

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region Twenty Seven**

WINCO FOODS, LLC,

Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL 483,

Petitioner

and

WINCO FOODS #91 BOISE DISTRIBUTION CENTER
EMPLOYEE ASSOCIATION

Intervenor

Case 27-RC-109711

**HEARING OFFICER’S REPORT AND RECOMMENDATIONS TO THE BOARD
ON OBJECTION TO CONDUCT AFFECTING RESULTS OF ELECTION
AND CHALLENGED BALLOTS**

This report contains my findings and recommendation regarding an objection filed by the Petitioner, International Brotherhood of Teamsters Local 483, to conduct allegedly affecting the results of the election and ten determinative challenged ballots. The Petitioner’s objection alleges that the Board agent conducting the election failed to maintain the integrity of the ballots and ballot box during the election, that this conduct interfered with employee free choice in the election, and that the election should therefore be set aside. The ten challenged ballots were challenged on the basis of statutory exclusions (supervisory and guard status) and confidential employee status.

Upon the entire record in this case,¹ and from my careful observation of the demeanor of the witnesses while testifying under oath, I recommend that Petitioner's Objection No. 1 be overruled. As to the determinative challenged ballots, I find that the record evidence establishes DC Assistant Shift Supervisors Patrick Douglass, Rodney Ricks, and Jason Munden, and DC Assistant Shift Supervisor/Lead Inventory Control Scott Renberg possess notable statutory criteria for supervisory status set forth in Section 2(11) of the Act. Therefore, I recommend that the challenge to those voters' ballots be sustained. I find that DC Security Gate Guards David Sweet, Joyce Higman, Jeffrey Howard, and Alejandro Chavez are not guards as defined by Section 9(b)(3) of the Act, therefore I recommend that the challenge to their ballots be overruled and their ballots be opened and counted. I find that HR Assistant Cheryl Berg is not a confidential employee, therefore I recommend that the challenge to her ballot be overruled and that her ballot be opened and counted. Finally, due to the parties' stipulation on the record as to the eligibility of Receptionist Catherine Dubish and agreement that her ballot should be counted,² I recommend that the challenge to her ballot be overruled and her ballot be opened and counted.

I. PROCEDURAL HISTORY

A certification petition was filed on July 23, 2013,³ by International Brotherhood of Teamsters Local 483 ("Petitioner"). Shortly thereafter, WinCo Foods #91 Boise Distribution Center Employee Association ("Intervenor") made a motion to intervene. A Stipulated Election Agreement executed by the parties was approved by the Regional Director on August 8 and an

¹ Permission was granted by the undersigned for the filing of briefs. Petitioner and Employer subsequently filed briefs, which I have duly considered in formulating my recommendations.

² Tr. 120: 8-20.

³ Unless otherwise indicated, all subsequent dates are in 2013.

election by secret ballot was conducted among certain employees of WinCo Foods, LLC (“Employer”) on August 28 and August 29. Specifically, the collective-bargaining unit contained in the Stipulated Election Agreement is as follows:

Included: All full-time and regular part-time warehousemen, drivers, office/support Class I employees (including janitors, sanitors, recoup, and truck cleanout), office/support Class II employees (including inventory control clerks, maintenance clerks, transportation clerks, shop utility), office/support Class III employees (including administrative assistants, billing/receiving clerks, maintenance tech, dispatchers), office/support Class IV employees (including maintenance specialists) employed by the Employer at its facility located at 2390 E. Freight St., Boise, ID 83716.

Excluded: All professional employees, guards, and supervisors as defined in the Act.

As the eligibility of certain classifications remained in dispute, the parties agreed in the Stipulated Election Agreement that these employees would vote subject to challenge, as follows:

*The following classifications are neither included nor excluded from the appropriate collective bargaining unit. They may vote in the election subject to challenge and their status can be determined subsequently, as appropriate under Board law, including through agreement of the parties, the challenged-ballot procedure, or a unit clarification petition:

Security and lead security employees; receptionists; lead inventory control; warehouse assistant supervisors; HR assistants.

The results of the election are set forth in the Tally of Ballots that issued at the conclusion of the election.⁴

On August 5, Petitioner timely filed three Objections to conduct of the election and/or to conduct affecting the results of the election. Thereafter, on September 19, the Regional Director

⁴ Approximate number of eligible voters.....	218
Number of void ballots.....	0
Number of votes cast for PETITIONER.....	92
Number of votes cast for INTERVENOR.....	99
Number of votes cast against participating labor organizations.....	3
Number of valid votes counted.....	194
Number of challenged ballots.....	10
Number of valid votes counted plus challenged ballots.....	204

for the Twenty Seventh Region issued a Report on Determinative Challenges, Objections, Order Directing Hearing and Notice of Hearing recommending that Petitioner's Objections 2 and 3 be overruled and ordering that a hearing be conducted at a location to be determined in Boise, Idaho before a duly designated Hearing Officer for the purpose of receiving testimony relative to the determinative challenges and Petitioner's Objection 1. In her September 19 Report and Order, the Regional Director directed the Hearing Officer to prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues.

On September 20, the Regional Director issued an Order Setting Location of Hearing at City Hall, Council Chambers, in Boise, Idaho. On September 24, the Regional Director issued an Order Rescheduling Hearing to October 3 at Ada Community Libraries in Boise, Idaho. On October 24, the Regional Director issued an Order Resetting Hearing which reset the Hearing previously scheduled for October 3, but taken off calendar due to a lack of appropriations, for November 13 at City Hall in Boise, Idaho. On October 30, the National Labor Relations Board issued a Decision and Order adopting the Regional Director's findings and remanding the proceeding consistent with her report.

Accordingly, on November 13, a hearing was held in Boise, Idaho, before the undersigned Hearing Officer duly designated for the purposes of conducting such hearing. The Employer, Petitioner and Intervenor were represented at the hearing and had full opportunity to call, examine, and cross-examine witnesses, and to introduce evidence regarding the issues.⁵

⁵ Prior to the Hearing, Employer made a motion to revoke a subpoena by Petitioner, which was deferred to the Hearing Officer by the Regional Director for ruling. During the Hearing, Employer submitted documents to Petitioner in response to the subpoena. Thereafter, the parties stipulated on the record that the production response was satisfactory.

II. THE OBJECTION

Pursuant to Petitioner's remaining Objection No. 1, the Regional Director's Report and Order directed that the hearing be held with respect to Petitioner's allegation that the Board Agent who conducted the election failed to maintain the integrity of the ballots and ballot box during the hiatus in voting between August 28 and August 29; specifically, the observers were advised by the Board agent that the ballot box became unsealed at a time when the observers were not present, creating an appearance of irregularity which affects the validity of the election.

III. BURDEN OF PROOF

"Representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). The Board's standard for evaluating objectionable conduct is whether such conduct reasonably tends to interfere with the employees' exercise of their free choice; the test is objective. *Cambridge Tool & Mfg. Co., Inc.* 316 NLRB 716 (1995). The burden is on the objecting party to prove its case. *Waste Management of Northwest Louisiana, Inc.*, 326 NLRB 1389 (1998). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993) citing *NLRB v. Chicago Tribune Company*, 943 F.2d 791, 794 (7th Cir. 1991). To meet the burden, the objecting party must present specific, detailed evidence in support of its position; general conclusory statements by witnesses are not sufficient.

IV. FINDINGS OF FACT

Pursuant to the parties' Stipulated Election Agreement (Joint Exhibit No. 1), a two-day election was held on August 28 and August 29, 2013 with polling periods from 1:30 p.m. to 3:30 p.m. and 9:30 p.m. to 11:00 p.m. each day, for a total of four voting sessions. (Tr. 14: 1-5). The election was conducted by Field Attorney Kristyn Myers ("Myers"), who was called by Counsel for the Regional Director to testify at the hearing. Myers testified that she conducted the election during all four voting sessions. (Tr. 15: 6-8). During the pre-election conference, Myers constructed the ballot box in the presence of the party representatives and their observers. (Tr. 15: 15-16). The ballot box was a rectangular, deconstructed packing box. (Tr. 15: 17-18). To construct the box, Myers folded in the sides of the box and, where the sides met in the middle, Myers used masking tape to seal the flaps. (Tr. 15: 18-21). She also extended the tape so that it covered the corners on the top and bottom of the box. (Tr. 15: 21-22). Myers testified that she has run 40 to 50 elections since she began working for the NLRB and this was the same method she used in any other election she had previously run. (Tr. 14: 16-18; 15: 23-25, 16: 1). No objections were raised by any party regarding the construction of the ballot box during the pre-election conference. (Tr. 16: 20-23).

Myers testified that nothing unusual happened to the box during the time of the first voting session. (Tr. 17: 2-4). At the end of the first voting session, Myers sealed the ballot box by placing masking tape over the slit on the top of the box where ballots are deposited. She then directed the parties' observers to sign across the masking tape covering the slit. Myers also directed the observers to sign over the masking tape covering each side of the box. (Tr. 17: 7-11). After the voting session, Myers placed the ballot box in the trunk of her car, which was locked, and then brought it into her hotel room, which she also kept locked. (Tr. 17, 14-23).

Myers then brought the ballot box back to the polling place with her for the second voting session, at which time the seal was removed in order for voters to be able to place their ballots in the ballot box. (Tr. 18: 7-9). At the end of the second voting session, Myers placed a new piece of masking tape over the opening in the box and again instructed the parties' observers to sign over the seal. (Tr. 18, 9-11). Once the ballot box was sealed, the observers departed the polling area, while Myers took down the voting booth. (Tr. 21, 1).

After packing up the voting booth, Myers went to pick up the ballot box to leave. As she placed her thumbs on either side of the box, the tape that covered the long side of the box ripped down the middle. (Tr. 18: 16-18). Myers testified that the length of the rip was the majority of the length of the box; however, it did not split all the way open, as there was also masking tape covering each of the corners. (Tr. 19: 5-7). Because the tape over the corners was still intact, the flaps did not open at all. (Tr. 8-11). Myers testified that as soon as this happened, she went to her election kit, took clear packing tape and taped over the rip. (Tr. 19: 13-14). The amount of time that elapsed from the moment Myers observed the tape splitting to the moment that she covered the rip with clear packing tape was approximately 30 seconds. (Tr. 19: 23). There were no witnesses, as the observers had already departed. (Tr. 21: 6).

