UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

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

EMPLOYER'S REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Jonathan P. Pearson, Esquire
Reyburn W. Lominack, III, Esquire
Santiago Alaniz, Esquire
1320 Main Street, Suite 750
Columbia, South Carolina 29201
Telephone: 803.255.0000
Facsimile: 803.255.0202
jpearson@laborlawyers.com
rlominack@laborlawyers.com
salaniz@laborlawyers.com

Attorneys for Employer

September 27, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Pursuant to Section 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, Pac Tell Group, Inc., d/b/a U.S. Fibers (the Employer), by and through the undersigned counsel, hereby files this request for review of the Regional Director's Supplemental Decision and Certification of Representative (Supplemental Decision) issued on September 13, 2013.[1]

II. PROCEDURAL BACKGROUND

A. PRE-ELECTION

On March 26, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 (the Union) petitioned to represent a unit of all production and maintenance employees at the Employer's Trenton, South Carolina facility. A hearing was held on April 18 to determine whether a question concerning representation existed. An issue at the pre-election hearing was whether Production Supervisors Eduardo Sanchez and Jose Lal, Recycle Operation Supervisor David Martinez, and Finish Supervisor Aduaco Torres (collectively, the putative supervisors) were "supervisors" under Section 2(11) of the National Labor Relations Act.

On May 3, the Acting Regional Director issued a Decision and Direction of Election finding, inter alia, that the putative supervisors were not statutory supervisors. The Employer filed a request for review (pre-election request for review) of that determination on May 16.

B. ELECTION

An election was conducted on May 29-30. The tally of ballots showed 71 votes for and 59 against the Union, with 7 challenged ballots. The putative supervisors were all challenged by the Employer's observer during the election.

[1] All dates referenced herein are in 2013, unless otherwise indicated.

C. POST-ELECTION

On May 31, the Board issued an order acknowledging that the Employer's pre-election request for review "raises a substantial issue with respect to the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres," but concluding that the issue "may best be resolved through the use of the Board's challenge procedure." Consequently, the Board denied the Employer's pre-election request for review.

On June 6, the Employer timely filed objections to conduct affecting the results of the election based on the open and pervasive union organizing activities of the putative supervisors prior to and on the day of the election.

On June 14, the Employer filed a motion for reconsideration of the Board's May 31 Order denying the pre-election request for review because the "substantial issue" the Board acknowledged the Employer raised regarding the supervisory status of the putative supervisors was not resolved by the challenge procedure as contemplated by the Board. Further, the Employer pointed out, the existence of new evidence that was not available at the time of the pre-election hearing justified granting the Employer's pre-election request for review.

On June 17, the Acting Regional Director, after reviewing both parties' submissions, directed a hearing on Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, and 14.[2]

On June 26, the Board issued an order denying the Employer's motion for reconsideration "without prejudice to the Employer renewing its arguments as to the alleged supervisory status of [the putative supervisors] on exceptions to a report on objections or on a request for review of the Regional Director's decision."

[2] The Employer withdrew Objections 5, 15, and 16 prior to the hearing.

A hearing on the objections was held on July 1-3. Both parties filed post-hearing briefs on July 10.

On July 26, the hearing officer issued a Report on Objections in which she found that the putative supervisors were statutory supervisors based on their authority to assign and responsibly direct employees and that they engaged in continuous, pervasive, and aggressive pro-union campaigning up to and including the date of the election, which interfered with employee free choice. Consequently, she recommended that the Regional Director sustain Objections 1, 2, 3, 4, and 10 and order that a second election be held.

On August 9, both parties filed exceptions to the hearing officer's Report on Objections. The Union excepted to the hearing officer's findings that the putative supervisors were statutory supervisors and engaged in prounion conduct sufficient to overturn the results of the election, as well as her recommendation that a second election be held. The Employer excepted to the hearing officer's failure to find that the putative supervisors also have the authority to discipline and reward employees (or effectively recommend such action) under Section 2(11) and her recommendations that Objections 6, 8, 9, 11, 12, 13, and 14 be overruled and that the petition not be dismissed.

On September 13, the Regional Director issued his Supplemental Decision in which he disagreed with the hearing officer's findings that the putative supervisors have the authority to assign and responsibly direct employees, but agreed with her findings that the putative supervisors are not authorized to discipline and reward employees (or effectively recommend such action). Having, therefore, determined that the putative supervisors are not Section 2(11) supervisors, the Regional Director declined to address the putative supervisors' misconduct, including whether their conduct as "third parties" was sufficient to overturn the election.

Accordingly, the Regional Director overruled the Employer's objections and issued a Certification of Representative.

III. GROUNDS FOR REVIEW

The Board should grant the Employer's request for review of the Supplemental Decision because (1) substantial questions of law and policy are raised because of the absence of, and departure from, officially reported Board precedent in the Supplemental Decision; and (2) the Regional Director's decisions on certain substantial factual issues are clearly erroneous on the record, and such errors prejudicially affected the rights of the Employer and, by extension, the employees in the voting unit.

IV. FACTUAL BACKGROUND

A. OVERVIEW

The Employer owns and operates a traditional synthetic fiber manufacturing operation in Trenton, South Carolina, under the name of U.S. Fibers (Pre. Tr. 14-15).[3] It has been in operation since approximately 2004 (Pre. Tr. 23). The plant covers approximately 500,000 square feet in four buildings (Pre. Tr. 112). Each building has multiple production lines (Pre. Tr. 31). At the time of the election, there were around 140 hourly employees working at the plant (Pre. Tr. 14-16).

B. OPERATIONS

The Employer obtains raw polyester waste products from various industrial sources and reprocesses them into fibers for a variety of uses (Pre. Tr. 15-16). Raw material consists largely of waste polyester yarn, waste polyester film, and "lump and chunk," which consists of large pieces of solid waste polyester (Pre. Tr. 15).

