

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC.,)
d/b/a U.S. FIBERS,)
)
Employer,)
)
and)
)
)
UNITED STEEL, PAPER AND FORESTRY,)
RUBBER, MANUFACTURING, ENERGY,)
ALLIED INDUSTRIAL AND SERVICE)
WORKERS INTERNATIONAL UNION,)
LOCAL 7898,)
)
)
Petitioner.)
_____)

Case 10-RC-101166

EMPLOYER'S REQUEST FOR REVIEW

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I. INTRODUCTION

The Employer, Pac Tell Group, Inc., d/b/a US Fibers is engaged in the business of reprocessing waste and producing synthetic fiber in Trenton, South Carolina. On March 26, 2013, the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 (US) petitioned to represent a unit of all production and maintenance employees at the Trenton facility. A hearing was held in Aiken, SC on April 18, 2013, to determine whether a question concerning representation existed. Following the hearing, US Fibers argued that the Employer's Laurens, South Carolina, facility should be included with the Trenton facility in the proposed bargaining unit. The Employer also argued that four individuals, Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres were supervisors ("putative supervisors") as defined by Section 2(11) of the Act.

On May 3, 2013, Acting Regional Director Mary Bulls ("ARD") issued a Decision and Direction of Election ("Decision") finding that the individuals named above were not supervisors under the Act and concluded that the following unit was appropriate for collective bargaining:

A unit of all full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance workers employed by the Employer at its Trenton, South Carolina, facility, excluding all other employees, including office clerical employees, professional and confidential employees, and guards and supervisors defined under the Act.¹

Pursuant to Section 102.67(b) of the Board's Rules and Regulations, US Fibers files this request for review of the ARD's decision that the putative supervisors are not supervisors under the Act. The Board should grant the request for review because: (1) substantial questions of law and policy are raised because of departure from officially reported Board precedents in the

¹ The Employer does not request review of the ARD's decision not to include Laurens in the proposed unit.

Decision; and (2) the ARD's decisions on certain substantive factual issues are clearly erroneous on the record, and such issues prejudicially affect the rights of the Employer.

II. FACTUAL BACKGROUND

A. US Fibers' Operation

Pac Tell Group, Inc., owns and operates a synthetic fiber manufacturing operation under the name of US Fibers at 30 Pine House Road in Trenton, South Carolina. (Tr. 14-15). The Trenton plant has approximately 500,000 square feet in four buildings. (Tr. 112). Ted Oh is Vice President of Operations of US Fibers. He testified at length regarding the South Carolina facilities and its operations and presented an organizational chart. (Emp. Exh. 1). Eduardo Sanchez, Jose Lal, and David Martinez are supervisors working under Production Manager Glen Jang. (Tr. 28-30; Emp. Exh. 1). Aduaco Torres works as a Finishing Supervisor under Production Manager Kyong Kang. (Id.). Each of these employees has Lead Operators working under them. (Tr. 35; Emp. Exh. 1).

B. US Fibers' Supervisors

Sanchez, Lal, Martinez, and Torres were officially promoted to supervisor in October of 2012 in a meeting held with all Trenton employees. (Tr. 171-172). The meeting was conducted by Alcorta, who told the assembled employees that Sanchez, Lal, Martinez, and Torres were going to be supervisors and would run the shifts. (Id.). Oh and Alcorta had met earlier with the four men individually, explained to them their change in status, and asked them if they would be willing to become supervisors. (Tr. 82, 171-172).

Alcorta testified as follows:

Q: You said he explained the expectations. What were his expectations?

A: Preparing work schedules, preparing the production schedules, all the different stats that we would have on our shift, look for people to make sure we had a full shift, apply overtime when it was necessary, recommend discipline, and different things like that.

Q: Now we keep referring to the four individuals. Can you tell me who they were?

A: Yeah, we have David Martinez, Aduaco Torres, we have Jose Lal, and we have Eduardo Sanchez.

(Tr. 172).

