

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

STANDARD PARKING CORPORATION

Employer

and

Case 27-RC-085144

TEAMSTERS LOCAL UNION NO. 455

Petitioner

DECISION AND DIRECTION OF ELECTION
(REVISED)

On July 12, 2012, Teamsters Local Union No. 455 (Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of certain employees who work for Standard Parking Corporation (Employer) at Denver International Airport (DIA) in Denver, Colorado, excluding office personnel.¹ At the hearing, Petitioner amended its proposed unit description to include lane supervisors, traffic supervisors, license plate inventory supervisors, finance supervisors, and audit supervisors (collectively referred to in this Decision as “supervisors”) employed by the Employer at DIA. The parties agreed, by stipulation, to exclude from the unit all other employees, office clericals, managers, guards, professional employees, and statutory supervisors as defined in the Act. There are approximately 21 employees in the petitioned-for unit.

¹ Although the Employer operates facilities throughout the United States, only the Employer’s operation at Denver International Airport is at issue in the present case.

The only issue to be addressed herein is whether the job classifications that Petitioner seeks to include in the petitioned-for unit are supervisory within the meaning of Section 2(11) of the Act.² Petitioner contends that none of these job classifications is supervisory, that all five of these classifications are supervisory in job title only, and that the individuals who work in these classifications function as lead employees. In contrast, the Employer contends that all five of the classifications are supervisory within the meaning of Section 2(11).

On July 23, 2012, a hearing officer of the National Labor Relations Board conducted a hearing in Denver, Colorado. Following the close of the hearing, the parties timely filed briefs.

As explained below, based on the record and the relevant Board law, I find that the record evidence does not establish that any of the five classifications at issue are supervisory positions within the meaning of Section 2(11) of the Act.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings:

1. **Hearing and Procedures:** The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. **Jurisdiction:** The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board.

² The Employer does not contend, in the event that the supervisors are deemed to be employees, that a unit of these employees would be inappropriate.

3. **Labor Organization Status:** The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. **Unit Finding:** The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and it is appropriate to direct an election in the following unit of employees:

INCLUDED: All full-time and regular part-time lane supervisors, traffic supervisors, license plate inventory supervisors, finance supervisors, and audit supervisors employed by the Employer at Denver International Airport.

EXCLUDED: All other employees, office clericals, managers, guards, professional employees, and statutory supervisors as defined in the Act.

DECISION

In contending that the five job classifications at issue in this case are supervisory, the Employer relies on several aspects of the authority that the supervisors exercise over employees classified as front-line employees concerning assignment, direction, reward, discipline, and grievance adjustment. Below, I set forth the evidence concerning that alleged authority and discuss whether it confers supervisory status within the meaning of the Act. I conclude that the Employer failed to show by a preponderance of the evidence that the supervisors' role, if any, in assignment, direction, reward, discipline, and grievance adjustment satisfies the definition of "supervisor" set forth in Section 2(11) of the Act.

I. GENERAL PRINCIPLES RELATING TO SUPERVISORY STATUS

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

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 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.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. See *KGW-TV*, 329 NLRB 378, 381 (1999). The requirement of use of independent judgment, however, is conjunctive; thus, an individual is not a supervisor unless the individual exercises an authority with the use of independent judgment and holds the authority in the interest of the employer. *Id.*

The requirement that independent judgment be exercised imposes a significant qualification that limits the definition of "supervisor" to include only people whose exercise of any of the 12 stated Section 2(11) authorities is not merely routine. In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees - such as "straw bosses, leadmen, set-up men, and other minor supervisory employees" - who enjoy the Act's protections even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006), the Board adopted an interpretation of "independent judgment" that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or

technical). For an individual's judgment to be "independent" within the meaning of Section 2(11), the individual "must at 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. As the Board explained, "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." *Id.* at 693. The Board recognized that at one end of the spectrum there are situations where there are detailed instructions for the actor to follow, but that at the other end there are situations where the actor is wholly free from constraints. *Id.* It 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[.]" but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. *Id.*

Additionally, the judgment that a putative supervisor exercises must "rise above the merely routine or clerical" for it to be truly supervisory within the meaning of Section 2(11). *Id.* at 693. "If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data." *Id.*

Consistent with the congressional intent to distinguish between truly supervisory personnel and those who merely perform minor supervisory duties, the Board is careful not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. See *KGW-TV*, 329 NLRB 378, 381 (1999). Thus, the burden of proving supervisory status is on the party asserting it, in this case the Employer. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Springfield Terrace LTD*, 355 NLRB 937, 941 (2010). Conclusory evidence is not sufficient to establish supervisory status. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Similarly, “[j]ob descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight” as “[t]he Board insists on evidence supporting a finding of actual as opposed to mere paper authority.” *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

II. FACTUAL FINDINGS AND ANALYSIS

A. Background

1. The Employer’s DIA Operation

The City of Denver (City) owns the parking lots at DIA. There are eight lots consisting of the following: west short-term, west garage, west economy, east short-term, east garage, east economy, Pikes Peak shuttle lot, and Mount Elbert shuttle lot.

The Employer has a contract with the City to oversee parking operations at DIA. The Employer works with representatives of the City to provide customer parking services at the airport.

The top level Employer managers at DIA are General Manager Isaac Kilgore and two assistant general managers, one of whom is Thomas Jorgensen. The record does not include the name of the other assistant general manager.

There also is a Human Resources department, the staff of which includes Human Resources Generalist Bobbi Neely and Human Resources Coordinator Denise Cratke.

The Employer has five operations managers, who also are referred to as managers on duty. The operations managers report to the assistant general managers. The assistant general managers oversee the operations managers to make sure that they comply with reporting requirements required by the City. The Employer usually has two operations managers on duty each shift.

Reporting to the operations managers are the individuals who occupy three of the five classifications at issue here: lane supervisors, traffic supervisors, and license plate inventory supervisors. There are approximately fifteen lane supervisors, three traffic supervisors, and one license plate inventory supervisor. The Employer has one person who works three days per week as a lane supervisor and two days per week as a license plate inventory supervisor.