When asked what led to the tape splitting, Myers testified that her opinion was only conjecture, but it could have been because the box was full, as the majority of the voters came to vote within the first two polling periods, or because it was a hot day and the box had been in the trunk of her car. (Tr. 20, 1-5).

Myers credibly testified that no ballots fell out of the box, and she checked the surrounding area to make sure of that; no ballots protruded or stuck outside the box from the area

where the tape ripped; she did not take any ballots out of the box; and she did not put any ballots into the box. (Tr. 20: 6-21).

After repairing the ballot box, Myers placed it again in the locked trunk of her car and then brought it into the hotel room, which was also locked. (Tr. 21, 18-25). The box remained in her locked hotel room until the next day, when she returned it to the locked trunk of her car and returned to the voting place for the third voting session. (Tr. 22: 2-10).

Myers had previously instructed the parties' observers to arrive at the polling session about 15 minute before it started. (Tr. 22: 17-18). Thus, prior to the start of the third polling session, the observers were there. Myers showed the three observers the ballot box, where it had ripped, and where she had put the clear packing tape over the rip. (Tr. 23, 1-3). Myers informed the observers that the tape had ripped, that this had never happened to her before, and that they should inform their respective representatives that the tape had ripped. (Tr. 23: 5-9). Myers constructed a new ballot box for the third session. It was constructed in the same manner as previously described and the observers watched the construction of the new ballot box. (Tr. 22: 19-21). During the third polling period, the first ballot box was kept on a table a short distance from the observers. The second ballot box was kept on a different table for voters to place their ballots into it. (Tr. 23: 21-24). Both boxes were visible to Board Agent Myers and the observers throughout the polling period. (Tr. 24: 1-5).

At the end of the third polling session, Myers sealed the second ballot box by placing masking tape over the slit and again instructing the observers to sign across the seal. (Tr. 24: 11-12). She then placed both boxes in her locked trunk and returned to the hotel, where they remained in her locked hotel room until the fourth and final voting session. (Tr. 24: 13-17). During the fourth voting session, Myers opened the second ballot box and used it to collect

ballots from voters. The first ballot box remained sealed and was placed on a table a short distance from the observers. (Tr. 24: 23-25).

Approximately five minutes after the close of the fourth and final polling session, the party representatives returned to the polling area. (Tr. 25: 18-20). Myers placed both ballot boxes on the table, where she opened the boxes in front of the parties and counted the ballots. (Tr. 26: 1). Representatives for all parties were present. (Tr. 26: 3).

Myers testified that prior to the hearing, she reviewed the *Excelsior* list of eligible voters (Joint Exhibit No. 4) to determine the total number of voters. She determined that the number of voters checked off from that list was 204,⁶ the same number of total votes reflected in the Tally of Ballots (Joint Exhibit No. 3; Tr. 27: 1-2, 12-18). Myers testified that she is one hundred percent certain the ballot boxes contained all the ballots that were cast and only the ballots that were cast. (Tr. 28: 5, 8-9).

No other witnesses were called by any other party to testify regarding the Objection, thus Myers' testimony remains uncontested.

V. FACTUAL AND LEGAL ANALYSIS

I find that Field Attorney Kristyn Myers testified credibly during direct examination and on cross-examination by Intervenor and Petitioner regarding the relevant events which expired during the election.⁷ Based on the record evidence, I find there is no merit to Petitioner's

⁶ Myers also described the observers' method for checking off voters, with either check marks or x's, depending on the observer. (Tr. 28: 22-25; Tr. 29: 3-9).

⁷ Petitioner, the Objecting Party, did not call any witnesses or offer any evidence to contradict the testimony of the Board Agent. At the conclusion of the hearing, Petitioner refused to take a position on the Objection or state whether its position had changed after hearing evidence on the Objection. Additionally, while Petitioner submitted a brief in support of its position on the challenged ballots, Petitioner again failed to take a position regarding the Objection, or even to mention the Objection.

Objection that the integrity of the ballot box was compromised such as to require a re-run election.

The Board has maintained a policy to set aside elections where the behavior of its agents during the representation process constitutes such a serious irregularity as to raise doubts as to the integrity and secrecy of the election, even if the integrity of the box was not in fact compromised.⁸ The facts of the instant case do not meet this standard. The evidence establishes that following the close of the second voting session, upon packing up the polling booth and preparing to depart the area, when the Board agent picked up the ballot box, the masking tape on one side of the box ripped. The flaps of the box did not open, as the masking tape covering the top and bottom corners remained intact. No ballots protruded from the box or fell out of the box and no ballots were inserted into the box. The tape was only torn for a matter of 30 seconds while the Board agent retrieved clear packing tape to cover the ripped masking tape, after which it was immediately repaired. There were no other persons in the area. Then, prior to opening the next polling session the following day, the Board agent showed the box to all three parties' observers, explained what happened, and told them to inform their respective representatives. No party raised any objections at the time, including when the Board agent opened the boxes to complete the Tally of Ballots.

The Board does not set aside every election that contains a mere possibility of irregularity. In *Capitan Drilling Co.*, 167 NLRB 144 (1967), enf'd 408 F.2d 676 (1969 6th Cir.),

⁸ Cases in which the Board has set aside an election due to an appearance of "irregularity": *Tidelands Marine Services, Inc.*, 116 NLRB 1222 (1956) (Board agent failed to seal the ballot box between polling periods on different days and carried the unsealed box with him in the interim, while away from the voting place, and while being transported by the Employer or the Intervenor under conditions permitting access to the ballot box by their representatives); *Athbro Precision Engineering Corp.* 166 NLRB 966 (1967) (Board agent seen by an employee drinking beer with a Union representative between polling periods).

the Employer objected to the Board-conducted election on the grounds that the ballot boxes were not properly sealed. Specifically, the Company alleged that one of the seams on the ballot box was not sealed with masking tape and thus there was enough space to insert or remove ballots. As with the instant case, there were no allegations that the Board Agent acted improperly or that interested persons actually removed or inserted ballots into the box, or that the ballot box had been left unattended for any period of time. Accordingly, the Board adopted Regional Director's recommendation that the objection be overruled.

Based on the foregoing, I recommend that the objection be overruled.

VI. THE CHALLENGES

Pursuant to the parties' agreement in the Stipulated Election Agreement that certain classifications of employees would vote subject to challenge, and the resulting ten determinative challenged ballots, the Regional Director's Report and Order directed that the hearing be held to resolve the question of the eligibility of those ten challenged voters. Following the parties' resolution of the eligibility of Receptionist Catherine Dubish, the nine remaining voters' eligibility was challenged on the basis of statutory supervisor status (four employees), guard status (four employees), and confidential status (one employee). Hereafter, this report will provide background information regarding the Employer's operations, followed by the legal standard and my finding of fact for each category of the challenges.

VII. FACTUAL BACKGROUND

A. EMPLOYER'S OPERATIONS

WinCo Foods, LLC is engaged in the business of distributing groceries to grocery stores throughout the western United States. (Tr. 37: 21-23). WinCo operates four distribution centers.

(Tr. 37: 25). The distribution center (“DC”) at issue in this proceeding is located in Boise, Idaho. (Tr. 37: 1-5). The Boise DC opened in 2009. (Tr. 36: 24). It employs approximately 155 warehousemen, 55 drivers, and has a management team of about 20. (Tr. 37: 16-17). The Boise DC receives, stores, and packs perishable and nonperishable grocery items. It also stages the products, fills the trucks, and distributes the products to twenty-two grocery stores in the states of Washington, Idaho, Nevada and Utah. (Tr. 38: 4-16, 23-25).

B. COLLECTIVE BARGAINING HISTORY

WinCo and the Intervenor to the instant proceeding are signatory to a collective-bargaining agreement (“CBA”) effective October 17, 2010 through October 15, 2016. (Petitioner Exhibit No. 1). The CBA identifies the Intervenor as the collective bargaining representative of the employees at the Boise DC who are covered by the Wage Summary in the agreement. According to Warehouse Manager Don Kellogg, all hourly employees have been considered in the historical bargaining unit from the start. (Tr. 74: 7-9).

VIII. CHALLENGES BASED ON SUPERVISORY STATUS

Employer asserts that Boise DC Assistant Shift Supervisors Patrick Douglass, Rodney Ricks, and Jason Munden are statutory supervisors and thus ineligible to vote. Petitioner and Employer both assert that Assistant Shift Supervisor/Lead Inventory Control Scott Renberg is a statutory supervisor and ineligible to vote. Intervenor asserts the DC Assistant Shift Supervisors are not statutory supervisors and thus their ballots should be opened and counted.

A. THE LEGAL STANDARD

Supervisors are statutorily excluded from representation under the Act. Section 2(3) of the Act states that the term “employee” shall not include any individual employed as a supervisor

and Section 14(a) provides that no employer subject to the Act shall be compelled to deem statutory supervisors as employees for the purpose of the Act related to collective bargaining.

Section 2(11) of the Act defines supervisors as follows:

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

The traditional three-part test for determining supervisory status used for all employees is: (1) whether the employee has the authority to engage in any one of the twelve criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994). Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if the authority has not yet been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866 (2001). A lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000).

**B. DC ASSISTANT SHIFT SUPERVISORS
(ANDY PATRICK DOUGLASS, RODNEY RICKS, AND JASON MUNDEN).**

Andy Patrick Douglass, Rodney Ricks and Jason Munden are employed by the Employer as Assistant Shift Supervisors. They work in one of two dock offices at the Boise DC, which are connected to the warehouse and approximately 3,300 square feet in size. (Tr. 41: 5-10). The

warehouse is approximately 700,000 square feet. (Tr. 41: 11). The dock offices are located on each side of the warehouse. Warehouse Manager Don Kellogg testified that for cross-training purposes, Assistant Shift Supervisors are rotated every six months to work in the other dock office. (Tr. 76: 9-15). Assistant Shift Supervisors have keys to the facility, as do all managers. (Tr. 57: 5-8). Andy Douglass has held the position of Assistant Shift Supervisor since 2009, Jason Munden has held the position since December 27, 2012, and Rodney Ricks has held the position for about two years. (Tr. 40: 9, 13, 17). They all report to Warehouse Manager Don Kellogg, but they also report directly to a shift manager and a salaried supervisor. (Tr. 42: 9-11).⁹ They each report to a different shift manager. (Tr. 42: 14). Andy Douglass works the evening shift (8:30 p.m. to 6:00 a.m.). Jason Munden works in perishables on the day shift (6:00 a.m. to 2:30 p.m.). (Tr. 41: 24-25). Rodney Ricks works the swing shift (2:30 p.m. to 11:00 p.m.). (Tr. 42: 5-6). While the Assistant Shift Supervisors are working, the shift manager is usually (but not always) on the floor or in the dock office. (Tr. 42: 17-18; 53: 23-24).