Sanchez and Lal report to Jang and supervise employees in the Extrusion operation. (Tr. 28-30; Emp. Exh. 1). Martinez also reports to Jang and supervises employees in the Recycle operation, which processes raw materials for production. (Id.). Torres is a Finishing Supervisor who reports to Kang. (Id.). He supervises employees involved in the stretching, crimping, setting, cutting, and bailing operations. (Id.).

Sanchez has nine Lead Operators working under him. Each lead supervises two people for a total of about 25 employees under his supervision. (Tr. 34). Lal supervises six lead persons, each of whom supervises three employees for a total of about 25. Martinez supervises 22 employees. (Id.). Torres supervises approximately 40 hourly employees, including eight lead people. (Tr. 34; Emp. Exh. 1). The leads are “basically . . . more experienced operators, that . . . have operational responsibility as far as making sure everything is right and they are more skilled than the rest of the team . . .” (Tr. 35).

The Regional Director correctly found as follows:

Generally, each contested supervisor has the same responsibilities. The contested supervisor must observe his team of employees to make sure that the department is operating correctly. If any issues arise, such as a machine breakdown, the contested supervisor can assign employees to do other work and go to other areas to fill in. The contested supervisors do not have regular production jobs on

the line; rather, they are asked to walk around the department to observe. For this reason, the contested supervisors do not have offices. Because the Employer's facility operates 24-hours per day, a contested supervisor must be present when a department manager is not at the facility. Unlike department managers, the contested supervisors are paid hourly and may earn overtime. Contested supervisors can be involved in calling employees in to work to cover absences and granting employee requests to go home due to illness.

Contested supervisors are also involved in creating work schedules for the employees assigned to them. The department manager will set the parameters for how many employees are needed for each shift. With this information, the contested supervisor chooses the employees who will work, as well as the work location in that department.

(Decision, p. 9). Facts surrounding the specific duties of the putative supervisors, as they relate to 2(11) status, are discussed in more detail below.

III. ARGUMENT

A. The Relevant Standard For Analysis of Supervisory Status Under Section 2(11) of the Act

Section 2(11) of the Act defines "supervisor" as:

any individual having the 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.

29 U.S.C. § 152(11).

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the United States Supreme Court adopted a three-part test for determining whether an individual is a "supervisor" under Section 2(11). Under the Supreme Court's test:

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions; (2) their

exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.

Kentucky River, 532 U.S. at 713. The burden of proving that an individual is a supervisor rests on the party alleging that supervisory status exists. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *Kentucky River*).

The first prong of the Supreme Court's test considers whether the putative supervisor holds the authority to engage in any one of the twelve supervisory functions listed in Section 2(11). *Kentucky River*, 532 U.S. at 713. "If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment." *Oakwood Healthcare, Inc.*, 348 NLRB at 688.

The second prong of the test considers whether the putative supervisor's authority requires the use of independent judgment and is not of a merely routine or clerical nature. *Kentucky River*, 532 U.S. at 713. To satisfy the "independent judgment" prong of the Supreme Court's test, "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" provided that the act is "not of a merely routine or clerical nature." *Oakwood Healthcare, Inc.*, 348 NLRB at 693.

B. The ARD's Factual Determination Regarding Whether Putative Supervisors Possess Authority to Effectively Recommend Discipline Is Clearly Erroneous and Prejudicial

The record clearly established that Sanchez, Lal, Martinez, and Torres have the authority to discipline employees. The ARD misconstrued the evidence of record by holding that there

was only “generalized” testimony of authority to discipline employees, which was insufficient to establish supervisory status. The ARD cited *G4S Regulated Security Solutions*, 358 NLRB No. 160, slip op. (2012), for the proposition that “generalized testimony is insufficient to establish supervisory status.” (Decision, p. 17). In *G4S*, the Employer relied exclusively on the testimony of a senior manager “several levels removed” from the supervisors in question. *Id.* at 2. The senior manager made “conclusory assertions” that supervisors had authority to discipline. *Id.*

In the present case, witnesses for both the Employer and the Petitioner agreed that the putative supervisors were specifically instructed to issue discipline. A Union witness, putative supervisor Jose Lal, and an Employer witness, Production Manager Glen Jang, both testified that Jang had given Lal and other supervisors disciplinary action forms and instructed them to administer discipline to employees who violated the rule. Jang testified that approximately three or four months before the hearing he instructed his supervisors to discipline employees under appropriate circumstances. (Tr. 135-136, 139).

