

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

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| In the Matter of: |) | |
| |) | |
| UNIVERSAL LUBRICANTS, LLC |) | |
| Employer, |) | |
| |) | |
| And |) | Case No. 14-RC-105696 |
| |) | |
| UNITED STEELWORKERS |) | |
| AFL-CIO, CLC |) | |
| Petitioner. |) | |

**REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

COMES NOW, Universal Lubricants, LLC (“Universal”), by and through its attorneys of record, hereby files its Request for Review of the Acting Regional Director’s Decision and Direction of Election. Universal respectfully submits that the Acting Regional Director’s legal conclusions and factual conclusions are not fully supported by substantial evidence in the record and the relevant legal authority and are clearly erroneous. Universal additionally seeks review of the denial of Universal’s Motion to Dismiss the Petition pursuant to *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Accordingly, the Request for Review should be granted.

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TABLE OF CONTENTS

- I. INTRODUCTION4
 - A. Statement of the Case.....4
 - B. Case History.....4
- II. STANDARD OF REVIEW5
- III. FACTUAL BACKGROUND.....6
 - A. Universal’s Refinery Operation6
 - B. Universal’s Management Structure.....7
 - C. The Lead Operators.....7
 - 1. The Lead Operators Have Supervisory Authority.7
 - 2. The Lead Operator Job Description Sets Forth Managerial Responsibilities.9
 - 3. Lead Operators Receive Performance Reviews Evaluating Their Supervisory Skills.10
 - 4. Lead Operators Issue Performance Counseling and Written Discipline to Employees.10
 - 5. Universal Provides the Lead Operators with Supervisor Training.11
 - 6. The Lead Operators Affect Pay Decisions and Promotions.12
 - 7. The Lead Operators Attend Management Meetings and Conduct Audits.....12
 - 8. The Lead Operators Receive Higher Pay and Other Benefits Not Provided to the Operators.13
- IV. LEGAL ANALYSIS.....13
 - A. The Acting Regional Director Departed from Clear Board Precedent and Policy.13
 - B. Disciplinary Authority15
 - 1. The Lead Operators Have Authority to Discipline And the Authority to Effectively Recommend Discipline and Discharge.15
 - 2. The Discipline Issued Was “Truly Disciplinary,” Not “Merely Reportorial.”17
 - 3. The September 16th and 19th Corrective Action Notices Clearly Were Disciplinary.19
 - 4. The Lead Operators Exercise Discretion in Evaluating Whether an Offending Employee is in Violation of the Employer’s Policies and In Determining the Appropriate Penalty.....20
 - 5. The Employer Satisfied Its Burden to Establish the Lead Operators

| | | |
|-----|--|----|
| | “Effectively Recommend” Discipline..... | 22 |
| C. | Authority to Reward | 23 |
| | 1. The Lead Operators Recommended and Assigned Overtime..... | 23 |
| | 2. The Lead Operators Recommended Pay Raises and Promotions..... | 24 |
| D. | Authority to Assign..... | 25 |
| | 1. The Lead Operators Have Authority to Assign. | 25 |
| | 2. The Lead Operators Make Assignments Based On Their Assessment of the Operators’ Qualifications and Experience..... | 27 |
| | 3. The Lead Operators’ Characterization of Their Relationship to the Operators Further Evidences That They Have Authority to Assign Those Employees..... | 28 |
| | 4. The Lead Operator Job Descriptions Provide Compelling Support that the Lead Operators Assign the Operators, and Use Independent Judgment in Doing So..... | 28 |
| E. | Authority to Responsibly Direct | 30 |
| | 1. The Lead Operators Responsibly Direct the Operators Who Report to Them. | 30 |
| | 2. The Lead Operators Have Independent Authority to Discipline Other Operators if the Operators Fail to Follow Their Instruction..... | 31 |
| | 3. The Lead Operators Are Held Accountable for Their Responsible Direction of the Operators. | 32 |
| F. | Secondary Indicia..... | 33 |
| V. | Motion to Dismiss..... | 37 |
| VI. | Conclusion | 39 |

I. INTRODUCTION

A. Statement of the Case

This case arises out of a petition filed by the United Steelworker AFL-CIO, LLC (“Union”) with Region 14 of the National Labor Relations Board (“Region 14”) to conduct a representation election among a unit of production employees employed by Universal Lubricants, LLC’s (“Universal” or “the Employer”) employees at its refinery in Wichita, Kansas. The Union requested that the unit include four (4) statutory supervisors, known at the refinery as Lead Operators. Universal objected to inclusion of the Lead Operators in the petitioned-for unit. Following a hearing and a post-hearing brief solely by the Employer, the Acting Regional Director for Region 14 (“ARD”) issued a Decision and Direction of Election (“DDE”) on Monday, June 17, 2013.

B. Case History

On May 23, 2013, the Union filed an Election Petition with Region 14. In its Petition, the Union requested a Board-run election to determine whether production employees of Universal desired the Union to be their representative for purposes of collective bargaining.

The parties stipulated to the following proposed bargaining unit: “All full-time and regular part-time refinery operations and maintenance employees, who are employed by the Employer at its refinery located at 2824 North Ohio Street, Wichita, Kansas, but EXCLUDING all non-refinery employees, office personnel, engineers, managers, guards and supervisors as defined by the Act.”

In pre-hearing discussions, the Union insisted that the proposed unit should be expanded to include Universal’s statutory supervisors, known at the refinery as Lead Operators. Universal objected to the inclusion of its supervisors into the unit. Thus, on June 5, 2013, a hearing was held in Wichita, Kansas before Hearing Officer Carla Coffman to determine whether

sufficient supervisory indicia existed for the Lead Operators to qualify as supervisors under Section 2 (11) of the National Labor Relations Act (“the Act”).

At the beginning of the hearing, the Employer filed its Motion to Dismiss the Petition premised on the ruling of the District of Columbia Court of Appeals in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013)¹. Hearing Officer Coffman accepted the Employer’s Motion and deferred ruling on the motion to the Regional Director.

The hearing lasted for approximately three hours. Four witnesses testified. Two witnesses were called by Universal (Brent Frahm, the Refinery Plant Manager and Randall Wilson, the Chief Financial Officer) and two were called by the Union (Andrew Doggett and Ray Gates, two of the four Lead Operators whose supervisory status the Union disputes). Universal submitted 32 exhibits in support of its case. The Union submitted none. Following the hearing, Universal filed a request with the Region for an extension of time in which to file its Post-Hearing Brief. That request was granted, in part. Briefs from the parties were to be filed no later than Friday, June 14, 2013. Universal filed its post-hearing brief on June 14, 2013 and no post-hearing brief was filed by the Union. On June 17, 2013, the ARD for Region 14 issued the DDE finding that Universal had not met its burden of proof. This Request for Review follows.

II. STANDARD OF REVIEW

The Board will grant a request for review of a Regional Director’s decision where compelling reasons exist. *NLRB Rules and Regulations Series 8*, §§ 102.67(c). Under Section 102.67 of the Board’s rules and regulations, review of the Regional Director’s decision can be requested when “a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from officially reported Board precedent.” 29 C.F.R. §§ 102.67 (1998)

¹ The U.S. Supreme Court agreed to accept oral argument in *Noel Canning v. NLRB* on Monday, June 24, 2013. http://www.supremecourt.gov/orders/courtorders/062413zor_n7ip.pdf (p.6).

This request more than satisfies that standard. The DDE in this case is predicated on numerous factual findings that are wholly incomplete and fail to accurately reflect the record in this proceeding.² All of the exceptions to the ARD's decision are based on the second ground enumerated by §§ 102.67(c), i.e., that the decision was clearly erroneous (contrary to the clear weight of evidence or an erroneous interpretation of the law).

Universal's evidence regarding multiple indicia of supervision by the Lead Operators was overwhelming, reliable and credible. The DDE ignored and mischaracterized the record in concluding that Universal failed to meet its burden to establish that the Lead Operators are supervisors under Section 2(11) of the Act. The DDE's conclusion on this issue was erroneous as a matter of law and the Board should grant review on this exception.

Universal additionally seeks review of the ARD's denial of Universal's Motion to Dismiss the Petition premised upon the District of Columbia Court of Appeals ruling in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). The case law applicable to the National Labor Relations Board ("Board") specifically prohibits Region 14 from processing the Representation Petition.

