

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

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

Case 10-RC-101166

EMPLOYER'S BRIEF ON REVIEW

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I. INTRODUCTION

On March 13, 2014, the National Labor Relations Board (NLRB or the Board) granted Pac Tell Group, Inc., d/b/a U.S. Fibers' (the Employer's) Request for Review of the Regional Director's September 13, 2013¹ Supplemental Decision and Certification of Representative (post-election request for review) solely with respect to whether Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres (collectively, the putative supervisors) are statutory supervisors based on their authority to assign and reward. Pursuant to Section 102.67(g) of the Board's Rules and Regulations, the Employer, by and through the undersigned counsel, hereby submits this brief on review.

II. PROCEDURAL BACKGROUND²

A. PRE-ELECTION

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

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

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

² The Procedural Background and Factual Background sections in this brief are substantially the same as those sections in the Employer's post-election request for review, which is incorporated by reference herein.

B. ELECTION

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

C. POST-ELECTION

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

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

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

On June 17, the Acting Regional Director, after reviewing both parties' submissions, directed a hearing on Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, and 14.³

On June 26, the Board issued an order denying the Employer's motion for reconsideration "without prejudice to the Employer renewing its arguments as to the alleged

³ The Employer withdrew Objections 5, 15, and 16 prior to the hearing.

supervisory status of [the putative supervisors] on exceptions to a report on objections or on a request for review of the Regional Director's decision.”

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

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

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

On September 13, the Regional Director issued his Supplemental Decision and Certification of Representative (Supplemental Decision) in which he disagreed with the hearing officer's findings that the putative supervisors have the authority to assign and responsibly direct employees, but agreed with her findings that the putative supervisors are not authorized to discipline and reward employees (or effectively recommend such action). Having therefore determined that the putative supervisors were not Section 2(11) supervisors, the Regional

Director declined to address the putative supervisors' misconduct, including whether their conduct as "third parties" was sufficient to overturn the election. Accordingly, the Regional Director overruled the Employer's objections and issued a Certification of Representative.

On September 27, the Employer filed its post-election request for review arguing that (1) substantial questions of law and policy were raised because of the absence of, and departure from, officially reported Board precedent in the Supplemental Decision; and (2) the Regional Director's decisions on certain substantial factual issues were clearly erroneous on the record, and such errors prejudicially affected the rights of the Employer and, by extension, the employees in the voting unit.

On March 14, 2014, the Board issued its order granting the Employer's post-election request for review, indicating that it "raises a substantial issue solely with respect to whether the putative supervisors are statutory supervisors based on their authority to assign and reward." The Board denied the post-election request for review in all other respects.⁴

III. FACTUAL BACKGROUND

A. OVERVIEW

The Employer owns and operates a traditional synthetic fiber manufacturing operation in Trenton, South Carolina, under the name of U.S. Fibers (Pre. Tr. 14-15).⁵ It has been in operation since approximately 2004 (Pre. Tr. 23). The plant covers approximately 500,000 square feet in four buildings (Pre. Tr. 112). Each building has multiple production lines (Pre. Tr. 31). At the time of the election, there were around 140 hourly employees working at the plant (Pre. Tr. 14-16).

⁴ The Board noted in its order that "[t]he question of whether the putative supervisors engaged in objectionable pro-union conduct remains before the Board, as resolution of that question may turn on whether the putative supervisors are supervisors within the meaning of Sec. 2(11) of the Act."

⁵ This brief discusses evidence submitted at both the pre-election and objections hearings. Testimony from the pre-election hearing will be cited as "(Pre. Tr. __).". Testimony from the objections hearing will be cited as "(Objs. Tr. __).".

B. OPERATIONS

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

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

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

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

C. ORGANIZATIONAL STRUCTURE

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

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

D. PUTATIVE SUPERVISORS

Sanchez, Lal, Martinez, and Torres were officially promoted to supervisor around October 2012 but had already been acting in that capacity through most of 2012 (Pre. Tr. 83). Oh and Safety Manager Jay Alcorta met with the four men individually, discussed their proposed official change in status, and asked them if they would be willing to accept the role (Pre. Tr. 81-82, 171-172).⁶

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

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

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

Sanchez and Lal each supervise approximately 25 employees on their respective shifts. Those 25 employees are divided into teams of between three and five employees, depending on

