

**UNITED STEELWORKERS
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of)	
)	
PAC TELL GROUP, INC. D/B/A U.S. FIBERS)	Case No. 10-RC-101166
)	
Employer)	
)	
And)	
)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER,)	
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL)	
AND SERVICE WORKERS INTERNATIONAL UNION,)	
AFL-CIO, CLC)	
)	
Petitioner,)	
_____)	

**PETITIONER'S RESPONSE TO THE NLRB'S ORDER GRANTING LIMITED
REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND
CERTIFICATION OF REPRESENTATIVE**

Respectfully submitted on this 10th day of
April, 2014

BACKGROUND

Pursuant to a petition filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 (“Union” or “USW”) and a Decision and Direction of Election issued by NLRB Region 10 on May 3, 2013, an election took place on May 29 and 30, 2013 at the Pac Tell Group Inc., D/B/A U.S. Fiber (“Employer”) facility in Trenton, South Carolina in a unit composed of full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees. The ballot count showed 71 votes for representation by the Union, 59 against, with 7 challenged ballots. Four of the seven challenged ballots were cast by employees whom the Employer argued, in the pre-election hearing and in the instant proceedings, are supervisors under Section 2(11) of the Act: Eduardo Sanchez, Jose Lal, David Martinez, and Aduco Torres.¹ The Decision and Direction of Election found that the Employer failed to establish that these four individuals were supervisors under the Act.

The Employer filed sixteen Objections to the election results, asserting that alleged supervisors Jose Lal, David Martinez, and Aduco Torres engaged in coercive conduct interfering with employee free choice such that the election results must be set aside. The Employer did not allege any objectionable conduct with respect to Eduardo Sanchez. The Employer’s Objections state in the alternate that the alleged objectionable conduct was committed by third parties. In addition, the Employer’s objections allege that the Union, through its agents, officers, and representatives, interfered with the fair operation of the election process. A hearing on the Employer’s objections was held on July 1, 2, and 3, 2013. The Hearing Officer recommended that the Employer’s Election Objections be upheld. The USW subsequently filed Exceptions to the Hearing Officer’s findings. The Employer filed Cross-Exceptions.

Upon reviewing these exceptions and cross-exceptions filed by the Employer, the

¹ Martinez and Lal have both been terminated by the Employer. Case No. 10-CA-121231. Aduco Torres has been the subject of alleged anti-union discrimination by the Employer. Case No. 10-CA 118511. Eduardo Sanchez has been promoted and is alleged to have engaged in anti-union harassment as an agent of the Employer. Case No. 10-CA-115819.

Regional Director issued a Supplemental Decision and Certification of the Representative holding that the Employer failed to meet its burden to establish that the alleged supervisors are supervisors as defined by the Act. The Employer filed a Request for Review of the Supplemental Decision. The NLRB granted the Employer's Request for Review only as it pertains to a need to further examine whether the alleged supervisors have the authority to assign and to reward. The USW offers this brief in response. It is the USW's position that, upon further review, the evidence makes clear that Employer has failed to establish that the alleged supervisors have the authority to assign or reward as defined in Section 2(11) of the Act.

ARGUMENT

The party asserting supervisory status bears the burden of proving that supervisory indicia exist by a preponderance of the evidence. *In Re Oakwood Healthcare*, 348 NLRB 686, 687 (2001). The party bearing this burden must present "detailed, specific evidence" with regard to each supervisory indicia asserted. *Alternate Concepts*, 358 NLRB No. 38, slip op. at 3 (2012). Evidence that "is in conflict or otherwise inconclusive" does not suffice to show supervisory status. *Brusco Tug & Barge*, 359 NLRB No. 43 (2012). Nor do "mere inferences or conclusionary statements." *Alternate Concepts*, 358 NLRB No. 38, slip op. at 3.

I. Authority to Reward

The Regional Director correctly found that the evidence offered by the Employer concerning the role played by the alleged supervisors in the granting of raises was "insufficient to establish that they have the authority to effectively reward employees." (Supplemental Decision at 20.)