[3] This brief discusses evidence submitted at both the pre-election and objections hearings. Testimony from the pre-election hearing will be cited as "(Pre. Tr. __)." Testimony from the objections hearing will be cited as "(Objs. Tr. __)."

When "lump and chunk" arrives at the plant it is initially cleaned and ground to a fine consistency. When waste yarn and film arrives it is put through a process called "densification," which also results in it becoming a smaller, more uniform particle. (Pre. Tr. 16-17.) This part of the process is referred to as the recycling operation.

Once the raw material is ground or densified, it is placed in an extruder and forced through a spinneret. The material exiting the spinneret falls vertically and is wound into drums. (Pre. Tr. 17-18.) This part of the process is referred to as the extrusion operation.

Following extrusion, the cans of fiber are moved to a creel area where the fiber is dried, cured, and cut. Depending on the end use, the extruded fiber can be made into different colors, links, or diameters. (Pre. Tr. 18-19.) This part of the process is referred to as the finishing operation.

C. ORGANIZATIONAL STRUCTURE

Ted Oh is the Employer's Vice President of Operations. Reporting directly to him is Director of Manufacturing Kevin Corey. Reporting directly to Corey are Production Manager Glen Jang and Production and Quality Assurance Manager Kyong Kang. (Pre. Tr. Emp. Exh. 1.)

Putative supervisors Sanchez and Lal are Production Supervisors in the extrusion operation. They both report to Jang. Putative supervisor Martinez is the Recycle Operation Supervisor in the recycling operation. He also reports to Jang. Putative supervisor Torres is the Finish Supervisor in the finishing operation. He reports to Kang. (Pre. Tr. 28-30, Emp. Exh. 1.)

D. PUTATIVE SUPERVISORS

Sanchez, Lal, Martinez, and Torres were officially promoted to supervisor around October 2012. Oh and Safety Manager Jay Alcorta met with the four men individually,

discussed their proposed change in status, and asked them if they would be willing to become supervisors (Pre. Tr. 81-82, 171-172).[4]

Oh explained to the putative supervisors that their expected duties included "[p]reparing work schedules, preparing the production schedules, all the different stats that we would have on our shift, look for people to make sure we had a full shift, apply overtime when it was necessary, recommend discipline, and different things like that" (Pre. Tr. 172). Oh specifically told the putative supervisors that they would be required to exercise independent judgment in making decisions (Pre. Tr. 82).

All of the putative supervisors accepted the promotion, although, Alcorta recalls, one was initially hesitant because he was unsure whether he could perform the required duties (Pre. Tr. 172-173). Alcorta could not recall which putative supervisor this was (Pre. Tr. 172-173). The putative supervisors were awarded pay increases as a result of the promotion (Pre. Tr. 40, 83).

Oh officially announced that the four putative supervisors had been promoted to supervisor during a group meeting with the hourly employees in October 2012. Alcorta translated during the meeting. (Pre. Tr. 135, 171.)

Sanchez and Lal each supervise approximately 25 employees on their respective shifts. Those 25 employees are divided into teams of between three and five employees, depending on what part of the extrusion operation they work in. Each team is assigned a lead operator. (Pre. Tr. 34-35.) The leads are "[b]asically . . . more experienced operators" (Pre. Tr. 35). Oh explained that "they have operational responsibility as far as making sure everything is right and they are more skilled than the rest of the team" (Pre. Tr. 35).

[4] Alcorta was involved principally as a translator (Pre. Tr. 82). The Employer's operations are complicated by language issues. Oh speaks Korean and English fluently, but almost no Spanish. Jang speaks Korean fluently, very little English, and no Spanish. (Pre. Tr. 28.) The putative supervisors speak Spanish and limited English. The hourly employees in the plant generally speak Spanish or a **Guatemalan dialect** of Spanish and either very little English or no English at all. (Pre. Tr. 169-170.) Alcorta speaks English and Spanish fluently, which is why he generally communicates to employees during meeting (Pre. Tr. 169-170).

Martinez supervises approximately 22 employees, including seven leads (Pre. Tr. 34, Emp. Exh. 1).

Torres supervises approximately 40 employees, including eight leads (Pre. Tr. 34, Emp. Exh. 1).

The Employer normally operates 24 hours a day with two, 12-hour shifts (Pre. Tr. 32). At all relevant times in the extrusion operation, Sanchez supervised the day-shift and Lal supervised the night-shift (Pre. Tr. 28-29). Martinez rotates supervising the day-shift and night-shift recycle operation (Objs. Tr. 310-311). Torres supervises the night-shift finishing operation (Objs. Tr. 370).

Jang and Kang normally work six days per week, from 8:00 a.m. to 6:00 p.m. (Pre. Tr. 43; Objs. Tr. 57). Thus, there are significant periods of time at the Employer's plant when no managers are present. A putative supervisor is always working when the managers are not. (Pre. Tr. 43.)

The putative supervisors are not assigned a particular location and do not perform significant production duties. They may occasionally fill in for an employee if necessary during an emergency, but their primary job is to move through their area of responsibility and supervise employees. (Objs. Tr. 35-36, 69, 92, 162, 187, 209, 285.)

The record is undisputed that the four putative supervisors are regarded as supervisors by the employees. Employee John Williams testified that he has always been told that Sanchez is a supervisor and has seem him exercise supervisory functions. Williams also has no "doubts" that Lal is a supervisor. (Objs. Tr. 71.) Employee Carlos Vicente similarly testified that there is no question in his mind that Sanchez and Lal are supervisors (Objs. Tr. 94).

Employee Jose Perez testified as follows regarding why he believes Torres and Lal are supervisors: "Because they give overtime to people. They can discipline people. And if we need to ask for a day off, we just talk to them about it, you know, and they automatically give us a day off" (Objs. Tr. 292). Employees Luke Milburn and Edwin Vicente likewise testified that they see Torres as a supervisor (Objs. Tr. 270, 286).