III. FACTUAL BACKGROUND

A. Universal's Refinery Operation

Universal operates a specialized oil refinery—known as a re-refinery—in Wichita, Kansas on a 24 hours/ 7 days per week basis. (Record Transcript, "R.T." 11:14-15; 12:21-24). A re-refinery is an operating facility where used motor oil is processed into several products, with the primary end product of lubricating oil, or "base oil." (R.T. 11:20-24). This process

² Equally concerning is the apparent wholesale disregard of the Employer's post-hearing brief. The DDE has a header with June 14, 2013 date throughout, with the sole exception of the signature page. The Employer's post-hearing brief was not actually filed until after 4:00 pm on the afternoon of June 14, 2013. Thus, the Region's willingness to allow the Employer to file a brief for the Region to review and consider by the end of business on June 14, 2013 was illusory.

produces approximately 25,000 gallons of base oil per day. (R.T. 12:15-17).

B. Universal's Management Structure

Universal operates on two twelve-hour shifts, and the operators of the refinery work four days on and four days off. (R.T. 37:2-7; Er.'s Ex. 3, p. 3). Brent Frahm serves as Universal's Plant Manager. (R.T. 11:17). Reporting to Frahm is Don Sanders, who is the Operations Manager. (R.T. 20: 4-5). Reporting to Don Sanders are four statutory supervisors: Andrew "Drew" Doggett, Ray Gates, Bob Lagasse, and Terry Stamper, all of whom carry the title of Lead Operator. (R.T. 8:21 to 9:4). Each of these four individuals was promoted to the Lead Operator role in 2010 from an operator position. (Er.'s Ex. 20, 25, 26, 34). Each Lead Operator oversees two operators during the shift and, as explained in detail below, is responsible for the shift supervised. (R.T. 20:6 to 21:19; 39:16-18; Er.'s Ex. 4).

Brent Frahm holds frequent and regular (monthly to every six weeks) meetings with his management team, including the Lead Operators. (R.T. 24:20 to 25:7; Er.'s Ex. 5). During these meetings, Frahm and the management team discuss key operational issues, such as new policies or procedures that may be coming into play, operator issues, personnel issues, upcoming projects, "wiped film evaporator" outages at the refinery, any other major approaching refinery outages, turn-around plans for refinery outages, and scheduling issues. (R.T. 25:9-22). No other members of the petitioned-for unit are permitted to attend these management meetings. (R.T. 28:9-11).

C. The Lead Operators

1. The Lead Operators Have Supervisory Authority.

The Lead Operators are in charge of the refinery at all times, with guidance from higher level management only during the day shift during the week. (R.T. 76:10-77:6). It is undisputed that the Lead Operators are the highest level individuals – and the only members of

management – regularly present at the refinery on all night shifts, all weekend shifts and all holiday shifts. (R.T. 76:10-77:6).

On June 14, 2010, a written announcement was made to the refinery’s employees that Doggett, Gates, Stamper, and LaGasse were all promoted to Lead Operators. (Er.’s Ex. 19). The announcement noted that the Lead Operators would be “the leaders of their respective shift assignments.” (R.T. 61:21- 25; Er.’s Ex. 19). The job descriptions for the Lead Operators confirmed this announced authority. (Er.’s Ex. 3).

Randall Wilson, Universal’s Chief Financial Officer, offered uncontested testimony that the Lead Operators “run the ship...give guidance...supervise the other two Operators...make sure the plant runs safely, keep the product on spec....” (R.T. 110:21 to 111:2). Wilson’s uncontested testimony was that the Lead Operators had the authority to assess any issue in the plant which might require a change in operations, such as a safety issue or product not within criteria needed, and then take action, including shutting down production or calling in maintenance. (R.T. 111: 4-17). The Union’s representative asked Wilson on cross-examination whether “...the Lead Operators have the authority to—that requires their independent judgment, to make changes in the refinery without contacting anybody.” (R.T. 112:7-9). Wilson unequivocally answered, “Sure. Absolutely...Absolutely.” (R.T. 112:10-12).

The Lead Operators have the authority to send an operator home if he or she is in violation of policy, including appearing to be under the influence of alcohol or drugs. (R.T. 22:6-12; Er.’s Ex. 1, p. 9). The Lead Operators have the authority to assign work to operators and move their team members from place to place within the refinery doing the shifts in which they are supervising. (R.T. 127:12-16; Er.’s Ex. 3, p. 1-2). They plan and establish work schedules, assignments, and production sequences to meet production goals for the employees

they supervise. (Er.'s Ex. 3, p. 2). They provide input on future work schedules so the schedules can be adjusted to meet the needs of the department, and do not have to check with any other higher managers or supervisors before ordering that action be taken, including requiring that maintenance employees return to the refinery after hours, even if that decision leads to overtime. (R.T. 53:14-17; R.T. 28:2-8; Er.'s Ex. 3, p. 2). In fact the uncontroverted evidence was that Lead Operator Ray Gates, when faced with an operator who had not appeared at work on time, found a replacement operator and called the late operator and directed him not to appear for work. (R.T. 105:15 to 106:11)

2. The Lead Operator Job Description Sets Forth Managerial Responsibilities.

The Lead Operator job description, distributed to the Lead Operators in 2010 and again in May 2013, specifies that Lead Operators must “plan, direct and coordinate the operations of [the] plant.” (R.T. 71:22 to 72:4; Er.'s Ex. 3, p.1). The job description sets forth the duties and responsibilities of the Lead Operators as including the following: ensuring compliance to company policies and procedures, managing daily operations, planning the use of materials and personnel, ensuring that plant security, safety, environmental regulations and recordkeeping are maintained, and directing and coordinating the activities of employees engaged in production or processing of goods. (R.T. 21:23 to 22:5; 39:16-21; Er.'s Ex. 3, p. 1). The job description explicitly requires that Lead Operators must apply principles and theories of business management, determine factors affecting production processes, and confer with management or subordinates to resolve worker problems, complaints and grievances. (Er.'s Ex. 3, pps. 1-2). By contrast, the job descriptions for the operators who are supervised by the Lead Operators have no such supervisory obligations. (Er.'s Ex. 23 and 24).

3. Lead Operators Receive Performance Reviews Evaluating Their Supervisory Skills.

The Lead Operators receive performance reviews evaluating their supervisory skills, including their patience with subordinates, supervisory training they have undergone or need to improve, and their ability to and performance training of employees. (R.T. 131:4-7; Er.'s Ex. 21, 28, 29, 30). The Lead Operators are also evaluated based on their skills in employee motivation, skills in their employee coaching, and their proficiency in appropriately issuing employee disciplinary action. (R.T. 131:4-7; Er.'s Ex. 21, 28, 29, 30). The Lead Operators are expected to, and do, provide regular training, and are responsible for ensuring the operators are trained effectively in all areas. (Er.'s Ex. 3, p. 1; R.T. 95:17-19).

The most recent completed annual reviews, the Lead Operators were each specifically warned that their level of supervision of their operators needed to improve. For example, Lead Operator Terry Stamper was warned by Universal that he needed improvement in his supervision of the operators on his team. "Patience with subordinates. Supervisory training in employee motivation, employee coaching and employee discipline would be helpful." (Er.'s Ex. 30). Lead Operator Ray Gates received the same citation and caution that improvement was required in his supervision of his team. (Er.'s Ex. 28). Lead Operator Bob LaGasse was cited for training new employees as an area for improvement, but was not told that he needed any additional supervisory training. (Er.'s Ex. 29). Lead Operator Drew Doggett was cited as needing "supervisory training in employee motivation, employee coaching and employee disciplinary action." (Er.'s Ex. 21). Thus, each Lead Operator was specifically reviewed and counseled that their level of supervision was insufficient and required improvement.

4. Lead Operators Issue Performance Counseling and Written Discipline to Employees.

The Lead Operators informally encourage improved performance before an employee

reaches the written action stage of the progressive disciplinary policy. (R.T. 24:9-12). The Lead Operators are held responsible for ensuring operators follow Universal's performance standards and for documenting performance deficiencies of the operators they supervise in a timely manner. (Er.'s Ex. 3, p. 1-2; R.T. 23:19-25). The Lead Operators issue verbal counseling and written discipline to the operators they supervise. (R.T. 24:13-15; 40:3-7). Based upon a request by the Lead Operators, they were provided disciplinary forms for use when they need to issue written discipline to the operators they supervise. (R.T. 40:8-10; R.T. 41:9-13; Er.'s Ex. 10).

