test.

²³*N.L.R.B. v. Security Guard Service, Inc.*, 384 F.2d 143, 148.

²⁴*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 693 (2006).

judgment do not need to obtain approval or permission from higher-ranked employees or follow the commands of superiors; instead, they alone make decisions regarding the organization's needs.²⁵ Authority that is customary, sporadic, nominal, or "dictated or controlled by detailed instructions," will likely fall below the required threshold.²⁶ Wherever the line will be drawn, the requisite supervisory authority "effectively to recommend" an action, or "responsibility to direct" employees, must be based on a managerial chain of command and deference to such delegated power.²⁷

Employer argues that there is a wealth of evidence demonstrating that the Dock Stevedore regularly exercises authority to assign employees using independent judgment in the interest of the Employer by instructing jockey truck drivers where to pick up and drop off containers. However, the evidence adduced at the hearing did not show one specific instance of when a jockey truck driver had been instructed by a Dock Stevedore on how to do his job.²⁸ Telling an ILA Field Clerk or an ILA longshoreman jockey truck driver that an individual container is being discharged from a vessel and taken to a particular spot in the container yard is a logistic factor which had already been determined according to the game plan by Planners and the Georgia Port Authority. (Tr. Pg. 81, L. 9-20; and Tr. Pg. 181, L. 9-12). Additionally, ILA longshoreman jockey truck drivers are supervised by a driver Gang Foreman. (Tr. Pg. 367, L. 6-23).

²⁵*Superior Bakery, Inc. v. N.L.R.B.*, 893 F.2d 493, 496-97.

²⁶*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 708 (2006); *N.L.R.B. v. Security Guard Service, Inc.*, 384 F.2d 143, 147: quoting S. Rep. No. 105, at 4 (1947): The definition of supervisor is "distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as to the right to hire or fire, discipline, or make effective recommendations with respect to such action."

²⁷*United Assn. of Journeymen & Apprentices of Plumbing & Pipefitting Industry, Local 195, AFL-CIO*, 237 N.L.R.B. 1099, 1102 (N.L.R.B. 1978).

²⁸*Alternate Concepts, Inc.*, 358 N.L.R.B. No. 38 (April 27, 2012), Citing *Lynwood Manor*, 350 N.L.R.B. 489, 490 (2007): "Mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority."

Certainly it is not an exercise of independent judgment for a Dock Stevedore to tell a ILA longshoreman jockey truck driver: “Go to stack 600 with this container.” In effect the decision to place the container in stack 600 was decided earlier in the planning stage by someone else and does not amount to the designation of significant overall duties to the jockey truck driver.

Such occasional and sporadic “assignments” do not implicate the authority to assign as that term is described in *Oakwood Healthcare*, because the activity does not constitute the “designation of significant overall duties to an employee.”²⁹ To the contrary, there is no new assignment of work; if anything it is merely an ad hoc instruction that the employee perform a discrete task.³⁰ Deck, Dock, and Field Stevedores do not assign “overall duties” but rather discrete tasks, such as delivering a container to the container field and loading a container onto a vessel. This ad hoc direction requires substantially less discretion than the nurses’ assignment of “overall duties” in *Oakwood*. Moreover, the degree of judgment needed to assign employees delivering a container to the container field and loading a container onto a vessel is far less than required to assign hospital staff to patient care.

In this case, Employer has failed to adduce evidence sufficient to establish that the responsibilities carried out by the Deck, Dock, or Field Stevedores meet the *Oakwood Healthcare* definition of “assign.” Deck, Dock, or Field Stevedores do not prepare the longshoremen’s work schedules, appoint longshoremen to any particular shifts or overtime periods, or give significant overall duties to them. Deck, Dock, or Field Stevedores do not direct jockey truck drivers regarding which job shall be done next. These workers’ jobs are the same all day. Deck, Dock, or Field Stevedores do not make decisions regarding who shall do the job. Jockey truck drivers come to the lead and pick up the next available container. Once a driver is told where to bring the container in the field, the driver does not need any guidance on how to drive.

²⁹*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689 (N.L.R.B. 2006).

³⁰*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689 (N.L.R.B. 2006).

e. Deck, Dock, or Field Stevedores Are Not Involved in Hiring ILA Employees or Assigning Overtime

Deck, Dock, or Field Stevedores are not involved in anyway with the hiring of ILA employees, who are hired by Gang Foreman. (Tr. Pg. 436, L. 15-25 and Employer Ex. 3). Additionally, in collaboration, the customer and Employer's managers, decide how many gangs of longshoremen are needed to load or discharge a vessel. (Tr. Pg. 303, L. 16-22). Deck, Dock, or Field Stevedores do not assess the ILA employees' technical ability to perform the work and do not make recommendations whether they should or should not be hired. (Tr. Pg. 554-55, L. 20-25 and L. 1-8). If an extra longshoreman is needed, the Planners or Shipping Line has already ordered the extra man. (Tr. Pg. 547-51, L. 20-25 up through the end of Pg. 551). Additionally, if a longshoreman leaves the job or if he is knocked off by his Gang Foreman or the Lead Stevedore, a replacement is then needed and the Gang Foreman will simply fill the need under the *Collective Bargaining Agreement*.³¹

Deck, Dock, or Field Stevedores do not have the authority to layoff or recall ILA employees. The Gang Foreman is the one to decide who from his gang will be able to leave at the end of a shift, because he is the one who has to hire a replacement. Deck, Dock, or Field Stevedores are not involved in any way in the decision to layoff or recall of ILA employees. Any ILA employee who determines that he wants to work past a meal break does so voluntarily after speaking with his Gang Foreman and not the Deck, Dock, or Field Stevedores. (Tr. Pg. 554, L. 7-19).

f. Deck and Dock Stevedores Collect Information So That Others Can Make Decisions

Employer argues that Deck and Dock Stevedores analyze how much time the longshore gangs have remaining to complete an operation. To the extent that Deck and Dock Stevedores are responsible for providing hourly move counts to the Lead Superintendent (Tr. Pg. 205-6, L. 7-25 and L. 1-23), the record reflects that these reports contain only factual information, such as: (1) counts

³¹Employer Ex. 33, § 6 (A through I): Hiring (Pg. 86-89).

of the number of boxes or containers that are moved on or off the ship every hour; (2) whether the crane went down; (3) any other down time issues; and (4) other delays. (Tr. P. 547, L. 3-12).