Jang stated:

A: At the beginning I told them to – warning. In other words, I delegate the responsibility to them.

Q: And what does he mean by the beginning?

A: Three or four months ago.

Q: What did he tell them three or four months ago regarding issuing disciplinary warnings?

A: You write – you manage people, you can do warnings.

(Tr. 139, Lines 8-14).

Lal confirmed this in his testimony. He stated that Jang “gave us these forms blank and told us that every person that would not satisfy the safety requirements or work requirements,

that we would have to fill one of these forms out.” (Tr. 211, Lines 9-12). While he stated that Jang instructed him to issue two of the warnings contained in Exhibit 2, he admitted that it was he who decided whether to issue a first warning, second warning, or final warning. (Tr. 212). He also admitted that he decided what offense had been violated. (Id.). Lal testified further:

Q: Did you testify earlier that Mr. Jang gave you a stack or group of blank forms?

A: Yes.

Q: Did he tell you to fill these forms out when you saw an employee violating the rules?

A: [Yes].

Q: Did he tell you it was your responsibility to fill out a form when you saw someone violate the rule?

A. Yes.

(Tr. 223-224, Lines 20-23). The ARD completely ignored the fact that Lal agreed with and corroborated Jang’s testimony.

C. The ARD’s Decision That Warnings Are Not “Discipline” Departs From Officially Reported Board Policy Precedent

The ARD made an error of law when she held that warnings are not considered “discipline” for 2(11) purposes if they do not result in the loss of pay or other adverse consequences. The Board has consistently found that written warnings and counselings are discipline for Section 2(11) purposes. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007) (“[I]t is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee.”); *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1064 (2006)

("[W]riteups . . . are placed in the employees' personnel file and play a significant role in the disciplinary process."); *Wilshire at Lakewood*, 345 NLRB 1050 (2005) (same).

In *Oak Park*, 351 NLRB 27, the Board made it clear that an individual's authority to issue written warnings – thereby initiating the progressive disciplinary process against an employee – satisfies the "independent judgment" prong of the statutory supervisor test. The Board held, "it is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee." *Id.*

Similarly, in *Bon Harbor*, 348 NLRB at 1064, the Board found that LPN's exercised independent judgment in disciplining employees notwithstanding that "management retain[ed] the ultimate authority to review the disciplinary action and to override it" The LPN's initial discretion whether to issue a write-up or not persuaded the Board: "[T]he evidence shows that LPN's are vested with the authority to decide whether to write-up employees for rule infractions." *Id.* at 1064. See also *Sheraton Universal Hotel*, 350 NLRB 1114 (2007) (finding that although upper management reviewed disciplinary warnings, they typically just signed off on them, indicating that the putative supervisors exercised independent judgment in disciplining employees). *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003) (individual found to be supervisor where disciplinary issues are brought to operations manager, who does not conduct an independent investigation but merely decides the level of discipline to be imposed); *Westwood Health Care Center*, 330 NLRB 935 (2000) (individuals found to be supervisors where they had authority to issue oral and written warnings and to suspend employees, and individuals' supervisor never independently investigated a suspension or recommendation of termination).

D. The ARD's Finding That a Putative Supervisor Must Actually Issue Discipline, As Opposed to Having Authority to Do So, In Order to Be Considered a 2(11) Supervisor Departs From Officially Reported Board Precedent

The ARD's decision that the putative supervisors were not 2(11) supervisors was based largely on her finding that no actual disciplinary action had been issued by the four supervisors in question. This is not surprising, since the supervisors were only elevated to supervisory status several months prior to the hearing. (Tr. 171-172).