It is undisputed that the alleged supervisors do not grant raises. Testimony offered by the Employer establishes that Vice President Ted Oh has the final say on all raises and effects the disbursement of raises. (Pre. Tr. 148:4-25). The only question, therefore, is whether the alleged supervisors have the authority to "effectively recommend" raises. As with all other indicia of supervisory authority, the use of independent judgment in making any such recommendation is an indispensable element.

In April of 2013, the Employer for the first time required certain of the putative supervisors to fill out a form listing the employees they work with by making notations next to each of the employee names. (Obj. Tr. 333:24-334:13.) The record shows that Eduardo Sanchez and David Martinez filled in such forms. (Pre. E. Ex. 4; Obj. E. Ex. 5.) While VP Ted Oh asserted that the Employer received a copy of a similar list from Jose Lal, no such document was introduced and the Employer offered no explanation for its absence. (Pre. Tr. 53:1-8.) Lal testified that he had at some point filled out a similar sheet, but not when. (Pre. Tr. 207:1-19.) There is no documentary evidence of any input by Jose Lal into the raise process, as the first page of Employer's Exhibit 4 features Eduardo Sanchez's handwriting only. Vice President Ted Oh testified there is no record of input on this matter by alleged supervisors prior to April 2013, but asserted that the alleged supervisors gave some form of input on raises through "conversations and notes." (Pre. Tr. 129). There is no evidence that the alleged supervisors were asked to complete such lists at any time prior to April 2013.

A. Alleged supervisors who provided input into the raise process did not use independent judgment.

The burden is on the Employer to show that the alleged supervisors used independent judgment in effectively recommending raises for subordinates. Conclusory testimony does not suffice to show independent judgment. *Alternate Concepts*, 358 NLRB No. 38, slip op. at 3. The Employer failed to show that alleged supervisors used independent judgment when, under the direct instructions of their managers, they filled out lists with raise amounts.

Jose Lal's testimony did not show that he exercised independent judgment in providing input on raises. Lal testified that in order to fill out a sheet with pay raise information, "we [Lal and Sanchez] would have to ask each person how much they were making at the time." (Pre. Tr. 208:16-22.) Lal did not identify any other basis for filling out the raise sheet besides the employee's current salary. Determining the amount of a pay raise based on an employee's current salary does not require the exercise of independent judgment. The Employer failed to show that Lal considered any other factor in filling out a pay raise form.

The documentary evidence shows that Eduardo Sanchez also did not exercise

independent judgment, despite his conclusory testimony to that effect. The list filled out by Sanchez shows the number “.50” next to some employee names, and a blank next to others. There is no other amount indicated on the document. Sanchez did not explain how his use of independent judgment to consider multiple factors for each employee led to a recommendation of the exact same raise for every employee. Production Manager Glenn Jang, however, cleared up this matter. He explained that the employees with blank spaces next to their names were new employees with little tenure at the Company, and that “We don't give pay increase to people who just joined the Company.” (Pre Tr. 149:1-7.) The Regional Director found that “[Eduardo] Sanchez’s testimony regarding his job responsibilities often amounted to conclusory responses to leading questions.” (Supplemental Decision at 19). Sanchez’s testimony regarding raises is consistent with the Regional Director’s assessment. He gave generalized, conclusory testimony, reciting factors that he uses in recommending raises. However, he failed to explain how he went about filling out Employer’s Exhibit 4, and gave no specific examples of how he decided to recommend a particular raise for any individual. (Obj. Tr. 34, 52).

David Martinez’s testimony shows that he did not understand his assignment with respect to recommending raises, and therefore could not have used independent judgment in filling out the raise sheet. Martinez testified that he was not given instructions on how to fill out the raise sheet, that he did not know why he was being asked to do so, and that he “did not understand the numbers” that he was supposed to insert on the form. Martinez insisted that he did not find the assigned exercise of filling out the raise sheet to be “valid.” (Obj. Tr. 331:6-336:20.)

Torres had no involvement in preparing such a list. Torres testified that when employees on his shift asked him about raises, he brings their demand to Kang, but has no further involvement. (Obj. Tr. 371-372.)