It is the Lead Stevedore who uses this information to create a vessel activity report, which he signs, and which the Deck and Dock Stevedores do not complete. (Tr. Pg. 622, L. 16-23). The Lead Stevedore then passes that information onto the Port Captain, who makes decisions regarding the level of manning required to complete the vessel and whether or not to work the longshoremen gang past the meal hour (Tr. Pg. 623-4, L. 3-25 and L. 1-7), or whether ordering an emergency gang to the vessel is necessary. (Tr. Pg. 545-46, L. 12-25 and L. 1-9). For the Deck and Dock Stevedores to relay hourly move counts to the Lead Stevedore is not an exercise of independent judgment because any decisions based off of this factual information is made by the Port Captain, Planner, and Lead Stevedore. Deck and Dock Stevedores collect information so that others can make decisions.

iii. Deck, Dock, or Field Stevedores Do Not “Responsibly Direct” Employees

The authority “responsibly to direct” arises “[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.”³² “[F]or direction to be ‘responsible,’ the person performing the oversight 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 are not performed properly.”³³

³²*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 691 (2006).

³³*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 691-92 (2006): “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”

a. Deck, Dock, and Field Stevedores Are Limited by Preset Policies, the Game Plan, and the Mandates of the *Collective Bargaining Agreement*

Deck, Dock, and Field Stevedores do not have the power to instruct and correct longshoremen, clerks, checkers, or Georgia Port Authority employees on how their work is to be performed.³⁴ Deck Stevedores are trained a couple of days before they are allowed to work on their own. (Tr. Pg. 22, L. 7-18). One of the reasons why there is not much training involved is that they are required to follow the game plan, the instructions of the shipping line, and the *Collective Bargaining Agreement* (Employer's Ex. 3), which makes the performance of their job function routine or clerical, not independent.³⁵ The same goes for the Dock and Field Stevedores, who direct employees that "generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance."³⁶

Nearly every employee at some time, under certain conditions, tells someone else what to do,³⁷ and it is a question of fact in every case as to whether an individual is merely a superior employee who exercises control over less capable workers, or is a supervisor who shares in the power of management.³⁸ Furthermore, it is not responsibility per se that signifies supervisory status; rather, responsibility for directing other employees is the critical factor.³⁹ That is, the individual must be concerned with personnel rather than primarily with equipment.⁴⁰

³⁴*Croft Metals, Inc.*, 348 N.L.R.B. 717, 721 (2006).

³⁵*Croft Metals, Inc.*, 348 N.L.R.B. 717, 721 (2006).

³⁶*Croft Metals, Inc.*, 348 N.L.R.B. 717, 722 (2006).

³⁷*N.L.R.B. v. Security Guard Service, Inc.*, 384 F.2d 143: court noted that even the traffic director tells the company president where to park his car.

³⁸*N.L.R.B. v. Griggs Equipment, Inc.*, 307 F.2d 275, 279.

³⁹*Exxon Pipeline Co. v. N.L.R.B.*, 596 F.2d 704, 706.

⁴⁰*Yellow Cab, Inc.*, 131 N.L.R.B. 239, 241: the Board found that where a taxicab dispatcher gave instructions to employees, but where his job related primarily to the deployment of vehicles and the use of equipment, he was not a supervisor because his responsibility did not cover the way the employees were to carry out their functions.

b. Changes in Hatch Sequencing is Merely Routine

Employer argues that changes in hatch sequencing and list issues cause Deck and Dock Stevedores to assign the longshore gang to a particular place. However, much of the work done by Deck, Dock, or Field Stevedores, including the movement of containers, is circumscribed, by their mandate to follow the game plan and related vessel documentation (Employer's Ex.'s 11, 12, and 13), the requirements of the shipping line, and the *Collective Bargaining Agreement* (Employer's Ex. 3). In the situations where it is sometimes necessary to make decisions not found in the game plan, most changes must be approved by the Lead Stevedore and the ship's crew. Deck and Dock Stevedores however can place some containers out of the suggested sequence within certain parameters. Deck and Dock Stevedores cannot however change where the container will go if it will alter the game plan in a fundamental respect such as making the stack higher or lower than the game plan calls for or making the weight in a particular cell more than what is allowed in their game plan. The practical effect of doing so would be to make the containers on deck too high which would interfere with visibility from the bridge and reduce the stability of the stack weights to dangerous levels. (Tr. 370, L. 4-18). For example, Employer's General Manager testified that Deck Stevedores had authority to cut boxes from a ship without talking to anyone else, on his own authority. (Tr. Pg. 229-30, L. 4-25 and L. 1-4; and Pg. 232, L. 2-25). However, a line manager for Employer testified that a Deck Stevedore would not have the authority to cut boxes from a ship, but that such a directive would have to come from the shipping line or Lead Stevedore. (Tr. Pg. 372-73, L. 14-25 and L. 1-8).

The record reflects that changes in the sequence of loading or discharging will only occur if there is some kind of commonly occurring circumstance (Tr. Pg. 332, L. 1-8; and Tr. Pg. 232, L. 21-25), such as: (1) a failure to locate the cargo; (2) cargo coming in out of sequence; (3) a crane or other equipment malfunctioning; or (4) a customer request that a change be made.

In these situations, factors that limit the Deck and Dock Stevedores in making changes to the sequence are as follows: (1) the maximum weight allowed per cell must be maintained according to the game plan; (2) the location of all hazard (class containers) and generally for reefer containers must be exactly according to the game plan; and (3) a container with an identifying number may be moved from its location on the game plan, but it may only be replaced with a container that is near the same weight and which is going to the same port. (Tr. Pg. 334, L. 6-15). If the change is within these parameters, then the Deck Stevedore may make the routine change in loading the containers onboard a vessel out of sequence with the game plan.

c. Choosing the Order of Discrete Tasks an Employee is to Perform is Not Indicative of Exercising the Authority to Assign

Additionally, if the vessel becomes too heavy on one side, causing it to tilt (a listing issue), it is mere common sense that the longshore gangs will need to begin discharging containers from the other side of the vessel so that it can balance itself. The focus of exercising the authority to assign is on what, where, and when work is performed, not on how it is performed.⁴¹ To argue a Deck or Dock Stevedore exercises independent judgment to tell the longshore gang to discharge cargo in a different order than the original plan indicated does not amount to the exercise of independent judgment. Deck and Dock Stevedore's are required to follow the game plan when discharging containers, but not if it will cause the vessel to dangerously tilt.

d. Deck, Dock, and Field Stevedores Are Not Responsible for the Work of Longshoremen, Clerks, Checkers, or Georgia Port Authority Employees

Deck, Dock, and Field Stevedores are not answerable for the work of longshoremen, clerks, checkers, or Georgia Port Authority employees.⁴² To be deemed answerable, Deck, Dock, and Field

⁴¹*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689: "[C]hoosing the order in which the employee will perform discrete tasks within those assignments . . . would not be indicative of exercising the authority to 'assign.'"

⁴²*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 691 (Citations omitted).

Stevedores must be “held fully accountable and responsible for the performance and work product of the employees” they direct.⁴³ The only documentary evidence in that regard was Employer’s Ex. 24, which is an after-the-fact attempt to prove that there exists the prospect of adverse consequences for Deck, Dock, and Field Stevedores if they do not take steps to correct the performance and work product of the employees they allegedly supervise. However, in this case, the written warning was concerning Mr. Hopkinson’s misdirection of a crane operator, not about any failure on Mr. Hopkinson’s part to correct the crane operator’s performance.