It is crystal clear that it is the *authority* to discipline and not the actual exercise of discipline which is important for purposes of 2(11) analysis. See *Pepsi-Cola Company*, 327 NLRB 1062, 1064 (1999) ("Contrary to the Regional Director, we do not draw a distinction between those account representatives who in fact have exercised their authority to discharge and those who have not; the determinative factor is that all such account representatives possess the authority to do so."); see also *Station Casinos LLC*, 358 NLRB No. 77, slip op. at 8 (2012) ("Section 2(11) requires only the possession of authority to carry out the operation of an enumerated supervisory function, not its actual exercise.") (quoting *Barstow Community Hospital*, 352 NLRB 1052, 1053 (2008)); *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) ("Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise.").

Once again, the ARD misconstrued *G4S*. In that case, the Board noted that there were no disciplinary warnings issued by the two putative supervisors. However, in *G4S*, there was no specific corroborating testimony regarding whether the putative supervisors had been given authority to issue discipline. Further, the putative supervisor in *G4S* denied having authority to discipline employees. In this case, a putative supervisor and union witness Lal admitted that he

had been given disciplinary warning notices by his Department Manager and told that his job duties included issuing disciplinary warnings in appropriate circumstances.

As explained above, US Fibers' supervisors have authority to make discretionary choices as to whether the disciplinary process should be invoked, and, if so, to what degree they have the discretion to issue non-disciplinary counseling or a written or oral disciplinary warning. They have been specifically instructed to issue discipline. The exercise of this function alone defines them as 2(11) supervisors.

E. The ARD's Determination That Putative Supervisors Do Not Have the Authority To Recommend Raises Was Clearly Erroneous and Prejudicial

US Fibers has traditionally given wage increases in October and April. (Tr. 51). The supervisors were asked for their input regarding which employee should receive raises on April 1. (Tr. 52-53, 147-148, 207; Emp. Exh. 4). In the first week of April, the supervisors gave their input into wage increases. (Id.). The supervisors were asked for similar input in October 2012. (Tr. 147). The Board has consistently found supervisory status where evaluations completed by a putative supervisor directly impact Section 2(11) factors such as promotions and terminations. See *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995) (“[B]ased on the significant role played by the assistant supervisors with respect to annual evaluations, we conclude, contrary to the Regional Director, that the assistant supervisors possess and exercise statutory supervisory authority.”); *Virginia Mfg. Co., Inc.*, 311 NLRB 992, 993 (1993) (“We agree with the hearing officer that leadmen . . . are supervisors within the meaning of the Act [based on evidence that they] have exercised independent judgment in evaluating the performance of employees.”); *Burns International Security Services, Inc.*, 278 NLRB 565, 570 (1986) (sergeants at a nuclear facility considered supervisors based on significant role in evaluating employees).

The ARD found that Jang testified that management agreed with 90% of the previous year's putative supervisors' recommendations and that the other 10% were disputed because Jang had a different opinion. (Decision, p. 24). In *Venture Industries*, 327 NLRB 918 (1999), the Board found that the requirement of "effectively" recommending a supervisory action is met when the putative supervisor's recommendations are accepted 75% of the time.

F. The ARD's Factual Determination With Respect to Whether Putative Supervisors Direct Employees in Their Work Is Clearly Erroneous and Prejudicial

The record also reflects that Sanchez, Lal, Martinez, and Torres "responsibly direct" employees. In *Oakwood Healthcare, Inc.*, 348 NLRB at 691, the Board found that "[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,' that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." 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 692.

In *Croft Metals, Inc.*, 348 NLRB 717 (2007), the Board found that lead persons at a manufacturing facility "directed" their crew members as that Section 2(11) term was defined in *Oakwood Healthcare*. The Board explained, "as part of their duties, the lead persons are required to manage their assigned teams, to correct improper performance, move employees when necessary to do different tasks, and to make decisions about the order in which work is to be performed, all to achieve management-targeted production goals." *Id.* at 722.