B. Input on raises by the alleged supervisors was not “effective recommendation.”

The record does not demonstrate that alleged supervisors effectively recommend raises. The Regional Director properly found that the Employer did not meet its burden on this matter, holding that the evidence was “inconclusive concerning how much the putative supervisors’ recommendations factored into the final decision.” (Supplemental Decision at 20.) The only

testimony offered by the Employer regarding management's consideration of input by the alleged supervisors was vague and conclusory. The Employer offered no testimony of a specific instance where management accepted an alleged supervisor's recommendation to grant a raise. *G4S Regulated Sec. Solutions*, 358 NLRB No. 160 (Sept. 28, 2012) (Rejecting "rote and conclusory testimony" on supervisory authority and requiring a showing of "specific instances").

At the pre-election hearing, Vice President Ted Oh testified that Employer Exhibit 4, the only concrete example of any input by the alleged supervisors into the raise process, had not yet been considered by management. No evidence was ever subsequently offered to show whether and how management took into account the recommendations on the raise sheets prepared by Sanchez and Martinez. When asked about the raise sheet filled out by David Martinez, Production Manager Glenn Jang testified that he did not understand the handwritten notation "T" made by Martinez. (Pre. Tr. 148:8-16.) The Employer's evidence did not explain how Jang planned to consider Martinez's input if he did not understand his notations.

Effective recommendation is not established where higher management conducts an independent investigation before making a final decision. *See Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1116 (2007). Testimony by supervisor Jang shows that upper management conducts an independent investigation before deciding on any raise. Jang explained that he independently assesses each raise recommendation, prepares a "document" and then submits that input to Ted Oh. (Pre. Tr. 147:8-18.) Jang's testimony that in October 2012 certain alleged supervisors made raise recommendations which were accepted "90%" of the time does not demonstrate the effectiveness of the recommendations. (Pre. Tr. 148:1-7.) If management performs an independent investigation, whether the results of that investigation coincide with an alleged supervisor's recommendation is not significant.

Having properly held the Employer to its burden of proof, the Regional Director correctly concluded that the evidence showed neither independent judgment nor effective recommendation. A review of the evidence reveals that the Board should affirm this finding.

II. Authority to Assign

The Board has defined "assign" as "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 an overtime period; or giving significant overall duties to an employee.” *Brusco Tug & Barge*, 359 NLRB No. 43 (Dec. 14, 2012).

Under *Oakwood Healthcare*, acts of assignment must be performed with the exercise of independent judgment. 348 NLRB 686, 692-693. Assignments made pursuant to verbal or written instructions from higher management do not exhibit the requisite independent judgment. *Id.* Assignments made in a “routine or clerical” manner do not exhibit independent judgment. *Alternate Concepts*, 358 NLRB No. 38 (April 27, 2012). An assignment is “routine or clerical” where it does not require an assessment of the skills and ability of the employee being assigned. *Pac. Coast M.S. Indus. Co.*, 355 NLRB No. 226 (Sept. 30, 2010).

The Employer has entirely failed to meet its burden of demonstrating that the alleged supervisors assign employees to a place, time or to significant overall duties using independent judgment. The evidence is clear that the overall job duties of production employees are assigned by higher management, for example, production managers Glenn Jang and Kyong Kang. See *Brusco Tug & Barge*, 359 NLRB No. 43 (Dec. 14, 2012) (mates are not supervisors where overall job duties are “preassigned at a higher level”); *Alstyle Apparel*, 351 NLRB 1287, 1304 (2007) (no supervisory authority to assign where “a managerial level above [alleged supervisors] determined which employees would work in knitting production, the shifts they would work, and what overall work they would perform.”).

The evidence shows that alleged supervisors do not possess the authority to assign employees to a particular shift. Alleged supervisors do not have the authority to give employees a new job or new position or to permanently transfer an employee to a new assignment. (Obj. Tr. 102:21-25; 141:14-21; 270:13-23; 288:2-25; 314:9-19.) As in *Croft Metals*, where the Board found that lead persons at a manufacturing facility did not exercise supervisory authority to assign, the alleged supervisors perform all of their tasks in the service of carrying out projects assigned to them by the production managers at the beginning of each day. 348 NLRB 717, 718.

As shown below, the evidence fails to show that the involvement of the alleged supervisors in adding to schedules, making temporary transfers, and creating ‘work groups’ is not “assignment” under Board law. Further, to the extent that they take part in assignment activities, the alleged supervisors do not do so using independent judgment.

