**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 10**

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| PAC TELL GROUP, INC., d/b/a U.S. FIBERS, | ) | |
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| UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898. | ) | Case No. 10-RC-101166 |

PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW


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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898


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## I. Introduction

On March 26, 2013, Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 7898 ("the Petitioner" or "the Union") filed a Petition seeking to represent a unit of all full-time and regular part-time production, janitorial, warehousemen, shipping, and maintenance workers employed by Pac Tell Group, Inc., d/b/a U.S. Fibers ("the Employer") at its Trenton, South Carolina facility. On April 18, a hearing was held before the Acting Regional Director of Region 10 of the NLRB ("the ARD") to determine whether the petitioned-for bargaining unit was appropriate, and whether four employees of the Employer—Jose Lal, David Martinez, Eduardo Sanchez and Adauco Torres—are supervisors under Section 2(11) of the Act.

The parties filed post-hearing briefs and on May 3, 2013 the ARD issued a Decision and Direction of Election ("DDE") finding that the petitioned-for unit of Trenton facility employees is an appropriate bargaining unit and that the four contested individuals are not supervisors and are eligible to vote in the directed election. The Employer filed a Request for Review of the ARD's Decision seeking that the Board review the supervisory status issue. The Request for Review does not ask for a review of the ARD's determination with respect to the single-facility bargaining unit.

On May 16, 2013, the Region issued a Notice of Election announcing that the election will take place in the agreed-upon unit at the Trenton facility on Wednesday, May 29, and Thursday, May 30 2013. The Employer's Request for Review does not request the postponement of the election, nor do the circumstances of the case compel any postponement. The Board's Rules and Regulations provides that

> The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director.

Section 102.67(b).

Accordingly, the Request for Review and this Opposition should not stay or postpone the scheduled election.

## II. Statement of Facts

The Employer converts polyester scrap into usable fiber, a manufacturing process that involves various steps. The Employer operates a facility in Trenton, South Carolina which has approximately 140 employees. Ted Oh is the vice president of operations for the Employer. (Tr. 80:12-23). Kevin Corey works under Oh as the director of manufacturing at the Trenton facility. (Company Ex. 1). Production Manager Glenn Jang and Production & Quality Assurance Manager Kyong Kang work under Corey at the Trenton facility who supervise the four alleged supervisors. Glenn Jang supervises the recycling plant and extrusion department and Kyong Kang supervises the finishing of the fibers. (Tr. 27-28). Eduardo Sanchez and Jose Lal work under Jang and lead the extrusion department. (Tr. 28:25-29:5). David Martinez also works under Jang in the recycling operations department. (Tr. 29:14-15). Adauco Torres works under Kang in the finishing department. Sanchez and Lal are responsible for supervising nine lead employees and approximately fifty employees under the leads. (DDE 8). Martinez has six lead men, one high lead men, and approximately twenty employees underneath him. Torres has seven lead employees, one lead man, and approximately forty employees underneath him.

## III. Argument

### A. Applicable Standards of Review

Section 102.67(c) of the Board's Rules and Regulations provides that a Request for Review will be granted only upon one of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The Employer's Request for Review should be denied as it raises no substantial or compelling issues warranting review. The ARD issued a Decision which properly applies Board precedent under Section 2(11) of the Act. Section 2(11) defines supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment.

Individuals are supervisors where the party asserting supervisory status proves that "(1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" or "responsibly to direct") listed in Section 2(11); (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." In Re Croft Metals, Inc., 348 NLRB 717, 721 (2006).

The ARD scrupulously applied the correct burdens of proof in this case. The party asserting supervisory status bears the burden of proving that supervisory indicia exist by a preponderance of the evidence. Oakwood Healthcare, 348 NLRB 686, 687 (2001). In particular, where the evidence does not

clearly indicate whether an alleged supervisor has performed a particular act using independent judgment or pursuant to management direction, the lack of evidence is construed against the party bearing the burden of proof. In Re Dean & Deluca New York, 338 NLRB 1046, 1047 (2003) (testimony to the effect that alleged supervisor had fired an employee was insufficient to establish that the alleged supervisor did so "on his own authority" rather than "on the direction of management," and lack of evidence was construed against the employer asserting supervisory status).

Moreover, the ARD's findings are entirely based in the evidence adduced at the hearing and do not warrant review under the "clearly erroneous" standard. The Employer's Request seeks generally to show error on the part of the ARD by noting scraps of evidence that could be interpreted to support a finding of supervisory status. But on every contested question of supervisory indicia, as required by Oakwood Healthcare, the ARD weighed the Employer's evidence, and found it to add up to less than a preponderance. 348 NLRB 686, 687 (2001). The Employer's attempt to dredge up and proffer the same evidence again in its Request should not change this result.