Employer also argues that the Deck, Dock, and Field Stevedores are responsible for directing the work of longshoremen, clerks, checkers, and Georgia Port Authority employees because they are awarded bonuses. In regard to the Employer’s argument concerning positive material consequences as a result of being responsible for the above-referenced employees’ performance, the record is devoid of evidence establishing proof that Deck, Dock, and Field Stevedores were held responsible for the above-referenced employees’ performance.⁴⁴ The General Manager, Mr. Garbarino’s testimony, established only that some of the Deck, Dock, and Field Stevedores received bonuses for the first time last year of up to a maximum of One Thousand (\$1,000.00) Dollars.⁴⁵

⁴³*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 691-92.

⁴⁴Tr. Pg. 161, L. 1-10: “Q. By Mr. Pearson: For the calendar year 2011, did you make any bonus payments to superintendents? A. [By Mr. Garbarino:] We did. Q. Would that be full-time and part-time superintendents received bonuses? A. They did. Q. What role did the productivity and the ability to manage the people under them play in those bonuses? It was a very important criteria for that, along with safety.”

⁴⁵Tr. Pg. 317-18, L. 7-25 and L. 1-5 “[By Hearing Officer Rich:] Q. You also indicated there were bonus payments made for 2011? A. [By Mr. Garbarino:] Made for 2011, yes. Q. How many people were among the full-time and part-time superintendents that were given bonus payments? A. The vast majority of people. The full-timers, full-time superintendents got bonus payments and of varying degrees. And the part-time superintendents, we gave bonuses to probably about 75 percent of them. Q. And what was the range of the bonus for the full-timers? What was the range bonus for the full-timers? A. For the full-timers, it varied from around -- I'm trying to think -- \$2,000 up to close to \$10,000. Q. And what about for the part-timers? What was the range of the 75 percent who got the bonus? A. For the part-timers, if they did receive a bonus, it was a thousand dollars. Q. It was flat for whoever got a bonus? A. Correct.”

iv. Deck, Dock, or Field Stevedores Do Not Have Authority to Discipline/Discharge

The power to discipline asks whether an employee has authority to effectuate consequences for a subordinate. There are a number of instances where alleged supervisors may appear to engage in disciplinary activities, but lack real authority. Many employees may not make any judgments regarding a subordinate's conduct, but merely act as a "conduit for information" for the employer to take necessary action.⁴⁶ For example, employees who informally counsel subordinates are not necessarily labeled supervisors.⁴⁷ Employees unable to discipline other employees without consulting higher management will not automatically create such status either.⁴⁸

a. Deck, Dock, or Field Stevedores Do Not Have Authority to File Grievances or Appear at Grievance Hearings

At the Garden City Terminal, based upon the grievances in the record, either a Gang Foreman (Employer's Ex. 15) or the Garden City Terminal General Manager (Employer's Ex. 18, 21, 22, and 25), are authorized to complete grievances. At the Ocean Terminal, based upon the grievances in the record, either the Terminal General Manager (Employer's Ex. 29); the Site Manager (Employer's Ex. 30); or the Assistant Site Manager (Employer's Ex. 31 and 32) are authorized to complete grievances. What is clear is that none of the grievances in the record were signed by any Deck, Dock, or Field Stevedore, which indicates that they do not have the authority to make the decision regarding filing a grievance. (Tr. Pg. 592-93, L. 22-25 and L. 1-14; Tr. Pg. 552, L. 6-24). Furthermore, neither the Deck, Dock, Field, nor Lead Stevedore participate in grievance hearings. (Tr. Pg. 528, L. 3-8; Tr. Pg. 527, L. 23-25; Tr. Pg. 514, L. 17-20; Tr. Pg. 511-12, L. 25 and L. 1-2).

⁴⁶*Nat'l Labor Relations Bd. v. Meenan Oil Co.*, 139 F.3d 311, 321.

⁴⁷*Schnurmacher Nursing Home v. Nat'l Labor Relations Bd.*, 214 F.3d 260, 264-65 (2d Cir. 2000): nurses counseled and disciplined staff members informally and occasionally referred such issues to higher management, but the court did not deem such actions and referrals as disciplinary authority.

⁴⁸*Nat'l Labor Relations Bd. v. Mt. Sinai Hosp.*, 8 Fed. App'x 111, 114.

Employer argues that ILA employees are knocked off without grievances being filed but provided no evidence of a specific instance where this has ever occurred. (Tr. Pg. 331, L. 4-11).⁴⁹

b. Deck, Dock, or Field Stevedores' Options in Particular Circumstances Are Predetermined under the *Collective Bargaining Agreement*

Under the *Collective Bargaining Agreement* (Employer's Ex. 3), neither party is to uphold performance issues. Discipline is handled through the *Collective Bargaining Agreement* (Employer Ex. 3, § 13(E) Discipline (Pg. 22-35)), which requires Gang Foreman and Lead Stevedores to discuss issues regarding discipline against ILA employees.

Gang Foreman have the responsibility for hiring under the *Collective Bargaining Agreement* (Employer Ex. 33, § 6 (A through I): Hiring (Pg. 86-89)). Likewise, as the person who hired the man, Gang Foreman are responsible for firing the man. Under the *Collective Bargaining Agreement* (Employer's Ex. 3), the Gang Foreman is responsible to each respective labor organization (ILA Local 1414 or ILA Local 1475) to ensure that longshoremen hired out of the hiring hall do not perform unsafe acts or have performance issues on the job (unfit; shirking work; insubordination).⁵⁰

1. Charges Brought by ILA Employees

Under the *Collective Bargaining Agreement* (Employer Ex. 3, § 13(E) Discipline (Pg. 22-35)), a longshoreman who is knocked off, has the due process rights to notice and an opportunity to be heard and may request a grievance hearing against whomever he believes is responsible for him being knocked off. (Employer's Ex. 16, 19, and 20).

2. Charges Brought Against ILA Employees

Under the *Collective Bargaining Agreement* (Employer Ex. 3, § 13(E) Discipline (Pg.

⁴⁹29 U.S.C. § 160(b). The Board is required to apply the adverse inference rule, when as we have here, the Employer fails to produce relevant evidence within his control. *Alternate Concepts, Inc.*, 358 N.L.R.B. No. 38 (April 27, 2012), Citing *Lynwood Manor*, 350 N.L.R.B. 489, 490 (2007): "Mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority."

⁵⁰*Alternate Concepts, Inc.*, 358 N.L.R.B. No. 38 (April 27, 2012); Employer Ex. 3, § 9, Gang Foreman Responsibilities (Pg. 58); and Employer Ex. 3, § 13(E) Discipline (Pg. 22-35).