Don Sanders, to whom the Lead Operators report, is available to answer questions and provide assistance as needed to the Lead Operators in connection with their issuance of discipline, but reminded the Lead Operators in writing of their authority to issue discipline on their own, with the request to just "keep him in the loop." (R.T. 42:20 to 43:10). There has never been a situation where Sanders has overturned any discipline issued by the Lead Operators against an operator. (R.T. 56:3-6). Employer's Exhibits 12, 13, and 14 show several examples of discipline at varying stages of the progressive discipline process issued by the Lead Operators to operators under their supervision. (Er.'s Ex.'s 12, 13, 14). These include written counseling, formal written warning, and a final written warning. It was uncontested that Jose Ruiz was terminated based on Final Warning issued by the Lead Operators. (R.T. 50:10-16).

5. Universal Provides the Lead Operators with Supervisor Training.

Universal provided and paid for supervisory training to develop the Lead Operators as better supervisors. (Er.'s Ex. 6, 7; R.T. 29:1-23; 31:14 to 32:4; 33:2 to 34:8; 35:12 to 36:4; 77:14-16; 132:21-23). No other employees in the petitioned-for unit received this opportunity. Id. The supervisor training topics included: "Management Concepts," "How to Plan, Organize and Control," "The Process of Motivation," "Employee Relations," "Training, Communication and Coordination," and "Cost Control and Work Simplification." (R.T. 85:19-25).

The Lead Operators also attended training for all supervisors and managers entitled “Dealing with Drug and Alcohol Abuse...for Managers and Supervisors” to learn about dealing with employee substance abuse in the workplace.” (Er.’s Ex. 8). The Lead Operators attended this training, as reflected by their signatures on the managers’ and supervisors’ scheduling and attendance form for the training and confirmed by Doggett and Gates’ testimony (Er.’s Ex. 9; R.T. 78:1-8; 131:24 to 132:2).

6. The Lead Operators Affect Pay Decisions and Promotions.

The Lead Operators effectively recommend pay increases and promotions. The Lead Operators give effective recommendations to Sanders and Frahm on the issuance of pay raises and the promotion of operators through the pay ranges. (R.T. 56:7-9). The evidence presented documented three different instances in which Lead Operators made recommendations for increased pay and/or promotions for operators, and in all three cases, Universal gave the pay raises and promotions recommended. (R.T. 56:21 to 60:13; Er.’s Ex. 16, 17, 18).

The Lead Operators issue work requests and have authority to request maintenance to make repairs, even where this leads to overtime. (R.T. 53:14 to 54:16; 126). The Lead Operators have the authority to require overtime. (R.T. 68: 5-7). When there is insufficient staffing (i.e. someone fails to appear), the Lead Operators have the authority to remain at the refinery or call other employees into work, even where this results in overtime. (R.T. 81:11-16). As noted already herein, Lead Operator Ray Gates did instruct an operator not to come in to work who was late, after calling in another operator to come in to fill the vacancy created by the late employee to ensure that the refinery continued normal operations. (R.T. 105:15 to 106:11)

7. The Lead Operators Attend Management Meetings and Conduct Audits.

The Lead Operators attend the refinery’s regular Management Team meetings roughly

every month to six weeks, during which new policies and procedures, operator and personnel issues, new projects, refinery outages, and schedules are discussed.³ (R.T. 25:1-25).

The Lead Operators are included on the Management schedule to conduct Universal's monthly refinery Safety Audit. (R.T. 80:3-8; Er.'s Ex. 15). No other members of the petitioned-for unit conduct this management duty. *Id.* Each Lead Operator is assigned to conduct the Safety Audit at least one month a year and for three of the Lead Operators, they will conduct this Safety Audit twice in 2013. (Er.'s Ex. 15).

Frahm testified that he assigned the Lead Operators, as part of his management team, the responsibility of develop questions and areas of inquiry for operators as part of Universal's development of training and refresher courses for the operators. (R.T. 106:12 to 107:21) No one else in the petitioned-for unit was assigned this management task. *Id.*

8. The Lead Operators Receive Higher Pay and Other Benefits Not Provided to the Operators.

The Lead Operators are paid more than \$2.00 per hour more than the highest paid non-supervisory operators, and more than \$4.00 per hour more than the entry-level operators. (Er.'s Ex. 2). The Lead Operators have individualized e-mail accounts, as do other members of Universal's management. (Er.'s Ex. 8, 10).

IV. LEGAL ANALYSIS

A. The Acting Regional Director Departed from Clear Board Precedent and Policy.

The ARD took a simple record and twisted it beyond recognition to improperly include statutory supervisors in a petitioned-for bargaining unit. The DDE's conclusions regarding the

³ Employer's Exhibit 5 exemplifies the Lead Operators' inclusion in such meetings. It reflects an e-mail from Don Sanders that the Company was having a turn-around preparation meeting for the Lead Operators to attend in planning for an upcoming refinery outage. (R.T. 27:1-9).

Lead Operators are predicated on factual findings that are wholly incomplete, fail to accurately reflect the record in this proceeding, and leave a false impression.

The record, which was carefully developed at the hearing, contains 136 pages of transcript and 32 exhibits. The Company submitted a 29 page post-hearing brief, with extensive citations to the hearing transcript and exhibits. The Union failed to file a post-hearing brief. Yet, the DDE makes alleged “factual findings,” with no citation to the record, that are oversimplified, are taken out of context, and are simply erroneous. These factual errors have materially prejudiced Universal by forcing an election to proceed with improperly included members. To include the Employer’s Lead Operators in the unit given their authority puts them in a position to impose unlawful pressure on rank-and-file employees to support the Union, a clear violation of the Act. While the Board has directed that Regional Directors construe supervisory status, the DDE in this case has construed the burden by Universal to such a high burden that no employer could ever meet the burden merely if the supervisors at issue wanted to be included in a petitioned-for unit. This the law does not permit. In ruling to include the statutory supervisors in the petitioned-for bargaining unit the ARD ignored critical relevant evidence and departed from long-standing Board precedent and authority.⁴ The Lead Operators—as statutory supervisors—should be excluded from the petitioned-for bargaining unit.

⁴ The Acting Regional Director’s Decision and Direction of Election appears to suggest the position that the powers listed in Section 2(11) are supervisory only if they are exercised in some affirmative way. In other words, the Lead Operators, according to the Acting Regional Director’s Decision and Direction of Election, may only be deemed supervisors if they have made a decision to discipline one of their subordinates. The decision by the Lead Operators not to engage in such discipline, despite their authority to do so, according to the practical impact of the Action Regional Director’s opinion is not supervisory. Section 2(11) of the Act has never been read in such a limited way. To permit this view to prevail would be to re-write the Act to find that supervisory status occurs when someone takes an action. Section 2(11) deals with the authority to decide whether to take action not just instances in which an action was taken.

B. Disciplinary Authority

1. The Lead Operators Have Authority to Discipline And the Authority to Effectively Recommend Discipline and Discharge.

The ARD's analysis that the Lead Operators lack disciplinary authority, as well as the power to effectively recommend discipline and discharge (a separate basis for finding the Lead Operators are supervisors) is based on an inaccurate (and frequently incomplete) summary of the testimony and misstatement of Board precedent.

The Board has held that those who use independent judgment in disciplining employees are supervisors. *Metropolitan Transportation Services*, 351 NLRB 657 (2007); *Sheraton Universal Hotel*, 350 NLRB 1114 (2007) citing with approval *Progressive Transportation Services*, 340 NLRB 1019 (2003) and *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004). The Board has held that the independent judgment must be the authority to act or effectively recommend action "free of the control of others" and to "form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, 348 NLRB at 693. However, the Board has held that this standard is met even where the individual in question is acting as a conduit through an upper level manager's delegation of authority to issue discipline. *Metropolitan Transportation*, 351 NLRB at 660-661.

