

**UNITED STATES GOVERNMENT**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 31**

**RITE-AID CORPORATION**

**Employer**

**and**

**Case 31-RC-8587**

**INTERNATIONAL LONGSHORE &**

**WAREHOUSE UNION, LOCAL 26**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The International Longshore & Warehouse Union, Local 26, filed a petition under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent all regular full-time and regular part-time general warehouse and maintenance employees employed by Rite Aid Corporation at its Lancaster, California facility.<sup>1</sup>

The sole issue is whether certain employees within the production department are supervisors within the meaning of Section 2(11) of the Act. The Employer contends that the Production Leads (“Leads”)<sup>2</sup> are Section 2(11) supervisors and therefore should be excluded from the petitioned for unit; the Petitioner disagrees.

<sup>1</sup> No collective bargaining agreement covers the petitioned-for employees.

<sup>2</sup> Although Cigarette Leads and Floor Leads/Coordinators (“Floor Leads”) are also Production Leads, they are not in dispute, as the parties have stipulated that they are excluded from the Unit. When referring to “Leads,” I will be referring to only the Leads at issue.

For the reasons set forth below, I conclude that the Leads are not supervisors under the Act, and are therefore included in the Unit.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

## I. FINDINGS

**A. HEARING OFFICER RULINGS:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

**B. JURISDICTION:** The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.<sup>3</sup>

**C. LABOR ORGANIZATION:** The Union is a labor organization within the meaning of Section 2(5) of the Act.

**D. QUESTION CONCERNING COMMERCE:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>3</sup> The Employer, Rite-Aid Corporation, a Delaware corporation, is engaged in the business of retail sales of pharmaceuticals and other products, with offices and places of business located at various locations in the State of California, including 2801 West Avenue H, Lancaster, California 93536. During the past 12 months, the Employer has had gross receipts in excess of \$500,000.00 and has purchased and received in excess of \$5,000.00 of materials and supplies directly from sources outside the State of California.

The Employer, thus, satisfies the statutory jurisdictional requirement as well as the Board's discretionary standard for asserting jurisdiction herein. *Siemons Mailing Service*, 122 NLRB 81 (1959).

**APPROPRIATE UNIT:** The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**INCLUDED:** All regular full-time and regular part-time general warehouse employees employed by Rite Aid Corporation at its facility located at 2801 W. Ave. H, Lancaster, CA 93536, including Replenishment Associates, Inbound Associates, Outbound Associates, Inventory Control (I/C) Systems Associates, Production Associates, including Ticket Printers, Maintenance Associates, Tote Crew Associates, Seasonal Associates, Carousel Associates, Cigarette Associates, Each Pick Associates, Case Pick Associates, Plant Clericals in the Inbound Department, the Administrative Assistant Plant Clerical in the Production Department, the Time Study Plant Clerical in the Production Department, and clerical positions in the Shipping Department, including Rx Clerks and Customer Service Clerks.

**EXCLUDED:** Replenishment Leads, Inbound Leads, Maintenance Leads, Outbound Leads, I/C Systems Leads, Cigarette Leads, Coordinators/Floor Leads, corporate and professional and management employees, confidential and administrative employees, office clerical employees, guards and supervisors as defined in the Act.

In analyzing the issue in this case, I will provide an overview of the Employer's operations, and then discuss the duties of Leads.

## **II. FACTS**

### **A. Overview of Operations**

The Employer operates a chain of retail drugstores throughout the nation, and runs a Distribution Center in Lancaster, California (the "Facility") from which it distributes products to approximately 440 stores. The Facility is about a quarter of a mile long and 600 feet wide totaling 940,000 square feet of floor space. The Employer employs over 700 employees

as well as many temporary employees (“Temps”) at the Facility.<sup>4</sup> The Production Department (“PD”) is the Facility’s largest department, employing most of the employees, both regular and temporary, and using most of the Facility’s space.

The PD pulls together orders and prepares orders for shipment to the retail stores; it has two ten-hour shifts – a day shift and a night shift. The Facility operates Monday through Saturday, approximately 20 hours each day. The PD has two managers, the Day Shift Manager and the Night Shift Manager, and seven Assistant Managers. Additionally, there are approximately 41 employees categorized as Leads in the PD. The parties stipulated to exclude the Employer’s five Floor Leads and three Cigarette Leads;<sup>5</sup> The supervisory status of the remaining 33 Leads is at issue.

Leads, Associates, and Temps in the PD work four ten-hour shifts each week.<sup>6</sup> All Leads earn \$0.50/hour more than Associates in the PD; however, because seniority dictates the wages earned by Rite-Aid employees, more senior Associates may earn more than some Leads. The record also establishes that Leads receive the same benefits package as Associates. In contrast to the Leads and Associates, the Managers and Assistant Managers are salaried employees who work a regular five- or six-day schedule.

The PD is comprised of two division: the “Each Pick” (Associates pick and pack individual items) and the “Case Pick” (Associates pick and pack whole cases of product).