Assistant Shift Supervisors are responsible for the coordination, supervision, and support of activities to employees engaged in receiving, transporting, stacking, order filling, shipping, and maintaining product in warehouse. (Tr. 44: 13-18; Employer Exhibit No. 1).¹⁰ In this capacity, Andy Douglass provides supervision and support to up to 17 employees; Jason Munden provides supervision and support to up to 42 employees; and Rodney Ricks provides supervision and support to up to 32 unit employees. (Tr. 42: 22-24; 43: 1-5).

⁹ Kellogg testified that all employees at the Boise DC report to him. (Tr. 39: 5).

¹⁰ Warehouse Manager Kellogg testified, "Basically, their entire eight and a half or 9-hour window of their job duties, that's what they do; they support all the activities that happen, whether it's transportation, whether it's receiving inbound-outbound, forklifting, loading, selecting." (Tr. 44: 21-25).

Authority to responsibly direct the workforce and assign work

Assistant Shift Supervisors direct and assign “bid” employees, hourly employees whose jobs are included in the seniority roster. Approximately 123 - 125 jobs out of 156 jobs in the warehouse pool are “bid jobs.” (Tr. 67: 21-25; 68: 1-4). Warehouse Manager Don Kellogg testified that Assistant Shift Supervisors assign openings in bid jobs to hourly employees in order of seniority. During cross-examination by Intervenor, when asked if a bid employee would just “show up” at the start of their shift and then go to their bid-assigned job, Warehouse Manager Kellogg affirmed this but also testified that the Assistant Shift Supervisors would also seek to fill any openings in jobs in the warehouse pool:

A: Yeah, so to speak, or an assistant supervisor could be standing there, if we had jobs that were open, and they could be asking them do they want to forklift instead of select or do they want to load instead of, you know, do something else if they're just in the warehouse pool. (Tr. 68: 5-11).

Their job description states that Assistant Shift Supervisors are also responsible for coordinating the reassignment of job responsibilities, scheduling of overtime hours, and addressing productivity issues as they arise. (Employer Exhibit No. 1). On direct-examination, Warehouse Manager Kellogg was asked to describe this job function. He explained that if employees such as pickers or selectors got ahead in their work, Assistant Shift Supervisors might shift that labor to the other side of the facility or allow employees to go home early:

A: If you were out there and we were picking and we got, you know, guys who are picking at 102, 103, 104 '5 percent, and the selectors got ahead, then we might shift that labor to the other side of the facility. We might allow people to go home early, et cetera.

Q: Okay. And they [Assistant Shift Supervisors] make that determination based on what's in front of them...

A: Absolutely. (Tr. 47: 20-25; Tr. 48: 1-2).

Warehouse Manager Kellogg also explained the Assistant Shift Supervisors' role in scheduling overtime. He testified that on a daily basis, Assistant Shift Supervisors schedule overtime hours based on what the needs are. (Tr. 48: 8-10). As for how they go about scheduling overtime, Kellogg testified that overtime is scheduled based on seniority. The Assistant Shift Supervisors would ask employees down the list in order of seniority, and if enough people didn't volunteer, they would "mandatory" off the bottom of the seniority list. (Tr. 48: 18-20).

On cross-examination, Warehouse Manager Kellogg further explained how Assistant Shift Supervisors make determinations regarding how many labor hour are needed:

Q: ...Now, to make sure I understand, you've got a piece of software that informs the shift supervisors of how many labor hours they're going to need on a shift?

A: Correct.

Q: And then the assistant shift supervisors make decisions where to put those particular hours on a particular shift?

A: Yeah, so to speak.

Q: Okay. And that decision is based on what?

A: The labor itself.

Q: Well, how does the shift supervisor decide I'm going to need this many people in perishables, this many people in dry goods?

A: They're going to look at the AS/400 [computer system], and it's going to say, hey, we need 240 hours. And 240 divided by 8 says, hey, we need 12 guys and we're going to put 12 guys in frozen, or we're going to put 12 guys on the grocery dock, or we're going to need 12 guys to load. It's just a mathematical equation.

Q: Okay. So in making is [sic] those decisions they're just applying the math to the work that needs done?

A: And then following our CBA agreement, they're doing that by seniority.

Q: So an individual worker's assignment to whether it be to perishable or non-perishable, loading, picking, is going to be based on that person's seniority?

A: Correct. (Tr. 65: 6-25; 66: 2-5).

Warehouse Manager Kellogg testified that Assistant Shift Supervisors are also responsible for calculating input on operational data, such as the labor hours and job codes. (Tr. 54: 19-20). He explained:

A: It's the same as what we touched on earlier. They're going go into the AS/400 [computer system], and they're going to calculate what's needed for labor for a day, and then they actually key that data into a database, and they keep track of their – each shift keeps track of their own retrospect. You know, how many put aways they're doing in an hour; how many cases they're throwing an hour or how many trucks they're loading a day; how many cubes they're loading in a day, et cetera.

An Assistant Shift Supervisor also “ensures loads consistently meet established guidelines, such as delivery sequence, weight distribution on axle groups....” (Employer Exhibit No. 1). In explaining this function, Warehouse Manager Kellogg testified that Assistant Shift Supervisors dictate where the loads go and when they need to be loaded:

A: We have loads that have to leave by a certain time of day, and we will set those loads up to be loaded in a time [sic] fashion that will get to the retail locations. So if there was a perishable load, for instance, and it had to get to the store earlier, then the assistant shift supervisor would move that up in the rotation and put somebody on that job to load earlier instead of later.

Q: And does the assistant supervisor use his judgment to determine what loads should be set out first?

A: It's driven by transportation, but they're going to look at that, and they're going to dictate where those loads go when they need to be loaded. (Tr. 49: 23-25; 50: 1-12).

The job description also refers to meeting guidelines for “weight distribution on axle groups.” As to this function, Warehouse Manager Kellogg testified that the hourly loaders actually load the trucks, but the Assistant Shift Supervisor is ultimately responsible that the trucks are loaded within the various states’ regulations with respect to weight and the Assistant

Shift Supervisor is ultimately responsible that the guidelines are met.¹¹ He testified, “[I]n case the load blew, they’d have to get ahold of transportation, and we’d have to reload that truck.” (Tr. 50: 25; 51: 2-18).

Another function of the Assistant Shift Supervisors is to coordinate the setup and execution of labor needed to accomplish shift operations, and to determine and assign job responsibilities. (Employer Exhibit No. 1). On direct-examination, Warehouse Manager Kellogg was asked how Assistant Shift Supervisors go about performing this role. He testified:

A: We get a pass from the stores, like you touched on earlier...and it says, hey, here's what the stores need, X amount of cases. That goes into our AS/400 [computer system] at corporate, that generates the labels and orders for -- to go to our retail locations. We have an engineered labor standard, it is real common in the industry, and that generates a report on our AS/400 that says, hey, we need X amount of labor. A good example would be, we need 240 hours of labor of active selecting for the day, and they would decide how many employees they need for that day.”

Q: And does the assistant shift supervisor determine that?

A: They determine where the people go; they don’t determine how much—what the load—workload is.”

Q: And when you say ‘where they go,’ what are their options; where can they sent [sic] them?

A: They can—if the perishable side of the facility was shorthanded, because it’s a split side of the facility, we have a dry and a perishable side, they can determine by seniority whether somebody needs to go to perishable; it could determine how many loaders we need, how many stockers we needs [sic], how many floaters we need. How many floaters we need to bring to work. How many selectors we need.

Q: How do they determine that? What are they looking at to make that determination?

A: It’s all calculations from our AS/400, [the computer system].

Q: The computer system sets forth what the specifications are for each load; is that right?

¹¹ The same goes for labeling products or “breaking” products such as frozen meat into cubes – the bid employees perform these tasks (along with, sometimes, the Assistant Shift Supervisor), but the Assistant Shift Supervisor is ultimately responsible that these tasks are performed correctly. (Tr. 49: 14-16 (labeling); 52: 4-7 (ordering “breaks”)).

A: Correct.

Q: So they would look at that and then make a determination about where their needs are in the warehouse, correct?

A: Correct.

Q: And if they decided they needed more people over here, they could do that, correct?

A: They could shift the labor.

Q: Okay. And they do that...continually?

A: Absolutely. (Tr. 45: 13-25; 46: 1-25; 47: 1-2).

Finally, Assistant Shift Supervisors are expected to interpret and apply the terms of the collective bargaining agreements, company working conditions, and wage agreements, and company personnel policies as the established guidelines to be adhered to. (Tr. 54: 12-17). On cross-examination, Warehouse Manager Kellogg testified that the terms of the CBA are clear, particularly with regard to seniority, therefore he wouldn't say they "interpret" so much as "apply" the terms of the contract. (Tr. 70: 13-25; 71: 1-6).

Authority to transfer employees

Assistant Shift Supervisors are not involved in transferring employees from one department to the next; however, they have authority to transfer employees "internally," or within their department. (Tr. 57: 21-25; 58: 1). Specifically, Warehouse Manager Don Kellogg explained in his testimony that the side of the facility in which the Assistant Shift Supervisors work is "split" between a dry goods side and a perishable goods side. Assistant Shift Supervisors can determine the workload; whether to send an employee from one side to the other; and how many loaders, stockers, floaters or selectors are needed. They transfer employees from one side to the other in order of seniority. (Tr. 45: 24-25; 47: 3-9).