**B. The ARD correctly found that the Employer failed to meet its burden of proving that alleged supervisors hold the authority to discipline.**

The ARD correctly found that insufficient evidence was presented to prove that the putative supervisors 1) had the authority to issue discipline 2) did so with independent judgment.

The ARD properly concluded that the Employer did not meet its burden of showing that alleged supervisors have the authority to issue discipline using the exercise of independent judgment. The ARD correctly concluded, applying G4S Regulated Security Solutions, that the Employer failed to meet its burden of showing that alleged supervisors have the authority to issue discipline. 358 NLRB No. 160 (Sept. 28, 2012). That case holds that where the evidence does not show a "single specific instance" in which an alleged supervisor "used discretion or independent judgment regarding discipline," authority to discipline has not been proven by the party asserting supervisory status. G4S Regulated Security

Solutions, 358 NLRB No. 160 (Sept. 28, 2012). Like the testimony in G4S, the testimony relied on by the Employer amounts to nothing more than "generalized testimony," because it asserts the existence of authority to exercise independent judgment without pointing to any specific instance.

The Employer's Request for Review fails to show that the ARD's factual findings are "clearly erroneous." The ARD considered the evidence which the Employer purports demonstrates authority to discipline, and concluded that it did not suffice to meet the Employer's burden of proving this supervisory indicium by a preponderance of the evidence. The Employer offers examples of testimony by managers Jang and Lal that alleged supervisors were given forms for written warnings and instructed to use them for discipline. (Request for Review 6-7). The ARD did not "ignore" this evidence, noting that "some evidence" shows and that "the record establishes" these facts, but declining to find them dispositive. (DDE 17).

The Employer's reliance on Pepsi-Cola Co., 327 NLRB 1062 (1999) is misplaced. The Board in Pepsi-Cola relied on several factors to find that a classification of alleged supervisors had authority to discipline, including the fact that two individuals in the group had actually exercised the authority to discharge employees, and the evidence clearly showed that they had done so using independent judgment. 327 NLRB at 1063. It is undisputed that, as distinguished from the alleged supervisors in Pepsi-Cola, none of the alleged supervisors here have ever issued discipline using independent judgment. (DDE 18; Request for Review 9; Tr. 210:20-212:23). The ARD, like the Board in Pepsi-Cola, correctly considered whether any of the alleged supervisors had ever actually issued discipline using independent judgment evidence in evaluating whether the Employer met its burden of proving this indicium by a preponderance of the evidence. (DDE 17). See also Oil, Chemical & Atomic Workers v. NLRB, 445 F.2d 237, 243 (D.C. Cir. 1971) (statute requires "evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.").

Moreover, the ARD correctly concluded that none of the evidence demonstrated that alleged supervisors have authority to issue discipline using independent judgment. The "independent judgment" prong of the test is not met where management exercises ultimate control over an alleged supervisor's decisions. The ARD found that none of the alleged supervisors had exercised "discretion or independent judgment regarding discipline." G4S Regulated Security Solutions, 358 NLRB No. 160 (Sept. 28, 2012). Here, it is undisputed that the 'Employee Warning Notice Forms' must be submitted to a manager for approval, and that some warning forms filled out by alleged supervisors were in fact approved by managers. (Company Ex. 2; Tr. 42:17; 60:2-3; 105:3-8; 137:3-8). The ARD properly construed a lack of evidence as to the approval process for certain other warnings against the Employer. See G4S Regulated Sec. Solutions, 358 NLRB No. 160 (Sept. 28, 2012) (independent judgment not proven where "no detailed, specific evidence in the record as to what role the [supervisors] who signed [disciplinary] notices played in making the decision to discipline.").

**C. The ARD correctly found that the Employer failed to meet its burden of proving that alleged supervisors hold the authority to assign work.**

The Employer argues that the DDE should be reviewed because the alleged supervisors "set the work schedules for employees, assign them to work particular hours, and grant overtime hours." (Request for Review 17). In determining that the alleged supervisors assign work without the exercise of "independent judgment," the ARD properly assessed whether they assigned work to other employees 1) "free of the control of others," and 2) exercising a degree of discretion beyond "the merely routine or clerical." Oakwood Healthcare, 348 NLRB at 693.

The ARD correctly declined to find supervisory status based on these activities because they are all subject to the "control of others." Oakwood Healthcare, 348 NLRB at 693. Work schedules must be approved by a manager, and can be changed by a manager. (Company Ex. 3; Tr. 93:9-21). In fact, alleged supervisor Lal testified that he fills out work schedules based on instruction from manager Jang. (Tr.