The job duties of the four putative supervisors include exactly the type of activities discussed by the Board in *Croft Metals* in finding the “responsibly direct” element was met.² They do not have regular production jobs. They spend their entire work day roaming the plant supervising employees. (Tr. 44). They have multiple lead persons under them. The supervisors are responsible for the efficient operation of the shift. Supervisors are responsible for reviewing the production reports prepared by lead people to make “sure that the operation was running as smooth as possible, trying to find a discrepancy – and if they find any issue with the report, that they do not – they’ll try to conduct an investigation to make sure that what has happened, making sure what happened.” (Tr. 113, Lines 20-24). Under cross examination, Jang testified as follows:

Q: Okay, okay. Do supervisors have responsibility for the amount of production?

A: Yes.

Q: They do?

A: Yes.

Q: If certain production is not satisfied, are they penalized?

A: They will receive warnings if it hasn’t happened before. They are to make a report about the amount. They have to explain.

(Tr. 153, Lines 2-11).

The Company presented two employee witnesses, Walter Tillman and James Hammond, to testify regarding supervisory direction of work. With reference to putative supervisor David Martinez, witness Tillman stated, “I was introduced to David as my supervisor, that’s my supervisor. He didn’t say no and none of that. He took me and showed me what I do everyday.

² As discussed further below, however, the putative supervisors in this case use “independent judgment” in exercising their authority to responsibly direct employees, unlike the employees in *Croft Metals*.

He has been telling me ever since.” (Tr. 183, Lines 18-22). Martinez was introduced as a supervisor by Jang. (Tr. 197). Tillman testified that his supervisor instructs him to switch from one machine to the other “whenever he (the supervisor) feels like you need to be moved.” (Tr. 184). In fact, Tillman has been instructed by Martinez to work in another building because “a man went home.” (Id.).

Tillman also testified that when he asked Martinez if he could work overtime, Martinez either agreed or disagreed during the same conversation, without checking with anyone. (Tr. 186-187). Tillman testified that his supervisor instructs him to leave his regular job and do other tasks three or four times a month. (Tr. 192). With respect to whether the supervisor gets approval from a Production Manager before making a decision, Tillman said, “No. When he tells me stuff, he don’t check with nobody. He don’t call nobody. He never said, well, I am going to check or I will let you know. I hear my responses right then.” (Tr. 193, Lines 7-10).

The ARD discounted the testimony of Tillman because Tillman’s supervisor, David Martinez, was not called as a witness to corroborate Tillman’s testimony. To begin with, there is no obligation that a party corroborate uncontested testimony. Further, Tillman’s testimony was fully corroborated by James Hammond. Hammond is a Lead Person who works for Martinez. After testifying that Hammond routinely tells him what to do on the job, including what jobs to run and what materials to use, he also assigned overtime. (Tr. 255). He testified as follows:

Q. Okay. Does he have the authority to tell you folks what to do?

A. Yeah.

Q. And can you give me some examples?

A. All right. For instance, like I said, when I come in, I go to him, I find out what material I’ve got to run, if I’m working night shift. In the daytime, he comes in with

what material we're running. And if I need overtime, I call him.

Q. Does he tell you whether you can have overtime?

A. Yeah.

Q. Does he tell you immediately or does he tell you he has to check with someone?

A. No, he'll tell me. I mean if it's slow -- I've been there so long, I know what be going on. So if it's slow, I understand. So, yeah, he talks to me.

Q. Now, has he ever called you in for overtime?

A. Yeah.

Q. And how many times?

A. Like I work, let's see, Monday through Thursday, and about Friday, Saturday, or Sunday, he'll call me one of those days, ask me do I want to come. That's every week.

Q. And he just calls you on the phone?

A. Yeah. I mean I ain't the only one he calls. He calls more than me.

Q. Okay.

A. People he can get in touch with.

Q. Has he ever asked you to stop doing what you're doing and go do a different job?

A. If I ain't busy running the machine, just sweeping up or something. If somebody needs some help somewhere, I can do it.

Q. What, he'll ask you to do that?

A. Yeah.

(Tr. 254-56, Lines 22-4).

Putative supervisor Lal also corroborated Tillman. He testified as follows:

Q: What did the Team Leaders do?

A: By being leaders, they checked the materials to be right and they moved the material to be ready for the next shift.