A. Schedules

The Regional Director found that where alleged supervisors contribute to the creation of a work schedule, they do so without the exercise of independent judgment. (Supplemental Decision at 17). The evidence as a whole demonstrates that any involvement by the alleged supervisors in scheduling is subject to management strictures. Further, as the Regional Director emphasized, assignments to the schedule that are made by alleged supervisors are “of a more routine nature.” (Supplemental Decision at 17). *See Alternate Concepts*, 358 NLRB No. 38 (2012).

The Employer’s Request for Review simply asserts that Jose Lal and Eduardo Sanchez create schedules, and fails to show that their involvement requires the exercise of independent judgment. The evidence shows that Jose Lal and Eduardo Sanchez, working under manager Glenn Jang, fill out a schedule which Jang created, subject to Jang’s supervision and final approval. It is clear that while Lal and Sanchez play a role in creating the schedule, they do not perform this task with independent judgment. *Croft Metals*, 348 NLRB 717, 721 (2006) (to exhibit independent judgment, the authority to assign must be independent [free of control of others]). Jose Lal testified that along with Eduardo Sanchez, he fills out a schedule with employee names as instructed by Jang. (Pre. Tr. 203:17-204:22; Pre. E. Ex. 3.) Jang created the template for the schedule, which Sanchez and Lal fill in with names. (Pre. Tr. 140:1-13; 205:2-206:12.) Jang has sole authority to decide how many employees work each shift. *Id.* Jang reviews and can amend the choice of employees filled in by Lal and Sanchez. (Pre. Tr. 205:16-23.) (Testimony by Lal that Jang “would always notice which person we would use, and he might come up with a different idea”). Jang has final authority over the schedule and can change it according to his discretion. *Id.*

Under *Oakwood Healthcare*, “the authority to effect an assignment. . . must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Oakwood Healthcare*, 348 NLRB 686, 693 (2006). Jose Lal testified that he fills out the schedule based on routine considerations. Two employees are required to move and load material, and two are required to remain stationary and check

production. (Pre. Tr. 204:23-205:1). Sanchez did not testify as to what factors he considers in making out a schedule. The Employer relies on testimony by employee John Williams that he once saw Sanchez writing on the schedule template. (Request for Review at 12). However, Williams' testimony does not and cannot bear on Sanchez's use of independent judgment.

The Employer's Request for Review concedes that Aduco Torres and David Martinez play no role whatsoever in creating the daily schedule. (Request for Review at 11-17.) Martinez testified that as to which employees work in each work group, "the lists are already made. I mean there is no sense of changing the list. You have to respect the list." (Obj. Tr. 312:25-313:15.) Martinez explained that production manager Glenn Jang decides how many employees work on a shift, and that Jang makes a list of employees divided into work groups. Martinez does not create the schedule or give input contributing to its creation. (Obj. Tr. 311:18-312:13.) Torres also testified that his production manager, Kyong Kang, makes the shift schedule dividing employees into their work groups. (Obj. Tr. 367:24-368:2.) *See Pacific Coast M.S. Indus.*, 355 NLRB No. 226 (Sept. 30, 2010) (no supervisory authority to assign where Employer did not prove that alleged supervisors created schedules "other than sporadically").

B. Work Groups

The Regional Director explained that Lal and Sanchez "divide the employees into work groups consisting of between 3-5 employees, depending on the work area. Each work group has a lead employee, who has been designated by a manager. In this regard, Lal and Sanchez divide employees into groups by placing less experienced employees with more experienced employees." (Supplemental Decision at 8). The Employer does not dispute these facts. The Employer's only difference with the Regional Director is as to the degree of discretion exercised by Lal and Sanchez when they take employee experience into account. (Request for Review at 13-15). The Employer offers only a few lines of testimony by Jose Lal in support of this argument. (Request for Review at 14-15; Pre. Tr. 205; 227). None of this testimony includes a specific example of an alleged supervisor applying independent judgment in order to assess the experience of a particular employee. *See Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (finding that employer failed to meet its burden of proof as to independent judgment where it "adduced almost no evidence regarding the factors weighed or balanced by the lead persons in making

production decisions and directing employees”); *Brusco Tug & Barge*, 359 NLRB No. 43 (Dec. 14, 2012) (no showing of independent judgment in assessing employee skill level where employer offered only hypothetical situations and failed to present an instance “of a mate or pilot selecting one deckhand over the other to perform a particular task”).