Employee Ignacio Bamaca testified that he has no "doubt" that Martinez is a supervisor because he goes to Martinez for any problems he has (Objs. Tr. 165). Employee Jose Garcia similarly testified that there is no question in his mind that Martinez is his supervisor (Objs. Tr. 189), as did employee Wilfredo Gonzalez, who explained that he knows Martinez is his supervisor because he has to "take orders" from him (Objs. Tr. 203). Employee Jose Allende testified that he sees Martinez as his supervisor because, "He gives me my hours. He tells me what to do" (Objs. Tr. 235). Employee Carlos Ortiz also believes that Martinez is his supervisor (Objs. Tr. 258). Ortiz testified that Martinez can "assign overtime, move employees around from one location to another, give employees a day off, and recommend raises" (Objs. Tr. 257).

V. SUMMARY OF ARGUMENT

The Regional Director's determination that the putative supervisors do not have the authority to assign, responsibly direct, discipline, or reward employees (or to effectively recommend such action) as contemplated by Section 2(11) disregards and misconstrues record evidence and Board precedent. Moreover, it defies common logic and ignores reality.

In essence, the Regional Director is saying the Employer operates multiple production lines in four very large buildings spanning 500,000 square feet, 24 hours a day, with only two people (Jang and Kang) who can exercise independent judgment to discipline, reward, or tell 140 hourly employees (in a language they do not understand) when, where, and how to work every

day. No traditional manufacturer with a conventional top-down organizational structure operates in that fashion, and the Employer is no exception.

Even worse, the Regional Director's determination effectively condones the putative supervisors' coercive, threatening, and intimidating conduct. Regardless of their status as Section 2(11) supervisors or "third parties" under Board law, the putative supervisors' conduct disrupted the laboratory conditions and interfered with employee free choice in the election.

Consequently, the Board should grant the Employer's request for review and reverse the Regional Director's Supplemental Decision.

VI. ARGUMENT

A. SECTION 2(11) SUPERVISORS

1. Applicable Standard

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

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

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

> Employees are statutory supervisors if (1) they hold the authority to engage in *any 1 of the 12* listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.

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

A party can prove the requisite supervisory authority either by demonstrating that they actually performed a supervisory action or by showing that they effectively recommended that it be done. Id. To prove that the authority is exercised using independent judgment, "an individual must, at a minimum, act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692-693. A "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. at 693.

Applying these principles here, the record evidence unequivocally establishes that the putative supervisors are statutory supervisors by virtue of their authority to assign, responsibly direct, discipline, and/or reward employees (or to effectively recommend such action).

2. Authority to Assign

The Regional Director disagrees with the hearing officer's finding that the putative supervisors have the authority to "assign" as contemplated by Section 2(11). His findings and conclusions in this regard are based on a misunderstanding of the facts and a misapplication of Board law.

In *Oakwood Healthcare*, 348 NLRB at 689, the Board held that "assign" for purposes of Section 2(11) refers to the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." To establish "independent

judgment," the authority to assign must be "independent [free of the control of others], it must involve a judgment [forming an opinion or valuation by discerning and comparing data], and the judgment must involve a degree of discretion that arises above the routine or clerical." *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006) (quoting *Oakwood Healthcare*).

a. Putative supervisors prepare the work schedules using independent judgment

The Regional Director first finds that the putative supervisors do not assign employees to a place or time under *Oakwood Healthcare* because they "do not draft the work schedule or assign employees to specific shifts or work areas, i.e. extrusion, recycling or finishing." Rather, he concludes, "that is done by the production managers, Jang and Kang." (Supplemental Decision, p. 17). These findings of fact are clearly erroneous on the record.

Production employees normally work rotating 12-hour shifts. There is a day-shift and a night-shift. Every few months a shift schedule is posted identifying which employees have been assigned to which shift. The shift schedule also identifies what work groups the employees have been assigned to and what buildings they will work in each week while the schedule is in effect. Contrary to the Regional Director's findings, *the putative supervisors are responsible for preparing the actual schedules, including assigning employees to a place and time.*

To substantiate the putative supervisors' authority to make these initial work assignments, the Employer introduced a copy of a recent shift schedule at the pre-election hearing (Pre. Tr. Emp. Exh. 3). As the schedule illustrates, the employees are assigned to either the day- or night-shift, they are divided up into groups A, B, and C, and then those groups are assigned to a particular building. The uncontradicted testimony is that putative supervisors Sanchez and Lal prepared the schedule introduced into evidence. (Pre. Tr. 48, 139-141, 150, 167.)

The Regional Director mistakenly concludes that the production managers rather than the putative supervisors prepare the work schedules because he misunderstands Jang's testimony. Jang testified that he developed the original *format* for the shift schedules several years ago. He explained, however, that since then, the putative supervisors have been responsible for the content of the schedules, including deciding which employees will work on which shifts and in what areas. (Pre. Tr. 166-167.)

The following uncontested testimony from Jang could not have been more clear on the subject:

> Q. And so [Sanchez] and [Lal] decide what employees work on what shift?
>
> A. Yes.

(Pre. Tr. 167.)

Bolstering Jang's testimony, employee John Williams testified that Sanchez "always did the work schedule" (Objs. Tr. 68). He described the following instance where he actually observed Sanchez making out the schedule:

> Q. Have you seen Eduardo Sanchez make a schedule?
>
> A. Yes.
>
> Q. Well, how does he make the schedule?
>
> A. That one particular time he just sat right there at the table on the job, and he got everybody's name and he just made it out, and then he print them out and pass them out to everybody.
>
> Q. So when he made the schedule and passed it out, did you have to comply with the schedule?
>
> A. Yeah, well, I had to get him to explain it to me because I didn't understand a lot of what he was saying as far as the shift was concerned. So he got it to where I could understand it, and then he would start posting it.

(Objs. Tr. 79-80.)