Q: Do they lead the people, too?

A: Yes.

Q: Do you give instructions to the Team Leaders?

A: Sometimes.

Q: Do you give instructions to the other employees underneath you?

A: ***Yes. I tell them what they are going to do and how they are going to do it.***

(Tr. 222, Lines 11- 21) (emphasis added).

To the extent that Tillman's uncontested testimony needs corroboration, it was fully corroborated by Hammond and Lal. Hammond's testimony, although referred to in the Employer's brief, was completely ignored by the ARD. It is also noteworthy that Tillman, Hammond, and Lal testified that supervisors tell employees what to do and gives them specific instructions on how to do it.

Lal also admitted that he decides who to call in to get overtime and that he had the authority to send an employee home if Jang was not there. *Lasar Tool, Inc.*, 320 NLRB 105 (1995) (individual found to be supervisor where had apparent authority to act as onsite person in charge when owner and foreman were away and regularly filled in as supervisor when owner was away); *DST Industries, Inc.*, 310 NLRB 957 (1993) (individual found to be supervisor where regularly filled in for absent supervisor).

Contrary to the ARD, there is ample evidence that the putative supervisors experience “material consequences” as a result of their authority to direct others. Moreover, there is ample evidence they exercise “independent judgment” in directing others.

The ARD cited Jang’s testimony that if production requirements are not met, the putative supervisors may receive warnings. (Decision, p. 21). Jang added, however, that no putative supervisor has ever been issued a warning for that reason. (Tr. 153). Consequently, the ARD concluded that because there was no documentary proof to support Jang’s testimony and no instances of discipline proffered, the record is insufficient to establish that the putative supervisors are held accountable in responsibly directing employees. (Decision, p. 21). The ARD’s reasoning is seriously flawed.

The Employer here has the burden of proving by a preponderance of the evidence the factors necessary to establish supervisory status. The Employer offered evidence in the form of testimony from Jang that putative supervisors may be held accountable for poor crew production. The Union offered absolutely no evidence to rebut Jang’s testimony, including for example, testimony from a witness that what Jang said is untrue. Thus, the preponderance of the evidence is that the putative supervisors may be held accountable.

That there are no actual instances of putative supervisors being issued warnings for poor crew performance in no way undermines or discredits Jang’s testimony. Perhaps the putative supervisors do a really good job of supervising their crew such that production never declines. Perhaps the production standards are low enough to where it is highly unlikely a putative supervisor could ever be issued a warning. Perhaps none of the four putative supervisors have been held accountable because they haven’t been supervisors very long. Any number of reasons could explain why there are no examples of putative supervisors being issued warnings when the

crew's production is poor. For the ARD to implicitly assume that the reason must be because Jang's testimony is untrue is fatal to his conclusions.

The ARD further erred in concluding that the record does not demonstrate the putative supervisors exercise "independent judgment" when responsibly directing employees. The ARD analogizes this case to *Croft Metals, Inc.*, 348 NLRB 717, 722 (2007), in which the Board found that, although the putative supervisors "responsibly directed" employees as the phrase is defined by the Act, they did not meet the "independent judgment" factor because they essentially followed a "preestablished delivery schedule and generally employ a standard loading pattern that dictates the placement of different products in the trucks."

The putative supervisors in the instant case are not overseeing employees stacking trucks pursuant to a set schedule, and there is no evidence they perform similar duties. As Tillman stated, "[Putative supervisor Martinez] took me and showed me what I do everyday. He has been telling me ever since." (Tr. 183, Lines 18-22).

G. The ARD's Factual Determination With Respect To Whether Putative Supervisors Assign Work Is Clearly Erroneous and Prejudicial

In *Oakwood Healthcare*, 348 NLRB at 689, the Board held that "assign," for purposes of Section 2(11), 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 overall duties, *i.e.*, tasks, to an employee." The evidence presented at the hearing demonstrates that supervisors set the work schedules for employees, assign them to work particular hours, and grant overtime hours. See *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003) (individual found to be supervisor where authorized to create work schedule, grant time off, and assign hours and overtime); *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 (1992) (individual found to be supervisor where she assigned and reassigned employee to jobs and

reassigned employee at employee's request); *Outboard Marine Corporation*, 307 NLRB 1333 (1992) (individuals found to be supervisors where they were authorized to grant overtime); *Wilshire at Lakewood*, 345 NLRB 1050 (2005) (individual found to be supervisor where independently granted employee requests to leave early to attend to personal matters).