22-35)), the longshoreman is also entitled to a hearing before the Port Grievance Committee when a grievance is filed against him by Employer. (Tr. Pg. 195-6, L. 18-25 and L. 1).

c. Actual Grievances - Missing ILA Employees

All of the following grievances involve missing ILA employees who were knocked off because they were missing. To argue a Deck or Dock Stevedore exercises independent judgment to make sure that jockey truck drivers assigned to the driver gang are coming to the lead to pick up containers to bring to the field does not equate with the exercise of independent judgment.

Drivers are required to come to the lead after dropping a container off in the field. If they do not arrive after a period of time and other drivers have made several passes, a Dock Stevedore might report that by passing on such information to the Driver Gang Foreman who is also making note of the same information (Tr. Pg. 525, L. 13-25 through Pg. 527, L. 25), or the Lead Stevedore. If a driver is not there, it is not a matter of independent judgment to say an individual is not there.⁵¹

1. Employer Ex.'s 15 and 16

In reference to Employer's Ex.'s 15 and 16, Mr. Garbarino testified that the Dock Stevedore was looking for and found the referenced driver asleep in his truck in the container field after said Dock Stevedore found that he was short of trucks on the line. (Tr. Pg. 166, L. 1-17). According to the Exhibit, the Gang Foreman for the driver's gang, Mr. Jones, stated that he (Jones) was in the lead and Wright and McNeil (drivers) never showed up. The Grievance Committee summary (Employer Ex.'s 15 and 16) refers to Jamie Keeran (Dock Stevedore) also noting the driver gang was running a "few" trucks short. The summary further states that the Header was told by Union business agent Montague to call the Lead Stevedore (Sergio Orozco) who told the Gang Foreman to knock the

⁵¹*Lincoln Park Nursing Home*, 318 N.L.R.B. 1160, 1162 (1995): authority to send employees home if they pose a threat to patient safety does not require sufficient independent judgment to confer supervisory status; *Chevron Shipping Co.*, 317 N.L.R.B. 379, 381 (1995): The Board has consistently found that the authority, as exists here, to order intoxicated or insubordinate employees to leave the workplace does not constitute the statutory authority to discipline employees, as such violations are so egregious and obvious that little independent judgment is needed.

driver (Wright) off. The fact that Sergio Orozco was, in fact, the Lead Stevedore who instructed this action is confirmed through correspondence read in the record and acknowledged by Mr. Garbarino, General Manager, Garden City. (Tr. Pg. 237, L. 1 through Pg. 240, L. 16).

Employer's Ex. 16 reflects a grievance filed by ILA Employee Andre McNeil, one of the drivers who was also missing from the line at the same time as the above Mr. Wright. The incidents occurred at the same time, on the same gang, on the same day. However, the Grievance Committee notes have handwritten in the name "Keeran" indicating he was the Dock Stevedore involved. Mr. Keeran is a part-time employee and a member of the proposed bargaining unit.

Although Mr. Keeran was not employed at all on July 2, 2011 (Tr. Pg. 510, L. 6 through Pg. 512, L. 12), Mr. Garbarino testified that he was certain that the Dock Stevedore was in fact Mr. Keeran because he looked up the back-up information on this alleged fact. (Tr. Pg. 168, L. 2 through Pg. 170, L. 8). There is no such evidence in the back up documents provided by Employer. The evidence proves that the Dock Stevedore was a full timer named James Lucas and the direction given by the Business Agent was to call the Stevedore, meaning the Lead Stevedore.

Additionally, the fact is that both drivers in question failed to appear at work, according to Driver McNeil after a lunch break. Under any version of alleged facts, replacing these drivers is perfunctory (Tr. Pg. 315, L. 2-21) and not independent judgment.⁵² Hiring a replacement for an employee who is missing does not constitute the exercise of independent judgment. In addition, the *Collective Bargaining Agreement* requires suspension from employment for various offenses and controls the punishment and due process requirement for contract infractions.⁵³ Pursuant to Board

⁵²*Lincoln Park Nursing Home*, 318 N.L.R.B. 1160, 1162 (1995); *Chevron Shipping Co.*, 317 N.L.R.B. 379 (1995); *Jochims v. N.L.R.B.*, 480 F.3d 1161, 1171-1172 (2007); and *Loffland Bros*, 243 N.L.R.B. 74, 75 (1979).

⁵³Employer Ex. 3, § 13(E) Discipline (Pg. 22-35).

precedent, authority to discharge which is limited to flagrant violation of common place working conditions is insufficient by itself to establish supervisory status.⁵⁴

2. Employer Ex. 19

Employer's Ex. 19 is a grievance filed by ILA employee Robert Brown in August 2010. This Exhibit was submitted by Mr. Garbinaro on behalf of Employer in an attempt to prove that a Dock Stevedore, Willie Proctor, knocked a driver off for failing to show up on the lead after lunch (missing employee). It bears mentioning that Mr. Brown did not appear at the Grievance Hearing on January 25, 2011 and that as a result there was no evidence taken in this matter. (Employer's Ex. 19). The only thing that this Exhibit shows is that an ILA employee made an allegation against a Dock Stevedore in a grievance. The accusation is not proof of the matter, where there is no hearing on whether the incident ever occurred and no evidence taken concerning the incident.

The only tangible evidence of what actually occurred that day was given by the accused, Dock Stevedore, Willie Proctor at the hearing in this case when he testified that as part of his job he counts the trucks that return to the line after meal time and that the driver Gang Foreman, Mr. Marty Grant, also counts the trucks. Mr. Proctor recalled that on the day in question, the Gang Foreman asked Mr. Proctor if he had seen the seventh (7th) truck and that Mr. Proctor replied that he had not. Thereafter, the Gang Foreman left the dock area to investigate. Upon his return from the field, the Gang Foreman asked Mr. Proctor if he had seen the driver yet. Mr. Proctor again replied no, at which time the Gang Foreman told Mr. Proctor that Driver Brown was late back from lunch and that he was going to fire him and get a replacement driver. Mr. Proctor was never advised a grievance had been filed nor was he asked to appear at a Grievance Hearing. (Tr. Pg. 525, L. 1 through Pg. 528, L. 1).

⁵⁴*Loffland Bros*, 243 N.L.R.B. 74, 75 n. 4 (1979): the Board stated that, we have “consistently held that authority to discharge which is limited to flagrant violation of common place working conditions, such as being drunk, is insufficient by itself to establish supervisory status.”

d. Actual Grievances - Lead Stevedore and Gang Foreman Knocked Off

1. Employer Ex. 20

Employer's Ex. 20 describes a grievance filed by an ILA employee against Mr. Wayne Rahn, Sr., for allegedly instructing the Gang Foreman to fire the complaining party. It is interesting to note that the grievant, Mr. Cannich, described Mr. Rahn, Sr., not as the stevedore, but as "Mr. Wayne Rahn of Ports of America". The written grievance in Employer Ex. 20, also states that Mr. Rahn "drove up to Mr. Gerido" the Gang Foreman and stated "I want this man fired".