That the putative supervisors prepare the work schedules on their own accord is also consistent with Alcorta's testimony that during the October 2012 meeting when Vice President Oh promoted the putative supervisors, he specifically told them they would be responsible for among other things, "[p]reparing work schedules" (Pre. Tr. 172).

Consequently, the Regional Director's finding that the putative supervisors do not prepare the work schedules or decide who is assigned to what shift and what area is directly contradicted by the record.

b. Putative supervisors assign and reassign employees using independent judgment

In addition to preparing the work schedules, the putative supervisors use independent judgment in assigning employees to work groups and making reassignments where necessary to maintain safe and efficient production.[5]

The Regional Director opines as follows with respect to the authority of Sanchez and Lal to assign employees to work groups: "While this involves some judgment on their part . . . it is of a more routine nature since they group employees to include inexperienced employees with experienced employees" (Supplemental Decision, p. 17). Contrary to the Regional Director's conclusion, assigning employees to groups based on their relative skills and experience is anything but "routine."

In *Oakwood Healthcare*, the Board specifically held that the "independent judgment" element of the Section 2(11) analysis is met when supervisors assign work based on their subordinates' relative skills and experience. In finding that charge nurses in the emergency department used independent judgment to assign nursing personnel to certain areas in the department, the Board explained, "[W]here the charge nurse makes an assignment based upon

[5] The Regional Director correctly points out that Martinez and Torres do not assign employees to work groups as do Sanchez and Lal. Such a finding, however, should not have precluded the Regional Director from finding that Sanchez and Lal are statutory supervisors based on their authority in that regard.

the skill, experience, and temperament of other nursing personnel and on the acuity of the patients, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function requiring the use of independent judgment." *Oakwood Healthcare*, 348 NLRB at 698. See also *American River Transportation Co.*, 347 NLRB 925 (2006) (individuals found to be supervisors where they have the authority to make assignments and reassignments of crew based on determination of which crew members perform best in certain positions).

Here, as in *Oakwood Healthcare*, the putative supervisors make and modify work assignments based on their subjective evaluation of each employee's respective ability as to be applied to the particular task at hand. Most telling on this issue is Lal's testimony that he and Sanchez group employees based on their "experience" (Pre. Tr. 225), which Lal later described as follows:

> Q: What do you mean by experience?
>
> A: They work better, and they know a little bit more about the materials.
>
> Q: Okay. And did you and [Sanchez], working together, decide that they were better workers and they knew more about the material?
>
> A: Yes.
>
> Q: Did you consider whether they knew how to operate different machines or just one machine?
>
> A: Yes.

(Pre. Tr. 227.)

The Regional Director inexplicably ignores the above testimony from Lal in favor of his own narrow construction of the term "experience" as simply referring to an employee's tenure. In the Regional Director's mind, then, deciding whether employee *A* has been employed longer than employee *B* requires no independent judgment. A plain reading of Lal's testimony,

however, reflects that he and Sanchez take into account much more. Lal's testimony makes clear that, at a minimum, he and Sanchez assign employees to work groups based on their own evaluation of how good the worker is, how knowledgeable he is about the materials being produced, and whether he has the skills to operate more than one machine.

That Lal's and Sanchez's decisions in making and changing group assignments involve independent judgment is further confirmed by Lal's testimony that he and Sanchez sometimes disagreed about the assignments: "Between the two of us, . . . he would have his opinion and I would have mine, and we would talk, and then we would agree on something" (Pre. Tr. 205). Of course, if preparing or modifying the schedule did not involve any independent judgment and was merely a routine task, Lal and Sanchez would not have had differences of opinions when carrying out the task. Moreover, there is no evidence that the putative supervisors consult a manager to resolve these differences when they arise.

Employee John Williams offered a concrete example of how putative supervisor Sanchez's subjective evaluation of his "experience" resulted in him being moved to an entirely different building on one occasion. Williams explained that the work in Building Number 1 is generally more difficult than the work in Building Number 3. He said that one time he was originally assigned to work in Building Number 1, but Sanchez thought that he did not have enough experience for that side, so he moved him back to Building Number 3. (Objs. Tr. 76.) There could be no more direct evidence of a supervisor's authority to "designat[e] an individual to a place (such as a location . . . .)" as this. *Oakwood Healthcare*, 348 NLRB at 689.

The Regional Director next fails to explain how the putative supervisors' role in reassigning employees when machines break down or when employees are absent does not require the use of independent judgment. Relocating employees to different jobs involves on-

the-spot decision-making to maintain safe and efficient production. It also requires the putative supervisor to quickly decide whether the employee is competent to perform the necessary task. See *NLRB v. Prime Energy Ltd. Partnership*, 224 F.3d 206, 211 (3rd Cir. 2000) ("[T]he record shows that Shift Supervisors weighed the relative urgency of immediate and unforeseen problems and directed Plant Operators to undertake necessary tasks. In so doing, they are performing a section 2(11) activity with independent judgment and without the guidance of routine.").

The record is clear (and conventional wisdom suggests) that the putative supervisors make reassignment decisions on a regular basis without any support from, or consultation with, the production managers. Again, because the Employer operates 24 hours a day using two, 12-hour shifts, there are significant periods of time when Jang and Kang are not at the plant. Thus, it is entirely unreasonable to assume that the putative supervisors in charge during those periods call Jang or Kang before moving anyone around.

Putative supervisor Sanchez added compelling insight on this issue. He testified:

Q: As a supervisor, can you move employees around from one location to another if you determine it's required?

A: Yes, I've done it.

Q: Why do you move employees from one location to another? Can you give us an example of why you do that?

A: If somebody is ill and cannot come to work, then I can move an individual to that group to complete the group.

Q: Do you have to ask anybody permission before you move employees?

A: I'll do it, but then I'll consult with my supervisor.

Q: *Can you move employees around based on your own judgment?*

A: Yes.