<sup>4</sup> Temporary employees refer to employees directly employed by agencies, not Rite-Aid.  
<sup>5</sup> Floor Leads monitor the volume flow in the Facility and record wave (work order) activity. Floor Leads report the status of workflow to Leads and Managers; they do not oversee Associates. Over the course of the past year, two of the Floor Leads split their time equally between the Floor Leads and regular Leads. Also, several of the Leads the Union seeks to include in the Unit fill in as Floor Leads.

<sup>6</sup> Throughout this Decision, the term “Associate” will include regular employees employed by Rite-Aid as well as temporary employees employed by outside agencies, unless otherwise specified.

The “Each Pick” division consists of six work areas known as modules or “mods.” Each mod is staffed by one team or crew of employees. Case Pick has three mods. The PD also consists of the specialty areas including the “Seasonal,” “Carousel,” and “Cigarette,” where employees pick and pack holiday/summer items, where employees pick off a rotating “carousel” machine, and where employees fill orders comprised of cigarettes, respectively. In addition to the Each Pick, Case Pick, and the specialty areas, the PD also includes the “Tote Crew,” which employs approximately five Associates who are responsible for ensuring that the mods are equipped with empty totes to be filled by Associates.

Within the PD, Associates’ duties include pulling and picking items off shelves and placing those items into totes for shipment to Rite-Aid stores, loading and unloading, and moving items throughout the Facility; Associates are often referred to as “pullers” or “pickers.”

## **B. The Hierarchy of the Facility**

The General Manager oversees the Facility and is the individual to whom the Employer’s four Senior Operations Managers report. One to two Department Managers supervise each of the departments along with a varying number of Assistant Managers. Each department also employs Leads, Associates, and Temps.<sup>7</sup> The Leads’ function is to assign Associates to specific locations within the work area and to give them tasks to complete each day. Leads report to the Assistant Managers and Managers. Additionally, there are five Floor Leads who keep track of attendance and monitor product flow known as “wave activity” through the Each Pick mods, ensuring that the workload is balanced between the mods. Only one Floor Lead is on duty per shift.

<sup>7</sup> While each department employs Leads, it is only the Production Leads’ supervisory status that is at issue.

### **C. The Production Department**

The Employer uses three linked computer systems: the Warehouse Management System (“WMS”), the Data Control System (“DCS”), and the Pro Rep System. The WMS sorts orders from the Employer’s corporate office into what the Employer refers to as waves, and links each order with numerically identified products and their location within the Facility. The WMS downloads these orders onto the DCS, which links to the Associates and the totes they are filling upon their scanning of their badges and the totes’ labels. After scanning the badge and the tote, the DCS will trigger what the Employer refers to as the “pick-to-light” system whereby the lines holding the product to be picked and the number of items to be picked light up.

The DCS is available on the computers located on each level of the mods. The Managers, Assistant Managers, and Leads have computer access. Although Associates do not have computer access, they can view the DCS screens to see how much work remains in their mod. Management can use the information provided by the DCS to track how much work is left in each mod and how quickly or slowly the employees are working. Finally, management uses a computerized Pro Rep system that tracks the rate at which the Associates are packing totes during each shift. Management uses the Pro Rep system to issue Reports Cards to Associates and Leads monthly. The Report Cards set out the employees’ efficiency; Associates falling below a 90% efficiency rating are subject to discipline.<sup>8</sup>

Associates, not Leads, are held to a production standard. The production standard is the rate at which Associates are expected to do their various tasks. Leads are not held to a production standard because the time during which Leads pick items alongside Associates is

<sup>8</sup> Failure to meet or exceed the 90% efficiency rating once subjects Associates to a verbal warning by an Assistant Manager. If Associates fall below the 90% rating twice they are subject to a written warning by an Assistant Manager. The third occurrence may result in a suspension and discharge if Associates fall under the 90% rate again within a 12month period. Suspensions and discharges are issued only with approval from the Employer’s Human Resources Department.

often interrupted by their other duties. One Lead testified that she spends, at most, two hours each day picking alongside Associates. Two other Leads who testified claimed to pick only for five or ten minutes here and there during the day. All Leads testified that some days they do not have time to do any picking. As such, the bulk of the Leads' time is spent monitoring the work to be done and being done in the mods, performing inventory adjustments, filling out forms, and relaying information between Managers, Assistant Managers, Floor Leads, and Associates.<sup>9</sup>

When deciding how to assign Associates to zones within the mods, a manager instructed Leads to use a rotation schedule so that Associates do not always work in the same level or zone within the mods. Most Leads use rotation schedules to assign Associates to different levels and zones in the mods. Some Leads also consider the amount of work to be done in each level and zone, the type of work to be done, and an Associate's speed, preference, and recent assignments when assigning Associates within the mods.

After being assigned to a particular level and zone, Associates fill totes without input or direction from Leads. The record establishes that Associates know what to do when picking – no direction from Leads is required. One Lead testified that she may coach an Associate on how to improve speed and avoid errors if the Associate is having a problem.