The Dockman stands on the dock. He does not drive anywhere. (Tr. Pg. 165, L. 16-21). Of course, the Deckman is on the vessel. (Tr. Pg. 165, L. 16-21). The actual position held by Mr. Wayne Rahn was Safety Supervisor. (Tr. Pg. 234, L. 14-19). He was characterized on the direct examination of Mr. Garbarino as a stevedore. (Tr. Pg. 155, L. 16-17). However, on cross examination, Mr. Garbarino did testify that he understood that Mr. Wayne Rahn had been a safety supervisor. (Tr. Pg. 234, L. 14-19). Mr. Sidner is the Safety Manager now and he does not ever work as a stevedore. (Tr. Pg. 234-35, L. 23-25 and L. 1-7). The issue of whether a Deck or Dock Stevedore is a supervisor is not affected by this Employer's Ex. 20 or any testimony in reference thereto.

2. Employer Ex. 31

Employer's Ex. 31 describes an incident at the Break/Bulk Ocean Terminal, which was found by the Regional Director not to be a relevant facility. It involved a disagreement while lifting some cargo. Testimony has shown that the Break/Bulk operation is much more complicated and requires much higher skill levels at the Deck Stevedore position. (Tr. Pg. 434-38, L. 1-25 and 1-12).

That being said, this Exhibit shows that a grievance was filed by Louis Sharpe, against Robert Mayes, Gang Foreman. Employer's Ex. 28 shows on March 19, 2012, which is the support document for said allegation contained in Employer's Ex. 31, that Robert Mayes was not shown as a Gang Foreman for the M/V Hermans which is the vessel operation pertaining to the Employer's Ex. 31. The lack of support documentation makes full examination of this evidence impossible.

3. Employer Ex. 32

This is another incident that occurred at the Ocean Terminal Break/Bulk facility. It appears that the ILA ship crane operator refused to follow instructions from the stevedore and the ILA Walking Boss. Employer's Ex. 28 shows on January 2, 2012, which is the support document for said allegation contained in Employer's Ex. 32, that there is no data for the day in question which is January 2, 2012. None of the actual witnesses, all of whom are employed by Employer, appeared in the present hearing. Again it should be stated that Petitioner has not requested inclusion of any personnel at the Ocean Terminal Break/Bulk facility.

e. Deck, Dock, or Field Stevedores Do Not "Effectively Recommend" Discipline

The effectiveness of the alleged supervisor's authority is normally a question of fact.⁵⁵ The test must be the significance of the alleged supervisor's judgments.⁵⁶ An effective recommendation is one which under normal circumstances is adopted by higher authority without de novo consideration as a matter of course;⁵⁷ if an individual's recommendations are subject to investigation by a higher authority who thereupon makes an independent determination, he will not be classified as a supervisor on that basis.⁵⁸

Deck, Dock, or Field Stevedores do not handle grievances. If any issues are brought to their attention, the extent of the Deck, Dock, or Field Stevedores' involvement is to relay what is going on to the Lead Stevedore or Gang Foreman to resolve the problems and after doing so, Deck, Dock, and

⁵⁵*Stop & Shop Cos., Medi Mart Div. v. N.L.R.B.*, 548 F.2d 17, 19: the court noting that in the phrase "effectively to recommend," the emphasis is on the initial word; and that: "a janitor does not become a supervisor merely because his superior invariably indulges his requests for assistance..."

⁵⁶*Stop & Shop Cos., Medi Mart Div. v. N.L.R.B.*, 548 F.2d 17, 19.

⁵⁷*Davenport v. Public Employment Relations Board* (Iowa), 264 N.W.2d 307, 314.

⁵⁸*DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB No. 149 (Dec. 22, 2011).

Field Stevedores are largely excluded from the process. (Tr. Pg. 558-9, L. 22-25 and L. 1-11).⁵⁹ There is no record evidence that Deck, Dock, or Field Stevedores recommend discipline based on their observations; indeed, the record shows that the Lead Stevedore and the Gang Foreman are responsible for independently investigating and determining whether to issue discipline. (Tr. Pg. 627-8, L. 2-25 and L. 1-3). Although Employer contends that Deck, Dock, or Field Stevedores have been delegated full responsibility for making certain that longshoremen follow Employer's rules, ranging from driving properly to following generalized safety instructions, the evidence fails to establish that they do anything other than report their observations.⁶⁰ Again, reference is made to past port practice and the *Collective Bargaining Agreement*⁶¹ which mandates the disciplinary process in any decision those individuals might make. (Tr. Pg. 450, L. 10-12 and Employer Ex. 3).⁶²

v. Deck, Dock, or Field Stevedores Do Not Exercise Independent Judgment in Interest of Employer

Employer argues that deck and dock stevedores do not report to the lead stevedore before making significant decisions because it would defy logic given the nature of the stevedoring operation and the fact that there is one lead stevedore assigned to each vessel.⁶³ However, it is the evidence on

⁵⁹*DirectTV U.S. DirectTV Holdings LLC*, 357 NLRB No. 149 (Dec. 22, 2011): "The authority to 'effectively recommend' an action 'generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.'"

⁶⁰*Riverboat Services of Indiana, Inc.*, 345 N.L.R.B. 1286 (2005); *Brown & Root*, 314 N.L.R.B. 19, 21 n. 6 (1994): The Board has held that the ability to refer rule infractions to supervisors, or the mere inspecting and reporting the work of others, do not confer supervisory status.

⁶¹Employer Ex. 3, § 13(E) Discipline (Pg. 22-35).

⁶²*Alternate Concepts, Inc.*, 358 N.L.R.B. No. 38 (April 27, 2012).

⁶³On a one (1) gang ship, there will be four (4) Gang Foreman or leadmen (counting the Chief Clerk) supervising the ILA employees and being supervised by the Lead Stevedore. A one-gang ship would have three (3) headers and one (1) chief clerk over the ILA employees on the various gangs: (1) a gang header (who is in charge of six (6) people, two on the ship and four (4) for the shipside); (2) a driver header (who is in charge of seven drivers); (3) a lashing header (who is in charge of six (6) people); and (4) the clerks call their header a chief clerk and he is in charge of the clerks (timekeeper, plan man, and three (3) field clerks - one (1) for the hatch and two (2) for the field). (Tr. Pg. 577, L. 14 through Pg. 578, L. 17). If more than one gang is on the ship, then another bargaining unit member referred to as the Walking Boss is over the Gang Foreman of the gangs and the Lead Stevedore is in turn over the Walking Boss.

the record and Board precedent that defies Employer's argument, not logic.