Authority to responsibly discipline other employees

Another responsibility of Assistant Shift Supervisors is to lead, coach and develop employees by “follow through of performance and employee-related issues,” including documenting substandard performance and communicating issues to the supervisor for corrective action (Tr. 52: 8-17; Employer Exhibit No. 1). To perform this duty of following through on performance and employee related issues, and documenting the issues, Assistant Shift Supervisors may issue “policy consultations” to employees. (Tr. 52: 22-25; 53: 4-5). Warehouse Manager Don Kellogg testified that policy consultations are a “written write-up.” (Tr. 53: 11-12). Employer Exhibit No. 2 consists of approximately 42 policy consultations created by Assistant Shift Supervisors or other disciplines signed by Assistant Shift Supervisors along with the managers. These “write-ups” are all kept in the employees’ files. (See also, Tr. 60: 8. 15).

Warehouse Manager Kellogg testified that the form is used by Assistant Shift Supervisors to discipline or report accident or absent issues. (Tr. 55: 20-25). For example, if an hourly employee was working and failed to fill out the proper OSHA paperwork, and there was no shift manager or salaried supervisor on deck, the Assistant Shift Supervisor would fill out and hand the hourly employee a policy consultation. (Tr. 52:24-25; 53: 1-5). While a policy consultation is apparently not considered “formal” discipline, it is a written verbal warning kept in the employees’ files and it can be used later by management in the determination to issue formal discipline. (Tr. 64: 2-3).¹²

Warehouse Manager Kellogg testified that the “Policy Consultation” is a standard form that the company has created. The form says “Policy Consultation” at the top; then it says

¹² Warehouse Manager Kellogg testified that a policy consultation is issued by the Assistant Shift Manager alone and any discipline resulting from it comes out of the managers’ operational meeting. (Tr. 63: 22-25; 64: 1-5).

“Supervisor initiating record,” followed by the Assistant Shift Supervisor’s name. There is space for an explanation of the consultation and then, at the bottom, there is a line for “Supervisor Signature” and “Employee initials.” (Employer Exhibit No. 2). Then it has boxes to be checked by the Assistant Shift Supervisor to indicate whether the consultation is for absence issues, accident and safety issues, work performance, S&E (the engineer's standard requirement of how many cases to throw per hour), gross misconduct, or “other.” The Assistant Shift Supervisor may check any of those boxes if it deems that a violation of one of those things has occurred. (Tr. 56: 1-24).

The policy consultation can be issued by the Assistant Shift Supervisor alone, through their own observation of the employee’s performance; they will sit the hourly employee down and sign the policy consultation along with that employee. (Tr. 63: 22-25; 64: 1-8).¹³

An example of one policy consultation entered into the record is a consultation dated 6/26/2013. The consultation was issued to employee “MM” (full name of the employee is redacted) by Assistant Shift Supervisor Andy Douglass. It states:

“M is receiving a policy consultation for timing out LCR012 on 6-26-13. M has been previously informed that he must complete a proper inspection each day and answers all the questions in Info-Link before operating his equipment. This is the 4TH time-out M has had in a revolving year. M also understands that having 5 time outs in a revolving year will result in formal discipline.” (Employer Exhibit No. 2).

Assistant Shift Supervisors are also expected to investigate all reported employee injuries and reported collision or incidents as needed, identify causes, and determine preventive measures

¹³ Kellogg testified, “[A]ny discipline that we do other than a policy consultation, comes through out [sic] weekly Tuesday operations meeting.” (Tr. 63: 4-21). Based on the policy consultation forms themselves (as submitted in Employer Exhibit No. 2), it is apparent that the policy consultations are only signed by the Assistant Shift Supervisor and not another manager. Kellogg’s testimony indicates that Assistant Shift Supervisors may draft the policy consultation based on their observations and personally hand it to the employee and sign it with them. (Tr. 52: 22-25; 53: 1-5).

that could be taken. (Employer Exhibit No. 1; Tr. 55: 9-10). When asked on direct whether this involves a “write-up,” Warehouse Manager Kellogg testified:

A: It could be, or a policy consultation.

Q: If it's a write-up, does it end up...in the employee's file?

A: It can, yeah.

Q: And does the assistant supervisor do the investigation himself when he does the write-up?

A: They do. (Tr. 55: 9-19).

Warehouse Manager Don Kellogg further testified regarding Assistant Shift Supervisors' involvement in discipline which is more “formal” in nature, something other than policy consultations. This type of discipline is signed by both the Assistant Shift Supervisor and the salaried supervisor or manager. Kellogg testified:

A: ...[I]t's a verbal warning, which is—we consider it formal discipline, signed by [Assistant Shift Supervisor] Rodney Ricks, that actually went in somebody's file. So you can see where Rodney Ricks' signature is on 10/12; Janelle Rayber (phonetic), our HR person was 10/12, and then a shift manager at 10/12 below that.

Q: Okay. So a—this one was a verbal warning.

A: Correct.

Q: And does that require the manager's signature?

A: That requires both.

Q: Okay. So the assistant shift supervisor could not himself have issued a verbal warning?

A: He could have set that employee down and issued that, but the shift manager would have already ran through an operations meeting, and we would clear that. So any discipline that we do other than a policy consultation, comes through out [sic] weekly Tuesday operations meeting.

Q: Okay. So the policy consultation alone is issued by the shift supervisor, any discipline resulting—

A: The assistant supervisor.

Q: The assistant shift supervisor?

A: Right.

Q: Any discipline resulting from it comes out of that operational meeting?

A: Correct...but that doesn't mean that that assistant supervisor wouldn't be sitting that employee down and he—him signaturing [sic] that, along with the employee. (Tr. 63: 5-25; 64: 1-8).

Authority to suspend, demote, or terminate other employees

Warehouse Manager Don Kellogg testified that an Assistant Shift Supervisor would not have independent authority to suspend an employee on his own; however, the Assistant Shift Supervisor could make a phone call to Warehouse Manager Kellogg to recommend such action and Kellogg would show up onsite and issue the suspension with the Assistant Shift Supervisor. (Tr. 64: 2-13). Nor do Assistant Shift Supervisors have independent authority to decide whether an employee will be demoted; however, again, they have authority to recommend such action. (Tr. 64: 14-16). Finally, Assistant Shift Supervisors do not have independent authority to discharge employees, but they can make a recommendation for termination of an employee. Warehouse Manager Kellogg testified that the recommendation may not always be followed, but sometimes the recommendation is followed. (Tr. 57: 15-20).

Attendance at management meetings

The Employer holds an operations meeting every Tuesday, in which members of management discuss issues such as productivity and any disciplinary issues. (Tr. 58: 9-10).¹⁴

¹⁴ Kellogg testified: "it's basically where everybody, my management team, it's usually 11 to 15 employees all in management on a Tuesday, and we discuss policy consultations, verbal warnings, written warnings, attendance, productivity issues." (Tr. P. 58, 9-15).

Warehouse Manager Don Kellogg attends and operates those meetings. (Tr. 58: 18-19).

Assistant Shift Supervisors attend these meetings on occasion, either biannually or quarterly if the person is deemed to be promotable. (Tr. 64: 23-25). Kellogg testified regarding the potential for promotion, “That's why they're in that position to start with. And the next step [toward promotion] would be is they would be part of that meeting.” Kellogg testified that their attendance at those meetings is part of the training process. (Tr. 64: 23-25; 65: 1-5).

No evidence of authority to reward, hire, lay-off or recall other employees, or adjust grievances

There is no evidence that Assistant Shift Supervisors have independent authority to reward employees, or to lay-off or recall employees, or to effectively recommend such action. Assistant Shift Supervisors are not involved in hiring or the interview process to hire. (Tr. 57: 1-4, P. 64, 14-20). Nor have Assistant Shift Supervisors been involved in adjusting grievances.¹⁵

**C. ASSISTANT SHIFT SUPERVISOR/LEAD INVENTORY CONTROL
(SCOTT RENBERG)**

Scott Renberg has been an Assistant Shift Supervisor in inventory control for three years. (Tr. 41: 2-4). Scott Renberg works from about 6:00/6:30 a.m. to 3:00 p.m. (Tr. 42: 5-6).

According to Warehouse Manager Don Kellogg, Renberg performs his work in the dock house; specifically, he works in the perishable side of the facility in one of the dock offices. He has his own office which is inside an office with the other management team. (Tr. 67: 13-14; 76: 5-23).

On cross-examination by the Petitioner, Warehouse Manager Don Kellogg was asked to explain what “Inventory Control” entails. Kellogg testified:

¹⁵ When asked on cross-examination: “If we have an employee that files a grievance under our collective bargaining agreement, would any of these assistant supervisors have the authority to represent the company in that grievance?” Warehouse Manager Kellogg testified, “We have not done that to this point. I usually represent the company along with HR.” (Tr. 70: 4-5).

A: Inventory control keeps track of anything that – if a store called and they called in, hey, we didn't get 20 cases of this, we would do that research. So Scott's got two employees that work for him and that's what they do. And Scott does that same capacity also. We do cycle counts. In other words, we cycle count all 70,000 slots in that facility about every ten days. He's part of the team that does that.

Q: What's a cycle – what does that mean?

A: A cycle count means we just want to go through and we're going to cycle count all 12,000 skews that we have in the facility, along with all the overhead reserves, to make sure that our inventory is accurate.

Q: So Mr. Renberg and two employees are basically checking the physical inventory to make sure it matches what the computer says?

A: Correct.

Q: So he's – is he responsible only for supervising those two employees?

A: Correct. (Tr. 66: 10-25; 67: 1-4).

In total, there are four people in the inventory control department at the Boise DC. This includes a salaried supervisor, Assistant Shift Supervisor Scott Renberg, and two employees with “bid jobs” that report to Scott Renberg. (Tr. 71: 24-25, 72: 1-2, 7, 9-17; 75: 1, 8-9).

When asked on cross-examination by Intervenor about Assistant Shift Supervisor Scott Renberg's authority to discipline, Warehouse Manager Don Kellogg testified that Renberg has authority to issue a policy consultation just like any of the other “hourly supervisors”:

Q: And as far as assigning the employees any disciplinary action or anything, that salaried supervisor, that would be her primary function and not Scott [Renberg]'s?

A: Yeah, but I think if you flip down through here [Employer Exhibit No. 2] Scott [Renberg] actually had somebody sign in on a policy consultation. If you go down to –

Q: No, we checked. We didn't see his name on any discipline action in that –

A: Okay. Maybe there wasn't any.