Throughout the shift, Leads must deal with product issues (such as misplaced items or missing items), equipment malfunctions (such as the scan gun that Associates use to scan the products placed into the totes), and issues concerning the Associates.<sup>10</sup>

Floor Leads, an excluded category of leads, distribute a document called the 9994 form to Leads each hour. The 9994 form requires Leads to look for particular items, enter information about the items into the computer system, and return the form to the Floor Lead. The testimony established that Leads must deal with Associates who are “goofing off,” or, who are not doing the tasks assigned to them. Leads must also address violations of safety rules, as well as safety incidents in the mods.

Leads testified that Associates may come to them if they are sick and need to go home. According to the Leads who testified, the Associates are directed to notify management before leaving. There is evidence that a Lead sent an Associate home without having the Associate notify the Floor Lead or a manager.

In the event that a mod has more work than it can handle, the Leads will contact the Floor Lead and request that additional Associates be assigned to their mod to help with the workload. Leads do not have the authority to assign Associates to their work area but may make a request through the Floor Lead. Conversely, if another work area needs additional employees, the Floor Lead will contact the Lead and either request that the Lead send a specific Associate to a different work area or the Floor Lead will ask for any Associate who has been trained to work in the particular department that needs assistance.

For each shift, there are between one and three Assistant Managers on duty. There is only one Assistant Manager on duty on Saturdays, but there are three Assistant Managers on duty on Wednesdays and Thursdays. About 120 Associates work during each shift.

One Associate testified that, although she takes daily problems to her Lead, she take problems such as rotation, disputes with employees, and requests for days-off to Assistant Managers. Another Associate testified that when she had a problem with the way the nightshift

Associates left her area, she went directly to an Assistant Manager. **D. The Modules Within the Production Department**

As described above, the Case Pick and Each Pick divisions in the PD are comprised of mods. Most of the mods have three levels or floors and are divided into zones and lines (shelves) that hold one item denoted by a specific identifying number. Management assigns one Lead and a varying number of Associates to a particular mod and the Leads assign the Associates to specific zones within the mod.

Generally, Each Pick Leads oversee somewhere between four and 20 Associates in their mods, while, two Case Pick Leads oversee 32 Associates, and the Seasonal Lead oversees eight Associates. Once in the mod, Associates spend their shifts picking specific quantities of products off the lines and placing them into plastic boxes known as totes.

### **E. Production Department Meetings**

At the start of each shift, management holds two meetings. One meeting is attended by Leads where management hands out wave sheets and staff planners—documents that give the Leads an idea of how many products they will need to prepare to ship out of the Facility during the shift, as well as, the number of Associates who will be needed to pick and pack the products for each wave. Management also makes announcements about the volume of product to be picked and packed for the shift, updates the Leads about special events, and informs Leads of the need for overtime. The second meeting is attended by all PD employees. Management goes over much of the same information as well as instructing Associates to pick safely and to clean up after themselves. Management also leads the Associates in stretches. Following this meeting, Associates report to their assigned work area.

Once assembled in their work areas, the Leads take attendance. Because the Associates should have already punched in at the start of their shift, the taking of attendance is merely a way to double-check who's there and who's not. Some Leads have an "S-card."<sup>11</sup> The S-cards can override the computer system to allow a late-arriving Associate to punch in, but the cards do not allow the Lead to alter the time at which the Associate punches in. Af

<sup>11</sup> The "S" stands for supervisor, but it is unclear whether employees are aware of what the "S" stands for. The Employer asserts that the only reason that some Leads have Scards and others do not is because the Employer does not have enough cards for all the Leads. Also, Tote Crew Leads (one of the categories of Leads in dispute) do not have S-cards and must contact Floor Leads when they need to clock in a late-arriving Associate.

ter attendance is taken, the Leads assign the Associates to zones within the mod. The Leads may use the information provided by the DCS to see how much work needs to be done on each level of the mod. After assigning the Associates to positions within the mod, Leads will continuously check the DCS screen to see how much work is left to be done in the mod for that wave. If Associates complete their work for the wave they may consult the DCS and independently relocate to another zone on their assigned level, if a Lead is not available; or, the Lead may reassign them to another zone or level to facilitate the completion of the wave.

About once a month there may be a meeting for Leads; these meetings, which last only about 20 minutes, are held after the PD meeting for all employees. On the days the Lead meetings are held, the Associates generally begin picking for the wave without direction from the Leads, although if the night-shift Lead is present and available, that Lead may direct the Associates. When the Lead returns to the mod after the meeting, the Lead may reassign Associates to different levels or zones.

There are two management meetings daily, one at 8 a.m., and one at 2 p.m. These meetings are not attended by Leads.

#### **F. Standard and Procedural Errors**

The Employer uses what are known as error reports (“Errors”) to document mistakes made at the Facility. Quality Control Associates, I/C Systems Associates, Tote Check Quality Control Associates, and Leads are all able to issue Errors. There are two primary types of Errors: Standard and Procedural. A Standard Error would be issued because an Associate pulled too many or too few items for a work order, pulled the wrong items for an order, or because an Associate mislabeled a box or tote. A Procedural Error would be issued when an Associate fails to record the employee identification number on a tote, or when an Associate sends damaged items down the conveyor belt.