⁶ Alcorta was involved principally as a translator (Pre. Tr. 82). The Employer’s operations are complicated by language issues. Oh speaks Korean and English fluently, but almost no Spanish. Jang speaks Korean fluently, very little English, and no Spanish. (Pre. Tr. 28.) The putative supervisors speak Spanish and limited English. The hourly employees in the plant generally speak Spanish or a Guatemalan dialect of Spanish and either very little English or no English at all. (Pre. Tr. 169-170.) Alcorta speaks English and Spanish fluently, which is why he generally communicates to employees during meeting (Pre. Tr. 169-170).

what part of the extrusion operation they work in. Each team is assigned a lead operator. (Pre. Tr. 34-35.) The leads are “[b]asically . . . more experienced operators” (Pre. Tr. 35). Oh explained that “they have operational responsibility as far as making sure everything is right and they are more skilled than the rest of the team” (Pre. Tr. 35).

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

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

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

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

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

Putative supervisor Sanchez expressly acknowledged that he and the other putative supervisors were “supervisors” with the same authority (Objs. Tr. 21-22). Additionally, the record is undisputed that the four putative supervisors are regarded as supervisors by the

employees. Employee John Williams testified that he has always been told that Sanchez is a supervisor and has seen him exercise supervisory functions. Williams also has no “doubts” that Lal is a supervisor. (Objs. Tr. 71.) Employee Carlos Vicente similarly testified that there is no question in his mind that Sanchez and Lal are supervisors (Objs. Tr. 94).

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

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

IV. ARGUMENT

A. APPLICABLE PRINCIPLES

Section 2(11) of the Act defines a “supervisor” as

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

To establish that individuals are supervisors, the party with the burden of proof must show: (1) that they have authority to engage in any one of the 12 enumerated supervisory functions; (2) that their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) that their authority is exercised “in the interest of the employer.” See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

A party can prove the requisite supervisory authority either by demonstrating that they actually performed a supervisory action or by showing that they effectively recommended that it be done. *Oakwood Healthcare*, 348 NLRB at 687. To prove that the authority is exercised using independent judgment, “an individual must, at a minimum, act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* at 692-693. A “judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* at 693.

Applying these principles here, the record evidence unequivocally establishes that the putative supervisors are statutory supervisors by virtue of their authority to assign and/or reward employees (or to effectively recommend such action).⁷

B. AUTHORITY TO ASSIGN

The Board should reverse the Regional Director’s finding that the putative supervisors do not have the authority to “assign” as contemplated by Section 2(11) because his findings and conclusions in this regard are based on a misunderstanding of the facts and a misapplication of Board law.

⁷ The Employer maintains its position that the putative supervisors are also statutory supervisors by virtue of their authority to responsibly direct and discipline employees (or to effectively recommend such action). However, because this brief is limited to addressing the issues identified in the Board’s order granting the post-election request for review, the Employer’s arguments concerning those indicia of supervisory authority are not addressed herein.

In *Oakwood Healthcare*, 348 NLRB at 689, the Board held that “assign” for purposes of Section 2(11) refers to the act of “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” To establish “independent judgment,” the authority to assign must be “independent [free of the control of others], it must involve a judgment [forming an opinion or valuation by discerning and comparing data], and the judgment must involve a degree of discretion that arises above the routine or clerical.” *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006) (quoting *Oakwood Healthcare*).

1. Putative supervisors prepare the work schedules using independent judgment

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

Production employees normally work rotating 12-hour shifts. There is a day-shift and a night-shift. (Pre. Tr. 32.) Every few months a shift schedule is posted identifying which employees have been assigned to which shift. The shift schedule also identifies what work groups the employees have been assigned to and what buildings they will work in each week while the schedule is in effect. (Pre. Tr. 46-48, 139-140.) Contrary to the Regional Director’s findings, *the putative supervisors are responsible for preparing the actual schedules, including assigning employees to a place and time.*

To substantiate the putative supervisors’ authority to make these initial work assignments, the Employer introduced a copy of a recent shift schedule at the pre-election hearing. As the schedule illustrates, the employees are assigned to either the day- or night-shift;

they are divided up into groups A, B, and C; and then those groups are assigned to a particular building. (Pre. Tr. Emp. Exh. 3.) The uncontradicted testimony is that putative supervisors Sanchez and Lal prepared the schedule introduced into evidence (Pre. Tr. 48, 139-141, 150, 167).