“[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”⁶⁴ “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”⁶⁵ Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that “[t]he authority to effect an assignment ... must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’”⁶⁶

A distinction is drawn between employees with minor supervisory duties, commonly known as straw bosses, lead men, set-up men, and the like, and individuals vested with genuine management prerogatives. The former ordinarily function as mere conduits for transmitting orders, instructions, requests, and other work related information between management and other employees, or simply lay out work which has been planned in advance. An employee who has the authority to transfer or assign tasks to workers does not qualify as a supervisor under the Act if such assignments or transfers are made solely on the basis of worker availability and therefore do not involve the exercise of

That is, the Lead Stevedore truly supervises a total of six (6) people. Included in the six (6) people are the following: (1) Deck Stevedore; (2) Dock Stevedore; (3) Driver Gang Foreman; (4) Lashing Gang Foreman; (5) Gang Foreman; and (6) Chief Clerk. (Tr. Pg. 584-85, L. 16-25 and L. 1-19). All of the Gang Foremen and the Chief Clerk are in turn supervising their respective gangs of ILA employees in directing the workforce. (Tr. Pg. 584, L. 19 through 585, L. 15). The evidence indicates that the average number of gangs on a container ship is two and a third (2 1/3) (Tr. Pg. 288, L. 2-10), which calculates to 14.9, including a Walking Boss, who are under the supervision of the Lead Stevedore.

⁶⁴*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 692-93 (2006).

⁶⁵*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 693 (2006).

⁶⁶*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 693 (2006).

independent judgment.⁶⁷ Furthermore, repetitive or rote tasks are not considered supervisory, nor are functions requiring little more than common sense.⁶⁸ Thus, the nondiscretionary or mechanical exercise of a statutorily enumerated power as a matter of routine is insufficient to confer supervisory status. Similarly, an individual's direction of other employees is routine and therefore not supervisory where such direction is governed by detailed directives, rules, or procedures.⁶⁹

In determining supervisory status, the Board has instructed that "the burden of proving supervisory status rests on the party asserting that such status exists."⁷⁰ The party seeking to prove supervisory status must demonstrate it by a preponderance of the evidence.⁷¹

Employer has failed to carry its burden of proving that Deck, Dock, or Field Stevedores exercise independent judgment and discretion that rises above the "routine or clerical" in performing any of their duties. (Tr. Pg. 289, L. 11-21). Deck Stevedores transmit information to the crane operators regarding where to place cargo onboard the vessel. Deck, Dock, and Field Stevedores do not direct and assign ILA personnel. Deck, Dock, and Field Stevedores do not exercise independent judgment in the performance of their work, which is routine and all done according to the game plan (vessel documentation, including the cover sheet, bay plan, and sequence sheet), local practices, verbal instructions of higher authority, or provisions of the *Collective Bargaining Agreement* (the provisions of which limit and control any type of judgment). (Employer's Ex.'s 3, 7, 8, 9, 11, 12, and 13).

⁶⁷*N.L.R.B. v Harmon Industries, Inc.*, 565 F.2d 1047 (1977); *N.L.R.B. v W. C. McQuaide, Inc.*, 552 F.2d 519, 532 (3d Cir. 1977).

⁶⁸*Davenport v. Public Employment Relations Board* (Iowa), 264 N.W.2d 307.

⁶⁹*Alternate Concepts, Inc.*, 358 N.L.R.B. No. 38 (April 27, 2012); and *Connecticut Light & Power Co.*, 121 N.L.R.B. 768, 770 (1958).

⁷⁰*Dean & Deluca New York, Inc.*, 338 N.L.R.B. 1046, 1047 (2003); accord *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001); deferring to existing Board precedent allocating burden of proof to party asserting that supervisory status exists.

⁷¹*Dean & Deluca New York, Inc.*, 338 N.L.R.B. 1046, 1047 (2003).

Deck, Dock, and Field Stevedores report directly to the Lead Stevedore who is always assigned one to a vessel. Deck, Dock, and Field Stevedores are in constant radio communication with the Lead Stevedore, who is always the highest ranking individual assigned at any given time to the vessel. It is evidence of the routine nature of the work that employees with only several weeks of experience are thrust into the job with only a couple of ships training, which have the duration of one (1) day. (Tr. Pg. 22, L. 7-18). This is hardly the role of a supervisor.

Regarding the area of authority to discipline, Deck, Dock, or Field Stevedores do not handle grievances. If any issues are brought to their attention, the extent of the Deck, Dock, or Field Stevedores' involvement is to relay what is going on to the Lead Stevedore or Gang Foreman to resolve the problems and after doing so, Deck, Dock, and Field Stevedores are largely excluded from the process. (Tr. Pg. 558-9, L. 22-25 and L. 1-11).⁷² Additionally, the provisions of the Collective Bargaining Agreement limit and control discipline, within the parameters of the *Collective Bargaining Agreement* (Employer Ex. 3, § 13(E) Discipline (Pg. 22-35)).

B. PART-TIME SUPERINTENDENTS ARE NOT UNDISPUTEDLY SUPERVISORS WHEN ASSIGNED TO WORK AS LEAD SUPERINTENDENTS

Employer argues that the Regional Director's analysis is flawed regarding his conclusion that the Employer failed to demonstrate that the full-time salaried stevedores share an overwhelming community of interest with the hourly part-time stevedores that their exclusion would render the unit inappropriate. Employer relies upon the fact that two part-time stevedores under cross-examination did not disagree with Employer's counsel in response to said counsel saying that "nothing stops the

⁷²*DirectTV U.S. DirectTV Holdings LLC*, 357 NLRB No. 149 (Dec. 22, 2011): "The authority to 'effectively recommend' an action 'generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.'"

company from assigning you to perform as a quarterback.” This does not establish nor infer that the Employer actually does the thing proposed.⁷³ In fact, the record directly contradicts this assertion.

As the Regional Director correctly found, the record evidence showed that the job duties of the Deck, Dock, and Field Stevedores was sufficiently distinct from that of the Lead Stevedores such that the exclusion of the Lead Stevedores from the unit was appropriate under Board law. The Regional Director specifically found, that although the Employer argues otherwise, the evidence reflects very little interchange between the petitioned-for unit and the salaried stevedores.⁷⁴

i. Job Requirements and Duties of Deck, Dock, and Field Stevedores Are Different than Those of Lead Stevedores

a. Lead Stevedores Are Required to Participate in Training in Which Deck, Dock, and Field Stevedores Are Not Required to Participate

According to Chris Garbarino, General Manager of Garden City Terminal, the Lead Stevedore job is primarily done by the full-time, salaried individuals. (Tr. Pg. 219, L. 1-5). To become a Lead Stevedore, a college degree, computer proficiency (Employer Ex. 8), and a significant amount of training and skill sets are required. (Tr. Pg. 72-73, L. 22-25 and L. 1-6).

b. Deck, Dock, and Field Stevedores Are Not Interchangeable with Lead Stevedores

Employer has not cross-trained the Deck, Dock, Field, and Lead Stevedores to function in all categories. Deck and Dock Stevedores were told by management, sometime around three (3) years ago, that they were not allowed to work as Lead Superintendents, unless they were full time. (Tr. Pg. 484, L. 10-22). Additionally, Deck, Dock, and Field Stevedores could not function as a Lead Stevedore on

⁷³Roy Ritter’s testimony was used by the Employer to demonstrate that nothing “... precludes the company from assigning [him] to work as a quarterback” (Tr. Pg. 502, L. 6-8). However, this employee has never worked anything but the Deck position (maybe once Dock) and he does not question the Employer’s ability to assign him. He knows he has never done the job and that he is unqualified on the computer which would be required prior to actually being assigned to the position of quarterback.