Q: I don't think he does that. I think the salaried –

A: He would – he would do an attendance follow-up, just like any of the other hourly supervisors. So if somebody was in trouble for attendance, he would fill that out and sign that. (Tr. 72: 18-20; 73: 1-5)

On cross-examination, Intervenor asked Warehouse Manager Don Kellogg about how often hourly employees report to Assistant Shift Supervisor Scott Renberg, suggesting there was little interaction between them. Kellogg disagreed, testifying they have daily interaction:

Q: So primarily they report – they're aware of their functions and there's very little interaction on Scott's part to direct them to do their jobs?

A: They know their job, but they have daily interaction with Scott. I mean they literally work in that dock office with Scott. (Tr. 73: 16-21)

On cross-examination by Petitioner, Warehouse Manager Don Kellogg testified regarding Inventory Control Assistant Shift Supervisor Renberg's authority to assign work:

Q: So does the assistant shift supervisor in inventory control decide which of these problems that come up, you know, like you said a store may report missing merchandise –

A: Right.

Q: – does he decide which of these problems that come up are going to be resolved by or investigated by which of the two inventory control persons?

A: Absolutely.

Q: Is that something that changes daily?

A: Absolutely. (Tr. 75: 10-25; 76: 1-3).

IX. FACTUAL AND LEGAL ANALYSIS

I find that Warehouse Manager Don Kellogg testified credibly regarding the duties and functions of the Assistant Shift Supervisors.¹⁶ Based on Kellogg's testimony and the evidence

¹⁶ Warehouse Manager Kellogg established his knowledge of the position, testifying that he is involved in supervising Assistant Shift Supervisors; that he was involved in the approval process of their job description (along with Human Resources); and that he observes Assistant Shift Supervisors working on nearly a daily basis. (Tr. 44: 11-12; 45: 6).

entered into the record, I find that all four Assistant Shift Supervisors have the authority to engage in at least one of the twelve supervisory criteria¹⁷ set forth in Section 2(11) (specifically, the authority to discipline other employees); that the exercise of such authority requires the use of independent judgment; and that the Assistant Shift Supervisors hold this authority in the interest of the Employer.

Assistant Shift Supervisors have authority to issue policy consultations to employees, which are kept in employees' personnel files, used to discipline employees or report accidents or absence issues, and which may lead to more formal discipline. Assistant Shift Supervisors use their own observation of the employee's performance in determining whether to issue a policy consultation. The Assistant Shift Supervisors themselves conduct the investigation into the incident and then, if a policy consultation is deemed appropriate, they use their own judgment to check one of the boxes on the form for the reason of the write-up (such as absence, accident/safety, work performance, tardy, and gross misconduct) and to write an "Explanation" of the reason for the consultation. They may also be involved in issuing more formal discipline (including signing the disciplinary write-up as "Supervisor"), although the more formal discipline would first be approved by management.

As for Scott Renberg, while none of the policy consultations submitted in Employer Exhibit No. 2 were issued by him, Warehouse Manager Kellogg testified that Renberg has the same authority and duty as the other Assistant Shift Supervisors to issue policy consultations when appropriate. The Board has held that possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if the authority has not yet been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001).

¹⁷ Authority 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.

Based on their ability to issue policy consultations (which are clearly disciplinary in nature, remain in the employees' personnel files, and can be used in the determination for more serious discipline), Assistant Shift Supervisors are supervisors within the meaning of the Act. See *Progressive Transportation Services*, 340 NLRB 1019 (2003) (the Board found those who used independent judgment in effectively recommending discipline are supervisors).

An employee need only possess authority to engage in *one* of the twelve criteria set forth in Section 2(11) to be found a supervisor within the meaning of the Act.¹⁸ However, there is evidence in this case to support a finding that, in addition to issuing discipline to employees, Assistant Shift Supervisors also have authority to responsibly direct employees and assign work and overtime. It also appears they may have the ability to recommend suspension or discharge, although they do not have independent authority to carry out such actions themselves.

As for their authority to assign and direct work, the Employer's computer system, the AS/400, generates a report on how many hours of labor are needed in a particular day. Based on that information, the Assistant Shift Supervisor must determine how many employees are needed for the day. They also determine where to assign the employees and then assign them accordingly, in order of seniority. An Assistant Shift Supervisor must determine whether additional employees are needed on the perishable side or the dry side, how many loaders, stockers or floaters are needed, or how many hours of overtime will be needed. They will seek volunteers for these transfers, bid jobs, or overtime shifts in order of seniority, and if there are no volunteers, they will "mandatory" overtime from the bottom of the seniority list.

While the AS/400 system directs how many labor hours are needed, the Assistant Shift Supervisors make the decision as to where to put those particular hours on a particular shift. For

¹⁸ See *NLRB v. Health Care & Retirement Corp.*, Id.

example, Warehouse Manager Don Kellogg explained that, based on the information in the AS/400, which states how many labor hours are needed, Assistant Shift Supervisors may assign 12 employees on the grocery dock, 12 employees to load, and 12 in frozen. This responsibility, along with their ability to assign overtime (even if done in order of seniority), meets the criteria for “assigning” within the meaning of Section 2(11). In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board majority defined “assign” as the act of “designating an employee to a place (such as a location, department or wing), appointing an individual to a time (such as a shift or overtime period) or giving significant overall duties to an employee,” 348 NLRB at 689.¹⁹

Additionally, Assistant Shift Supervisors are ultimately responsible for ensuring that the tasks performed by the hourly employees—such as labeling products, “breaking” products, and meeting state regulations for truck weight—are properly carried out. Compare with *Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962) (“Shift leaders” had the responsibility for transmitting work orders and for seeing to it that these orders were carried out).

In addition to scheduling overtime, if work is completed at a higher rate of efficiency, Assistant Shift Supervisors may also allow employees to go home early. (Tr. 47, 23-25; 48: 1-2). See *Western Saw Mfrs.*, 155 NLRB 1323, 1329 fn. 11(1965) (Board found a “working foreman” to be a statutory supervisor who, among other indicia of authority, granted employees time off).

Finally, Warehouse Manager Don Kellogg testified that an Assistant Shift Supervisor would not have independent authority to terminate or suspend employees, but they could recommend such action. Specifically, Warehouse Manager Kellogg testified that an Assistant Shift Supervisor’s recommendation that an employee be terminated may not always followed,

¹⁹ The Board has found employees to be statutory supervisors where their responsibilities included, among other indicia, assigning overtime (*Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972)) and making work assignments (*Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971)).

but sometimes it is, as with a recommendation of suspension of an employee. (Tr. 57: 15-20; 64: 2-13). While the Board has held that persons with the power “effectively to recommend” the actions described in Section 2(11) are supervisors within the statutory definition, I find that the record is not sufficiently clear on this point and therefore the Employer has not met its burden to establish that Assistant Shift Supervisors have the power “effectively” to recommend such actions as understood by the Board.²⁰

Based on the record evidence, I find the Assistant Shift Supervisors are supervisors within the meaning of the Act and recommend the challenge to their ballots be sustained.

X. CHALLENGES BASED ON GUARD STATUS

Petitioner and Employer assert Security Gate Guards David Sweet, Joyce Higman,²¹ and Jeffrey Howard are guards as defined in the Act and thus ineligible to vote. Intervenor asserts they are not guards as defined in the Act and thus their ballots should be opened and counted.

Additionally, Employer asserts Security Gate Guard Alejandro Chavez is ineligible to vote inasmuch as his duties and responsibilities qualify him as a guard, as defined in the Act. Petitioner and Intervenor assert he is eligible to vote and therefore his ballot should be opened and counted. Petitioner argues that he works primarily as a janitor and that his guard duties are

²⁰ See *Westwood Health Care Center*, 330 NLRB 935 (2000) (Board found RN and LPN to be supervisors within the meaning of the Act based on their authority to effectively recommend termination of employees, among other statutory indicia).

²¹ Following the election, prior to the Hearing, Petitioner asserted that Security Gate Guard Joyce Higman is also a statutory supervisor, in addition to being a guard within the meaning of the Act. However, in stating its position on the record, Petitioner did not take a position that Higman is a statutory supervisor, but rather, only stated its position that she is a guard within the meaning of the Act. No evidence was presented on the record that Higman has supervisory authority within the meaning of the Act. (Nor did Petitioner take this position in its brief).

incidental; Intervenor asserts that Chavez's guard duties and responsibilities do not qualify him as a guard, as defined in the Act.

XI. THE LEGAL STANDARD

Section 9(b)(3) of the Act prohibits the Board from finding appropriate any bargaining unit that includes both guards and nonguards. Section 9(b)(3) defines a guard as:

[A]ny individual employed...to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises.

The Board has considered whether the employees in question are deputized, wear uniforms, carry weapons, patrol the Employer's property, punch clocks, enforce company rules, or prevent unauthorized individuals from entering the Employer's property in determining whether they are guard within the meaning of the Act. Unlike the criteria for statutory supervisors, no single factor is dispositive and, as discussed in the cases cited herein, the Board often looks to see that several of the criteria are met to establish guard status.

XII. DC SECURITY GATE GUARD (DAVID SWEET, JOYCE HIGMAN, AND JEFFREY HOWARD)

There are four employees employed in the position of Security Gate Guard at the Boise DC.²² (Tr. 98: 10-11). Their shifts are 5:00 to 1:00, 1:00 to 9:00, and 9:00 to 5:00. Security Gate Guards do not work with another guard; they work alone. (Tr. 100: 19-22). Security Gate Guards report to Support Supervisor Ken Gorton, who also supervises bargaining unit employees

²² Warehouse Manager Don Kellogg could not recall if there are three and a "half" employees in the position of Security Gate Guard ("half" referring to someone working in the position less than full-time) or four and a half employees in that position. (Tr. 109: 1-22). In the matter of this proceeding, four Security Gate Guards' ballots were challenged: three employees who hold the position on a full-time basis (David Sweet, Joyce Higman, and Jeffrey Howard) and one employee who holds the position on a part-time basis (Alejandro Chavez).

in Sanitation, Trailer Reclamation Center (“TRC”) and “Recoup.” (Tr. 100: 11-13; 117: 8-9, 11-12). As to Security Gate Guard training, employees in that position are trained how to operate the gates, how to operate the computer system, who to call, when to call said person (such as in the event of a fire), and when to let the trucks through the gate. (Tr. 117: 18-23).