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

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

Q. And did [Sanchez] and [Lal] fill in the names on the second page of Exhibit 3?

A. Yes.

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

A. Yes.

(Pre. Tr. 167.)

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

Q. Have you seen Eduardo Sanchez make a schedule?

A. Yes.

Q. Well, how does he make the schedule?

A. That one particular time he just sat right there at the table on the job, and he got everybody's name and he just made it out, and then he print them out and pass them out to everybody.

Q. So when he made the schedule and passed it out, did you have to comply with the schedule?

A. Yeah, well, I had to get him to explain it to me because I didn't understand a lot of what he was saying as far as the shift was concerned. So he got it to where I could understand it, and then he would start posting it.

Q. Does that schedule change?

A. Yes, it changes. It's rotating shifts.

Q. So if [Sanchez] were to change the schedule, your work times would be different?

A. Uh-huh. Yes.

(Objs. Tr. 79-80.)

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

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

2. Putative supervisors assign and reassign employees using independent judgment

Not only do the putative supervisors prepare the work schedules, they prepare them using independent judgment. Moreover, they modify the schedules using independent judgment by reassigning where necessary to maintain safe and efficient production.

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

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

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

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

Q. What do you mean by experience?

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

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

A. Yes.

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

A. Yes.

(Pre. Tr. 227.)

The Regional Director inexplicably ignores the above testimony from Lal in favor of his own narrow construction of the term “experience” as simply referring to an employee’s tenure. In the Regional Director’s mind, then, deciding whether employee *A* has been employed longer than employee *B* requires no independent judgment. A plain reading of Lal’s testimony, however, reflects that he and Sanchez take into account much more. Lal’s testimony makes clear that, at a minimum, he and Sanchez assign employees to work groups based on their own evaluation of how good the worker is, how knowledgeable he is about the materials being produced, and whether he has the skills to operate more than one machine.

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

Employee John Williams offered a concrete example of how putative supervisor Sanchez's subjective evaluation of his "experience" resulted in him being moved to an entirely different building on one occasion. Williams explained that the work in Building Number 1 is generally more difficult than the work in Building Number 3. He said that one time he was originally assigned to work in Building Number 1, but Sanchez thought that he did not have enough experience for that side, so he moved him back to Building Number 3. (Objs. Tr. 76, 82-83.) There could not be more direct evidence of a supervisor's authority to "designat[e] an individual to a place (such as a location . . .)," *Oakwood Healthcare*, 348 NLRB at 689. Cf. *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, slip op. at 6 (2012) ("Although the Employer asserts that a mate may choose which of several deckhands to perform a specific task based on their skill and ability, the Employer did not present evidence that this has ever actually occurred.").

The Regional Director next fails to explain how the putative supervisors' role in reassigning employees when machines break down or when employees are absent does not require the use of independent judgment. Relocating employees to different jobs involves on-the-spot decision-making to maintain safe and efficient production. It also requires the putative

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

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

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

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

A. Yes, I've done it.

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

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

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

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

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

A. *Yes.* [emphasis added]

(Objs. Tr. 28-29.)

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

Consequently, the Regional Director erred in failing to find that the putative supervisors have the authority to assign.

C. AUTHORITY TO REWARD

The Board should also reverse the Regional Director's finding that the putative supervisors do not have the authority to "reward" or "effectively recommend" rewards as contemplated by Section 2(11) because he failed to consider substantial evidence in the record.

Vice President Oh testified that the putative supervisors are given a list of employees to evaluate in their department twice a year. The putative supervisors are asked to indicate on the list beside each employee's name whether they recommend that the employee receive a raise and, if so, how much. The putative supervisors base their recommendations on their perception of each employee's performance. (Pre. Tr. 51.) Oh explained that raises are not issued "across-the-board," but instead are only given to "certain employees" based on input from the putative supervisors and the production managers (Pre. Tr. 90).

Production Manager Jang confirmed Oh's testimony about the putative supervisors' role in the raise process. Jang explained that the putative supervisors were asked their opinion on the amount of the raises, and Sanchez, for example, came up with 50 cents himself (Pre. Tr. 161-162). Jang did not give the putative supervisors any established guidelines that govern raises; he simply told them to exclude new employees (Pre. Tr. 162).