Associates receive a verbal warning if they accumulate four Standard Errors or twelve Procedural Errors. If an Associate continues to accumulate Standard Errors the employee will receive a written warning followed by suspension, and, potentially, discharge.<sup>12</sup> The Errors remain on an Associate's record for 12 months. At times, Leads will use their discretion to decide not to issue an Error to an Associate if the Lead feels that the Error would be unfair. For example, one Lead testified that she will not issue an Error to an Associate for failing to find a product when she, herself, had to embark on a lengthy search to find the product. Given that an Associate is held to a production standard, it is not economical for an Associate to do a lengthy, thorough search for a product.

Leads also report incidents of misconduct that they observe to management. About once a month, Leads contact management about Associates engaging in acts of gross negligence. Ultimately, the Human Resources Department determines how best to handle these incidents, but it may ask the Lead for a statement documenting the gross negligence.

Management will ask Leads for input when evaluating Associates, and when determining

### **G. Evaluations of Associates and Hiring of Temps**

whether to recommend a Temp to Human Resources for hire. One Assistant Manager, who is responsible for evaluating Associates, testified that he regularly asks Leads for input regarding Associates' performance because of the Leads' familiarity with the Associates. Leads testified that they communicate with management about the progress or lack of progress of Associates and Temps.

<sup>12</sup> No evidence was adduced indicating that any employee has received discipline, been suspended, or discharged, for accumulated Errors. Likewise, no evidence was adduced indicating any Lead has received discipline when an Associate under their direction accumulates Errors.

Two Leads, however, testified that they recommended a Temp who did not get hired; another Lead testified that a Temp got hired whom she recommended against. One Lead testified that Temps she has recommended have gotten hired. Another Lead testified that her input was not sought on Temps. Management decides whether to forward a name for hire to Human Resources. In addition to a Lead's recommendation, management considers the Temps' productivity and attendance. The record establishes that all final decisions regarding hiring, however, are made by Human Resources.

Before being hired, Temps interview with the Human Resources Recruiter. Only Temps that are recommended by management go on to interview. Temps with bad productivity, bad attendance, or bad accuracy, would not be forwarded by management to Human Resources for an interview. Also, before an interview, Human Resources conducts a background check, and Temps with felonies are not interviewed for a permanent position. After the interview, but before being offered a position, a Temp must pass a physical capabilities test. If the Temp passes all of these hurdles, then the Temp is offered a permanent position with the Employer, subject to a 90-day probationary period.

#### **H. The Training of Leads**

New Leads are given a Lead Manual. They are also trained by working alongside another Lead. Leads attend supervisory training along with Assistant Managers, and they attend sexual harassment training along with management. Associates do not attend the sexual harassment training.

#### **I. The Tote Crew**

As described above, in addition to the mod employees, the Tote Crew is also part of the Production Department. The Tote Crew is responsible for providing the mods with empty totes that will eventually be filled by Associates in the mods. During a shift, the em

ployees on the Tote Crew must break down used totes, sort and clean dirty totes, and bring empty totes to the mods using either “walkie-riders” or forklifts.

In 2004, the Employer created a Tote Crew Lead position. Prior to that time, Tote Crew Associates designated one Associate to be the “go-to person” in order to streamline communications between the Tote Crew and other employees at the Facility. After about one year of using the informal “go-to person” system, the Tote Crew approached management and proposed the creation of a Tote Crew Lead position. According to the Employer, the Tote Crew Associates were required to justify the creation of a Tote Crew Lead position and to set forth the responsibilities and expectations for the position.

Doug Baker, the then-Production Manager, approved the creation of the Tote Crew Lead position and designated four of the five Associates in the Tote Crew as Tote Crew Leads. Along with the creation of the position came a \$0.50/hour raise. The Tote Crew Lead’s responsibilities include: taking calls from the Floor Leads, mods, and management; responding to work needs; performing inventory checks; and verifying attendance. Like other Associates, the Tote Crew, including Leads, works four 10-hour days.

Currently, there are five day-shift Associates on the Tote Crew who rotate in and out of the Tote Crew Lead position every six months. While on a rotation as Lead, the Tote Crew Associate serves as Lead for three days and then acts as an Associate for the fourth day of the week. The Tote Crew Lead earns the \$0.50/hour wage increase while working as a Lead. There is only one Tote Crew Lead on the night shift. The Tote Crew Lead works alongside Associates between 20 and 40 percent of the time.

Although the Tote Crew Lead’s responsibilities, according to the list generated by the Tote Crew and approved by management, include directing Associates in the Tote Crew area and assigning equipment operators to specific areas, the day-shift Tote Crew Lead who testified explained that the members of the day-shift Tote Crew have been working together for

four years, and that the Associates have an agreement about where each of them is going on a specific day. He further stated that the Associates just assign themselves to the work areas. The day shift Tote Crew Lead admitted, however, that he had the authority to assign Associates if there were a conflict, or if new Associates, who were unfamiliar with the workings of the Tote Crew, happened to be assigned to the Tote Crew. By contrast, the night-shift Tote Crew Lead testified that he assigned the Tote Crew Associates to their work areas at the beginning of each shift.