The Security Gate Guards work in a little building on the backside of the Boise DC which is commonly referred to as the “guard shack.” (Tr. 98: 14-17). The Security Gate Guards do not patrol the grounds by foot or vehicle; they remain in or around the guard shack. (Tr. 106: 9-12).

The guard shack is about 250 feet from Freight Street, the public road on the south side of the facility. If one were to enter the Boise DC from the south side, one must enter through this Freight Street entrance. (Tr. 98: 24; 99: 3-4). The guard shack is approximately 24 by 17 feet. (Tr. 99: 20). After crossing the distance of 250 feet from Freight Street to the guard shack, there are another 950 feet from the guard shack to the main warehouse building. (Tr. 99: 25).

Approaching the guard shack from the street, one will see “stop” signs painted on the ground just before the guard shack. Just behind the guard shack are the gates. The gates are thus situated to allow trucks to pull up parallel to the shack before entering the gate. (Tr. 100: 3-7). There are two gates for inbound traffic and one gate for outbound traffic. (Tr. 111: 9-10).²³ The gates are simple drop gates or “cross arms.” (Tr. 111: 10-11). The Security Gate Guards control these devices by opening and closing the gate (by pushing a button) to allow entrance. (Tr. 111: 20-25; 115: 1).

Inside the guard shack there is a computer, a telephone and a fax machine. (Tr. 100: 24). Security Gate Guards also operate a citizens band radio. The purpose of the radio is to talk to truck traffic after the driver pulls the truck into staging, in the event there is not a door available

²³ Warehouse Manager Don Kellogg testified there are two inbound gates and one outbound gate because trucks often enter “two deep” and only exit one at a time. (Tr. 111: 16-19).

for the truck. (Tr. 107: 14-19). There is no security camera system at the Boise DC or in the guard shack. (Tr. 107: 20-25).

Security Gate Guards' duties include monitoring and documenting entry and exit to and from the grounds to ensure entrance only approved individuals. (Tr. 102: 1-5; Employer Exhibit No. 3). Those that would come to the Freight Street entrance are any third-party vendor hired to do work at the facility or any common-carrier traffic (including big trucks) going in to offload pallets of goods. (Tr. 102: 6-10). In other words, if goods were coming into the warehouse by a third party, to be stacked and eventually back sent out, those goods would come past the guard shack. (Tr. 101, 11-15). An example of a third-party vendor includes the company hired to wash the trucks and trailers and to bring fuel. (Tr. 102: 21-23). This type of visitor would have to go through the guard shack area first. (Tr. 103: 1-2). When a truck (for example, an 18-wheeler) comes to unload goods, the driver must exit the truck; walk to the guard shack; talk to the Security Gate Guard who verifies the truck name and number; and give the Security Gate Guard a bill of lading ("BOL"). There is a window in the guard shack from which the Security Gate Guard can speak to a person seeking to enter the property. The window is about 24 by 36 inches. (Tr. 101: 1-4). The Security Gate Guard then calls the dock office at the warehouse and reports the number for the truck. In turn, the dock office assigns the driver a door on the dock and the guard informs the driver of this dock door assignment.

Before the driver will be allowed to enter, the Security Gate Guard must check off this information and approve their entry. (Tr. 103: 6-12, 16; 105: 8-10). The Security Gate Guard will know beforehand if somebody is coming into the facility because they are able to access that information in the Employer's AS/400 computer system. (Tr. 104: 2-3).

If someone attempted to enter the facility that did not have the proper approval to enter, the Security Gate Guard will turn that person away. (Tr. 104: 7-9). If a third-party visitor attempted to enter the facility through the Freight Street entrance that was not bringing goods or services to the facility, the Security Gate Guard would direct them to go to the front of the building, where there is a receptionist. (Tr. 104: 17-18).²⁴ Security Gate Guards have on occasion sent unauthorized visitors away. (Tr. 105: 5-7).

The Security Gate Guard job description states, “Investigates and reports suspicious activities to management” and “Monitor all gate activity at the guard shack, identify and investigate suspicious activity and/or personnel.” (Employer Exhibit No. 3). However, this is not fully accurate. Warehouse Manager Kellogg testified that the Security Gate Guards would identify but not investigate suspicious activity. Rather than investigate the activity themselves, the Security Gate Guards would call a supervisor who would investigate. (Tr. 106: 1-8). Warehouse Manager Kellogg also testified that if someone was “running around” within the gates of the facility, the Security Gate Guard would not be called and asked to take action or to pursue them; rather, a supervisor would be called, or the police, as appropriate. (Tr. 115: 19-25; 116: 1). Warehouse Manager Kellogg testified that the Security Gate Guards would report anything suspicious in their area the same as any other WinCo employee on site would do. (Tr. 104: 14-19).

Another duty of the Security Gate Guard is to “[s]ecure incoming/outgoing traffic in cases of emergency such as fire, direct emergency vehicles to identified area of emergency, if necessary.” (Employer Exhibit No. 3). In the event of a fire at the facility, Security Gate Guards

²⁴ When asked on cross-examination by Intervenor, Warehouse Manager Don Kellogg testified that part of the job of the receptionist at the receptionist station includes turning away unauthorized people but she is not classified as security. (Tr. 115: 11-14).

would direct fire trucks through the back entrance. (Tr. 106: 17-20). In the event police authorities arrived at the facility, they would be directed to the front entrance. (Tr. 106: 21-25). Warehouse Manager Kellogg testified that everyone in the facility, including Security Gate Guards, has independent authority to call the police. Typically they would be required to call a supervisor first, but it depends on the circumstances. (Tr. 116: 10-18).

In the event that someone—including an employee of the Employer—attempted to enter the Employer’s property through the back gate without the proper authorization, the Security Gate Guard would stop that person from going through the gate. (Tr. 112: 1-16).²⁵ However, the Security Gate Guard would not be expected to pursue an individual that ran through the gate; rather, they must notify a supervisor or the police. (Tr. 116: 9; 17-18; 19-24). Warehouse Manager Don Kellogg testified that the Security Gate Guard’s job is to enforce the rules of the facility with regard to access through that gate. (Tr. 113: 4-6).

In the event of a labor disturbance, strike or lock-out, Warehouse Manager Don Kellogg testified that Security Gate Guards would not have a role to protect the property because they are part of the bargaining unit. When asked on direct-examination if they were not part of the bargaining unit whether they would have a “role to protect the Employer’s property,” Warehouse Manager Kellogg responded, “Yes.” (Tr. 108: 1-12).

On cross-examination by Intervenor, Warehouse Manager Don Kellogg testified that the Gate Security Guard position is not bid out each year as the other hourly positions are. Rather, the same individuals have worked in that role since they started:

²⁵ Employees of the Employer are required to enter through the front gate or a different set of gates provided; without proper authorization, they are not allowed to enter through the back gate by the guard shack. This is the only gate monitored by Security Gate Guards. (Tr. 112: 20-25; 113: 1-6). Excluding the guard shack, there are four ways for foot traffic to access the facility, and the rest of the Employer’s 75 acres is fenced in. (Tr. 115: 2-5; 10).

Q: Is the guard shack a bid job,²⁶ Don?

A: We don't bid the guard shack out annually...we've got a lead guard out there and three of the positions are filled. So the same people have been in the same job capacity since they started. (Tr. 113: 13-16).

Warehouse Manager Kellogg also testified that other employees have never been assigned to the guard shack as Security Gate Guards:

Q: Are there other employees that have been assigned to the guard shack besides these four individuals?

A: Currently?

Q: No. Since we've opened the DC?

A: Not assigned to it—not to my knowledge.

Q: If somebody was preferred worker program?

A: Well, if you're on light duty,²⁷ you could be out there, but you wouldn't be the guard.

Q: So there's somebody else with them at the time?

A: Yeah. (Tr. 114: 11-21).

Finally, when asked on cross-examination by Intervenor whether, in his opinion, Security Gate Guards could instead be called “check-in personnel” or something to that effect, Warehouse Manager Kellogg agreed that the title of “check-in clerk” would be appropriate. (Tr. 119: 1-5).²⁸

²⁶ A “bid job” refers to positions in the facility which are bid by seniority. The first person hired is the highest in seniority and the last person hired is lowest in seniority. Warehouse Manager Kellogg testified that in the warehouse (not the guard shack), the facility is bid out twice a year. Each employee gets to bid in order of seniority on the position that they would like to have for the next six months. (Tr. 114: 3-9).

²⁷ The “light duty” program is for employees who are immobile and can only sit. One of the options for an employee on “light duty” would be to sit at the guard shack with the guard and help them push the button to operate the gate. (Tr. 114: 23-25; 115: 1).

²⁸ Petitioner objected to the question on the basis of relevancy, which the Hearing Officer overruled, finding that the question was relevant. However, as stated by the Hearing Officer on the record, the decision in this proceeding will not be made upon general conclusionary statements but upon the facts and evidence in the record.

**XIII. DC SECURITY GATE GUARD
(ALEJANDRO CHAVEZ)**

Alejandro Chavez is consistently employed by the Employer at the Boise DC as a Security Gate Guard one day per five-day workweek. He is employed in Sanitation and TRC for the remaining four days per workweek. (Tr. 109: 23-25; 110: 1-5, 20-21). As a Sanitation and TRC employee, Chavez unloads load trailers and cleans the warehouse. (Tr. 110: 6). In his capacity as a Security Gate Guard, Chavez maintains the same duties and responsibilities as those described above for the other Security Gate Guards. (Tr. 108: 14-17).

XIV. FACTUAL AND LEGAL ANALYSIS

A guard within the meaning of Section 9(b)(3) of the Act is any individual employed to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises. As previously mentioned, the Board considers factors such as whether employees are deputized, wear uniforms, carry weapons, patrol the Employer's property, punch clocks, enforce company rules, or prevent unauthorized individuals from entering the Employer's property in determining whether they are guard within the meaning of the Act. Based on the record evidence, I find that the duties of Security Gate Guards do not qualify them as guards within the meaning of the Act.²⁹

Of the factors listed above, Security Gate Guards are not deputized, they do not carry weapons, or patrol the Employer's property or punch clocks.³⁰ As for uniforms, there is no

²⁹ I find Warehouse Manager Don Kellogg credibly testified regarding the position of Security Gate Guard. He testified that has personally observed what they do on many occasions and demonstrated knowledge of the position and its functions. (Tr. 101: 20-25).