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

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

At the objections hearing, the Union offered the testimony of putative supervisor Martinez, who claimed on direct examination that his only involvement in the raise process was "printing" a list of employees that he gave to Jang (Objs. Tr. 316). On cross-examination, however, Martinez was handed a copy of a signed version of the April raise list that was introduced as Employer's Exhibit 4 at the pre-election hearing and asked whether he filled it out and signed it (Objs. Tr. 331-333, Emp. Exh. 5). Martinez acknowledged that he filled it out and signed it after asking each employee when their start date was and how much they were earning (Objs. Tr. 332-336).⁸

Multiple witnesses confirmed that Martinez and other putative supervisors walked around the floor with a "list" and talked to employees about recommendations for raises. Employee Carlos Ortiz, for example, testified that he "had a conversation with [Martinez] that [he] could operate all of the machinery there" and "told him . . . that [he] can operate all the machines, [and] [he] deserve[ed] to get a raise, and all of the machine operators earn more, the rest of them" (Objs. Tr. 255). Ortiz explained that after that conversation, Martinez noted how much he was going to recommend, and Ortiz later received the raise (Objs. Tr. 255). Employees Ignacio Bamaca and Jose Garcia similarly testified that Martinez walked around with a list and talked to them about raises (Objs. Tr. 160-161, 186).

⁸ In a feeble attempt to minimize the significance of his involvement with the raise list and justify his conflicting testimony on the issue, Martinez offered the confusing theories that the list "wasn't valid" and he "didn't understand the numbers" (Objs. Tr. 334-335). Curiously, Martinez never explained why the sheet "wasn't valid" and what he "didn't understand" about the numbers.

Martinez's testimony that he simply walked around with a list and asked employees how much they made and when their start date was is woefully insufficient to rebut Jang's, Oh's, Sanchez's, and other employee witnesses' testimony establishing that the putative supervisors exercise independent judgment in recommending raises. Notwithstanding that the hearing officer expressly discredited Martinez as a witness (see Hearing Officer's Report 25), it simply defies logic to presume that the purpose of having Martinez and the other putative supervisors walk around and talk to each employee was to only collect dates of hire and current salary information. Indeed, Martinez himself acknowledged this made no sense, as management could have easily found that information in the computer (Objs. Tr. 332).

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

Jang testified that once he receives the putative supervisors' recommendations, he offers his own opinion and then submits it "to the management" (Pre. Tr. 162).⁹ Jang explained that he bases his opinion on, for example, an employee missing a day of work (Pre. Tr. 163). While Jang could not recall on the spot the names of any employees who did not receive the raise recommended by their putative supervisor, he testified that when he rejects a recommendation, it is because he has a "different opinion from the supervisor" (Pre. Tr. 162). Jang's difference of opinion further shows that the putative supervisors were exercising independent judgment in

⁹ It is clear from the record that Jang was referring to Vice President Oh.

making the recommendations. If the putative supervisors were merely recommending raises based on objective criteria such as length of service, then Jang certainly could not have had a difference of opinion with that.

Oh's testimony further illustrates that the putative supervisors' recommendations are given much credence. According to Oh, once he receives the recommendations, he simply ensures they are in line with what the Employer is financially able to pay (Pre. Tr. 54).

The only reasonable inference to be drawn from all this evidence is that the putative supervisors were charged with evaluating the performance of each of their subordinates and then providing input to upper management based on that evaluation for the purpose of rewarding employees in the form of raises. The record is uncontradicted that the putative supervisors' recommendations were followed in October 2012 90 percent of the time, which is more than sufficient to demonstrate that the putative supervisors "effectively recommended" the raises for purposes of establishing Section 2(11) authority to reward. See *Venture Industries*, 327 NLRB 918 (1999) (finding requirement of "effectively" recommending a supervisory action is met when the putative supervisor's recommendations were accepted 75 percent of the time). Accordingly, the Regional Director erred in failing to find that the putative supervisors possess the authority to reward employees or effectively recommend rewards under Section 2(11).

V. CONCLUSION

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

officer, that their prouion conduct up to and on the day of the election tainted the results in such a manner as to warrant dismissal of the petition or, at a minimum, a rerun election. Having granted the Employer's post-election request for review on these issues, the Board should correct the Regional Director's errors to preserve the employees' right to vote in an election free from undue coercion and intimidation.

Respectfully submitted,

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April 10, 2014

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

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

Case 10-RC-101166

CERTIFICATE OF SERVICE

I, Jonathan P. Pearson, do hereby certify that I have on this 10th day of April, 2014, served a copy of Employer's Brief on Review upon the following by email:

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