The Employer also has two finance supervisors and one audit supervisor, who report to the finance manager.

Under the terms of the contract with the City, the City requires the Employer to have lane supervisors, traffic supervisors, license plate inventory supervisors, and an accounting supervisor. The Employer apparently has divided the City-required accounting supervisor classification into the finance supervisor and audit supervisor classifications.

Below the various supervisors, there are approximately 150 front-line employees who handle various aspects of the day-to-day DIA parking operation. This group of front-line employees includes cashiers, traffic agents, license plate inventory agents, master clerks, vault clerks, and audit clerks. The cashiers work in booths located at the parking lot exits, where they collect payment from customers as they leave the parking lots. The traffic agents are involved in opening and closing parking lots, including placing signs to direct customers to the proper lots. The license plate inventory agents go through the parking lots with hand-held computers, recording license plate numbers from the cars parked there. The master clerks and vault clerks handle money that the Employer collects through paying customers. The audit clerks examine transactions for accuracy.

The Employer's lane supervisors, traffic supervisors, license plate inventory supervisors, finance supervisors, and audit supervisors have some authority over these front-line employees. As will be described in more detail below, lane supervisors provide oversight for cashiers; traffic supervisors provide oversight for traffic agents; license plate inventory supervisors provide oversight for license plate inventory agents; finance supervisors provide oversight for master clerks and vault clerks; audit supervisors provide oversight for audit clerks.

Service Employees International Union, Local 105 (SEIU) is the collective-bargaining representative for the Employer's front-line employees. The Employer and SEIU are party to a collective-bargaining agreement that covers these employees, with a term from October 16, 2011, through October 15, 2014.

2. The Employer's Written Job Descriptions for the Alleged Statutory Supervisors

Although, as stated above, job descriptions are not given controlling weight in assessing supervisory status, the Employer submitted into the record written job descriptions for the five supervisor job classifications at issue here. While not dispositive, the job descriptions constitute relevant background material in assessing whether the supervisors have actual Section 2(11) supervisory authority. The basic duties and responsibilities that the written job descriptions reference are set forth below.

The written job description that is applicable to the lane supervisors states that they are responsible for supervising and monitoring front-line airport parking employees in multiple vehicle exit lanes.³ It also states that they are responsible for supervising and coordinating the scheduling of all shift cashiers, including creating a daily schedule and making changes as needed, and calling in additional staff as needed. Additionally, the job description reflects that lane supervisors are to oversee work areas and watch employee performance, resolve employee issues such as dress code violations and improper phone use, prepare backup documentation for disciplinary steps as needed, provide testimony and support in the grievance procedure to support disciplinary actions, and assist employees with difficult issues or angry or upset customers. The job description also states that lane supervisors are responsible for keeping records of cashier attendance, issuing disciplinary warnings for attendance, issuing opportunity-to-improve notices in cases of cashiers using improper procedures, issuing progressive discipline steps, and scheduling and documenting employee break times.

³ Assistant General Manager Jorgensen testified that the Employer modified this written job description for purposes of the hearing, by adding some bullet points to clarify the lane supervisors' duties and responsibilities. He also testified that lane supervisors actually do not perform two of the duties identified on that job description. Although the job description lists designation of vehicle and lot assignments, lane supervisors do not perform this function.

The traffic supervisor job description states that traffic supervisors generally are responsible for accurate parking counts; lot closings and openings; customer assistance with jump starts, lockouts, and lost vehicles; flagging operations; and cashier transportation. It also states that, in connection with the foregoing, traffic supervisors are responsible for directing the duties and work assignments of traffic agents assigned to the shift, and for supervising and disciplining traffic agents.

The job description for the license plate inventory supervisor classification states that they are responsible for overseeing license plate inventory staff including scheduling, accuracy of work, preparing reports, and equipment downloads. The stated essential duties and responsibilities are to follow Employer and airport procedures, including disciplining employees and reporting issues to airport operations; provide accurate vehicle inventory; provide assistance to customers; ensure that employees follow proper procedures such as dress code, car counts, and care of units; and monitor employees' performance and provide feedback and coaching.

The finance supervisor written job description provides that finance supervisors have responsibility for overseeing some cash management functions, including monitoring and overseeing the activities of master clerks and vault clerks. The written job description states that finance supervisors are responsible for monitoring daily vault activities and for handling finance reporting, including attendance tracking and disciplinary action.

The written job description for the audit supervisor states that this position is responsible for the day-to-day management of the audit technicians who handle the auditing of transactions, including tracking shortages and overages. It specifies that the audit supervisor has to take care of numerous tasks relating to revenue and to work

· closely with the finance manager to prepare reports for the City and the corporate office.

B. Authority to Assign

The Employer contends that the supervisors are authentic Section 2(11) supervisors because their involvement in moving employees between work locations and/or in making daily scheduling adjustments constitutes supervisory assignment using independent judgment. As explained below, I conclude that the putative supervisors do not exercise Section 2(11) assignment authority with the use of independent judgment.

1. Factual Findings

As part of the City's determinations about the basic level of services provided in the DIA parking lots, the City establishes the number of employees, per shift, in the various work areas throughout the parking lots. Working within the parameters that the City sets, the general manager, the assistant managers, and the operations managers create a blank master schedule to provide for employee coverage of all work areas on all shifts. The blank master schedule is subject to approval by the City.

Once the managers create a blank master schedule and the City approves it, the front-line employees submit bids for placement on the master schedule. Article 14.B. of the collective-bargaining agreement between the Employer and SEIU provides that “[s]eniority shall prevail in bidding of shifts” Article 14.C. provides that “[a]ll shift openings and days off shall be posted for at least five (5) days and shall be awarded on the basis of seniority.”

Upon completion of the contractual bidding process, the managers put a master schedule into effect. The master schedule shows employees' assigned parking lot work

locations and shifts. Each master schedule stays in effect for at least several months and sometimes up to year. The master schedule changes, for example, when the City makes coverage changes that require modification of the master schedule.