The Tote Crew Leads who testified agreed that it was generally the Lead who unloaded totes from trucks, because unloading totes did not count towards an Associate's productivity rate. However, a Tote Crew Lead may sometimes request a volunteer to assist with the unloading.

### **III. ANALYSIS AND CONCLUSIONS A.**

#### **Statutory Supervisory Indicia**

The Employer contends that the Leads are supervisors under Section 2(11) of the Act. The Board recognizes that it must not construe supervisory status too broadly because the employees who are deemed to be supervisors are denied rights provided to employees in the Act. *Chevron Shipping Co.*, 317 NLRB 379, 380-381 (1995). Accordingly, the party asserting the supervisory status carries the burden of proving supervisory status. *Id.* at 381. Also, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

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

Any 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 direct them, or to adjust their grievances, or effectively to recommend such ac

tion, 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.

As emphasized by Congress, only truly supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, setup men and other minor supervisor employees.” *Bozeman Deaconess Found.*, 322 NLRB 1107, 1114 (1997), *citation omitted*. Regardless of the kind of supervisory authority at issue, its exercise must involve the use of “true independent judgment in the employer’s interest before such exercise of authority becomes that of a supervisor.” *Id.* The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks. *Id.* An employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *Id.*

### **B. The Production Leads Are Not Supervisory Employees**

It is undisputed that the Leads do not have the authority to transfer, suspend, lay off, recall, promote, discharge, or reward employees. The Employer, however, asserts that the Leads are statutory supervisors for the following reasons:

- (1) they assign Associates;
- (2) they responsibly direct Associates;
- (3) they effectively recommend hires;
- (4) they adjust Associates’ grievances;
- (5) they play a role in disciplining Associates;
- (6) they effectively recommend reward by providing input on evaluations;
- (7) they perform these six tasks with independent judgment;
- (8) secondary indicia establishes that Leads are Supervisors; and
- (9) interchange between Leads that were stipulated to be excluded from the Unit,

and the Leads in question, mandates a finding that all Leads are Supervisors.

For the reasons set forth below, I find that the Leads are not supervisors within the meaning of Section 2(11) of the Act.

### **1. Leads Do Not Assign Associates**

In *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), the Board stated that the term “assign” means “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.” *Id.* The Board further explained that assigning an employee to a department (e.g., housewares), shift (e.g., night), or certain significant overall duties (e.g., restocking shelves), qualifies as “assigning” work under the Board’s definition, but choosing the order in which employees perform discrete tasks within those assignments (e.g., restocking toaster before coffeemakers) is not indicative of exercising the authority to “assign.”

The Employer asserts that Leads have the authority to assign Associates, and are, therefore, supervisors. The record establishes that, at the beginning of a shift, Leads assign Associates to a particular level and zone within the mod. In assigning Associates, the Leads must consider their relative skill and where they have recently worked. Notably, Leads do not assign Associates to a shift, or to a mod, nor do they assign overtime.

The record establishes that Leads assign Associates tasks within their mods by using a rotation schedule. A manager decided to institute the practice of rotating Associates through levels and zones within the mod, leaving the specifics to the Leads. The purpose of rotating Associates is to promote fairness by preventing Associates from having to pull the same product every day. Because Associates rotate through the levels, their assignment to any particular level on any particular day is largely due to a consideration of what tasks need to be completed and where the Associates worked in the recent past. At one time or another, Associates will work on each Level.

If the Lead is not available when Associates finish with the tasks in their particular zone, Associates consult the computer to determine if more product needs to be pulled on their level. If there is additional work to be done on their level, the Associates will complete that work. Associates, however, would not reassign themselves to another level, or another mod, without being directed to do so by a Lead. Further, about once a month, Leads arrive late to their mods because of a Lead meeting. On these occasions, the testimony varies, but it has been established that, at least some of the time, Associates assign themselves to a Level and Zone to begin work.

I find that, here, the Leads' authority to assign Associates to a level within a mod is akin to assigning employees to discrete tasks (e.g., restocking toasters before coffeemakers) within their larger assignment – working in a particular mod, on a particular shift.

Thus, I find that Leads do not assign Associates.

Although I find that I do not need to determine whether they perform this task with independent judgment because the Employer fails to establish that the Leads “assign” Associates within the meaning of Section 2(11) as recently defined by the Board, I will address independent judgment in Section III.B.7, below.

## **2. Leads Do Not Responsibly Direct Associates**

In *Oakwood Healthcare*, the Board found that for direction to be responsible, “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” 348 NLRB No. 37. Accountability, for purposes of responsible direction, is established when the putative supervisors have the authority to direct work and the authority to take

corrective action, if necessary, and when the putative supervisors face adverse consequences for failing to take corrective action against employees.