⁷⁴*Decision and Directions of Election*, Pg. 16.

any given day because they are not trained in the computer programs necessary to perform the job functions of a Lead Stevedore. (Tr. Pg. 509, L. 11-14). SPARCS is a terminal operating system that is provided by the Georgia Ports Authority and all the stevedoring companies in Savannah use it. (Tr. Pg. 301, L. 16-19). Only Lead Stevedores have access to the SPARCS system through an individually identifiable password which is issued to them by the Georgia Ports Authority. (Tr. Pg. 242, L. 5-19). As Employer correctly pointed out, others may use the Lead Stevedores password to gain access to the system with permission, but the fact remains that only Lead Stevedores are trained on the system and have passwords issued solely to them for their use.

c. Lead Stevedores Periodically Fill in as Deck, Dock, and Field Stevedores

The record shows that Lead Stevedores only work Deck, Dock and Field positions periodically when individuals are sick, not showing up, or taking a break, etc. (Tr. P. 658-9, L. 24-25 and L. 1-2). The Regional Director found that “since full-time stevedores are paid a salary and are scheduled to work a certain number of days per week, it appears that these assignments are made when there are not enough lead positions on a given day to accommodate all the full-times who are scheduled to work.”⁷⁵ In fact, an analysis of Employer’s exhibit 6B shows out of the total number of days that Lead Stevedores worked Deck and Dock Stevedore positions, Lead Stevedores only worked three and six tenths (3.6%) percent of the time in those positions.⁷⁶

d. Deck, Dock, and Field Stevedores Do Not Spend a Regular and Substantial Portion of Their Time Working as Lead Stevedores

Employer alleges that Deck, Dock, and Field Stevedores work as Lead Stevedores. However, an analysis of Employer’s Exhibit 6B for Garden City Terminals shows that only six (6) out of a total of thirty-nine (39) bargaining unit members have worked at all as Lead Stevedores for the period

⁷⁵*Decision and Directions of Election*, Pg. 17, ¶2.

⁷⁶*Decision and Directions of Election*, Pg. 17, ¶2.

covered by Employer's Exhibits' 6A and 6B, for an aggregate total of thirteen (13) times.⁷⁷ All but two (2) of these occasions are disputed because of the internal inconsistencies, discrepancies, and errors in Employer's Exhibits and in comparison with Petitioner's Exhibit 1⁷⁸. The Employer uses Jerry Swafford and David Noble as examples to support their argument. The specific discrepancies for each individual's assignments as quarterback are outlined below.

1. Alleged Deck, Dock, and Field Stevedores Working as Lead Stevedores from November 1, 2011 to April 30, 2012 - Analysis of Employer's Ex. 6B and Petitioner's Ex. 1

1.1 Jerry Swafford

Jerry Swafford (part timer) is alleged to have worked as Lead Stevedore a total of nine (9) times in Employer's *Request for Review* based upon Employer's Exhibit 6B. However, Jerry Swafford is actually listed as working Lead Stevedore only three (3) times in Employer's Exhibit 6B. Each time, it appears that his usual dock position has been switched with a full timer: (1) Wes Winter (full timer);⁷⁹ (2) Sergio Orozco (full timer);⁸⁰ and (3) James Lucas (full timer).⁸¹

⁷⁷Multiple dates were missing from 6B so a truly accurate number cannot be determined. Also, the dates worked by Clay Conner were not included in the totals for this analysis due to his working primarily as a Deck, Dock or Field until a recent promotion to Lead Stevedore. *Petitioner's Post-Hearing Brief Attachments: Analysis of Employer's Ex. 6B - Part Time Employees (Garden City Terminal) and Analysis of Employer's Ex. 6B - Full Time Employees (Garden City Terminal)*.

⁷⁸Petitioner's Ex. 1 is a document containing information provided by Employer (Tr.Pg.618, L.5-10) when labor orders are made for clerks and checkers through ILA Local 1475's dispatch system. (Tr.Pg.604-05, L.5-25 and L.1-16). Said document is an actual printout of Employer's labor orders from ILA Local 1475 for the relevant time period.

⁷⁹Employer's Ex. 6B, 11/01/11 shows "Sunday 11/01/11" but 11/01/11 was a Tuesday. Sunday was 10/30/11. In addition, Employer's Ex. 6B lists Jerry Swafford (part time) as a Lead Stevedore and Wes Winter (full time) as a Dock for vessel New Dehli Express at 1300. When compared to the Petitioner's Ex. 1 for 11/01/11, there is no vessel New Dehil Express listed for that date. Said vessel is listed on Petitioner's Ex. 1 for 10/30/11 at 1300 with Wes Winter listed as the Lead Stevedore.

⁸⁰Employer's Ex. 6B, 12/05/11 lists Jerry Swafford (part time) as Lead Stevedore and Sergio Orozco (full time) as Dock for vessel Melbourne on 12/05/11 at 0800. Petitioner's Ex. 1 lists Tommy Buchan as the Lead Stevedore for said vessel.

⁸¹Employer's Ex. 6B, 12/06/11 lists Jerry Swafford (part time) as the Lead Stevedore for Vessel Maersk Wismar on 12/06/11. Petitioner's Ex. 1 lists James Lucas as the Lead Stevedore for said vessel.

If Jerry Swafford did work as Lead Stevedore all three (3) times, then he worked Lead Stevedore for a total of Three and Seven Tenths (3.7%) Percent during the time period. If he did not work Lead Stevedore on these dates, then he worked Lead Stevedore Zero (0%) Percent.⁸²

1.2 David Noble

David Noble (part timer) is alleged to have worked as Lead Stevedore a total of four (4) times in Employer's Exhibit 6B. The first time he is listed as Lead Stevedore, on November 2, 2011, it appears that his position has been switched with Bubba Palmer (full timer) who is listed as working the field position for vessel Maersk Damietta.⁸³ The second time David Noble is alleged to have worked as a Lead Stevedore, it appears that Sergio Orozco (full timer) was actually working as Lead Stevedore.⁸⁴ Petitioner could not find any discrepancy with the third and fourth entries in Employer's Exhibit 6B listing David Noble as a Lead Stevedore.⁸⁵ Employer argues that David Noble worked as Lead Stevedore all four (4) times, for a total of Thirteen (13%) Percent. However, it appears that he

⁸²See *Petitioner's Post-Hearing Brief Attachment: Analysis of Employer's Ex. 6B - Part Time Employees (Garden City Terminal)*.