Lane supervisors and traffic supervisors are involved in adjusting employees' posts when a lot is short of employees and other lots have extra employees. The record does not clearly establish whether the supervisors need operation managers' approval before moving employees. Assistant General Manager Jorgensen testified that no approval is needed, but Lane Supervisor Asfaw Kuture testified that it is.

Traffic Supervisor John Eckart testified that he rotates traffic agents daily through the various work areas, as provided for at Article 11.E. of the collective-bargaining agreement with SEIU. That article provides that "[w]ork assignments for cashiers, traffic LPIs, Vault Clerks, and License Plate Review Clerks will be rotated on an equitable basis by the Employer based on scheduling needs." Eckart testified that these employees are well trained and that when he assigns them to the various areas they know what their duties are.

Because employees occasionally are not able to work as scheduled (for example, due to sickness), daily adjustment of the master schedule sometimes is necessary. The lane supervisors, traffic supervisors, license plate inventory supervisors, finance supervisors, and audit supervisors take care of finding employees to fill in for absent employees. The supervisors notify the operations managers when there is a need to fill in vacant slots, but the supervisors apparently retain the responsibility for finding coverage. It appears that the supervisors do not have to obtain approval from a manager to go through the contractual process to find a replacement,

although Lane Supervisor Asfaw Kuture testified he cannot start that process unless a manager authorizes him to do so.

Article 9.F. of the collective-bargaining agreement between the Employer and SEIU provides the following:

The Employer will maintain a list of Employees requesting overtime by shift basis. The Union may review this list upon request. If any Employee refuses overtime more than twice in a sixty (60) day period, the Employee's name shall be dropped from the overtime list for ninety (90) days. Scheduled overtime in a classification will be offered first to the most senior Employee on the overtime list who is at work in that classification. Unscheduled overtime in a classification will be offered first to the Employees who are at work in that classification, in order of seniority and then to qualified Employees who are at work in other classifications, in order of seniority. Thereafter, qualified Employees will be called and assigned the unscheduled overtime in reverse order of seniority.

Pursuant to this contractual language, supervisors fill unscheduled vacancies by offering employees the opportunity to extend their shifts, first by seniority among the employees who are at work in the affected classification and then by seniority among qualified employees who are at work in other classifications. If that does not work, supervisors call employees into work, by reverse order of seniority, using a pre-established list of employees who have signed up to work overtime.

The Employer allows employees to trade shifts within the Employer's established guidelines, which are set forth at Article 9.I. of the collective-bargaining agreement with SEIU. The guidelines are that the employees have to agree in writing in advance, the trade cannot create overtime, an employee cannot trade an overtime shift that he signed up to take, and employees cannot create a long-term or regular shift trade. When employees agree to a shift trade, they submit a form to the supervisor. The supervisor has to sign off on the form before the trade goes into effect. The supervisor will deny the trade only if it creates a scheduling conflict or if it conflicts with policy by

creating overtime or by establishing a pattern. Once a supervisor signs off, the form goes to an operations manager, the payroll supervisor, or the assistant general manager, who enters the shift change on the schedule and then files the form in a binder. Higher management can overturn a supervisor's approval of a shift trade, but that rarely happens, and when it happens it is usually because the supervisor did not notice a scheduling conflict.

Supervisors also schedule employees' daily break times, to ensure that they are able to take required breaks throughout the day.

2. Analysis

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board construed the Section 2(11) term "assign" to refer to "the act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Id.* at 689. "[T]o 'assign' for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee . . ." *Id.* The Board observed that some job assignments are more difficult and demanding than others, and that the power to assign an employee's overall duties is important to the employee and management. *Id.*

As set forth above, the record shows that the supervisors have no involvement in making the master schedule, which determines employees' regular work areas and shifts. The evidence establishes that the managers are responsible for creating the master schedule. The supervisors only make daily adjustments, such as when there is a need to move employees because of work load, when an employee calls out and a replacement employee needs to be moved or called in, or when employees work out a mutual shift trade.

Here, it does not appear that the supervisors' involvement in making these day-to-day adjustments to employees' work locations and hours constitutes Section 2(11) assignment, as the Board interpreted that term in *Oakwood*. Higher management officials handle the Section 2(11) assignment functions because, through their completion of the master schedule, they – not the supervisors - take care of designating employees to their regular work stations, to their regular work shifts, and to their overall duties. See, e.g., *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (occasional switching of tasks does not implicate the authority to assign, within the meaning of *Oakwood*).

In any event, even if it were the case the supervisors' involvement in making day-to-day adjustments to the master schedule constitutes Section 2(11) assignment, any such assignment still would not qualify them as true Section 2(11) supervisors. As explained below, the supervisors' role in making day-to-day adjustments to employees work locations and hours does not involve statutory independent judgment.

Although lane supervisors and traffic supervisors can move employees between work locations, they do so only when there are not enough employees in a location and employees in other locations are available to fill the void. The Board has held that assigning work to equalize workloads is routine and clerical in nature and does not implicate independent judgment. See *Oakwood*, 348 NLRB at 697.

Moreover, the record does not establish that there are any significant skill differences among the cashiers and traffic agents, or that the work locations available for them involve substantially different types of work. Under these circumstances, the movement of cashiers and traffic agents does not involve significant matching of individual employee skills with the particular needs of the various work locations. Accordingly, the process of moving employees between work locations does not involve

the supervisors' exercise of independent judgment. *See, e.g., Shaw, Inc.*, 350 NLRB 354, 355-356 (2007) (rotating essentially unskilled and routine duties among available crew members does not involve the use of independent judgment).

With respect to replacing employees who call in, the evidence shows that the supervisors follow the procedure set forth in the collective-bargaining agreement between the Employer and SEIU. Pursuant to that provision, when there is a need to have other employees fill in, the supervisors follow seniority, first among the employees at work in the involved classification and then among the qualified employees at work in other classifications. If that procedure does not yield an employee who can fill in, the supervisor then, in reverse order of seniority, calls qualified employees from a pre-established list of employees who have signed up for overtime.