Here, the Leads receive yearly evaluations of their work; they are not, however, held to a production standard, like the Associates. Instead, according to the Production Manager, they are evaluated on their ability to do their job, such as the way they complete safety sheets, the way they perform housekeeping duties, and the way they interact with Associates. I find that the bases for the Leads' evaluations fails to establish that they are held "accountable" for the performance of the Associates.

Thus, I find that Leads do not responsibly direct Associates.

Although I find that I do not need to determine whether they perform this task with independent judgment because the Employer fails to establish that the Leads "responsibly direct" Associates within the meaning of Section 2(11) as recently defined by the Board, I will address independent judgment in Section III.B.7, below.

### **3. Leads Do Not Effectively Recommend New Hires**

Although evidence establishes that management asks Leads for input when determining whether to recommend a Temp for hire, the evidence also establishes that, before being hired, Human Resources interviews Temps, conducts a background check, and conducts a physical capabilities test. Two Leads testified that they recommended a Temp who did not get hired; another Lead testified that a Temp got hired whom she recommended against. One Lead testified that Temps she has recommended have gotten hired. Another Lead testified that her input was not sought on Temps.

The authority to effectively recommend generally means that the recommended action is taken with no independent investigation by higher supervisors, not simply that the recommendation is ultimately followed. *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982).

See also *Mountaineer Park, Inc.*, 343 NLRB No. 135, slip op. at p. 5-6 (2004) (recommendation “effective” if followed without further review). Here, the record failed to establish that Temps are hired solely on a Lead’s recommendation.

Thus, I find that the Leads do not effectively recommend new hires.

Although I find that I do not need to determine whether they perform this task with independent judgment because the Employer fails to establish that the Leads effectively recommend new hires within the meaning of Section 2(11), I will address independent judgment in Section III.B.7, below.

#### **4. Leads Do Not Adjust Grievances**

A limited ability to resolve minor complaints with employees does not rise to the level of the adjustment of grievances sufficient to make Leads supervisors. *Greenborne & O’Mara, Inc.*, 326 NLRB 514, 517 (1998) (crew chiefs who resolve minor disputes or complaints between employees, and who do not perform any role in any formal grievance procedure are not supervisors); *St. Frances Medical Center-West*, 323 NLRB 1046, 1048 (1998) (limited authority to resolve a “squabble” between employees does not amount to statutory authority to adjust grievances).

Accordingly, because the Employer has failed to establish that Leads do anything other than resolve minor complaints or “squabbles” amongst Associates, and because the Employer has failed to establish that Leads are involved in the formal grievance process, I find that Leads do not adjust grievances in a way that amounts to supervisory authority.

Although I find that I do not need to determine whether they perform this task with independent judgment because the Employer fails to establish that the Leads “adjust grievances” Associates within the meaning of Section 2(11), I will address independent judgment in Section III.B.7, below.

## 5. Leads Do Not Effectively Recommend Discipline

The evidence establishes that Leads have the capability to report safety rule infractions to management, and to issue Standard and Procedural Errors that are used in the Employer's progressive discipline policy. It is undisputed that the Errors are not, in and of themselves, discipline, as Associates are allowed a certain number of Standard Errors and a certain number of Procedural Errors before a disciplinary act occurs. The evidence also establishes that on occasion Leads report incidents of gross negligence to management that have resulted in an Associate's discharge.

Although Leads are expected to report Errors and safety infractions to management, management and Human Resources make the decisions on whether discipline or other adverse actions are warranted. The record adduces no evidence that the Leads have effectively recommended discipline, suspension, or discharge. The Employer's progressive discipline policy, as described in the record, indicates that four Standard Errors result in a progressive discipline step. The steps of progressive discipline are: (1) verbal warning, (2) written warning, (3) suspension, and (4) discharge. The Employer failed to present any evidence, however, of an employee who was eventually suspended or discharged for receiving too many Errors. In fact, a manager testified that, although Leads make management aware of an Associate's Errors, Human Resources makes the decisions as to when the steps of the progressive discipline policy are actually applied.

"It is well established that merely issuing verbal reprimands is too minor a disciplinary function to be statutory authority." *Passavant Health Center*, 284 NLRB 887, 889 (1987). In addition, mere factual reporting of oral reprimands and the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority. *Id.* Given that merely issuing verbal reprimands is too minor a disciplinary function to be statutory

authority, it would be far too big of a stretch to find that issuing Errors that may lead to verbal reprimands is a supervisory indicia.

Further, although the evidence has shown that Leads have found errors of gross negligence that have resulted in discharge, the record failed to establish that management or the Human Resources Department did not do its own independent evaluation of the incident of gross negligence. Rather, a manager testified that he did not know what factors, other than the incident of gross negligence, Human Resources relied on in discharging an Associate accused of gross negligence. Another manager testified that the Lead reports the facts and Human Resources decides what to do about the incident.