204:6-7). Jang has authority to change the assignments made by the alleged supervisors working under him. (Tr. 205:2-206:6).

The ARD correctly found that because the assignment decisions made by the alleged supervisors are "dictated by verbal company policies," they are "routine." (DDE 19.) Testimony showed that manager Jang determines how many employees work on each line. Jang tells Sanchez and Lal how many employees are on each line and they accordingly assign employees to the line. (Tr. 149:5-7). Testimony also shows that managers determine how many employees work each shift. (Tr. 205:2-4). Alleged supervisors assign individual employees to the shift based on this managerial determination. (See Tr. 204:24-205:1, 150:2-4)("Q: So all that the supervisors are doing is deciding which employees will work on a certain shift? Jang: Yes."). The ARD additionally found that the drafting of work schedules by the alleged supervisor is controlled by management policies and not by independent judgment. This finding is supported by evidence showing that, as conceded by the Employer, the work schedule was created by department manager Jang and is merely filled out by the alleged supervisors. (Request for Review 18).

The ARD's analysis of the assignment issue does not depart from Board precedent and does not require review. The ARD properly relied upon Alternate Concepts for the proposition that where employees use pre-set procedures in assigning work, they are not exercising independent judgment. Alternate Concepts, Inc., 358 NLRB No. 38 (Apr. 27, 2012) The Employer attempts to distinguish Alternate Concepts based on the fact that the employees in that case followed written manuals, rather than instructions from management. But this is a distinction without a difference. Where employees have "little or no flexibility" in performing their work, they do not have authority to exercise independent judgment. 358 NLRB No. 38 *6. The ARD properly relied on Oakwood Healthcare to find that the putative supervisors lack flexibility because the assignments they make are "dictated or controlled by detailed instructions, whether set forth in company policies or rules" or "the verbal instructions of a higher authority." 348 NLRB 686, 693 (2006).

The Employer additionally seeks review of the ARD's finding that the Employer fell short of meeting its burden to show that alleged supervisors can assign overtime using independent judgment. (DDE 20). The ARD correctly found that bare testimony by members of management was insufficient to prove authority and independent judgment. Further, the ARD properly found that testimony by employee Walter Tillman could not without more show independent judgment on the part of alleged supervisor. Lal testified to the contrary that he always checks with Jang before assigning anyone overtime. (Tr. 214:24-25). The ARD found that Lal's testimony, which referenced specific instances, could not be overcome by the generalized testimony of the other witnesses to meet the Employer's burden on this point. It is appropriate for the ARD, in assessing the evidence as a whole, to grant weight to the testimony of the alleged supervisor who has first-hand knowledge of his decision-making process over that of an employee who is not privy to the decision-making. (DDE 20).

**D. The ARD correctly found that the Employer failed to meet its burden of proving that alleged supervisors hold the authority to responsibly direct employees.**

The alleged supervisors do not responsibly direct employees, and do not use independent judgment in directing employees.

In finding that the alleged supervisors do not engage in responsible direction, the ARD correctly applied Oakwood Healthcare, which holds that responsible direction requires that "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." 348 NLRB 686, 691-92 (2006). The Employer argues that the ARD clearly erred in finding that the alleged supervisors are not accountable for the direction of employees, relying solely on testimony by manager Jang that alleged supervisors can receive warnings if "certain production is not satisfied." (Tr. 153:2-11). The ARD noted Jang's testimony, but correctly found it insufficient to establish accountability by a preponderance of the evidence. (DDE 21).

This testimony is directly contradicted by testimony from Ted Oh that there are no production quotas. (Tr. 100:14-17). Further, the ARD correctly assessed Jang's bare statement as insufficient to show accountability without further corroboration. (DDE 21). The Employer asserts that the ARD should have found responsible direction because the alleged supervisors here perform "exactly the type of activities" discussed in Croft Metals. (Request for Review 12). However, that case in fact supports the ARD's conclusion. The Employer neglects to mention that the Board in Croft Metals specifically found that the alleged supervisors there were subject to adverse consequences if their crews did not meet certain criteria, whereas here, the ARD made a factual finding directly to the contrary. (Request for Review 12; DDE 21; 348 NLRB at 721).