Given that this collectively-bargained procedure limits the scope of the supervisors' authority to find employees to fill in, the supervisors' authority in this area does not constitute true supervisory authority. *See, e.g., Regal Heath & Rehab Center, Inc.*, 354 NLRB 466, 470-471 (2009) (nurses' authority to call in additional employees did not involve supervisory independent judgment where the nurses' authority involved merely consulting an existing list that contained the names and telephone numbers of employees who were potentially available to come in to cover a staff shortage); *Oakwood*, 348 NLRB at 693 ("if a collective-bargaining agreement require[s] that only seniority be followed in making an assignment, that act of assignment would not be supervisory").

As for the Employer's contention that the supervisors' role in approving employee mutual shift trades is supervisory, the evidence shows that the supervisors merely sign off on shift changes that the employees work out between themselves,

within the Employer's established guidelines and as set forth in the collective-bargaining agreement. The Board has held that similar authority is routine and clerical, and does not involve supervisory independent judgment. See, e.g., *Golden Crest Healthcare Center*, 348 NLRB 727, 730 n.10 (2006) (authority to "okay" or "initial" time changes not supervisory). Moreover, the evidence does not establish that the supervisors regularly decline to approve schedule changes that the employees have worked out. In the absence of evidence showing that supervisors approve some switches and deny others, there is no basis for concluding that they exercise enough judgment for that approval process to be anything other than routine.

Nor does the supervisors' responsibility for making sure that employees take their breaks make them statutory supervisors. The Board has held that authority over breaks does not involve sufficient authority to make it supervisory authority. See, e.g., *Youville Health Care Center*, 326 NLRB 495, 495-496 (1998) (authority to approve breaks is a routine, clerical judgment); *Washington Nursing Home*, 321 NLRB 366, 366 n.4 (1996) (same). In summary, the supervisors' assignment function that is controlled by pre-established guidelines or is routine does not confer supervisory status within the meaning of Section 2 (11) of the Act.

C. Authority to Responsibly Direct

The Employer contends that the supervisors are statutory supervisors based on their responsible direction of employees, using independent judgment, by performing tasks such as observing employees' work, answering their questions, and providing them with assistance. Although the record demonstrates that the supervisors do engage in these types of activities, I conclude that this direction of employees is not supervisory, because it is not "responsible" direction within the meaning of *Oakwood*.

1. Factual Findings

Lane supervisors oversee a team of cashiers, between approximately three to ten cashiers per shift. Lane supervisors check to make sure that the cashiers are at their work stations on time, and that they perform their jobs correctly. Lane supervisors answer questions that cashiers have, and they assist cashiers when necessary, such as with difficult transactions. They make sure that cashiers wear the correct uniform. Lane supervisors also assist cashiers with customers when cashiers cannot handle their complaints or when there are problems such as customers not having enough money to make full payment.⁴

Traffic supervisors work with traffic agents to make sure that full parking lots are closed, that parking lots with space available are opened, and that signs are properly placed to direct customers to open lots. Traffic supervisors make sure that traffic agents are in the correct parking lots at the proper times and that they accurately count vehicles in the lots.

License plate inventory supervisors oversee license plate inventory agents to make sure that they accurately record the required number of license plate numbers. The Employer requires license plate inventory agents to record 500 license plate numbers per hour with 97 percent accuracy. License plate inventory supervisors conduct spot-checks to audit the entries that license plate inventory agents make, to ensure that they meet the required quantity and accuracy levels.

Finance supervisors are responsible for overseeing some cash management functions, including monitoring and overseeing the activities of master clerks and vault

⁴ When a customer cannot make full payment, lane supervisors have the authority to approve a promissory note that obligates the customer to pay in full at a later time.

clerks in performing their duties and responsibilities. They handle issues that come up in the operation of cash vaults, and they answer questions from clerks.

In addition to their responsibility for tracking cashier shortages and overages, audit supervisors oversee the audit department employees, answer employees' questions, and provide day-to-day direction.

The Employer has an incentive program for the supervisors, under which they are eligible for a monthly bonus of up to \$100 based on whether they meet certain specified criteria, several of which relate to how they perform in overseeing employees. These criteria are outlined in Employer Exhibits 7 and 8. Employer Exhibit 7 sets forth the criteria for the lane supervisors, traffic supervisors, and license plate inventory supervisors. Employer Exhibit 8 sets forth the criteria for the finance supervisors and audit supervisors. For all these supervisors, the operations managers keep track of points that the supervisors earn, based on their performance in the categories identified in these documents.

Under Employer Exhibits 7 and 8, the relevant performance categories for the supervisors include the following:

- * Customer service (whether the supervisor followed all policies and procedures regarding all written compliments and complaints having to do with employee team members, including whether the supervisor made suggestions for employee improvement or employee training and properly recognized employees for compliments);
- * Employee incentive (whether the supervisor followed policies and procedures with each team member, including documentation of infractions, ensuring proper points given, weekly updating employees; and properly communicating with employees about performance);
- * Attendance (whether the supervisor updated team member attendance points and took appropriate action with the team member);
- * Team meetings (having to do with the supervisor conducting monthly team meetings with employees);

- * Communication (whether the supervisor kept team members informed about important information);
- * Accuracy (relating to the supervisor's accuracy on paperwork and documentation);
- * Safety (including following safety guidelines, reporting unsafe conditions, wearing seat belt when in vehicles, and eliminating unsafe conditions such as snow);
- * Supervisor's attendance;
- * Outstanding performance on supervisor's work;
- * Customer compliments for and complaints against supervisors;
- * Overages or shortages and incorrect vehicle audits; and
- * Disciplinary write-ups for the supervisor.

2. Analysis

In *Oakwood*, 348 NLRB at 691-692, the Board discussed the Section 2(11) term "responsibly to direct." The Board held that, for direction to be "responsible," "the person directing and performing oversight of [an] 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." *Id.* "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.*

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. *Id.*; *Lynwood Manor*, 350 NLRB 489, 490-491 (2007). The Board has held that accountability was established, for example, where an employer issued written warnings to lead persons because of the failure of their crews to meet production goals or other crew shortcomings. See, e.g., *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006).