Jang developed a basic format for the shift schedules in his area several years ago. (Tr. 166-167). Since that time, Eduardo Sanchez, Jose Lal, and David Martinez have completed the shift schedules. (Tr. 46). Exhibit 3 was a shift schedule that had been posted for approximately three to four months completed by Sanchez and Lal. (Tr. 166).

The ARD ignored record evidence that the supervisor's prepare work schedules based upon their independent judgment regarding which employees were the best workers, had the most experience, and could operate the machines needed to be operated. The ARD found that this was done "based solely on their ability to operate the machines." (D&D at 19). This ignores record testimony from the Petitioner's witness Jose Lal.

Lal admitted that the discretion of supervisors to assign people to different shifts was based on independent judgment and discretion. He testified that he and Sanchez assigned employees to different shifts based on "experience." (Tr. 226-227). He testified as follows:

Q: What do you mean by experience?

A: They work better and they know a little bit more about the materials.

Q: Okay. And did you and Eduardo, working together, decide that they were better workers and they knew more about the material?

A: Yes.

Q: Did you consider whether they knew how to operate different machines or just one machine?

A: Yes.

(Tr. 227, Lines 9-17). This testimony shows that Lal and Sanchez used their independent judgment to make subjective decisions about which employees were better workers and knew about the materials. They also made value judgments that employees who could operate more than one machine would be more appropriate for a particular shift than others. *American River Transportation Co.*, 347 NLRB 925 (2006) (individuals found to be supervisors where they have the authority to make assignments and reassignments of crew based on determination of which crew members perform best in certain positions).

Supervisors can also call in employees to work overtime or award overtime. When an employee is absent or additional help is needed, supervisors can call in other employees at their discretion. (Tr. 142). This awards overtime opportunities to the called employees. (Id.). While Lal stated he usually checked with Jang, he admitted that he could call in employees in Jang's absence and even when Jang approved working overtime, Lal always selected which employees to call. (Tr. 214-215). The putative supervisors also have the authority to instruct employees to stop performing one task and go to another location and perform another task as needed during the day. (Tr. 183-187, 254-260). They can allow an employee to leave during the work day and excuse employees early. (Id.).

The ARD erroneously relies on *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. (2012), to support her conclusion that the putative supervisors do not have the authority to assign employees using independent judgment. In that case, the Board observed that any authority the crew dispatchers and line controllers had to assign and direct operators was "either routine or significantly limited by the Employer's SOP [Standard Operating Procedure] and troubleshooting manuals, as well as by its collective-bargaining agreement

covering the operators, and thus does not involve the exercise of independent judgment required under Section 2(11).” *Id.* at 4. *Alternate Concepts* is easily distinguishable.

As an initial matter, *Alternate Concepts* involved putative supervisors who performed traditional dispatching duties, and dispatchers have historically been not be found to be supervisors. Indeed, the Board even expressly mentioned that fact in footnote 16 of its decision: “The Board, in the past, has found similar facts to give rise to the conclusion that dispatchers are not supervisors.” 358 NLRB at 4, fn. 16 (citing *St. Petersburg Limousine Service*, 223 NLRB 209 (1976); *Southwest Airlines Co.*, 239 NLRB 1253 (1978); and *Bay Area – Los Angeles Express*, 275 NLRB 1063 (1985)).

More importantly, however, the authority of the putative supervisors in *Alternate Concepts* is vastly different from the authority of the putative supervisors here. In *Alternate Concepts*, for example, the Board observed, “There is little or no flexibility in the SOP manual for the operation of the trains, as the options in particular circumstances are essentially predetermined, and employees have been trained to recognize that there are certain, specific actions that must be undertaken in various situations.” *Alternate Concepts*, 358 NLRB at 5. One witness in that case even testified, “You wouldn’t exactly be flexible with the Standard Operating Procedures. Those are pretty much set in stone.” *Id.* Here, there is evidence that the putative supervisors do not follow written manuals in making assignments.