³⁰ *Jakel Motors*, 228 NLRB 730 (1988) (Watchmen who make rounds, punch clocks, enforce company rules, and prevent unauthorized individuals from entering property are "guards" within that definition).

record evidence that Security Gate Guards wear guard uniforms or clothing which would otherwise identify them as guards.³¹ The only factors listed above which apply to Security Gate Guards are the duty to prevent unauthorized individuals from entering the property and to enforce company rules, but only with respect to one gate on the Employer's property. Other than with regard to entrance through this gate, they do not enforce the Employer's rules or protect the safety of persons on the Employer's premises.

The Board has held that merely holding the responsibility to prohibit unauthorized employees from passing through an area of the Employer's property, checking in and requiring clearance to visitors, and reporting violations to supervisors is not sufficient to make an employee a guard within the meaning of the Act. In *Ford Motor Co.*, 116 NLRB 1995 (1956), the Board found a receptionist not to be a guard even though she did not permit unauthorized employees to pass through the lobby, immediately reported to her supervisor any violation of company security rules and regulations, checked in and issued passes to all vendors and visitors, and required clearance passes for all incoming and outgoing packages, and even though a plant guard performed the same duties on shifts when the receptionists were not present.³²

The following factors further support a finding that Security Gate Guards are not guards within the meaning of the Act. Security Gate Guards report to Support Supervisor Ken Gorton, the same person who supervises bargaining unit employees in Sanitation, Trailer Reclamation

³¹ I note that Employer states in its brief that the Security Gate Guards wear clothing distinct from other employees, but no evidence of this was presented on the record.

³² See also, *Guards Union Local 79 (ICI Americas)*, 297 NLRB 1021 (1990), in which the receptionist/switchboard operator was found not to be a guard. The Board held, "[U]nlike guards, the receptionist/switchboard operator does not wear a uniform, carry a gun, or receive any specialized training. Although the receptionist/switchboard operator is responsible for admitting visitors and employees to the facility during the normal course of the day, these functions are merely incidental to the remaining duties performed by the receptionist/switchboard operator."

Center (“TRC”) and “Recoup” and they do not receive specialized training, apart from how to operate the gate (which is apparently done by pushing a button), how to operate the computer system, and who and when to call in certain situations and how to direct traffic. See *American Dist. Tel. Co.*, 128 NLRB 345 (1960) (Board found the employees in question were not guards as they received no guard training, were not armed or uniformed, were not subject to call when their shift ended, and worked under different supervision than the guards).

Security Gate Guards do not patrol the grounds or make rounds of the Employer’s property. There is no security camera or equipment. They do monitor the area around the guard shack, but they do not investigate suspicious activity.³³ Rather, they are instructed to call a supervisor or the police to report any suspicious activity, as any other employee of the Employer would be expected to do. If an unauthorized person attempted to enter the facility, the Security Gate Guard would stop that person from entering but they would not pursue an individual who ran through the gate. Instead, again, they would be expected to call a supervisor or the police, as appropriate. Similarly, if there were an altercation within the building or if someone was “running around” within the gates of the facility, the Security Gate Guard would not be called or asked to take action or pursue that person.

Another of the factors considered in determining whether an employee is a guard within the meaning of the Act is whether the employee is called upon by the Employer to protect property or persons during a strike or labor dispute. Warehouse Manager Kellogg testified that in the event of a labor disturbance, strike or lock-out, Security Gate Guards would not have a role to protect the property, as they are currently part of the bargaining unit. Additionally, the

³³ *American Dist. Tel. Co. of Cleveland Co.*, 160 NLRB 1130 (1966) (“servicemen” found to be guards by the Board when they, among other things, had the responsibility of responding alarms on the premises of the employer’s customers in order to protect the customers’ property, investigate trouble, and, if necessary, repair and restore to normal operation the protection system).

record is clear that Security Gate Guards are not called upon to investigate disturbances or take action or pursue unauthorized persons. Rather, a supervisor, the police, or the fire department is called to respond, as appropriate. Finally, even if the Security Gate Guards were not part of the unit and had property protection duties during a labor dispute, this alone would not be sufficient to make them guards. See *Boeing Co.*, 328 NLRB 128 (1999) (the Board found that property protection duties assigned to firefighters during a strike are not sufficient to make them guards).

Based on the foregoing, I find that the Security Gate Guards are not guards within the meaning of the Act and recommend that the challenge to their ballots be overruled.

XV. CHALLENGES BASED ON CONFIDENTIAL EMPLOYEE STATUS

Petitioner and Employer assert that HR Assistant Cheryl Berg is ineligible to vote as she is a confidential employee. Intervenor asserts she is eligible to vote as her duties and responsibilities do not qualify her as a confidential employee.

XVI. THE LEGAL STANDARD

“Confidential employees” are defined as those who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations or regularly substitute for employees having such duties. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981).³⁴ This is known as the “labor nexus” test. Mere access to confidential financial or business information or personnel records is not sufficient to confer confidential status. For example, in *Fairfax Family Fund*, 195 NLRB 306, 307 (1972), the Board held evidence that employees have access to restricted business information, albeit vital to the Employer, does not establish the “confidential” status of such

³⁴ See *Associated Day Care Services*, 269 NLRB 178 (1984); *B.F. Goodrich Co.*, 115 NLRB 722 (1956).

employees within the meaning of the Act and concluded that the “computer operators” were not confidential or management employees, as there was no evidence that they participated in any way in formulating, establishing, or determining any management or labor relations policies.

XVII. HR ASSISTANT (CHERYL BERG)

HR Assistant Cheryl Berg reports directly to Warehouse Manager Don Kellogg, who interacts with her on a daily basis. (Tr. 132: 17-19). She works in an office which is located two offices down from Warehouse Manager Kellogg’s office. (Tr. 132: 20-21). Warehouse Manager Kellogg testified that he has overall responsibility for labor relations at the DC center, including all Human Resources issues. (Tr. 132: 22-25; 133: 1-2). Warehouse Manager Kellogg also has overall responsibility for production and distribution issues at the Boise DC. (Tr. 133: 3-5).

In addition to HR Assistant Cheryl Berg, the Employer employs HR Generalist Ruth Griggs, a salaried employee who had been employed at the Boise DC for four or five weeks as of the date of the hearing. (Tr. 133: 10-16). Prior to HR Generalist Ruth Griggs’ hire, from June 2009 to June 2013, the HR Generalist was Janelle Raber. (133: 17-25; 134: 1-2).³⁵

A typical duty of HR Assistant Cheryl Berg is to process weekly payroll for hourly DC center employees, which includes verifying sick pay, vacations, and holiday pay. (Tr. 134: 22-

³⁵ There was a three-month period of time between HR Generalist Janelle Raber’s departure and Ruth Griggs’s hire by the Employer in which there was no HR Generalist employed by the Employer. Warehouse Manager Kellogg testified that during that time, HR Assistant Berg picked up extra duties such as handling FMLA and workmans compensation claims that she wouldn’t otherwise have handled, but she did not have access to more information than she otherwise would have. (Tr. 151: 5-14). As to the differences between the HR Generalist and HR Assistant’s access to information, Warehouse Manager Kellogg testified: “[T]here's a different sign-on in the [AS/]400 [computer system] for an HR assistant versus an HR manager or specialist, and really it's just a matter of whether they know their social security number or not or they can look in anybody's file. And [HR Assistant] Cheryl's sign-on, she can look at anybody at our facility and in HR, the next level above would be able to access anybody's information probably company-wide. In other words, it would be one tier above that. (Tr. 153: 11-18).

25; 135: 1; Employer Exhibit No. 4). HR Assistant Berg goes about doing this by utilizing the Employer's AS/400 computer system and transfer sheets and ensuring payroll is accurate for the prior week every Monday morning. (Tr. 135: 6-8). She also ensures that employees' "punch" cards are correct (meaning that they have checked in and out on time) by cross-referencing them with the AS/400 computer system. (Tr. 135: 11-23). The computer system itself keeps track of how many vacation hours each employee has taken, but HR Assistant Berg is able to look at the records and ensure the employee is paid appropriately. The same is true for holiday pay. (Tr. 136: 9-20).

Another typical duty of HR Assistant Berg is to "correct" clocking deviations daily and coordinate the collection of transfer sheets. (Tr. 136). Transfer sheets are the documents used by Assistant Shift Supervisors to record the work employees do, the hours they worked, whether they take time off or have vacation time. (136: 21-25; 137: 1). HR Assistant Berg verifies the transfer sheets against the payroll information and input data from those sheets. (Tr. 137: 2-6).

HR Assistant Berg's duties also include receiving and responding to inquiries from the Payroll and Benefits Departments in a timely manner. (Tr. 137: 17-18; Employer Exhibit No. 4). The inquiries may pertain to FMLA or insurance. Warehouse Manager Kellogg testified that HR Assistant Berg does not "apply" FMLA or insurance, that the corporate office handles that. (Tr. 137: 21-25). In other words, HR Assistant Berg does not have any authority or ability to determine whether an employee would be eligible for FMLA leave. Instead, she would fill out a form which would go to the corporate office, and the corporate office would determine whether the employee was eligible for FMLA. (Tr. 138: 1-9).³⁶

³⁶ HR Assistant Berg testified that Receptionist Catherine Dubish never files FMLA and does not have access to those files, but she does have access to vacation files and employee files from time to time. (Tr. 158: 17-20).

Petitioner called Boise DC Warehouseman Travis Luzkow to testify regarding his knowledge of HR Assistant Berg. From what could be understood of his testimony, HR Assistant Berg is involved in handling information related to employee requests for FMLRA or vacation.³⁷ Warehouseman Luzkow did not know whether HR Assistant Berg was involved in handling paycheck issues, benefits issues, or medical benefits. (Tr. 129: 10-18).

HR Assistant Berg is also responsible for reporting employee performance, productivity (for example, how many cases are loaded an hour), discipline, and attendance to Warehouse Manager Don Kellogg. HR Assistant Berg also inputs this data into the AS/400 computer system. (Tr. 138: 13-19).