(Tr. 28-29) (emphasis added).

The Regional Director completely ignores the above uncontradicted evidence, which is crucial to the Section 2(11) analysis. The putative supervisors exercise independent judgment in deciding who has the requisite skills and experience to work in a particular area on a particular machine, and they make regular judgment calls on the priority and efficacy of reassigning tasks. Consequently, the Regional Director erred in failing to find that the putative supervisors have the authority to assign.

3. Authority to Responsibly Direct

The Regional Director next concludes, contrary to the hearing officer, that the putative supervisors do not "responsibly direct" employees under Section 2(11). In this regard, the Regional Director finds that "the nature of the work is routine, requiring minimal instruction, and there is insufficient evidence that the putative supervisors are held accountable for the employees' performance." (Supplemental Decision, p. 10). The Regional Director's findings and conclusions are once again clearly erroneous.

The fact that employees generally know how to perform their jobs or even that their jobs are routine in nature does not mean that their supervisors do not responsibly direct their job performance as contemplated by Section 2(11). In *Croft Metals, Inc.*, 348 NLRB 717 (2007), the Board found that lead persons at a manufacturing facility "directed" their crew members as that Section 2(11) term was defined in *Oakwood Healthcare*. The Board explained, "as part of their duties, the lead persons are required to manage their assigned teams, to correct improper performance, move employees when necessary to do different tasks, and to make decisions about the order in which work is to be performed, all to achieve management-targeted production goals." Id. at 722. Moreover, "lead persons instruct employees how to perform jobs properly,

and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filed and production completed in a timely manner." Id.

Like the supervisors in *Croft Metals*, the putative supervisors manage their assigned teams, correct improper performance, move employees when necessary, instruct employees on how to perform their jobs properly, and tell them what order to perform tasks in. Unlike the supervisors in *Croft Metals*, however, the putative supervisors direct employees using independent judgment. Lal's testimony could not have been more clear on the issue: "Yes. I tell them what they are going to do and how they are going to do it" (Pre. Tr. 222).

With reference to Lal and Sanchez, employee John Williams testified, "Well, those [Lal and Sanchez] were the only ones that would give directions and tell everybody what needs to be done" (Objs. Tr. 63-64). Employee Carlos Vicente similarly stated that he receives his orders from Lal and Sanchez (Objs. Tr. 126). Employee Edwin Vicente testified that Lal is the "person who tells others what to do at work" and that Torres would give directions when the machines were not working or when he did not have enough materials (Objs. Tr. 281, 284).

With reference to putative supervisor Martinez, a number of witnesses testified that he gives them their work orders on a daily basis. Employee Tillman testified that ever since he was hired, Martinez has been telling him what to do on the job (Objs. Tr. 132, 183). Employee Bamaca testified, "Ever since I started on my date, I have received my orders from [Martinez]" (Objs. Tr. 152), and "I have to wait to be told by [Martinez] whether I need to work at one machine or a different machine" (Objs. Tr. 176). Employee Jose Garcia confirmed that Martinez "is the one who tells us what to do" and tells the workers what they will be doing on a daily basis (Objs. Tr. 179-181). Employee Wilfredo Gonzalez testified that Martinez "tells me [what to do] and I have to take orders from him" (Objs. Tr. 203). Employee Jose Allende testified that when

he arrives to work, he waits for Martinez to "tell [him] what to do" (Objs. Tr. 224). Employee Carlos Ortiz testified that Martinez "is the one that I take my orders from" (Tr. 249).

Finally, employee Jose Perez testified that everyday when he arrives at work, he gets with Torres to get instructions on what materials were going to be used to get instructions on production (Objs. Tr. 296).

Not only do the putative supervisors tell employees what to do, they are held responsible when employees do not perform as instructed. The putative supervisors review the production reports prepared by lead people to make "sure that the operation was running as smooth as possible, trying to find a discrepancy – and if they find any issue with the report, that they do not – they'll try to conduct an investigation to make sure that what has happened, making sure what happened" (Pre. Tr. 113). The Regional Director references this fact in the Supplemental Decision, but he fails to explain why it does not prove the putative supervisors responsibly direct employees.

Finally, at the objections hearing, Sanchez and Martinez corroborated Jang's testimony that the supervisors are penalized if production is not satisfied. Sanchez testified that he received a verbal disciplinary warning because of an issue with the production and was told to put more attention to his work and to check the material (Objs. Tr. 52). Martinez testified that Jang "yelled at me many times" and threatened to discipline him because of production problems (Objs. Tr. 319, 344).

Consequently, the Regional Director erred in concluding that the putative supervisors do not responsibly direct employees under Section 2(11).

4. Authority to Discipline

The Regional Director next finds that the putative supervisors do not discipline or effectively recommend discipline as defined by the Act. Specifically, the Regional Director concludes there is insufficient evidence that the putative supervisors use independent judgment in issuing warnings to employees. (Supplemental Decision, p. 11.) The Regional Director misunderstands the facts and misapplies Board law in analyzing the evidence of disciplinary authority offered by the Employer.

The records from both hearings clearly establish that the putative supervisors have the authority to discipline employees and to effectively recommend discipline by virtue of their authority to issue written warnings. Lal testified that Jang gave the putative supervisors blank forms and instructed them to fill one out when employees did not satisfy safety or work requirements (Pre. Tr. 211). Lal admitted that the putative supervisors decide what offense has been committed and whether to issue a first warning, second warning, or final warning (Pre. Tr. 212).

Consistent with those instructions, the putative supervisors issued several warnings in the relatively brief time between when they were appointed as supervisors and when the initial hearing in this case took place. The Employer offered into evidence warnings issued by all four putative supervisors. The Regional Director, however, erroneously discounted each of those examples.