“Assigning employees according to their known skills is not evidence of independent judgment,” as no discretionary assessment is required. *Shaw, Inc.*, 350 NLRB 354, 355-56 (2007). In *Shaw*, the Board found that a foreman’s assignment of employees was based on “an employee’s trade or known skills, and is, thus, essentially self-evident. For example, if an operator is part of a crew, he will operate the heavy equipment, a fuser will fuse plastic pipe, and a welder will handle metal pipe. Such assignments do not involve the exercise of independent judgment.” *Id.*

Here, the evidence shows that when Lal and Sanchez create work groups A, B, and C, they select known “Leads,” who have more experience than other employees, to head a crew of less experienced employees. “Lead” is an established employee status. No discretion is required to decide who is and is not a Lead. The Employer’s organizational chart shows that nine “Leads” work in Sanchez and Lal’s department: Noe Cortez, Antonio Garcia, Sergio Lara, Jesus Magona, Carlos Vicente, Victor Perez, Rudy Perez, Juan Guch, and Misael Vasquez. (Pre. E. Ex. 1.) Ted Oh testified that these individuals are “the lead persons for each team,” and that they are “more experienced operators” who are “more skilled than the rest of the team.” (Pre. Tr. 35:8-11).

Oh explained that “each of [the Leads] lead the team made up anywhere from three-man to five-man team.” (Pre. Tr. 35:1-4). The “teams” Oh refers to are the A, B, and C work groups listed on the schedule submitted into evidence by the Employer. (Pre. E. Ex. 3.) Consistent with Oh’s testimony, each work group is headed by one of the Leads listed on the Employer’s organizational chart. For example, in Buildings 1 and 2, designated Lead Victor Perez heads the daytime A group, with two other non-Lead employees below him. Designated Lead Misael Vasquez heads the nighttime A group. Designated lead Jesus Magana heads the daytime B group. (Pre. E. Exs. 1; 3). Every single work group on this sample schedule includes a designated Lead.

Jose Lal, the only employee to give testimony on how alleged supervisors select work groups, clearly explained that he exercises discretion in this function only to the extent of making

sure to include one Lead per work group. When asked “How did you decide which employees would be in A, B, and C?” Lal responded that “the way they were divided in groups is the person that had the most experience would be the leader of a group, and they would put two persons with less experience in the group.” When asked to explain further how he groups employees into groups A, B, and C, Lal explained: “For example, on the Group A, the day shift, Victor Perez is the leader because he has more experience, and the other two don't have that much experience. And that's how that group was formed. And the night shift, Misael Vasquez is the one with more experience and the other two have less experience.” (Pre. Tr. 225:25-226:14). Victor Perez and Misael Vasquez are Leads. (Pre. E. Ex. 1). When asked by the Hearing Officer whether the selection of work groups is “based only on experience,” Lal testified that “[a]gain, there is one more experienced, the other ones have less experience.” (Pre. Tr. 225:15-22). Here again, Lal is referring to Leads as “more experienced.” The Hearing Officer pressed this line of questioning, asking “Are there any other factors that led into the decision?” Lal answered “No.” *Id.*

Like the foremen in *Shaw*, Sanchez and Lal assign employees to work groups based on their known skills and pre-designated functions. There is no evidence that Lal or Sanchez play any role whatsoever in determining who is and is not assigned to be a Lead employee. They select Leads for work groups based on their knowledge of that person's pre-designated function. Therefore, the Regional Director correctly found that when Sanchez and Lal place “employees on their respective shifts to work groups,” the judgment they use is “of a more routine nature since they group employees to include inexperienced employees with experienced employees.” (Supplemental Decision at 17).