The Leads' responsibilities and practice of reporting Errors and infractions to management, therefore, is insufficient to confer supervisory status as it does not result in personnel action without review by others. *Passavant Health Center*, 284 NLRB 887, 889 (1987); *Arcraft Displays, Inc.*, 262 NLRB 1233, 1234-1235 (1982) (leads found not to be supervisors even though they reported employee problems to employer). At most, the Leads perform a reporting function that does not constitute the exercise of supervisory authority under the Act. *Chevron Shipping Co.*, 317 NLRB at 381. See also *Somerset Welding & Steel*, 291 NLRB 913, 914 (1988) (employees who inspected the work of others are not supervisors where they did not have the authority to effectuate personnel decisions, such as discipline or reward of employees for the quality of their work); *Express Messenger Systems*, 301 NLRB 651, 653-654 (1991) (reporting and documenting employee non-compliance with Employer policy is a reporting function that fails to establish supervisory status where management makes its own investigation as to what should be done); *Knogo Corp.* 265 NLRB 935, 935-936 (1982), enf. in relevant part 727 F.2d 55 (2d Cir. 1984) (lead not agent of employer although she reported rule infractions or reported incidents of poor performance by other employees where discipline was preceded by an independent investigation).

The Employer argues that, pursuant to *Virginia Manufacturing Co.*, 311 NLRB 992 (1993), the Leads' duties of monitoring the Associates' work places them in an adversarial position with the employees. The Employer asserts that this adversarial position makes the Leads statutory supervisors. In *Virginia Manufacturing*, however, the clerk in question was excluded from the Unit on grounds other than alleged supervisory status. *Id.* at 992-93.

Thus, I find that Leads do not effectively recommend discipline.

Although I find that I do not need to determine whether they perform this task with independent judgment because the Employer fails to establish that the Leads "effectively recommend discipline" within the meaning of Section 2(11), I will address independent judgment in Section III.B.7, below.

#### **6. Leads Do Not Effectively Recommend Reward By Providing Input on Evaluations**

The evidence establishes that the Leads do not write evaluations for Associates, although management may ask Leads to give input on an Associate's performance. A manager testified that he may incorporate a Lead's opinion into his own evaluation of the Associate, but when evaluating the Associate he relies on additional factors such as the attendance and productivity of the Associate. Further, the Manager testified that he does not quote or cite to the Lead in his evaluations of Associates.

Section 2(11) does not include "evaluate" as an indicia of supervisory authority. The authority to evaluate employees without more is insufficient to establish supervisory status. *Passavant Health Center*, 284 NLRB at 891. Therefore, as the Board confirmed in *Harborside Healthcare*, 330 NLRB 1334 (2000), "when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor."

Here, managers prepare evaluations, not Leads. In addition, even assuming Leads had a greater role in preparing evaluations, the record fails to establish that any Associate's job status has been affected by an evaluation, let alone input, by a Lead regarding an Associate's performance. See *Harborside Healthcare, Inc.*, 330 NLRB at 1335 (nurses not supervisors where role in evaluating employees is akin to more-experienced leads expressing their opinions on the abilities of less-experienced co-workers).

Thus, I find that the Leads' minor role in providing opinions about Associates' work habits does not amount to effectively recommending a reward.

Although I find that I do not need to determine whether they perform this task with independent judgment because the Employer fails to establish that the Leads "effectively recommend reward" Associates within the meaning of Section 2(11), I will address independent judgment in Section III.B.7, below.

## **7. Leads Do Not Act With Independent Judgment**

If I were to find that Leads performed any of the six tasks described in Sections III.B.1 through III.B.6, above, I would find that Leads do not do so with independent judgment. In *Oakwood Healthcare, Inc.*, the Board states that "to exercise '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." 348 NLRB No. 37. Further, although these requisites are necessary, they are not always sufficient. *Id.* The Board further found that "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.*

In Section 2(11), independent judgment is contrasted with actions that are of a “merely routine or clerical nature.” Thus, to be found a supervisor, an employee must perform one of the tasks set forth in Section 2(11) independently, i.e., with authority not controlled by others, and the employee must perform the tasks with judgment with discretion rising above “routine or clerical.” *Id.*

For instance, in *Croft Metals, Inc.*, the Board found that while the evidence supported a finding that the lead persons “responsibly direct,” there was no evidence that the lead persons did so with independent judgment. 348 NLRB No. 38 (2006). In that case, the Board stated that the evidence revealed that the employees generally performed the same job or repetitive tasks on a regular basis, and, once trained in their positions, required minimal guidance. *Id.* Further, because the employer failed to adduce evidence regarding the factors weighed or balanced by the lead persons in making decisions and directing employees, the Board found that the degree of discretion involved did not rise above the level of routine or clerical. *Id.*

Here, even if I were to find that Leads assign or responsibly direct Associates, per Section 2(11), the Employer has failed to adduce evidence indicating that the Leads assign or responsibly direct Associates with independent judgment. While Leads may evaluate certain factors when assigning or directing the Associates, such as – where did this individual pick or pull from yesterday, does this individual pick or pull fast or slow, and what product needs picked or pulled today – the Leads’ judgment in these areas is not independent and the discretion required does not rise above the level of routine or clerical. See *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (“The assignment of tasks in accordance with an Employer’s set practice, pattern or parameters, or based on such obvious factors as whether an employee’s workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition.”).