First, the Regional Director erred in dismissing the warnings Sanchez issued to employees Diego Perez, Andrez Guzman, and Humberto Alexandro in March for not properly checking product (Pre. Tr. Emp. Exh. 2, pp. 4-6; Objs. Tr. 43). According to the Regional Director, these warnings were the "strongest evidence" in support of the Employer's argument

concerning the putative supervisors' authority to discipline. Nevertheless, he states there was insufficient evidence concerning the amount of discretion, if any, Sanchez used when making the decision to issue the discipline because there was no explanation about what "checking product" involved. (Supplemental Decision, p. 19.)

Sanchez essentially testified that he issued the employees discipline because they failed to follow a work instruction that they check the product coming from the machines they were operating. It is quite obvious what that means – the employees were not ensuring a quality product was being produced. The Regional Director needed no additional details to determine that Sanchez was issuing discipline using independent judgment. What is important is that there is no evidence any other manager was involved in the discipline. See *General Die Casters,* 359 NLRB No. 7, slip op. at 45 (2012) (concluding that putative supervisor who was authorized to issue disciplinary warnings to employees he observed not following safety rules, such as not wearing a seat belt on equipment, exercised his authority to discipline employees using independent judgment where there was no credible evidence of involvement by anyone else).

The Regional Director next failed to properly analyze the warning issued by putative supervisor Lal to employee Quinones for failing to wear proper safety equipment. Lal's warning to Quinones plainly illustrates that the putative supervisors are supposed to be disciplining employees on their own. The record reflects that Jang only told Lal to issue the discipline because he (Lal) had not done so himself. Lal claims he "was in another building at the time" and "didn't realize [Quinones was] not using protection" (Pre. Tr. 210). Lal testified that he told Jang this when Jang "complained to [him] that why didn't [he] fill out a warning form for [Quinones] . . ." (Pre. Tr. 210). Clearly then, Jang instructed Lal to discipline Quinones because Jang thought Lal was not doing his job, not because Jang had independently made the decision to

discipline the employee and wanted Lal to simply convey the message to him. Cf. *PPG Aerospace Industries, Inc.*, 353 NLRB 223, 223 (2008) ("Where the putative supervisor serves as a conduit relaying assignments from management to the employees, the independent judgment standard is not met.") (citations omitted).

This was precisely the situation presented in *Metropolitan Transportation Services*, 351 NLRB 657 (2007), which the Regional Director makes a poor attempt at distinguishing. In that case, the Board disagreed with the ALJ's conclusion that an alleged supervisor was merely acting as a conduit for his manager's disciplinary decisions. A mechanic refused to change a tire on a van for the director of operations, who subsequently called the alleged supervisor's manager to complain. The manager in turn called the alleged supervisor and told him, "These guys work for you. You go out there and you tell them that they are to get the tire changed on the vehicle and if any one of them refuses you, you are to send them home or to terminate them." Id. at 660. The ALJ found this insufficient to demonstrate independent judgment on the alleged supervisor's part. The Board rejected this conclusion, opining as follows:

> It may well be that [the manager] told [the alleged supervisor] what to do vis-à-vis the mechanic who refused to change a tire, but [the manager] acted because [the alleged supervisor] had failed to act. Moreover, in chastising [the alleged supervisor] for his failure to exercise disciplinary authority . . . [the manager] made clear that [the alleged supervisor] was empowered to impose differing levels of discipline. Absent any suggestion that [the alleged supervisor] should consult with [the manager] (or anyone else) before acting, the determination of what discipline to impose would necessarily depend on [the alleged supervisor's] independent judgment of what the situation warranted.

Id. at 660 (citing *Oakwood*).

According to the Regional Director, *Metropolitan Transportation* is distinguishable because in that case "the putative supervisor had been recently promoted into a maintenance manager position and . . . the Employer clearly communicated to the putative supervisor that in

his new position that he had the authority to 'send employees home, write them up, or terminate them' if they did not follow his directives" whereas in this case the putative supervisors "at most, were told they could recommend discipline and issue warnings" (Supplemental Decision, p. 19). While the Regional Director correctly points out that the alleged supervisor in *Metropolitan Transportation* may have had more authority to discipline employees than the putative supervisors in this case, that fact does not alter the analysis. The Regional Director cites no authority for his conclusion that is contrary to existing Board law.

Metropolitan Transportation is significant because the alleged supervisor in that case, like Lal, failed to do his job, which was to discipline employees when they violate a work rule. Like the manager in *Metropolitan Transportation*, Jang became upset when he learned Lal had not issued a disciplinary warning to Quinones.

The Regional Director next inexplicably disregards evidence showing that Martinez exercised independent judgment in disciplining employee Jose Allende for not wearing a safety mask (Objs. Tr. 132, 153, 181, 225-226, Emp. Exh. 2). Allende and three co-workers all testified about Martinez issuing Allende the warning, and none of them testified that Jang was around or otherwise involved (Objs. Tr. 132, 153, 181, 225-226). Moreover, Martinez's name is clearly on the discipline, and Jang's is not (Objs. Tr. Emp. Exh. 2).

Martinez is the only witness who testified about Jang's involvement in the Allende incident. His testimony on the issue, however, was inconsistent and dodgy. More importantly, the hearing officer specifically discredited Martinez as a witness:

> I find that his testimony is not credible. In this regard, when questioned about his authority within the plant, he became defensive, and at times during his testimony, he stood and appears to argue with the Employer's officials who were present in the hearing room. Moreover, many of his responses to questions on direct and cross were evasive and he failed to answer the question.

(Hearing Officer's Report, p. 25). For the Regional Director to ignore the hearing officer's credibility resolution in this regard is improper.

Finally, the Regional Director erred in relying on Torres's testimony about issuing a written warning to employee Gabriel Rodriquez in April for failing to follow proper procedure (Objs. Tr. 394-395, Emp. Exh. 6). The written warning is admittedly signed by Torres, but he claims to have no recollection of it (Objs. Tr. 395). He surmised, "I mean, it could be that Mr. Kang filled them out and I signed them" (Objs. Tr. 396). This is insufficient evidence for the Regional Director to conclude that Torres was merely acting pursuant to Kang's instructions. There is simply no credible testimony to rebut the clear documentary evidence establishing that Torres disciplined Rodriquez on his own accord for failing to follow proper procedure.