The Employer relies on a few lines of testimony which it purports demonstrate that Lal and Sanchez perform some kind of *de novo* assessment of each employee's skills and experience when creating work groups. (Request for Review at 14). However, in the preceding few pages of hearing testimony, as described above, Lal had clearly explained that the “experience” he and Sanchez rely on is a function only of the pre-established “Lead” designation. Taken in this context, it is clear that Lal's testimony regarding relative work skills and experience is simply a further explication, at the prompting of Employer counsel, of what distinguishes a Lead employee from other employees. (Pre. Tr. 227). The Employer further argues that testimony by Jose Lal that he and Sanchez sometimes differ in opinion over who to assign to a work group

demonstrates the use of independent judgment. (Request for Review at 15). However, the Employer did not offer evidence showing that any difference of opinion between Sanchez and Lal was over the assessment of the employees' skills. Differences could arise over routine matters—for example, the equalization of workloads or the known skills of an employee—or even over allegations of favoritism.

Oakwood Healthcare and *American River Transportation*, 347 NLRB 925 (2006), relied upon by the Employer, found the use of independent judgment in assignment under very different circumstances than those presented here. The Board held in *Oakwood Healthcare* that where a registered nurse “weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment.” *Oakwood Healthcare*, 348 NLRB 686, 693 (2006). Those cases involve the use of independent judgment in matching the skills of a particular employee to a particular task—for example, matching a nurse skilled in dialysis to a dialysis patient.

Lal testified that he and Sanchez consider employee experience for the limited purpose of grouping employees into the A, B, C, and D work groups. These groupings in no way determine which employee performs which task. In fact, the evidence shows that all employees regularly perform all of the tasks in their department and are familiar with all of the machines, and that they rotate routinely throughout the day to different tasks and machines. (Pre. Tr. 182:1-183:3 (testimony by line employee that three employees in a work crew will “rotate like every four hours” between jobs); Obj. Tr. 311:19-312:2; 313:5-15 (testimony that “we have four individuals in a group and everybody knows what they need to do; it rotates. So basically one person will go to cutting, one person will go to the grinding, and so on and so forth.”)).

Lal clearly testified that employees are placed in work groups by experience in order to balance out the group, not to match a particular employee to a particular task. To the extent assignments to work groups involve a degree of discretion, it is not the kind of careful evaluation that goes into assigning a highly skilled registered nurse to a particular patient. The creation of a group with different levels of experience is far more like the “equalizing of workloads,” which *Oakwood* makes clear does not constitute independent judgment. *Oakwood*, 348 NLRB at 693. See also *Esco Corp.*, 298 NLRB 837, 839 (1990); *Masterform Tool Company*, 327 NLRB

1071 (1999) (assignment or direction simply aimed at equalizing workloads or varying employee routines does not require independent judgment.)

C. Temporary Transfers

The alleged supervisors on occasion make temporary work transfers in which they move an employee from one workstation or line to another, prompted by the need to fill in for an absentee or a machine breakdown. These temporary transfers are not “assignments” under *Oakwood Healthcare*, which distinguishes ad hoc instructions to perform discrete tasks from the making of assignments. The “occasional switching” or “sporadic rotation” of tasks within an assignment does not rise to the level of assigning significant overall duties, as this “more closely resembles an ad hoc instruction that the employee perform a discrete task during the shift and as such is insufficient to confer supervisory status.” *Croft Metals*, 348 NLRB 717, 722 (2006). *See also Alstyle Apparel*, 351 NLRB 1287, 1304 (2007) (different machines within a shift leader’s department are “discrete components of the overall work assignment” such that a shift leader’s assignment of employees to a specific machine does not rise to the level of assignment).

Even if these temporary transfers of employees could be said to implicate “significant overall duties,” the Employer has not shown that they involve the exercise of independent judgment. Alleged supervisors move employees subject to the oversight and direction of production managers Glenn Jang and Kyong Kang. Aduco Torres testified that if he moves an employee from one line to another, he always first obtains permission from production manager Kang. He testified that if he were to use his own discretion to make temporary moves, he could easily run afoul of Kang’s imperatives, making Kang “very mad.” (Obj. Tr. 379:21-380:18.) According to testimony by Jose Lal, David Martinez, and Glenn Jang, the alleged supervisors are in “constant verbal communication” with production managers Jang and Kang, who circulate the production area on golf carts. (Pre. Tr. 153:22-155:4; 201:20-202:17; Obj. Tr. 314:20-315:13; 371:1-8.) *See Brusco Tug & Barge*, 359 NLRB No. 43 (Dec. 14, 2012). Testimony by line employees that they have not observed whether alleged supervisors obtain permission from a manager before making a temporary transfer is not sufficient to show independent judgment. *See, e.g.*, Obj. Tr. 183:13-22 (testimony by line employee Jose Garcia that he has not seen David

Martinez have to ask permission before moving an employee to a different machine). An employee being temporarily transferred would have no way of knowing whether the alleged supervisor was acting pursuant to directions from higher management, or whether the transfer had been approved by higher management.