Individual employees who have the power to effectively recommend discipline or discharge are supervisors under the Act. *General Die Casters, Inc.*, 359 NLRB No. 7 (2012) (holding the authority to issue verbal warnings to employees and to effectively recommend the imposition of discipline establishes the authority of an individual as a supervisor); *Entergy Systems & Service*, 328 NLRB 902 (1999); *Detroit College of Business*, 296 NLRB 318 (1989); *Westwood Health Care Center*, 330 NLRB 935 (2000). The authority to recommend is considered "effective" under Section 2(11) of the Act if the recommendations usually are or

would be followed by a subsequent deciding official without conducting an independent investigation. See, e.g., *DirectTV*, 357 NLRB No. 149, slip op. at 3 (2011), citing *Children's Farm Home*, 324 NLRB 61 (1997); and *Sheraton Universal Hotel*, 350 NLRB 1114, 1115-1118 (2007); compare also *Pine Manor Nursing Center*, 270 NLRB 1008 (1984) (charge nurses effectively recommended termination or retention of probationary employees where director of nursing reviewed but did not independently investigate the basis of the recommendation), with *Consolidated Services, Inc.*, 321 NLRB 845 (1996) (senior cooks did not effectively recommend promotion of cook-trainees where the facility manager did not follow their recommendations without conducting an independent investigation).

The uncontested testimony (additionally supported by exhibits presented at the hearing) established that the Lead Operators not only had the authority to issue discipline but did actually issue discipline. By meeting either of these indicia, the Employer meets its burden to establish the Lead Operators are supervisors.

The evidence (both testimonial and written) conclusively established that the Lead Operators are responsible for maintaining discipline on their shifts and issuing written discipline to the operators who report to them. (R.T. 24:9-12; 23:19-25; 24:13-15; 40:3-10; Er.'s Ex. 3, 10). The Lead Operators act independently in issuing progressive discipline to the operators they supervise. They are expected to discipline employees, and are evaluated based on whether they are supervising their employees proficiently. (R.T. 131:4-7; Er.'s Ex. 21, 28, 29, 30). The operators, by contrast, have no authority to issue corrective action notices, warnings, or other counseling or discipline. (Er.'s Ex. 23 and 24).

The Lead Operators acknowledge that they received disciplinary action forms for their use in issuing discipline to their operators in 2010, shortly after each was promoted to supervisor.

(R.T. 40:8-10; Er.'s Ex. 10). Indeed, the Lead Operators themselves requested the forms to document performance issues concerning an operator and the authority to use them on their own. (R.T. 40:8-10; R.T. 41:9-13; Er.'s Ex. 10). There have been at least four different instances in which Lead Operators issued progressive discipline to an Operator who reported to them. (Er.'s Ex. 11, 12, 13, 14). In each case, no further review was required and the noted disciplinary action was implemented by Universal. Thus, this supports the conclusion that the Lead Operators are supervisors.

2. The Discipline Issued Was “Truly Disciplinary,” Not “Merely Reportorial.”

The Company has a progressive disciplinary policy. (Er.'s Ex. 11, 12, 13, 14). However, the ARD completely disregarded evidence of the Lead Operators taking their employees through progressive discipline.

The ARD concluded that operator Jose Ruiz's expected denial of pay if his behavior did not improve was irrelevant to concluding the Lead Operators had authority to issue “truly disciplinary actions.” She held some unknown greater resulting adverse action is required. The ARD also incredibly found that Lead Operator Terry Stamper's signature on, and issuance of, the “Written Warning” and “Final Written Warning,” did not establish his participation in the disciplinary process. (DDE, p. 10). These conclusions, in the face of uncontroverted testimony to the opposite, are astounding. The ARD then concluded these “facts” showed the discipline issued was “reportorial” rather than truly disciplinary, citing *Ken-Crest Services*, 335 NLRB 77 (2001). (DDE, p. 12).

In doing so, the ARD ignores key uncontested facts and relies upon a case, *Ken-Crest Services* (335 NLRB 77 (2001)), that is clearly not applicable. In *Ken-Crest Services*, the employees in question issued only verbal warnings, and no written warnings were placed in

evidence that even referred back to previous verbal warnings. 335 NLRB 77 (2001). Therefore, the Board found that the employer failed to show that any actual consequences flowed from the verbal warnings. *Id.* In the present case, however, no such lack of evidence existed because the Lead Operators did issue written discipline. There are four examples of written counseling and discipline issued to one employee, Jose Ruiz. The threat of a lost pay increase, for example, as threatened in one corrective action notice, is an adverse action. This warning alerts the employee that the failure to correct his behavior will result in loss of pay. Moreover, based on the final warning given by Lead Operator Terry Stamper, Jose Ruiz was terminated by Universal. (R.T. 50:1-16; Er.'s Ex. 14). These written disciplinary actions were, according to Frahm, "the straw that broke the camel's back" regarding the decision to terminate Ruiz. (50:14-16).

Existing Board precedent has conclusively established the above facts as strongly supporting a finding that the employee has authority to discipline. For example, in *In re Progressive Transportations Services Inc.*, 340 NLRB 1044 (2003), the Board rejected the position taken by the hearing officer that the disciplinary notices prepared by the employee in question were "reportorial" and failed to affect employees' job status. It concluded that the very format of the notices showed the Employer followed a progressive system of discipline, and in at least two cases, warning notices signed by the employee were referenced in later discipline imposed. Again, Universal presented twice as many examples. The Board then clarified that issuing discipline is supervisory even when it does not automatically lead to an action affecting employment. To so hold, the Board explained, would mean the imposition of discipline would be supervisory only if there is a rigid and inflexible system under which discipline always leads to a precise impact on employment. The Board rejected this notion. 340 NLRB at 1046. Finally, the lack of authority of a purported supervisor to impose discipline solely by himself had

nothing to do, the Board held whether he could effectively recommend discipline to a manager who then approves it, the latter of which is clearly sufficient to meet the test for this indicia. 340 NLRB at 1047. The DDE ignores existing Board precedent in finding that the written counselings were not truly disciplinary.

3. The September 16th and 19th Corrective Action Notices Clearly Were Disciplinary.

The ARD surprisingly challenges the relevance of the September 16th and 19th corrective action notices issued by Lead Operators Stamper and LaGasse on the basis that “the record does not clearly establish that the documents are disciplinary.” (DDE, p. 10). *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007), is particularly instructive in highlighting the erroneous conclusions reached by the ARD. The Board found that LPN’s were supervisors by virtue of their authority to discipline, and to effectively recommend discipline of, employees. The Board in *Oak Park Nursing* disagreed with the Regional Director’s finding that while the LPN’s do have the authority to fill out employee counseling forms, their role in doing so was “merely a reportorial role that did not evince any supervisory authority.” *Id.* The Regional Director’s finding in this respect was based, in large part, on his incorrect determination that the counseling forms neither constitute discipline, nor automatically lead to discipline. *Id.* The majority concluded, contrary to the Regional Director, that it was clear the counseling forms were a form of discipline because they *lay a foundation* for future discipline against an employee. *Id.* at 28-29 (emphasis added).

As in *Oak Park Nursing*, the discipline issued by the Lead Operators, including the corrective action notices, lays the foundation for termination decisions. (Er.’s Ex. 12, 13, 14). The ARD concludes, without any support, “the evidence indicates that higher management either disregarded [Stamper’s] recommendation or imposed different discipline.” (DDE, p. 12). This

is entirely incorrect. The evidence as to former operator Jose Ruiz demonstrated that the progressive discipline, including the corrective action notices, issued to him led to further discipline, and ultimately to his termination. (R.T. 50:10-16). Even the Union did not dispute this. Jose Ruiz was explicitly warned in the corrective action notices that the notices were warnings and that his continued failure to comply with the rules would lead to negative consequences (i.e. no raise). (Er.'s Ex.'s 12, 13, 14). The testimony established was that after Ruiz was given a final warning, he was terminated, and the final warning was “the straw that broke the camel’s back.” (R.T. 50:14-16). These could be no greater disciplinary action than one that leads to termination.

4. The Lead Operators Exercise Discretion in Evaluating Whether an Offending Employee is in Violation of the Employer’s Policies and In Determining the Appropriate Penalty.