As stated above, the ARD ignored record evidence that the supervisor’s prepare work schedules based upon their independent judgment regarding which employees were the best workers, had the most experience, and could operate the machines needed to be operated. There

is simply no evidence that they merely follow a written procedural manual in making these decisions.

H. The Secondary Indicia Compels a Finding of 2(11) Status

Where the putative supervisor engages in at least one supervisory function listed in Section 2(11), the Board may also consider secondary indicia of supervisory authority. *Pacific Beach Corp.*, 344 NLRB 1160, 1161 (2005); *Progressive Transportation Services*, 340 NLRB 1044 (2003); *SAIE Motor Freight, Inc.*, 334 NLRB 979 (2001); *McClatchy Newspapers, Inc.*, 307 NLRB 773 (1992); *Burns International Security Services, Inc.*, 278 NLRB 565 (1986).

Although all employees in the plant are hourly, the supervisors make considerably more money per hour than the employees they supervise. In fact, they make approximately \$2.00 per hour more. See *American River Transportation Co.*, 347 NLRB 925 (finding as secondary indicia of supervisory status that individuals received higher pay than employees); *Mountaineer Park, Inc.*, 343 NLRB 1473 (2005) (same).

Further, they are not assigned a particular location and do not perform significant production duties. They may occasionally fill in for an employee if necessary during an emergency, but their primary job is to move through their area of responsibility and supervise employees.

The ratio of supervisors to employees is also indicative of supervisory status. As noted above, while the leads supervise small groups of employees, each supervisor supervises 25 to 40 people. If Jang were the only supervisor, he would be in charge of 75 employees working 24 hours a day spread over several hundred thousand square feet. Further, he cannot communicate with most of them. *Colorflow Decorator Products, Inc.*, 228 NLRB at 410 (two supervisors overseeing almost 50 employees for a substantial portion of time is disproportionate and weighs

in favor of finding that a third individual in question also was a supervisor); *Formco, Inc.*, 245 NLRB 127 (1979) (finding that unless foremen were supervisors, there would be a disproportionate employee-to-supervisor ratio of 30 to 1 and perhaps 70 to 1).

I. The Putative Supervisors' Authority Is Held In The Interest Of The Employer

The third prong of the Supreme Court's test considers whether the putative supervisor's authority is held in the interest of the employer. *Kentucky River*, 532 U.S. at 713. This prong is satisfied where the supervisor duties at issue "are a necessary incident to the production of goods or the provision of services." *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994).

There is no doubt that the supervisor's authority is held in the interest of the employer while the supervisor performing their job duties were assisting in the production of US Fibers products. (Tr. 63-64). Their job duties are essential to the operations of US Fibers. (Id.).

IV. CONCLUSION

The ARD's decision regarding whether Sanchez, Lal, Martinez, and Torres are supervisors was based on clearly erroneous factual determinations regarding their authority to discipline, ability to effectively recommend employee pay increases, direction of employee work, and assignment of employees to work particular hours and overtime. The ARD's decision also departed from official Board precedent by determining that disciplinary warnings are not considered "discipline" for purposes of 2(11) analysis and her decision that the actual issuance of discipline, rather than the authority to do so, is necessary for 2(11) status.

For the foregoing reasons, the Employer requests that the Board review the decision of the ARD and reverse it.

Respectfully submitted,

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Dated this 16th day of May 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC.,)	
d/b/a U.S. FIBERS,)	
)	
Employer,)	
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	Case 10-RC-101166
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
LOCAL 7898,)	
)	
Petitioner.)	
_____)	

CERTIFICATE OF SERVICE

I, Jonathan P. Pearson, do hereby certify that I have on this 16th day of May, 2013, served a copy of the Employer's Request For Review upon the following by email:

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