The ARD's finding that alleged supervisors do not exercise independent judgment in their direction of employees properly applies Croft Metals to the evidence adduced at the hearing. 348 NLRB 717 (2006). In that case, alleged supervisors were found not to exercise independent judgment in direction where the Employer only put forward "sparse evidence" of their use of discretion and "adduced almost no evidence regarding the factors weighed or balanced" by the alleged supervisors. 348 NLRB at 722. The Employer here also failed to prove that alleged supervisors at Pac Tell use "a degree of discretion that rises above the routine or clerical" in directing employees. Id. Here, the ARD properly found that testimony by Vice President Oh regarding the oversight of production and the preparation of production reports did not suffice to meet the Employer's burden of proof on independent judgment. The ARD properly found that, as in Croft Metals, management testimony in fact tended to show the "routine" nature of the production reports. 348 NLRB at 722; (Tr. 62:15-20; 108:14-109:4) ("Q. Okay. So there's not a whole lot of discretion involved in filling out this report? In other words, you just have to write down the numbers that are on there and make sure they are accurate? A. That's correct.").

Further, alleged supervisors direct employees under the control of management. Oh testified that the production reports are submitted to management for approval. (Tr. 60:2-3). The Employer seeks to distinguish Croft Metals on the basis that the alleged supervisors here do not follow set production

schedules as they direct employees. (Request for Review 17). This reasoning shows a misunderstanding of the parties' burdens of proof on this issue. While the presence of written production schedules would be a factor in finding a lack of independent judgment, the lack thereof proves nothing without a preponderance of concrete evidence adduced by the Employer that these individuals actually exercise independent judgment.

The ARD properly declined to rely on testimony by employees Walter Tillman and James Hammond, which the Employer claims is dispositive on the issue of responsible direction, in evaluating the alleged supervisors' use of independent judgment. (Request for Review 13). These two employees interact with the alleged supervisors in the course of their work and are competent to testify to some of the day to day activities of the alleged supervisors. However, their testimony cannot and does not bear on the question of whether the alleged supervisors perform their duties with the exercise of independent judgment. For example, Tillman testified to his understanding that when alleged supervisor Martinez directs Tillman to do a particular task, Martinez does not check with or call anybody to obtain instruction. (Tr. 193:7-10). Tillman, however, simply would not be aware of conversations that Martinez has with management before or after communicating with Tillman, or of overarching written or verbal policies that dictate Martinez's decision-making. The ARD, therefore, properly did not credit Tillman and Hammond on the question of independent judgment.

All other evidence cited by the Employer on this point at most shows that the alleged supervisors do some work that can be characterized as "direction." The Employer has pointed to no further evidence that the direction is "responsible," or that it is performed with independent judgment.

**E. The ARD correctly found that the Employer failed to meet its burden of proving that alleged supervisors hold the authority to effectively recommend raises.**

The ARD correctly concluded that the evidence did not show that alleged supervisors have the authority to effectively recommend raises for employees. (DDE 23). While some evidence shows that

alleged supervisors have input on raises, this input is not effective. In Harbor City Volunteer Ambulance Squad, relied upon by the Employer in its Request for Review, the Board found that the alleged supervisors completed evaluations of junior employees that led to "an automatic wage increase for the evaluated employees" and had "never been changed by upper management." 318 NLRB 764, 764 (1995); (Request for Review 10). Based on these facts, the Board held that the alleged supervisors played a "significant role" in making "effective" recommendations regarding raises. Id. Here, the ARD properly found that contrary facts obtain. Vice-President Oh testified that he makes the final decision on raises. (Tr. 129:2). Manager Jang testified that he gives input on raises and that "of course" the raises recommended by Lal and Sanchez are different from the raises ultimately awarded to employees. (Tr. 148:6-7). Upon the evidence presented, the ARD properly concluded that "it is unlikely that the contested supervisors' recommendations are effective in determining the raises of employees." (DDE 23).

**F. The ARD properly declined to analyze secondary supervisory indicia.**

The Employer urges review based on the ARD's decision that secondary supervisory indicia need not be analyzed in this case. However, the ARD bases this squarely on Board precedent holding that where alleged supervisors do not have any of the twelve primary indicia, secondary indicia "in the absence of evidence indicating the existence of any one of the primary indicia of such status." Cent. Plumbing Specialties, 337 NLRB 973, 975 (2002). See also Pac. Coast M.S. Indus. Co., 355 NLRB No. 226 fn. 13 (Sept. 30, 2010); Williamette Indus., 336 NLRB 743 (2001). This direct application of established case law in no way warrants review.

## IV. **Conclusion**

The Employer bears the burden of proving supervisory status. The ARD found that the Employer failed to meet that burden on any of the 2(11) supervisory indicia. The ARD based this finding on a careful assessment of the evidence presented and the application of Board precedent. Therefore, there are no compelling issues warranting review, and the Board should deny the Employer's Request for Review.

May 24, 2013

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that a true copy of the Petitioner's Brief was served via electronic mail this 24th day of May, 2013 upon:

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