The ARD disregarded the evidence on the authority of Lead Operators to send operators home. The ARD states “although lead operators might exercise some discretion in deciding whether to report or address a safety or attendance issue, there is little discretion involved in discerning whether the offending employee is in violation of the Employer’s policies.” (DDE, p.11). This finding is clearly erroneous. The ARD goes to great pains to attempt to downplay the ability of the Lead Operators to send employees home when necessary, and particularly for disciplinary reasons. In this case, the uncontested testimony was that the Lead Operators had the right to send an employee home for numerous reasons, including failure to appear on time and for suspicion of being under the influence of drugs or alcohol. Again, even the Union did not contest this authority.

The ARD failed to note the uncontested evidence that the Lead Operators had to attend – and did attend – supervisory training on drugs and alcohol in the workplace. (R.T. 78:1-8; 131:24 to 132:2; Er.'s Ex. 8 and 9). This additional training—designed to provide the supervisors with

additional background on addressing this issue with their operators—demonstrates that the authority to send an employee home for a suspicion of alcohol or drugs was not merely routine in nature as erroneously suggested by the ARD, but required the use of independent judgment guided by training. Additionally, Universal’s Handbook is explicit in providing discretion in this regard. The Handbook lists several offenses in a “not all-inclusive” list of offenses, but specifies “depending on the severity of the offense, or the frequency of related offenses, the Company may elect to implement any level of disciplinary action, up to and including discharge.” (Er.’s Ex. 1, p. 9). Finally, the uncontested testimony at the hearing was that the Lead Operators could also send operators home for other reasons including for failing to appear on time—a breach of Universal’s rules—and did so. The ARD’s failure to reference or consider this testimony is surprising. The ARD’s citations to *Washington Nursing Home*, 321 NLRB 366 (1996) and *Vencor Hospital*, 328 NLRB 1136 (1999) are not merely unavailing, but entirely irrelevant given that there was no evidence in either of those cases that the purported supervisors could send the employees home for non-drug or alcohol reasons, had any supervisory training to assist them in the ability to make decisions in this regard, or had discretion provided in an employee handbook to make independent judgments in how to apply penalties in different situations. Further, both cases cited by the ARD referenced extreme misconduct which constituted significant and extreme risk of danger to others, while the Lead Operators at Universal had no such limitations on their authority to send employees home. The ability of the Lead Operators to send employees home – particularly where they have actually done so for a breach of Universal’s rules – clearly establishes the Lead Operators disciplinary authority. The ARD’s findings to the contrary are incorrect and fatally flawed.

5. The Employer Satisfied Its Burden to Establish the Lead Operators “Effectively Recommend” Discipline.

The ARD incorrectly found that Universal failed to establish that Lead Operators effectively recommend discipline. Her sole basis for this finding was that Universal did not have Don Sanders testify that he never independently investigated discipline issued by the Lead Operators. (DDE, p. 11). Board law does not require testimony by each manager in the hierarchy. The uncontested testimony clearly established that no further independent investigation has ever been required for discipline issued by the Lead Operators before the adverse action is taken. (R.T. 42:20 to 43:10). The Lead Operators have authority to implement the discipline – and have repeatedly done so – at multiple levels of the progressive disciplinary stage: counseling, written warning and final warning. (Er.’s Ex. 12, 13, 14). It was uncontroverted that while the Lead Operators are to “keep Don in the loop” regarding discipline issued, they have never been required to seek his approval before implementing discipline to the employee, and in fact, have never done so. (R.T. 79:12-16). Further, even after the Lead Operators’ issuance of discipline, there has never been a situation where Sanders overturned the progressive discipline issued. (R.T. 56:3-6).

Particularly troubling is the erroneous suggestion by the ARD that Universal had a burden to offer affirmative testimony from Sanders that he never independently investigated the conduct underlying a disciplinary action. (DDE, p. 10). No such burden exists. The issue of whether an independent investigation is done by a higher level supervisor could be relevant in establishing whether a purported employee had the authority to effectively recommend discipline. *DirectTV*, 357 NLRB No. 149, slip op. at 3 (2011). However, Universal established that its Lead Operators had this authority and more. The Lead Operators have authority to use independent judgment and discipline on their own. (Section 4, *infra.*) In addition, the Lead

Operators have authority to effectively recommend discipline.

In *Oak Park Nursing Care*, the Board addresses this issue and distinguished between two distinct fact sets. 351 NLRB at 30. In the first, if the evidence demonstrated that management would not act on reported incidents without conducting an independent investigation first, the Board found that no authority to effectively recommend existed. *Id.* In the second, where there is no such affirmative evidence that an independent investigation is required, the Board held that it was sufficient to show the employee made explicit disciplinary recommendations, then met with the manager to discuss the content of the counseling form, which could either result in suspension or termination. *Id.* The latter scenario, the Board held, was sufficient to demonstrate supervisory authority. *Id.* Here, Universal established that independent investigations are not required, and in all cases discipline has been implemented as directed by the Lead Operators. In other words, Universal has exceeded the standard that is required by *Oak Park Nursing Care Center*, 351 NLRB 27 (2006); *See also Mower Lumber Co.*, 276 NLRB 766 (1985). Having exceeded its burden, Universal was not required to offer testimony from Sanders affirmatively demonstrating that he has never conducted an independent investigation in any case.

C. Authority to Reward

1. The Lead Operators Recommended and Assigned Overtime.

The Board has held that an employee effectively recommends a reward within the meaning of Section 2(11) when the evidence establishes that his or her recommendation impacts an employee's job status or is relied on without any independent determination by a higher authority. *See Mercedes-Benz of San Diego*, 357 NLRB No. 67, fn. 2 (2011); *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995). The testimony and the evidence established that the Lead Operators could – and did recommend and assign overtime. (R.T. 53:14 to 16; 68:5-7). For example, when faced with insufficient staffing (i.e. someone failing to

appear), the Lead Operators can direct employees to stay past their shift end time or call other employees into work, thus awarding overtime. (R.T. 81:11-16). The Union did not contest this authority. Lead Operator Ray Gates told an operator not to come in who was late, after calling in another operator to come in to fill the vacancy. (R.T. 105:15 to 106:11). In addition, the Lead Operators can require the maintenance department to return to the refinery on off hours, thus awarding overtime without prior approval from any higher level of management. (R.T. 68:5-7). In holding that the Lead Operators lack authority to reward, the ARD ignores this evidence entirely.

2. The Lead Operators Recommended Pay Raises and Promotions.

The uncontested evidence showed three different instances in which Lead Operators made specific recommendations for increased pay and/or promotions for specific operators. (R.T. 56:7-9; 56:21 to 60:13, Er.'s Ex. 16, 17, 18). In every case, Universal accepted and implemented recommendations. The Board has conclusively found that this evidence strongly supports a finding that the Lead Operators are supervisors under the Act. See *Mercedes-Benz of San Diego*, 357 NLRB No. 67, fn. 2 (2011); *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995).

Incredibly, the ARD chose to create ambiguity where none existed or was even suggested by the Union. The ARD held that the record was “inconclusive” regarding whether the lead operators’ recommendations led to the operators’ promotions or pay raises, because all that was presented was Brent Frahm’s “conclusory testimony,” which failed to establish the recommendations are done without any independent determination by a higher authority (DDE, p. 9). Frahm, as Refinery Manager, offered uncontested, not conclusory testimony supported by three e-mails which the ARD ignored.

For example, the testimony showed that Don Sanders sent an e-mail to Brent Frahm on

June 17, 2010 stating “Both Terry [Stamper] and Bob [LaGasse] tell me that Jose definitely knows more than they or us gave him credit for knowing. Both recommend that his pay be increased to an operator in training.” (Er.’s Ex. 16). Brent Frahm testified that he took this recommendation by Stamper and LaGasse, two Lead Operators, and gave the pay increase recommended. (R.T. 56:22 to 57:19). But this was not the only example. In an e-mail sent January 20, 2011, regarding a different employee, Don Sanders tells Brent Frahm, “Terry [Stamper] and Bob [LaGasse] both agree that Harry is ready for his first increase in pay.” (Er.’s Ex. 17). Brent Frahm again testified that as a result of this recommendation, the employee received the recommended pay raise. (R.T. 58:4-25). A third example occurred on June 25, 2010, when Don Sanders e-mailed Brent Frahm and Lead Operator Ray Gates stating “Ray tells me that he thinks Kent should be at a minimum an operator in training based on what he does, knows, and his exemplary work ethic. (Er.’s Ex. 18). Frahm testified as a result of this recommendation, the employee got the recommended promotion. (R.T. 59:11 to 60:13). This evidence clearly establishes that Frahm issued the recommended raises and promotions without additional investigation—rather, he relied on the judgment of the Lead Operators.