⁸³Employer's Ex. 6B for date 11/02/11 and *Petitioner's Post-Hearing Brief Attachment: Analysis of Employer's Ex. 6B - Part Time Employees (Garden City Terminal)* shows that all employees on vessel Northern Diversity have a start time of 0800 and a location of berth 1. David Noble (part time) is listed as the Lead Stevedore for vessel Northern Diversity, which has a listed start time of 0700 at location berth 8. All employees on vessel Maersk Damietta have a start time of 0700 and a location of berth 8. Bubba Palmer (full time) is listed as working the field position for vessel Maersk Damietta with a start time of 0800 at location berth 1. It appears that the vessel/position for David Noble (Part time-Northern Diversity/Lead Stevedore) has been switched with the vessel/position of Bubba Palmer (Full time- Maersk Damietta/Field). Additionally, Employer's Ex. 6B, 11/02/11 entry shows "Monday, 11/02/11" but 11/02/11 was a Wednesday. Monday was 10/31/11. When compared to Petitioner's Ex. 1 for 11/02/11, there is no vessel Northern Diversity listed for that date. This vessel is listed on Petitioner's Ex. 1 for 10/31/11 at 0800 with Mike Hightower listed as the Lead Stevedore.

⁸⁴Employer's Ex. 6B 11/16/11 and *Petitioner's Post Hearing Brief Attachment: Analysis of Employer's Ex. 6B - Part Time Employees (Garden City Terminal)* show that on 11/16/11, David Noble (part time) is listed as the Lead Stevedore for vessel Genoa Express with a start time of 1300. However, Petitioner's Ex. 1 shows that on 11/16/11, vessel Genoa Express had a start time of 1900 and the Lead Stevedore was Sergio Orozco (full time).

⁸⁵*Petitioner's Post Hearing Brief Attachment: Analysis of Employer's Ex. 6B - Part Time Employees (Garden City Terminal)*, Endnotes 4-5.

worked Lead Stevedore only on the two (2) uncontested dates which means that he actually worked Lead Stevedore only Six and Four Tenths (6.4%) of the time during the time period.⁸⁶

1.3 Employer's Ex. 6

It should be mentioned that Employer introduced Employer's Ex. 6, which purported to show that Roy Ritter, Mark West, Jonathan Lewis, and Kris Griner had all performed as Lead Stevedore during the relevant time period. (Employer's Ex. 6). Roy Ritter (Tr. Pg. 500-01, L. 25 and L. 1-5), Mark West (Tr. Pg. 489-90, L. 16-25 and L. 1-2), Kris Griner (Tr. Pg. 513, L. 13-14),⁸⁷ and Jonathan Lewis (Tr. Pg. 507-08, L. 25 and L. 1-3) all denied that they had ever worked as Lead Stevedore and were cross-examined on the issue. None of Employer's Exhibits introduced into evidence (Employer Ex.'s 6A, or 6B) show that the above-referenced individuals ever worked as Lead Stevedore.

1.4 Total Percentage of Deck, Dock, and Field Stevedores Working as Lead Stevedore

Out of the entire proposed bargaining unit working the various positions (Deck, Dock, and Field Stevedore) a total of 2,296 times, and assuming the accuracy of Employer's Exhibit, Lead Stevedore was worked by Deck, Dock and Field Stevedores a total of Six Tenths (0.6%) Percent of the time during the time period.⁸⁸ However, if the questionable Lead Stevedore entries are excluded, then Lead Stevedore was worked by Deck, Dock and Field Stevedores a total of Nine One Hundredths (0.09%) Percent.⁸⁹

⁸⁶*Petitioner's Post Hearing Brief Attachment: Analysis of Employer's Ex. 6B - Part Time Employees (Garden City Terminal).*

⁸⁷Mr. Griner testified that he started a vessel on April 25, 2012 when he was working as a Field Stevedore because Lead Stevedore, Bubba Palmer, had a doctor's appointment. Mr. Griner testified that he was in constant telephone contact with the Lead Stevedore and that the only duties he performed which were not Field Stevedore duties was handing paperwork to headers and taking the plan to the chief for him to review. (Tr.Pg.519-24, L. 3 through L. 20).

⁸⁸*Petitioner's Post-Hearing Brief Attachment: Analysis of Employer's Ex. 6B - Part Time Employees (Garden City Terminal).*

⁸⁹*Petitioner's Post-Hearing Brief Attachment: Analysis of Employer's Ex. 6B - Part Time Employees (Garden City Terminal).*

Even though it was not claimed that Lead Stevedores are not supervisors, and even though it appears that a minute number of Deck, Dock, and Field Stevedores filled in as Lead Stevedores, the substantial prong of the test set forth in *Oakwood Healthcare, Inc.*, cannot be met in the instant case.⁹⁰ To hold Deck and Dock Stevedores as “part-time supervisors” would extend the supervisor exception beyond its logical constraints. Additionally, any filling in of Deck, Dock, and Field Stevedores does not happen regularly to a set schedule, but only on a sporadic basis. (Tr. Pg. 273, L. 2-23). The sporadic assumption of supervisory duties when the statutory supervisor is on vacation or sick leave, rather than on a routine and regular basis, is not sufficient to establish supervisory status.⁹¹ In the present case, of the two (2) individuals relied on by the Employer to establish the “presumptive threshold for regularly working in an undisputed supervisory position,” none of those individuals out of the entire proposed bargaining unit of thirty-nine (39) actually worked as Lead Stevedore in range of the presumptive threshold.

IV. CONCLUSION

Employer basically takes issue with every factual determination made by the Regional Director. The record is replete with facts that make it clear that the Directors *Decision* is reasonably based in fact and soundly placed in law. Employer's arguments against the Regional Director's *Decision* fly in the face of controlling precedent. The Regional Director correctly found that all hourly part-time

⁹⁰*Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 693 (2006): If the individuals spend a regular and substantial portion of their working time performing supervisory tasks, they are supervisors; if the time spent in supervisory duties is merely sporadic and insignificant, they are employees.

⁹¹*Jakel Motors*, 288 N.L.R.B. 730 (1988). Rotation in and out of supervisory positions, as in the construction industry, may be indicative that the deck or dock man is an employee and not a statutory supervisor.

stevedores are not supervisors under the Act. Petitioner respectfully requests that the Board reject the Employer's *Request for Review* and affirm the Regional Director's Decision.

RESPECTFULLY SUBMITTED, this 12th day of July, 2012.

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V. CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the *Petitioner's Brief in Opposition to Employer's Request for Review* in Case No. 10-RC-080061 via electronic filing through the National Labor Relation Board's website, www.NLRB.gov, and by email upon:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 12th day of July, 2012, at Savannah, Georgia.

BIGNAULT & CARTER

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