Consequently, the Regional Director erred in failing to find that the putative supervisors do not possess the authority to discipline employees or effectively recommend discipline under Section 2(11).

5. Authority to Reward

As a final matter, the Regional Director concludes that the putative supervisors do not have the authority to reward or effectively recommend rewards to employees by virtue of their involvement in the raise process. In reaching this conclusion, the Regional Director failed to consider substantial evidence in the record.

Vice President Oh testified that the putative supervisors are given a list of employees to evaluate in their department twice a year. The putative supervisors are asked to indicate on the list beside each employee's name whether they recommend that the employee receive a raise and, if so, how much. The putative supervisors base their recommendations on their perception of each employee's performance. (Pre. Tr. 51.) Oh explained that raises are not issued "across-

the-board," but instead are only given to "certain employees" based on input from the putative supervisors and the production managers (Pre. Tr. 90).

Production Manager Jang confirmed Oh's testimony about the putative supervisors' role in the raise process. Jang explained that the putative supervisors were asked their opinion on the amount of the raises, and Sanchez, for example, came up with $0.50 himself (Pre. Tr. 161-162). Jang did not give the putative supervisors any established guidelines that govern raises; he simply told them to exclude new employees (Pre. Tr. 162).

Sanchez testified at length about his involvement in the raise process. He explained that he recommended raises based on whether the employee was doing a good job, was responsible, and "how much that person gives of themselves" (Objs. Tr. 34, 52). Sanchez further explained that he has recommended that certain employees not receive raises in the past, and that management has followed those recommendations (Objs. Tr. 52).

Employer's Exhibit 4 at the pre-election hearing is a copy of the raise evaluation list completed by putative supervisors Sanchez, Lal, and Martinez in April (Pre. Tr. 53). Those recommendations had not yet been reviewed by management at the time of the hearing; however, similar recommendations were reviewed in October 2012, and the record reflects those recommendations were followed 90% of the time (Pre. Tr. 147-148, 162).

The Regional Director concludes that the evidence concerning the role played by putative supervisors Lal, Sanchez, and Martinez in the granting of bi-annual pay raises is insufficient to establish that they have the authority to effectively reward employees. Specifically, he find that the Employer failed to produce sufficient evidence to establish what happened to the employee list of raises once the putative supervisors give it to upper-level managers. (Supplemental Decision, p. 20). On the contrary, the Employer offered substantial evidence on this issue.

Jang testified that once he receives the putative supervisors' recommendations, he offers his own opinion and then submits it "to the management" (Pre. Tr. 162).[6] Jang explained that he bases his opinion on, for example, an employee missing a day of work (Pre. Tr. 163). Oh testified that once he receives the recommendations, he simply ensures they are in line with what the Employer is financially able to pay (Pre. Tr. 54). While there is a limited sample size because management has only considered one list of recommended raises since the putative supervisors became involved in the process, that sample indicates that the putative supervisors' recommendations were followed 90% of the time (Pre. Tr. 148, 162).

Accordingly, the Regional Director erred in failing to find that the putative supervisors possess the authority to reward employees or effectively recommend rewards under Section 2(11).

B. THIRD-PARTY CONDUCT

It is well-established that elections are not only invalidated because of the conduct of the parties and their agents but also because of third-party conduct which interferes with the right of employees to a free and uninhibited choice in the selection of a bargaining representative to such an extent that it renders "a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *U.S. Electrical Motors*, 261 NLRB 1343 (1982); *O'Brien Memorial*, 310 NLRB 943 (1993). Employees of an employer may be considered "third-parties" for purposes of determining whether their conduct interfered with a free election. See, e.g., *Q.B. Rebuilders*, 312 NLRB 1141 (1993) (election set aside based on conduct of employee who was designated member of union's in-plant organizing committee); *Steak House Meat Co.*, 206 NLRB 28 (1973) (election set aside based on employee statements to co-workers). Here, even if the putative supervisors are not Section 2(11) supervisors, their conduct as third-parties was "so aggravated

[6] It is clear from the record that Jang was referring to Vice President Oh.

as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB at 803. The Regional Director totally ignored this issue in the Supplemental Decision.

In assessing the seriousness of third-party threats, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election. Id. Applying these facts, the Board should conclude that the putative supervisors' conduct – even if they are not deemed Section 2(11) supervisors – warrants setting the election aside.

First, regarding the nature of the putative supervisors' conduct, the record establishes that, inter alia, putative supervisors threatened employees with discipline/discharge if they did not vote for the Union and/or if the Union did not win. Employee Wilfredo Gonzalez reports to putative supervisor Martinez (Objs. Tr. 203). He testified that Martinez told him and approximately six co-workers that the Union "was best for all and that *if we didn't vote for the Union, the Company would let us go*" (Objs. Tr. 211 (emphasis added)).

Employee Carlos Vicente testified that he approached a group of employees putative supervisor Lal was talking to and heard Lal mention "that if the employees did not sign the union form, that basically was going to make it a lot easier for the Company to be able to let employees go" (Objs. Tr. 95).

Employee Ignacio Bamaca testified that putative supervisor Martinez told a group of about six or seven employees on their break that "if we supported the Company, that there could

be a possibility of them letting us go and that we had to think about it well" (Objs. Tr. 167-168). Bamaca felt "a lot of pressure" after that comment, in "fear of losing [his] job" (Objs. Tr. 168). He added that "we even talked about putting in applications at other companies" (Objs. Tr. 168). Bamaca further testified that minutes before it was his crew's turn to go vote, Martinez told the group of about eight employees to "think well," which he inferred meant that if they voted for the Company, "things were going to go bad" (Objs. Tr. 167).