Here, the supervisor's incentive program, described above, is the only record evidence that potentially could show that the supervisors are prone to gain some benefit or suffer some adverse consequence depending on how the employees on their respective teams perform their jobs. The record evidence relating to the supervisors' incentive program, however, does not establish accountability as the Board construed that term in *Oakwood*. Employer Exhibits 7 and 8 reflect only that the supervisors' entitlement to the bonus depends on their performance of their own job duties and responsibilities including overseeing the front-line employees, and that their entitlement to the bonus does not depend on how well the front-line employees actually perform their jobs. Nor does the hearing testimony demonstrate that the supervisors' bonus depends on how well the employees perform. In the absence of evidence showing that the supervisors are actually accountable for the employees' performance of their jobs, responsible direction cannot be found to exist. See, e.g., *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 5-6 (December 20, 2011) (no responsible direction where evidence showed that putative supervisors were accountable only for their own work). Accordingly, a preponderance of the evidence does not support a finding that supervisors responsibly direct employees.

D. Authority to Reward

The Employer contended at the hearing that the supervisors are statutory supervisors on the grounds that they have the authority to reward employees through their participation in an employee incentive program.⁵ As explained below, the supervisors' involvement in the employee incentive program is not sufficient to establish that they are statutory supervisors.

1. Factual Findings

In addition to supervisors' incentive program, the Employer has a separate employee incentive program for the front-line employees. Under this employee incentive program, an employee – like the supervisors - can earn monthly bonus pay of up to \$100 per month by meeting specified performance standards during the month.

According to Assistant General Manager Jorgensen, the Employer has written documents - similar to Employer Exhibits 7 and 8, discussed above – that set forth the rating criteria. The Employer, however, did not introduce them, or attempt to introduce them, into the hearing record. Accordingly, the only evidence about the front-line employees' incentive program is in the form of witness testimony.

According to the witness testimony, the criteria under the employee incentive program include wearing the proper uniform, keeping the work area clean, completing paperwork accurately, having good attendance, not having any counseling or discipline, taking training courses, and attending monthly meetings with the supervisors.

Assistant General Manager Jorgensen also referred to another standard relating to cashier performance with customers (such as whether the cashier is friendly with

⁵ The Employer did not contend in its post-hearing brief that the petitioned-for employees are statutory supervisors based on the authority to reward employees.

customers), but he did not explain this customer performance standard in detail. Nor did either of the two lane supervisors who testified (Abdul Rahimi and Asfaw Kuture) mention that one of the incentive program criteria involves performance with customers.

On a daily basis, each of the supervisors oversees the employees on his team to determine whether they have met the various criteria under the incentive program.

Each of the supervisors is responsible for making daily entries into an electronic computer database to assign employees points on the relevant criteria. The database is laid out as a grid, by category. The supervisor enters points as appropriate for each employee, and also can make comments if appropriate so that other personnel can decide whether or not to add points to the employee's total. The record evidence does not clearly explain the number of points available for each rated element, or what considerations go into assigning a specific number of points for each element. It appears that supervisors give employees one point if they regularly wear the required uniform and no points if they do not regularly wear the uniform. The evidence, however, does not describe how supervisors assign points for the other factors.

After the supervisors enter points for the employees, a payroll supervisor receives the documentation, compiles the data into a single monthly report, and the payroll department issues monthly bonuses to those employees who qualify.

2. Analysis

Contrary to the Employer's contention at hearing, the evidence is not sufficient to establish that the supervisors' role in administering the employee incentive program is more than routine and clerical. As described above, the supervisors make daily entries into a computer database to reflect the points awarded to employees for their performance on several factors. The evidence does not show that the supervisors'

process of entering these points involves the exercise of a significant degree of discretion as to whether the employee deserves points or, if so, how many. In light of the limited scope of the supervisors' authority under the employee incentive program, their participation in rating employees does not make them statutory supervisors.

Of the various factors included in the incentive program database, the factor discussed in most detail in the record was whether employees wore the required uniform. The evidence shows that the supervisor enters either a one or a zero, with a one for wearing the uniform and a zero for not wearing it. The supervisor's determination to enter a one or a zero is straightforward and does not call upon the supervisor to engage in a significant judgmental process of discerning and comparing data to form an opinion or evaluation.

As discussed above, Assistant General Manager Jorgensen alluded to the lane supervisors entering ratings on employees' performance with customers, but Jorgensen did not provide additional detail about this asserted rating and other lane supervisors did not mention it at all. Absent detail, it cannot be said that ratings on such an element involve enough judgment for the supervisors to be considered statutory supervisors. Since the evidence presented by the Employer is inconclusive, the Employer has not sustained its burden of proof that the petitioned-for employees have the authority to reward and exercise independent judgment in doing so. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989) (when evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, supervisory status will not be established on the basis of such indicia.)

E. Authority to Discipline

The Employer contends that the supervisors are statutory supervisors because of their role in disciplining employees. According to the Employer, the supervisors are Section 2(11) supervisors based on actual authority to discipline, and/or on authority to effectively recommend discipline. I find that the supervisors' involvement in disciplining employees falls short of establishing supervisory status.

1. Factual Findings

The collective-bargaining agreement between the Employer and SEIU establishes a progressive discipline system. Article 15.B. provides the following:

The Company agrees to utilize the principles of a progressive disciplinary program (first written warning, second written warning, suspension not to exceed three (3) days or pending completion of investigation of violation and termination). However, for more serious offenses, which shall be listed in the Company rules and furnished to the Union, an Employee may immediately be suspended or terminated depending on the circumstances and severity of the violation. Closely related infractions of Company policies and/or rules may be combined for purposes of progressive discipline depending on the circumstances of the infraction.