The evidence affirmatively established the Lead Operators’ recommendations led to promotions and pay increases. In fact, Lead Operator Gates admitted that he gave input on promotions and wage increases to Don Sanders. (R.T. 115:21024). The ARD’s conclusion, in the face of the evidence, that the Lead Operators do not have authority to recommend raises and promotions is baffling. In this case, Universal has met its burden to establish that the Lead Operators use independent judgment in directing other employees.

D. Authority to Assign

1. The Lead Operators Have Authority to Assign.

Under the Act, the Board has interpreted the term “assign” as referring 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.” *Oakwood Healthcare Inc.*, 348 NLRB 686, 689 (2006).

The ARD concluded that the record lacked any specific examples demonstrating that Lead Operators independently assign work, but did so after ignoring several critical pieces of testimony and documented evidence. The Lead Operators make work assignments both to individual team members they supervise and also to the maintenance department, and have authority to establish work schedules, assignments and production sequences to meet production goals. (R.T. 127:12-16; 53:14 to 54:16; Er.’s Ex. 3, p. 1-2). These facts demonstrate the Lead Operators possess the requisite authority to assign their subordinates. *RCC Fabricators, Inc.*, 352 NLRB 701 (2008); *Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971); *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972). These facts were uncontested except for the self-serving testimony of only two of the Lead Operators.

The evidence established that the Lead Operators use independent judgment in making assignments. “For an assignment function to involve independent judgment, the putative supervisor must select employees to perform specific tasks on the basis of a judgment about the individual employee’s skills.” *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1349 (11th Cir. 2012). Such is the case here. During the course of the shift, the Lead Operators use independent judgment to determine the assignment of where to place employees, how to keep the oil mixture within pre-determined criteria, and how to keep the facility safe. (R.T. 21:23 to 22:5; 39:16-21; Er.’s Ex. 3). The Lead Operators assignments by evaluating each *operators’* skill set and qualifications for particular assignments. For example, Lead Operator Gates testified that Lead Operators are able to make operator assignments based on what each of

his subordinate operators are best qualified to do and to make sure a person is not assigned to something he is not ready to do. (R.T. 127:1-125; 128:19-25). Thus, neither party contested this authority.

2. The Lead Operators Make Assignments Based On Their Assessment of the Operators' Qualifications and Experience.

The Lead Operators make assignments based on their assessment of the *operators'* qualifications and experience. *Id.* The ARD attempts to conflate this issue by mischaracterizing Universal's position. She wrongly "summarizes" Universal's argument as: Lead Operators have authority to independently assign because they use their own skill set and experience to assign operators. From that erroneous summary of Universal's position, the ARD finds the Lead Operators do not have the authority to assign because "although circumstances might require lead operators to instruct another operator about a particular task without first discussing the matter with Sanders, the record suggests that [the Lead Operator] provides this direction based on [the Lead Operator's] superior experience and knowledge." The ARD then cites Board precedent holding "a putative supervisor does not independently assign work by providing direction and guidance to employees based on his or her experience and craft skill." See e.g. *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111,111 (1996)." (DDE, p. 15). The ARD concludes "in this case, the record fails to show that lead operators do no more than attempt to share their wisdom with their less-experienced colleagues." *Id.*

However, as noted herein, the evidence conclusively established just the opposite as admitted by the Union. Lead Operators, the evidence established, assign based on their independent judgment regarding the qualifications of the operators reporting to them. The ARD's analysis misstates the evidence and thus, reaches a flawed conclusion. The Board should

not permit a finding based on authority both parties concede exists.

3. The Lead Operators' Characterization of Their Relationship to the Operators Further Evidences That They Have Authority to Assign Those Employees.

The Lead Operators' own characterization of the operators they supervise supports the finding that the Lead Operators, in practice, do have authority to assign operators using independent judgment. Lead Operator Ray Gates referred to the operators working for him as his "subordinates" and acknowledged lead operators discuss with them what duties need to be done each day and whether anything "abnormal" needs to be done. (R.T. 118: 8-13). Lead Operator Gates freely admitted Lead Operators make suggestions as to the work that needs to be performed during Brent Frahm's Management Team Meetings. (R.T. 117:25 to 118:1-6). Lead Operator Gates also testified that it is only in the rare instance of an unexpected reduction or increase of rates, or where a safety issue with extenuating circumstances occurs, that a Lead Operator would even have to notify a higher supervisor. (R.T. 116: 23 to 117:7). Though they tried to down play their authority, the Lead Operators view of their authority strongly supports a finding that they are supervisors.

4. The Lead Operator Job Descriptions Provide Compelling Support that the Lead Operators Assign the Operators, and Use Independent Judgment in Doing So.

The ARD, for unknown reasons, ignores entirely the significance of the job description for the Lead Operators, acknowledging it only to cite *Adco Electric, Inc.* 307 NLRB 1113, 1113, fn. 3 (1992) and conclude "while the Employer relies heavily on lead operators' job descriptions as demonstrating their supervisory status, the job descriptions do not constitute evidence of supervisory authority." The attempt to water down this uncontested evidence fails.

Adco Electric is not the case the ARD believes it to be. The Board in *Adco Electric* held that the job descriptions must be rejected in that case because the job descriptions, if accurate,

conferred supervisory status *on virtually all employees*, including journeymen, save only a few apprentices, leaving the Board to conclude that the job descriptions were an inaccurate reflection of the purported supervisor's duties and responsibilities. 307 NLRB at FN 3. The Board in *Adco Electric* also discredited the job descriptions on the basis that the purported supervisor testified he never received a job description. *Id.* This was not the case here.

First, the operator job description differed significantly from the Lead Operator job description. (Er's Ex. 3, 23, 24). The Lead Operators acknowledged receipt of the job description on two occasions, had read them and raised no concerns upon receiving them. (R.T. 71:22 to 72:4).

Moreover, in *RCC Fabricators, Inc.*, 352 NLRB 701 (2008), the Board cited importance to a written statement of job duties and responsibilities for the individuals in question that noted among the responsibilities, “[s]upervise shop operations and provide direction to the two shop foreman [sic] in charge of equipment and steel fabrication.” *Id.* at 712. The Board held that this statement supported the testimony that the foremen were vested with supervisor authority.

As in *RCC Fabricators*, the Lead Operator job descriptions provide significant support that the Lead Operators are vested with supervisory authority. The job description requires that the Lead Operators must apply principles and theories of business management, determine factors affecting production processes, confer with management or subordinates to resolve worker problems, complaints and grievances, and direct and coordinate the activities of employees engaged in production and processing of goods. (Er.'s Ex. 3). The uncontested evidence was that Universal in fact paid for the Lead Operators to receive training in these areas (Er.'s Ex. 6, 7). The ARD ignored this fact, as well as the uncontroverted fact that the Lead Operators are held accountable for the duties set forth in the job descriptions through their

evaluations. (R.T. 131:4-7; Er.'s Ex. 21, 28, 29, 30). Thus, the Lead Operators use independent judgment to determine and recommend the assignment of the Operators they supervise.

E. Authority to Responsibly Direct

1. The Lead Operators Responsibly Direct the Operators Who Report to Them.

The Lead Operators responsibly direct the operators who report to them. 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. *Oakwood*, 348 NLRB at 691–92. To establish accountability, it need only 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. *Id.* It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. *Id.*

Here, the testimony and documentary evidence demonstrates that the Lead Operators “plan, direct and coordinate the operations of the plant.” (R.T. 71:22 to 72:4; Er.'s Ex. 3, p. 1). Randall Wilson, the Employer’s Chief Financial Officer, offered uncontested testimony that the Lead Operators “run the ship...give guidance...supervise the other two Operators...make sure the plant runs safely, keep the product on spec....” (R.T. 110:21 to 111:2). Wilson explained the Lead Operators had the authority to assess any issue in the plant which might require a change in operations, such as a safety issue or product not within criteria needed, and then take action, including shutting down production or calling in maintenance. (R.T. 111: 4-17). The Union’s representative asked Wilson whether “...the Lead Operators have the authority to—that requires their independent judgment, to make changes in the refinery without contacting anybody.” (R.T.