Employee James Hammond similarly testified that Martinez made "a smart comment that if the Union win[s], then someone's probably [going to] be fired" (Objs. Tr. 139). Hammond stated this took place after the pre-election hearing but prior to the election (Objs. Tr. 139).

Second, the record establishes that the putative supervisors' threats encompassed virtually the entire bargaining unit. Not only were the threats discussed above made directly to several groups of between 6-8 employees, the evidence is that the putative supervisors attended and spoke at several union meetings at which groups of 20 employees were in attendance. Moreover, at least one putative supervisor wore a Union t-shirt and hat, which "everybody that works in the building" could see (Objs. Tr. 414).

Third, the record establishes that the threats of discipline/discharge were widely disseminated within the unit. Again, employee Bamaca explained that he "felt a lot of pressure" and "felt a lot of . . . fear of losing [his] job" (Objs. Tr. 168). He then stated, "I mean *we're talking with other co-workers* . . . we even talked about putting in applications at other companies" (Objs. Tr. 168 (emphasis added)).

Fourth, the record establishes that the putative supervisors were capable of carrying out the threats, and it is highly likely the employees acted in fear of that. As discussed above, the putative supervisors have the authority to discipline employees, and that discipline can lead to

termination. Even if the authority to discipline/discharge is not sufficient for purposes of establishing supervisory status under Section 2(11), it is nonetheless important in determining whether threats of discipline/discharge constitute objectionable third-party conduct, particularly where employees reasonably believed their putative supervisor had the authority to discipline/terminate them.

Employee Jose Allende, for example, testified:

Q. And do you know whether David Martinez can fire you?

A. Yes.

Q. How do you know?

A. Because he's a supervisor.

(Objs. Tr. 244).

Similarly, employee Jose Perez testified:

Q. Now, you said something about being able to discipline people. How do you know that [Torres] or [Sanchez] can discipline people?

A. Because Jose Lal was able to fire someone. He fired someone without consulting a manager.

Q. When did this happen?

A. It's been about seven months now. I mean I don't remember the exact date, but it's been a while.

Q. Do you know who it was that he let go?

A. Yeah, I mean I, you know, someone and he was let go, and the next day we didn't see him.

Q. Did you know his name?

A. Not exactly, because he worked in a different area.

Q. Was that in the area where Jose is at?

A. Yes, the area of Jose Lal.

(Objs. Tr. 292-293).

Additionally, the record reflects that a number of employees have either been issued written warnings from putative supervisors or have witnessed their co-workers receive warnings (Objs. 86-87, 132, 153-154, 181, 225-227, 249-250). Clearly then, employees at least reasonably believed they could be disciplined/discharged by the putative supervisors.

Finally, the record establishes that the threats were repeated as late as the day of the election (Objs. Tr. 167, 213).

The Regional Director's failure to consider and apply the third-party conduct test was clearly erroneous. As the Board in *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1954), explained: "The election was held in such a general atmosphere of confusion and fear of reprisal as to render impossible the rational, uncoerced selection of a bargaining representative. It is not material that the fear and disorder may have been created by individual employees and nonemployees and that their conduct cannot be attributed either to the Employer or to the unions. The important fact is that such conditions existed and that a free election was thereby rendered impossible."

VII. CONCLUSION

The Regional Director ignored and misconstrued substantial record evidence and established Board precedent concerning the putative supervisors' authority to assign, responsibly direct, discipline, and reward employees (or to effectively recommend such action). As a result, he turned a blind-eye to the putative supervisors' threatening and coercive conduct that permeated the workplace throughout the campaign. The Regional Director should have determined that the putative supervisors were statutory supervisors, which would have then led

him to conclude, in agreement with the hearing officer, that their prounion conduct up to and on the day of the election tainted the results in such a manner as to warrant dismissal of the petition or, at a minimum, a rerun election. Even absent a finding that the putative supervisors were statutory supervisors, however, the Regional Director should have found that their threatening conduct as third parties was so egregious that a free election was impossible. The Board should grant the Employer's request for review to correct these errors and preserve the employees' right to vote in an election free from undue coercion and intimidation.

Respectfully submitted,

FISHER & PHILLIPS LLP

s/ Jonathan P. Pearson
Jonathan P. Pearson, Esquire
Reyburn W. Lominack, III, Esquire
Santiago Alaniz, Esquire
1320 Main Street, Suite 750
Columbia, South Carolina 29201

Telephone: 803.255.0000
Facsimile: 803.255.0202
jpearson@laborlawyers.com
rlominack@laborlawyers.com
salaniz@laborlawyers.com
Attorneys for Employer

September 27, 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

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

CERTIFICATE OF SERVICE

I, Jonathan P. Pearson, do hereby certify that I have on this 27th day of September, 2013, served a copy of Employer's Request for Review of Supplemental Decision and Certification of Representative to the Executive Secretary upon the following by email:

James E. Sanderson, Jr.
President-USW Local 7898
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and
Service Workers International Union, Local 7898
PO Box 777
Georgetown, SC 29442-0777
uswa7898@gmail.com

Dionisio Gonzalez, Organizer
United Steelworkers
International Union
111 Plaza Dr
Harrisburg, NC 28075-8441
dgonzalez@usw.org

Norman J. Slawsky, Esquire
Quinn, Connor, Weaver, Davies & Rouco, LLP
3516 Covington Hwy
Decatur, GA 30032-1850
nslawsky@gmail.com

Keren Wheeler, Esquire
Assistant General Counsel
Five Gateway Center
Room 807
Pittsburgh, PA 15222
kwheeler@usw.org

Claude T. Harrell Jr., Regional Director
Region 10, Subregion 11
National Labor Relations Board
4035 University Parkway, Suite 200
Winston-Salem, NC 27106

s/Jonathan P. Pearson
Jonathan P. Pearson