Assistant General Manager Jorgensen testified that the Employer relies on the supervisors for disciplinary purposes, because the supervisors are the individuals in the field who oversee the employees. He testified that all of the supervisors have the authority to use their own discretion in issuing written discipline to the employees whom they oversee, for attendance infractions and other matters that fall under the progressive discipline policy except for discharge decisions. He also testified that supervisors can verbally counsel employees in order to give them an opportunity to improve. According to Jorgensen, this verbal counseling does not constitute a step in progressive discipline. In his testimony, however, Jorgensen did not provide much detail about the scope or extent of the discretion involved in this alleged disciplinary

authority. Jorgensen testified about some specific examples of discipline, included in the record as Employer Exhibits 9 through 13, but his testimony did not demonstrate that he had actual involvement in issuing those disciplines or that he had first-hand knowledge of the circumstances therein. He did explain that, as a general matter, Human Resources reviews discipline, for the purpose of making sure that it is appropriate under the applicable policies and rules and that all documentation is in place.

With regard to enforcement of the attendance policy, Jorgensen testified that there is a schedule of attendance infractions and points, which is an Employer attendance policy that SEIU accepted as an addendum to the collective-bargaining agreement, and that the supervisors are responsible for assessing the points required under this policy.⁶

Employer Exhibit 10 includes an example of the attendance tracking form that the supervisors use to track employees' attendance. The form identifies the employee and lists attendance infractions, including the nature of the infraction, the date of the infraction, the number of points assessed for each infraction, and a running tally of the total points accumulated.

Operations Manager Mohamoud Abdulaahi testified, without elaboration or reference to specific examples, that the supervisors do not need to get permission to discipline employees and that they can take such action on their own.

Lane Supervisor Abdul Rahimi testified similarly, in a general way, that he has the authority to write up disciplinary reports for employees when they commit violations

⁶ The record does not include the text of this addendum to the collective-bargaining agreement.

such as attendance infractions, reporting to work without the proper uniform, or sleeping on the job. According to him, he does not need any approval to issue these write-ups, except that he does not have authority to suspend employees without a manager's approval. Rahimi testified that, for attendance violations, there is a prescribed number of points that employees accrue, with the number of points depending on the nature of the infraction and how much advance notice the employee gave. He testified that he keeps track of employees' attendance on the computer, where he maintains and records the attendance points that count against employees.

Traffic Supervisor John Eckart testified that he disciplines using his own discretion, without needing manager approval to discipline. He testified that he notifies managers about discipline that he issues as a courtesy to the managers, and that he consults with Human Resources to make sure that he is following proper procedure. Eckart testified that, regarding attendance, the Employer and SEIU have a policy under which employees accumulate points for attendance infractions. He explained that the level of points dictate the extent and type of discipline for the infraction. Eckart testified that the Employer also has a policy that employees who are not dressed in the proper uniform are sent home. He testified that he follows this policy, but if he quickly can provide the employee with the missing piece of the uniform he will not make employees leave work. Eckart was the only witness to testify about specific examples of discipline in which he was involved as a supervisor (Employer Exhibits 12 and 13, which are discussed further below).

Contrary to the other witnesses, Lane Supervisor Asfaw Kuture testified that as a supervisor he has little authority to discipline employees. He testified that, for a minor employee infraction, he can talk to the employee and then report to the operations

manager. He testified that, for a major infraction, he documents the incident and reports it to the manager, and the manager decides what action to take. According to Kuture, the manager handles the discipline or instructs the supervisor what to do. Kuture testified that the supervisors only report facts to management without even making recommendations about what to do. With regard to attendance, Kuture testified that the supervisors can handle that on their own, because attendance involves mere math calculations, based on the points system for the various sorts of attendance infractions. He testified that, for attendance infractions, Employer policy is that when an employee reaches a certain point value a specified write-up happens. According to Kuture, he can send employees home for not wearing a uniform only if a manager approves it.

In support of Lane Supervisor Kuture's testimony that supervisors lack independent disciplinary authority, Petitioner introduced Union Exhibit 2, which is an e-mail, dated June 20, 2011, from Human Resources Generalist Bobbi Neely to General Manager Isaac Kilgore and other managers and supervisors, stating the following:

Going forward **all** progressive discipline and warnings must be provided to Human Resources with supporting documentation attached for approval prior to being issued to the employee.

Documents without supporting documentation attached will not be considered. No discipline is to be issued without approval from Isaac and Human Resources.

The same exhibit shows that Training Specialist Michel Jennings asked if that policy applied to the assistant general manager as well, and Neely clarified that not even the assistant general manager could approve discipline.⁷

⁷ The Employer disputes in its brief "that the e-mail constituted a 'policy' or 'procedure' or that the company ever implemented such a policy...." In that regard, the Employer contends that the record evidence belies that the policy or procedure outlined in the e-mail was followed.

In addition to the witness testimony, the hearing record includes exhibits showing five specific examples of supervisors' involvement in disciplining employees. Lane supervisors were involved in two of those disciplines, Traffic Supervisor Eckart was involved in two, and Audit Supervisor Binyam Daba was involved in one. The Employer did not introduce any documentary evidence concerning the involvement in discipline by license plate inventory supervisors or finance supervisors.

Employer Exhibit 9 is a progressive disciplinary warning, dated September 23, 2011, issued to a cashier, Markos Muleta, on the grounds that an audit found no reason for the employee to be short by \$50. Audit Supervisor Binyam Daba and an unidentified manager signed the warning. The discipline was a third and final written warning and suspension for one day. The write-up stated that, per Article 10, Section C of the collective-bargaining agreement with SEIU, the cashier's combined shortage and overage reached \$87, and that he was in violation of the cash-handling policy. Article 10, Section C of the labor contract provides that shortages are "revenue control violations" that are subject to a points system. That provision states that receipt of a third point will result in the employee getting a first written warning, a fourth point will result in a second written warning, a fifth point will result in a final written warning, and a sixth point will result in suspension pending termination. It also states that an accumulation of \$50 in errors or a single error of \$50 or more can result in the bypassing of the above procedures, and may result in discipline up to and including termination. Assistant General Manager Jorgensen testified that the Employer has a policy that any cashier who has an error of \$50 or more gets a one-day suspension. Jorgensen also testified that the audit supervisor's job is to track shortages and

overages, and that the audit supervisor automatically writes up cashiers upon the audit department's discovery of violations that call for discipline under these policies.