As to the performance and productivity data, Warehouse Manager Kellogg testified this would include “confidential” numbers about how much the warehouse is producing in a particular time period. (138: 20-23). As part of her duties, HR Assistant Berg maintains daily, weekly, and monthly distribution center reports and spreadsheets related to productivity, labor and inventory. (Tr. 143: 19-23; 144: 3-4). On cross-examination by Petitioner, Warehouse Manager Kellogg provided more information regarding this productivity data, testifying:

A: [HR Assistant Berg] does run the engineering standard SE reports so she would run that and create another report on Excel whether an employee was low [in productivity], and that could mean that the manager or supervisor would sit down with that employee and do a follow-up with them.

Q: Or more broadly, have you ever complaints, for instance, from either rank and file workers or an employee representative that there was an unreasonable expectation of productivity –

³⁷ I find that Warehouseman Luzkow’s testimony was vague and often contradictory. For example, when Warehouseman Luzkow was asked direct whether, when requesting time off for vacation, if HR Assistant Berg lets him know it is approved or not, Luzkow testified: “Not necessarily her directly, but she’s the one basically that does it... You hear it from your supervisor probably.” (Tr. 122: 19-24). He also testified that he had knowledge of her involvement of the FMLA process, stating that he himself had applied for FMLA through her, and then later admitted he had not completed or returned the forms yet and could not provide specific details regarding the process. (Tr. 124: 15-17).

A In –

Q In other words, did anyone ever complain –

A In the environment I work in, absolutely. (146: 5-15)

Warehouse Manager Kellogg went on to testify that HR Assistant Berg prepares for him the reports that he relies upon in deciding how to respond to complaints about productivity standards being too high. However, HR Assistant Berg does not *create* the data that he relies upon in formulating and effectuating the labor relations' policy of the Employer; rather, she processes the data that is going to “kick out” in the AS/400 computer system. Warehouse Manager Kellogg testified that the data obtained and the reports maintained on productivity does not drive the development of labor policies at the distribution center; he testified that those policies are negotiated when negotiating a collective-bargaining agreement. (Tr. 147: 1-16). Warehouse Manager Kellogg testified that HR Assistant Berg is only responsible for running the report, she does not develop the data. (Tr. 147: 22; 148: 1-3).

As to HR Assistant Berg's responsibility of inputting disciplinary documents into the AS/400 computer system, this refers to a disciplines created by a supervisor, signed off on by Warehouse Manager Kellogg, who would hand that to HR Assistant Berg, who would in turn input that document into the “paperless” computer file for the employee. (Tr. 138: 15-19). HR Assistant Berg maintains the employee personnel files, both paper and electronic, which means she has access to everything that goes into the file, such as discipline or “medical stuff.” (Tr. 141: 21-25; 142: 1-5). The electronic files are kept in the AS/400 computer system. The paper files are kept in a secure room which is locked with a key, a copy of which HR Assistant Berg keeps in order to access and file documents. (Tr. 142: 7-9).

Warehouse Manager Kellogg provided more information on cross-examination by Petitioner regarding HR Assistant Berg's access to medical information. He testified:

Q: [D]oes the HR assistant have access to...medical records related to leave?

A: If they're handed in, yeah, but that's pretty confidential. I mean that's going to go to corporate, and we're either going to – they're either going to qualify or they're not going to qualify so I'm not going to tell you that she would never know a specific because an employee didn't bring that to our attention. But that's probably as far as it goes. (Tr. 152: 21-22; 153: 2-9).

HR Assistant Berg also ensures timely processing of termination documentation, calculation of final hours worked and final paychecks. (Tr. 139: 23-25). Warehouse Manager Kellogg testified that HR Assistant Berg would not make the determination or calculation as to how much should be paid; rather, she would get that information from payroll. (Tr. 140: 7-11).

HR Assistant Berg also creates and maintains the identification access card system for active employees and for outside contractors. All employees use an identification card to enter and exit the building, which she maintains through the computer system. (Tr. 140: 12-25; 141: 1-2). As for outside contractors, HR Assistant Berg gives them access to a particular location of the plant. (Tr. 141: 14-18).

Next, HR Assistant Berg provides administrative support for processing workers compensation claims. In this capacity, she functions as a liaison between the corporate office and the employee; she does not make the decision as to whether an employee qualifies or does not qualify for workers compensation. (Tr. 143: 12-21). In this role, HR Assistant Berg would only cover hourly employees, not salaried employees. (Tr. 144: 4-6).

HR Assistant Berg "assists with the screening of applicants or applications." When the Employer hires an individual, HR Assistant Berg would "onboard" the employee into the system and send him to be screened for pre-employment. (Tr. 144: 7-14; Employer Exhibit No. 4). This

includes “physical and chemical screenings” and processing of new hires. Warehouse Manager Don Kellogg testified that drug testing is done on all new hires and HR Assistant Berg would be able to look at the results of these tests. (Tr. 144: 15-23).

During cross-examination by Intervenor, Warehouse Manager Kellogg elaborated upon the process of “screening” applicants. He testified that it is primarily his job to screen applicants and hire, and HR Assistant Berg’s involvement is clerical. (149: 14-17).

HR Assistant Berg "performs daily accountability of ATM utilized by third party balancing funds." Specifically, Warehouse Manager Kellogg testified the Employer has an ATM on site that can hold up to \$20,000 and HR Assistant Berg is responsible for taking care of the ATM. She has access to that \$20,000. (Tr. 145: 4-8).

HR Assistant Berg communicates vacation eligibility on the calendar to employees, but she is not the one who makes the decision or authorizes vacation time. Rather, Warehouse Manager Dave Kellogg testified that he is the one who creates the vacation eligibility calendar:

Q: Then down below it says "processes and maintains vacation eligibility calendar for employees including coordination of annual signups." She's the depository, so to speak, for who can take vacation and when?

A: It's driven by me...I create that. And then it's handed off to her. And then she can tell somebody whether it's available or not. (Tr. 145: 8-16).

During cross-examination by Intervenor, Warehouse Manager Kellogg elaborated on the process of processing vacation time, testifying that he himself would be the one to allow “x” amount of single days or full weeks off, HR Assistant Berg would just be the one to look in the AS/400 system to confirm whether those days are available. (Tr. 148: 18-24).

HR Assistant Cheryl Berg was called to testify by Intervenor. She testified that she has never been involved in a grievance hearing, apart from testifying as a witness. (157: 12-14). She also testified that the FMLA information would be considered confidential federally and other

information would be considered confidential due to company policy, such as discipline. (Tr. 157: 21-25; 158: 1-3). HR Assistant Berg testified that she is not involved in “pricing” and she has never been involved in collective-bargaining with the Intervenor. (Tr. 158: 4-10).

XVIII. FACTUAL AND LEGAL ANALYSIS

Based on the record evidence,³⁸ I find that HR Assistant Cheryl Berg is not a “confidential” employee within the definition used by the Board. In applying the standards for determining whether a person is a confidential employee, the Board has always considered the three indicia of “formulate, determine and effectuate” in the conjunctive. In other words, all three indicia must exist for an employee to be “confidential.” *Greyhound Lines, Inc.*, 257 NLRB 477 (1981) citing *Holly Sugar Corporation*, 193 NLRB 1024 (1971). Using these criteria in *Greyhound Lines*, the Board concluded that the employee in question was not a person who formulated, determined, and effectuated management policies in the field of labor relations. The Board held that although it was clear the employee effectuated such policies, it was equally clear that he did not formulate and determine them, as the Employer had a “centralized approach” to the formulation and determination of its labor relations policies (meaning most of it was found to be done at the corporate level or regional level, but not at the local level).³⁹

Based on the Board’s standard, HR Assistant Cheryl Berg is not a confidential employee. While she has access to information the Employer deems confidential, such as productivity data or employee disciplines and personnel files, and other confidential information such as documents related to employee requests for FMLA, the record fails to establish that HR

³⁸ I find that Warehouse Manager Kellogg and HR Assistant Berg testified credibly regarding the duties of the HR Assistant.

³⁹ Also see *Kleinherg, Kaplan, Wolf Cohen & Burrow. P.C.*, 253 NLRB 450 (1980).

Assistant Berg formulates or determines any policies. In fact, the evidence suggests to the contrary, that HR Assistant Berg's duties are limited to maintaining and entering the data into the paper and electronic files. Warehouse Manager Kellogg testified repeatedly that HR Assistant Berg is not involved in the decision-making process or in formulating the policies, but rather, she simply runs reports for him from the Employer's computer system. In *Brodart, Inc.* 257 NLRB 380, 384, fn.10 (1981), the Board held that the "mere fact that" a payroll employee "has access to personnel records and to raw financial data, which might eventually be used by the Employer in a more composite form to determine the nature of its economic package offerings in labor negotiations, is insufficient to constitute her as a confidential employee," citing *Victor Industries Corporation*, 215 NLRB 48 (1974). Based on the foregoing, I find that HR Assistant Cheryl Berg is not a confidential employee and recommend that the challenge to her ballot be overruled.

XIX. CONCLUSION AND RECOMMENDATION

In view of the foregoing findings of fact, and after carefully considering all of the evidence in the record and assessing the credibility of each of the witnesses who testified, I conclude that the evidence does not support Petitioner's objection and I therefore recommend that it be overruled in its entirety. I recommend that the challenge to the ballots of Assistant Shift Supervisors Patrick Douglass, Rodney Ricks, and Jason Munden and Assistant Shift Supervisor/Lead Inventory Control Scott Renberg be sustained. I recommend that the challenge to the ballots of Security Gate Guards David Sweet, Joyce Higman, Jeffrey Howard, and Alejandro Chavez, HR Assistant Cheryl Berg, and Receptionist Catherine Dubish be overruled and their ballots be opened and counted and that a new Tally of Ballots issue.⁴⁰

⁴⁰ *Right to File Exceptions*: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the

Signed at Minneapolis, Minnesota this 4th day of December, 2013.

/s/ Martha C. Armstrong

Martha C. Armstrong
Hearing Officer
National Labor Relations Board, Region 18
330 South Second Avenue, Suite 790
Minneapolis, Minnesota 55401

Executive Secretary, National Labor Relations Board, 1099 14th Street N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on December 18, 2013, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. *Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.