Further, this occasional shifting of job duties is routine, in that it does not require a high level of discretionary decision-making. *See Croft Metals*, 348 NLRB 717, 718 (2006) (assignment does not implicate independent judgment where “employees generally do the same work every day, and the assignment of employees to particular jobs is “pretty routine,” day in and day out,” even where an alleged supervisor “may switch tasks among employees on his line or in his crew during the shift.”). In assigning employees to machines or tasks, the alleged supervisors do not assess their skill and ability. *See Alternate Concepts*, 358 NLRB No. 38 (Apr. 27, 2012) (where trains run on a pre-determined schedule, “assigning an operator to a train is simply a routine function: all trains are the same and all operators possess the same qualifications and skills.”). Evidence that workers regularly rotate between machines and duties demonstrates that workers subject to temporary transfer generally have the same level of skill. The production lines run twenty-four hours a day. When a machine breaks down, the rearrangement of workers does not require any independent judgment. According to a structure created by higher management, four employees form one work group. Certain machines only require three individuals, freeing up the fourth group member to join another group which needs four people or is short a person. (Obj. Tr. 152; Tr. 252:1-153:18; 282:7-16.) The only assessment necessary in making a transfer under these circumstances is the availability of workers. *See Croft Metals*, 348 NLRB 717, 718 (2006) (“When a production line is shorthanded and/or an employee is sent from his regular line to another lead person's line, then the lead person must tell the employee what jobs to perform and may shift other employees accordingly.”)

Testimony by an Employer witness refers to an incident where Eduardo Sanchez kept him from going to Building 1 and had him stay in Building 3 instead, but the Employer provided no testimony from Sanchez on this matter. The witness could not establish the exercise of independent judgment by Sanchez, as the witness could not know whether or not the Sanchez was working based on instructions from Jang, or how Sanchez might have determined that the witness should stay in Building 3. This appears to be a completely isolated incident in which the

Employer failed to produce any evidence supporting its claim that this indicated supervisory authority to assign. The NLRB has long held that occasional, irregular, or ad hoc instances of assignment or direction are generally insufficient to establish supervisory authority. *Oakwood*, NLRB No. 37 at 14; *Croft Metals*, NLRB No. 38 at 6.

CONCLUSION

The Union notes that The Employer makes an additional disingenuous argument that the Regional Director's decision "defies logic and ignores reality." (Request for Review at 8). The Employer blusters that production could not possibly operate without the exercise of supervisory authority by Martinez, Lal, Torres, and Sanchez. However, under the Employer's own theory of the case, that is exactly how the Employer's facility functioned until October 2012, when these four employees were allegedly "promoted to supervisor" and given additional authority. (Request for Review at 5). The Employer cannot credibly assert both of these claims at once. Moreover, the Regional Director properly and reasonably found that "the role of the putative supervisors in the production process appears to be more of a lead person." (Decision at 18). They play a role as a conduit to those with supervisory authority, but this does not make them into supervisors. *See PPG Aerospace Industries*, 353 NLRB No. 23 (2008) (authority is not supervisory "[w]here the putative supervisor serves as a conduit relaying assignments from management").

Finally, the Board should take into account that a finding for the Employer in this case would stand as unfortunate verification of the prediction made by the dissent in *Harborside Healthcare*:

"The majority's ruling puts unions in an extraordinarily difficult position...As we have pointed out, many prounion supervisors are unaware of their own supervisory status. ... If ... unions guess wrong, the results of many elections will be subject to challenge. Either way, employees who want union representation lose."

Harborside Healthcare, 343 NLRB 906, 919 (2004) (Liebman, dissenting).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing Charging Party United Steelworkers' Exceptions from the Above-Captioned Case was made on the following from Pittsburgh, Pennsylvania this 10th day of April, 2013.

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