Employer Exhibit 10 is an attendance progressive disciplinary warning issued to a cashier, Hanna Aguye, on or about March 12, 2011, for a no call/no show on March 5, 2011. The exhibit reflects that the employee received seven attendance points, a third and final written warning, and a three-day suspension. The written warning shows that a supervisor and a manager signed the warning, but it is not clear who they were. The warning itself states that, in light of the investigative findings, "we are going to proceed with issuing 7 attendance points for NCNS, along with a three day suspension." The record does not include evidence explaining who was involved in deciding upon the discipline in this instance, or why the write-up refers to how "we" are proceeding with the discipline.

Included with Employer Exhibit 10 is a written investigation report from Lane Supervisor Girum Melese, dated March 13, 2011, in which the supervisor explained that Cashier Aguye claimed that the reason for the no call/no show was that she had switched shifts with another employee but an investigation disclosed that her claim was false. The exhibit also includes a written statement that LPI/Lane Supervisor Dean Chavez wrote, dated March 13, 2011, stating that the employee had not submitted a form to switch shifts with another employee.

The lane supervisors who were involved in the circumstances relating to Employer Exhibit 10 did not testify at the hearing. Assistant General Manager Jorgensen testified about Exhibit 10, but he did not offer much detailed first-hand knowledge about the situation. Jorgensen did testify that Lane Supervisor Chavez submitted his written statement to Human Resources. Also, Jorgensen explained that a

no call/no show is an automatic suspension, pursuant to the Employer attendance policy that SEIU accepted as an addendum to the collective-bargaining agreement.

Employer Exhibit 11 is a progressive disciplinary warning issued to a cashier, Mekdes Lemma, on April 27, 2011, for listening to music while on the clock and arguing with the supervisor that she had the right to listen. An unidentified supervisor and an unidentified manager signed the warning. The employee received a second written warning for this violation. Assistant General Manager Jorgensen testified that a lane supervisor issued the warning, but the lane supervisor did not testify. Jorgensen testified that he did not recall the incident described in the warning.

Employer Exhibit 12 is a progressive discipline warning form, dated March 19, 2012, that Traffic Supervisor John Eckart filled out and signed. A line signifying that a manager reviewed the discipline is blank, but Eckart testified that there should have been a signature there and that he thought there may be another copy of the same discipline that includes a manager's signature. The written warning was a first written warning for a traffic agent, Dadale Abdi, for hooking up jumper cables incorrectly on a customers' car battery, thereby damaging the battery. Traffic Supervisor Eckart testified that, as soon as he found out that there was damage to a customer's battery, he immediately brought in an operations manager. Eckart testified that the operations manager was present when he talked to the employee about what she did, and he informed the operations manager that he would take care of handling a write-up while the manager took care of reporting the incident to the City. Eckart testified that, before he wrote out this warning, he checked with Human Resources and determined that the employee did not have any previous written warnings.

Employer Exhibit 13 is another progressive disciplinary warning, dated March 15, 2012, that Traffic Supervisor Eckart filled out and signed. As with Employer Exhibit 12, this exhibit has a line to reflect that a manager reviewed the discipline, but there is no signature on that line. Eckart testified that there should have been a manager signature. The discipline was a third and final warning and two-day suspension to an employee (apparently a traffic agent), Lois Howard, for violating safety procedures by failing to wear a safety vest while walking in traffic. Eckart testified that an operations manager observed the employee's misconduct on a live surveillance camera and directed Eckart to write up the employee. Additionally, Eckart testified that he consulted with the manager before imposing this discipline, because it involved a suspension.

2. Analysis

In concluding that the record does not demonstrate that the supervisors are statutory supervisors, I find that the hearing testimony about the supervisors' disciplinary authority is not adequate to prove supervisory status. As described above, for the most part, the witnesses testified generally, in a very conclusory fashion, that the supervisors discipline employees and that they do so on their own, in an independent manner. Little of this testimony included recitation of or reference to actual detailed facts concerning concrete situations in which the supervisors were involved in disciplining employees. This general testimony was largely disconnected from, and not grounded in, any real-life events involving discipline. Consequently, the hearing testimony is not sufficient to meet the Employer's burden of proving that the supervisors are true supervisors under Section 2(11) based on any authority to discipline.

Furthermore, with regard to testimony about supervisors' authority to discipline based on attendance infractions, the testimony shows only that supervisors engage in a

basically clerical process in which they take note of attendance violations, check a schedule of infractions with defined punishments, and then issue the discipline that the schedule requires. This sort of formulaic process does not involve enough judgment for it to qualify as true supervisory independent judgment.

Assistant General Manager Jorgensen testified that the supervisors can verbally counsel employees and issue opportunity-to-improve notices which are not part of progressive discipline, in order to correct unsatisfactory performance. That evidence, however, does not prove that the supervisors issue supervisory discipline. Absent a demonstration that such counselings result in the issuance of actual discipline, it cannot be said that such verbal counseling is disciplinary in nature. *See, e.g., Ken-Crest Services*, 335 NLRB 777, 777-778 (2001) (authority to issue general counselings is not supervisory discipline).

Traffic Supervisor John Eckart's testimony that supervisors can send employees home also fails to establish supervisory status. Although the authority to send employees home involves disciplinary authority, Eckart's testimony shows that supervisors can send employees home only if they are out of uniform and a fix cannot be implemented quickly and easily. Given these narrow confines within which supervisors have authority to send employees home, it cannot fairly be concluded that they exercise independent judgment in sending employees home.