112:7-9). Wilson unequivocally answered, “Sure. Absolutely...Absolutely.” (R.T. 112:10-12).

Wilson’s testimony is fully supported by the Lead Operator job descriptions, as well as other testimony. The Lead Operators manage daily operations and plan the use of materials and personnel. (Er.’s Ex. 3). The Lead Operators plan and establish work schedules, assignments, and production sequences to meet production goals. (Er.’s Ex. 3, p. 2). The Lead Operators have the authority to send an operator home if he or she appears to be under the influence of alcohol or drugs. (R.T. 22:6-12; Er.’s Ex. 1, p. 9). The Lead Operators assign work to operators and move their team members from place to place within the refinery. (R.T. 127:12-16; Er.’s Ex. 3, p. 1-2). The Lead Operators plan and establish work schedules, assignments, and production sequences to meet production goals. (Er.’s Ex. 3, p. 2). The Lead Operators provide input on the proposed employee work schedules so the schedules can be adjusted to meet the needs of the department, and do not have to check with any other higher managers or supervisors before ordering that action be taken, including calling in maintenance after hours, even if that leads to overtime. (R.T. 53:14-17; R.T. 28:2-8; Er.’s Ex. 3, p. 2). The uncontroverted evidence was that Lead Operator Ray Gates, when faced with an operator who had not appeared at work on time, found a replacement operator and called the late operator and instructed him not to appear. (R.T. 105:15 to 106:11). Finally, as Lead Operator Drew Doggett admitted, the Lead Operators are the highest level individuals at the refinery on the night, weekend, and holiday shifts. (R.T. 76:10-77:6).

2. The Lead Operators Have Independent Authority to Discipline Other Operators if the Operators Fail to Follow Their Instruction.

The Lead Operators have authority to take corrective action where their direction is not followed. Lead Operator Ray Gates admitted that he has authority to recommend discipline, and in fact, has done so in the past, with employees such as Jose Ruiz and “multiple others.” (R.T.

129: 1-12).

As noted herein, each Lead Operator has the authority to send members of their team home, and has done so, such as when an operator failed to appear on time. (R.T. 105:15-106:11). The Lead Operators can direct employees to stay late or call other employees into work when there is insufficient staffing. (R.T. 81:11-16). Thus, the Lead Operators have independent authority to discipline operators.

3. The Lead Operators Are Held Accountable for Their Responsible Direction of the Operators.

The ARD incorrectly concluded “the record fails to establish that the Employer holds the lead operators accountable by evaluating them based on their supervisory skills.” (DDE, p. 15). Testimony existed supporting this point, but was ignored by the ARD. Additionally, the ARD erroneously dismisses the uncontested evidence in the form of written documentation, including the job descriptions, evaluations of the Lead Operators, and documents showing the Employer offered supervisory training to the Lead Operators, all of which were used to support testimony provided in the record. However, the Board has held, “written policies, job descriptions, performance evaluations, and the like, when corroborated by live testimony or other evidence, are obviously relevant to the issue of responsible direction.” *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012).

As further corroborated by Lead Operator Gates, the Lead Operators are responsible for the performance of the employees on their shift, for issuing evaluations, and for issuing appropriate counseling or discipline in response to performance deficiencies. (R.T. 24:13-15; 40:3-10; 119:25 to 120:1; 131:4-7; Er.’s Ex. 10; Er.’s Ex. 21, 28, 29, 30; Er.’s Ex. 3). The Lead Operators are evaluated, in writing, on the adequacy of their supervision of others, each was cautioned about appropriately performing their supervisory responsibilities, and thus was held

accountable for the performance of the operators and their direction of the operators. (R.T. 131:4-7; Er.'s Ex. 21, 28, 29, 30). In those reviews, three of the four Lead Operators received reviews which specifically found that supervision of subordinates was insufficient. (Er.'s Ex.s 21, 28, 30). All four of the Lead Operators were cautioned that they needed to improve their authoring of operating procedures for reference and future training needs. (Er.'s Ex.'s 21, 28, 29, 30). Lead Operators Drew Doggett, Terry Stamper and Ray Gates were each cautioned that improvement was needed in employee motivation, employee coaching and employee disciplinary action. *Id.* Each Lead Operator was instructed that additional training in these areas would be helpful to them to correct this area of improvement. *Id.* The performance by the Lead Operators was not all below standard, however. Each of the Lead Operators was also commended on their ability to utilize and train their personnel efficiently. *Id.* Each of the Lead Operators also were given high marks in their troubleshooting skills. *Id.* Thus, the Lead Operators have been held accountable (receiving both good and bad marks) on their ability to manage their employees. Lead Operator Gates admitted that he did not object to the evaluations that held him accountable for his supervisory skills. (R.T. 131:4-13). These facts further support a finding that the Lead Operators are statutory supervisors. *Birmingham Fabricating Co.*, 140 NLRB 640, 642 (1963).

F. Secondary Indicia

The ARD's factual determinations and analysis of the secondary indicia were not merely erroneous, but prejudicial as the evidence was improperly minimized, was entirely ignored or was improperly stated.

The Board has held that higher rates of pay support a finding that an individual is a supervisor. *Illinois Steel Fabricators*, 197 NLRB 303 (1972). It was uncontested that the Lead Operators earn more than \$2.00 more per hour than the operators that they supervise. (R.T. 69:7-

8). Thus, this supports the finding that the Lead Operators are supervisors under the Act. *In re Progressive Transportations Services, Inc.*, 340 NLRB No. 126 (2003). While the ARD did admit that the uncontested evidence proved this supervisory indicia, she then suggested that because the Lead Operators were not salaried, this did not constitute sufficient supervisory indicia. No such requirement actually exists and in fact, Board cases have never held that being salaried is indicia of supervisory status. The ARD offers no supporting legal authority, nor could she. While being salaried can constitute secondary indicia where there are primary indicia of supervisory status, that an employee is not salaried does not weigh against a determination of supervisory status. *See In re Training School at Vineland*, 332 NLRB 1412, 1418 (2000). To the contrary, that the Lead Operators have a higher hourly salary than the operators constitutes secondary indicia. *St. Francis Medical Center West*, 323 NLRB 1046, 1047 (1997). Again, the ARD's finding on this issue is plainly erroneous.

The Board has also held that attendance at management only meetings also supports a finding that an individual is a supervisor. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003). It was uncontested that the Lead Operators attend management meetings with only management / supervisory employees. (R.T. 80:3-8; 120:19-20). The ARD incredibly stated that the Lead Operators only "occasionally"⁵ attend management meetings. This finding was clearly erroneous.

Notwithstanding these erroneous findings, the ARD went further still up the proverbial creek with no paddle. The ARD, citing a footnote in *Dean & Deluca*, 338 NLRB 1046 (2000), notes that the lead operators were only "occasionally" the highest ranking employee at the

⁵ The MacMillan dictionary defines "occasionally" as "happening sometimes, but not frequently or regularly." It is unclear how the ARD could find something which occurs regularly every month to six weeks, to be something that only occurs "sometimes" or "not regularly." This is just one of the myriad of factual errors made by the ARD.

refinery. This characterization misstates the record and ignores the evidence that demonstrated that the Lead Operators are in charge of the facility at all times, with support from the executive management team only during the day shift. (R.T. 76:10-77:6). It was undisputed that the Lead Operators are the highest level individuals—and the only members of management—regularly present at the refinery on the night, weekend and holiday shifts. (R.T. 76:10-77:6).”