Similarly, even if I were to find that Leads effectively recommend hires, adjust Associates' grievances, discipline Associates, or effectively recommend reward, I would fail to find that the Leads perform these tasks with independent judgment, as the Employer has failed to adduce evidence establishing that the Leads act independently, or that their judgment requires discretion rising above "routine or clerical."

#### **8. Secondary Indicia Insufficient to Establish Supervisory Status**

To the extent the Employer relies on secondary indicia to argue the supervisory status of Leads, it is noted that where the individuals in question do not possess any one of the statutory indicia enumerated in Section 2(11) of the Act, the secondary indicia, which are not indicators of supervisory authority under Section 2(11), are insufficient to establish supervisory status. In other words, "secondary indicia of supervisory status ... are in themselves not controlling." *First Western Building Services, Inc.*, 309 NLRB 591, 603 (1992), *citations omitted*.

Non-statutory "secondary" indicia may be used as background evidence to bolster an argument for the existence of supervisory status but are not dispositive absent evidence supporting the existence of one of the statutory indications of supervisory status. *Training School at Vineland*, 332 NLRB 1412, 1413 (2000).

Here, although the Employer contends, in its brief, that the Leads possess certain secondary indicia of supervisory status, I find it unnecessary to evaluate these factors given the absence of evidence indicating the existence of any one of the primary indicia of such status.

#### **9. Interchange Between Excluded Leads and the Leads in Question**

##### **Does Not Mandate a Finding that All Leads Are Supervisors**

The Employer argues that because Leads regularly move between the various Lead positions, and because some of these Lead positions were stipulated to be excluded from the

Unit, all Leads should be considered supervisors. I reject this argument given that the parties did not contend that the Leads to be excluded are supervisors.

### **C. The Tote Crew Leads Are Not Supervisory Employees 1.**

#### **Tote Crew Leads Do Not Assign Associates**

The Employer argues that Tote Crew Leads assign Associates, thus establishing that they are statutory supervisors. The duties of a Tote Crew Lead are not markedly different from the duties of a Lead, as discussed above. The night-shift Tote Crew Lead, however, seems to operate more as a lead than the day-shift Tote Crew Lead, who stated that the Tote Crew works cohesively and that the day-shift Tote Crew members assign themselves to their daily tasks. Nevertheless, even considering the duties performed by the night-shift Tote Crew Lead, I find that Tote Crew Leads do not assign Associates. See Section III.B.1, above.

#### **2. Tote Crew Leads Do Not Responsibly Direct Associates**

The Employer argues that Tote Crew Leads responsibly direct Associates, thus establishing that they are statutory supervisors. Like Leads, however, the Employer has failed to establish that Tote Crew Leads are held accountable for the performance of the Associates. Thus, I find that Tote Crew Leads do not responsibly direct Associates. See Section III.B.2, above.

#### **3. Tote Crew Leads Do Not Act With Independent Judgment**

Even if I were to find that Tote Crew Leads assign or responsibly direct Associates, the Employer has failed to establish that the Tote Crew Leads act with independent judgment. See Section III.B.7, above.

#### 4. Secondary Indicia Insufficient to Establish Supervisory Status

Here, although the Employer contends that the Tote Crew Leads possess certain secondary indicia of supervisory status, I find it unnecessary to evaluate these factors given the absence of evidence indicating the existence of any one of the primary indicia of such status. See Section III.B.8, above.

#### D. Conclusion

For the reasons set forth above, I have determined that the Leads are not supervisors under the Act, and are therefore included in the Unit.

There are approximately 621 employees in the appropriate Unit.

#### DIRECTION OF ELECTION<sup>13</sup>

I shall conduct an election by secret ballot among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations.

**ELIGIBLE TO VOTE:** Those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, are eligible to vote. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been per

<sup>13</sup> In accordance with Section 102.67 of the Board's Rules and Regulations, as amended all parties are specifically advised that I will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

manently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls.

**INELIGIBLE TO VOTE:** Employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced are ineligible to vote.

Those eligible shall vote whether they desire to be represented for collective bargaining purposes by International Longshore & Warehouse Union, Local 26.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employer with me within 7 days of the date of the Decision and Direction of Election. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before, **October 18, 2006**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **2** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

### **RIGHT TO REQUEST REVIEW**

A request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, under the provision of Section 102.67 of the Board's Rules and Regulations. This request must be received by the Board in Washington by **October 25, 2006**.<sup>14</sup>

**DATED** at Los Angeles, California this 11<sup>th</sup> day of October, 2006.

James J. McDermott, Regional Director  
National Labor Relations Board Region 31

<sup>14</sup> In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board's web site: [www.nlr.gov](http://www.nlr.gov).