As before, the ARD’s analysis of what constitutes “occasionally” is surprising and in this instance is belied by the uncontested testimony that the Lead Operators were the only supervisors present during all night shifts (50% of each day), all weekend shifts (100% of both weekend days), and during holidays. Thus, the Lead Operators are the highest ranking supervisors **for more than half** of the refinery’s weekly operations. The finding by the ARD was not merely factually incorrect but used to make an incorrect conclusion of the applicability of *Dean & Deluca*. First, the testimony in *Dean & Deluca* noted that the purported supervisor was an acting supervisor only on Saturdays, unlike the facts of this case, where the Lead Operators are the highest supervisors present for the majority of the operations. Second, the testimony in *Dean & Deluca* established that the purported supervisor’s responsibility was solely customer service and that the purported supervisor had no responsibility for the operation of the store at any time, again unlike in this case where the Lead Operators have overall control over the operations of the refinery. Thus, that case – even assuming it has the meaning which is ascribed to by the ARD – is entirely distinguishable from the facts of this case.

The ARD’s analysis of the Lead Operator’s views of their subordinates is equally mystifying. The uncontested evidence was that the Lead Operators deemed the operators they supervised to be their subordinates, not merely lower ranking employees. The Acting Regional Director notes that such a finding – which she implicitly admits is true – would not be dispositive

of the issue of supervisory status. This analysis is flawed for two reasons. First, the fact that the Lead Operators deem the operators to be their subordinates highlights their view of their role in managing their facility during the majority of time they oversee the refinery, not simply that they have a different title. Second, no one suggested that such a fact would be dispositive of the issue of supervisor status. The ARD's argument as to the dispositive nature of the issue is a false narrative suggesting a burden where none exists.

The ARD also misses the mark on supervisor responsibilities. The ARD incorrectly stated that the employees share "predominately" the same responsibilities, and thus, no secondary indicia exists. Not only is this an incorrect factual assertion, it fails to follow existing Board precedent. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *U.S. Radium Corp.*, 122 NLRB 468 (1958). While the Board has not established a strict standard for the specific percentage that is applicable, it has found that an employee who devotes 10-15% of their total work time to supervision is sufficient to render that individual a supervisor. *Id.* As evidenced by the Lead Operator job description, at least 19 of the 46 job duties of the Lead Operators are supervisory. (Er.'s Ex. 3). The Union did not dispute this, nor did it dispute the fact that none of the job duties of the operators had supervisory obligations. Thus, in this case, the uncontested evidence demonstrated that the Lead Operators spent at least 40% of their time in supervision, more than quadruple the time viewed sufficient for supervisor status by the Board. The ARD's finding on this secondary indicia was erroneous

Training employees can constitute secondary indicia of supervisory authority. *Training School of Vineland*, 332 NLRB 1412 (2000). Here, the undisputed evidence was that the Lead Operators were responsible for training the operators who reported to them. (R.T. 84:16 to 85:4;

85:22-25; 95:17-21; 99:17-20; 103:20-23; Er.'s Ex. 3, 21, 28, 29, 30). Thus, this supported a conclusion that the Lead Operators are supervisors under the Act. The ARD completely ignored this testimony and made no reference to it in the DDE. We are left to question why this secondary indicia, which was uncontested, was ignored by the ARD.

The Lead Operators are assigned responsibility for conducting the monthly safety audit at least once per year. (R.T. 80:3-8; 25:1-25; Er.'s Ex. 5; Er.'s Ex. 15). Non-supervisory employees do not have these obligations. *See Harbor City Volunteer Ambulance Squad, Inc.*, 318 NLRB 764 (1995). These facts constituted secondary indicia supporting a finding of supervisory authority. The ARD ignored this secondary indicia entirely and refused to even discuss it in the DDE. Again, we are left to question why this uncontested fact which supports a finding of supervisory status was ignored.

V. Motion to Dismiss

In responding to Universal's Motion to Dismiss, the ARD claims that, "it would not be appropriate for the Board, or the Board's appointed agents, to suspend its activities in response to a claim that Presidential appointments to the Board are not valid." (DDE, p. 18). However, the ARD gave short shrift to the growing tide of opinions – not mere claims – that the Board cannot validly process this election petition.

The National Labor Relations Act provides that in order for the Board to take any action, it must have a quorum consisting of at least three legitimately appointed members at all times. *See* 29 U.S.C. § 153(b); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473-475 (D.C. Cir. 2009), *aff'd sub nom. New Process Steel v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010); *Noel Canning v. NLRB*, 705 F.3d 490, 499 (D.C. Cir. 2013). The three-member-composition requirement is "a threshold limitation" on the scope of the power delegated to the Board by the Act: the Board cannot exercise its power through a delegee group if that group has

fewer than three members. *NLRB v. New Vista Nursing & Rehab.*, No. 11-3440, 2013 WL 2099742 (3d Cir. May 16, 2013). This statutory mandate is therefore jurisdictional. *Id.* (citing *Arbaugh*, 546 U.S. at 515 (explaining that “threshold limitation[s] on a statute’s scope” imposed by Congress are jurisdictional); *Teamsters Local Union No. 523*, 624 F.3d at 1322 (holding that a “two-member NLRB group that issued the order in this case lacked statutory authority to act “ (emphasis added)). By explaining that three members are required “in order to exercise the delegated authority of the Board,” the Supreme Court has in essence declared that the three-member-composition requirement goes directly to the board’s “power to hear a case.” *New Process Steel*, 130 S.Ct. at 2644, *United States v. Cotton*, 122 S.Ct. 1781 (2002); see also *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013) (“[T]he objections before us concerning lack of a quorum raise questions that go to the very power of the Board to act.”).

Currently, the Board has only one legitimately appointed member: Chairman Mark G. Pearce. Chairman Pearce was appointed by President Obama and confirmed by the Senate on June 22, 2010, in accordance with the statutory requirements of 29 U.S.C. § 153(a). The recess appointments of Sharon Block and Richard Griffin were declared unconstitutional by the U.S. Court of Appeals for the District of Columbia. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). The D.C. Circuit ruled that intra-session Presidential recess appointments to the NLRB are invalid because they exceed the scope of the President’s authority under the Recess Appointments Clause of the U.S. Constitution. *Id.* at 498, 514. Under that decision, the NLRB has been acting without a quorum since January 4, 2012. *Id.*

The Board has the authority to delegate its responsibility to make initial determinations of the appropriateness of bargaining units, including the determination of the status of supervisors to its Regional Directors, but the source of that authority is, at all times, with the Board. See 29

U.S.C. 154(a). During periods when the Board is unable to act, including periods when it lacks a quorum required by law, delegations to Regional Directors are inoperative. *Laurel Baye*, 564 F.3d at 473-475. Thus, the Acting Regional Director lacks the authority to order or to certify the result of any representation election absent authority. In *Noel Canning*, the court noted the employer had no obligation to ask the Board to decide issues it lacked the power to adjudicate. 705 F.3d 490. Additionally, the consolidation of Regions 14 and 17 and the appointment of the Regional Director of these consolidated regions were approved by the Board on or about December 6, 2012, when the Board did not have authority to act. 77 Fed. Reg. No. 235 pp. 72886-72889 (Dec. 6, 2012).

Moreover, in connection with directing elections or certifying election results, actions taken by a Regional Director pursuant to a delegation of authority may be appealed to the Board. See 29 U.S.C. § 153(b). Given that the Board lacks a valid quorum, the Board cannot rule on any appeal of a Regional Director's decision. This renders the ARD's Decision and Direction of Election void ab initio. Finally, the Acting General Counsel was not properly appointed under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-49(d). Accordingly, actions by the Acting General Counsel, or derived through his authority, are invalid and void. Given that the ARD had no authority to proceed on this petition, the petition is void and should be dismissed.

VI. Conclusion

The ARD clearly erred in finding the Lead Operators are not supervisors as defined by Section 2(11) of the Act. Including them in a petitioned-for-unit is wholly inappropriate under the Act. For all of the reasons stated above, the Board should grant review in this case. Notwithstanding the required exclusion from the petitioned-for bargaining unit, the Employer respectfully moves that the Board remand the matter to the Acting Regional Director with instructions to dismiss this petition, as no authority exists to proceed forward. The Employer

further moves that the Board direct the Acting Regional Director to suspend the election pending resolution of this challenge, or in the alternative, to impound the ballots, until such time as a properly and legal constituted Board may consider this Request for Review.

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CERTIFICATE OF SERVICE

The undersigned states that he filed a copy of the above and foregoing with the National Labor Relations Board via its E-File service and further e-mailed a copy on this 25th day of June, 2013 to:

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