Additionally, as explained further immediately below, the warning documents that the Employer submitted pertaining to the supervisors' asserted disciplinary authority do not demonstrate convincingly that the supervisors in those situations exercised a sufficient degree of discretion for their judgment to be considered independent, or that they imposed the discipline on their own without involvement by higher management

officials. Such a showing – which is lacking here - is necessary to prove the existence of supervisory status. As discussed above, *Oakwood* requires that, for an individual's judgment to be independent within the meaning of Section 2(11), the individual must act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

Thus, the evidence relating to Employer Exhibit 9 (Audit Supervisor Binyam Daba's progressive disciplinary warning to Cashier Markos Muleta for being short by \$50) shows that a manager signed off on it, indicating that higher management officials may have been involved and that the discipline may not have been an action that the audit supervisor took solely on his own authority. Because no one with direct, first-hand knowledge about this warning testified, the evidence on these issues is inconclusive.

Moreover, the evidence does not show that the audit supervisor had any discretion in determining whether to issue the warning or the level of discipline to be imposed. Rather, in this instance the audit supervisor had to write out the warning because, as Assistant General Manager Jorgensen testified, the Employer's policies and agreements with SEIU call for and require discipline of cashiers with shortages of \$50 or more. There is no evidence to show that an audit supervisor ever found such a violation but decided not to issue discipline for it. Thus, the audit supervisor's issuance of the discipline appears to have been non-discretionary and, therefore, the situation was not one in which he was called upon to exercise enough judgment to qualify as Section 2(11) independent judgment.

With regard to Employer Exhibit 10 (concerning the attendance progressive disciplinary warning to Cashier Aguye for a no call/no show), the evidence indicates that personnel other than the supervisors may have been involved in deciding upon the

discipline. As stated above, the write-up references “we,” which suggests the involvement of others in addition to the supervisor. Also, the documents attached to the write-up include an investigative report, and it appears that supervisors submitted documentation to Human Resources. At the very least, the evidence relating to this discipline leaves open the possibility that other managers were involved. Given the uncertainty about whether the supervisor acted alone or under the direction of managers, it cannot be said that the supervisor exercised independent judgment in issuing this warning.

Moreover, in light of Assistant Manager Jorgensen’s testimony that a no call/no show automatically results in a suspension, this situation also was one in which the supervisor was not called upon to exercise enough discretion to qualify as Section 2(11) independent judgment.

Regarding Employer Exhibit 11 (involving the progressive disciplinary warning to Cashier Mekdes Lemma for listening to music and arguing with the supervisor about it), there was no testimony from any witness with first-hand knowledge about the situation. Assistant General Manager Jorgensen testified that he did not recall the incident. The record evidence simply does not disclose the actual sequence of events surrounding this disciplinary warning or who was involved in deciding to issue it. Consequently, this exhibit also is not sufficient to prove that a supervisor issued this discipline on his own, without involvement from higher officials, and exercised independent judgment in doing so.

As to Employer Exhibits 11 and 12 (the progressive disciplinary forms that Traffic Supervisor John Eckart issued), Eckart’s own testimony establishes that operations managers were involved in those disciplines and that he did not issue the discipline on

his own. Moreover, Eckart's testimony establishes that, for Employer Exhibit 12, an operations manager specifically directed Eckart to discipline the employee.

Union Exhibit 2 – which is the e-mail dated June 20, 2011, from Human Resources Generalist Neely stating that no progressive discipline is to issue without approval from Human Resources and General Manager Kilgore – further tends to undermine the Employer's contention that supervisors possess independent authority to discipline.

As for the Employer's contention that the supervisors effectively recommend discipline, the record does not support that contention either. Under the Board's construction of the Section 2(11) phrase "effectively to recommend," such authority generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendations ultimately are followed. See *Bellaire Medical Center*, 348 NLRB 940, 954 (2006); *Children's Farm Home*, 324 NLRB 61, 61 (1997). Because, as discussed above, there is an absence of detail surrounding the various instances of discipline included in the record, it is not possible to find - based on concrete rather than conclusory testimony - that the supervisors' input in the disciplinary process is accepted without independent investigation by higher authorities and that the supervisors are the real decision-makers.⁸ Therefore, the record evidence is too equivocal to establish that supervisors possess the independent

⁸ For this reason, the Employer's reliance on *Progressive Transport Services*, 340 NLRB 1044 (2003), and *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), is misplaced. Unlike here, the evidence in each of those cases was sufficient to demonstrate that the putative supervisor did effectively recommend discipline. In *Progressive Transport*, unlike here, independent judgment was discernable from the narrative language the supervisor used in the numerous disciplinary notices that she issued. Further, the 33 disciplinary actions at issue in *Progressive Transport* addressed a wide variety of employee conduct that would have required some discretion, and there was evidence that the Employer followed the supervisor's recommendations to issue discipline. Also, in this case, unlike the facts in *Mountaineer Park*, there is insufficient evidence to show that supervisors have effectively recommended that a certain level of discipline be imposed.

authority to discipline or to effectively recommend discipline of employees within the meaning of Sec. 2(11) of the Act.

F. Authority to Adjust Grievances

The Employer contends that the supervisors are Section 2(11) supervisors because they possess supervisory grievance-adjustment authority. The Employer relies on the grievance procedure set forth in Article 18 of the collective-bargaining agreement with SEIU, on various aspects of the supervisors' participation in the grievance process, and on the supervisors' involvement in informally resolving employee disputes. As with the other factors discussed above, I find that the supervisors' involvement in the grievance process does not confer Section 2(11) supervisory status.

1. Factual Findings

Article 18 of the collective-bargaining agreement between the Employer and SEIU sets forth a grievance procedure that governs the filing and processing of contractual grievances. Under Article 18, a grievant must file a written grievance with the employee's "immediate supervisor" within specified timeframes. At step one of the procedure, the "immediate supervisor" has the authority to meet on the grievance and attempt to resolve the dispute.

When employees file grievances over discipline, supervisors can be involved in the contractual grievance process where they have knowledge about the underlying events and any discipline that issued. The supervisors attend grievance meetings and participate in them. The record, however, does not provide additional detail about the nature or extent of the supervisors' actual participation in such contractual grievance meetings.

Supervisors can informally resolve disputes involving employees. As an example, the record includes evidence showing that in September 2009 Lane Supervisor Asfaw Kuture talked to two cashiers about a situation in which one of the cashiers aggressively asked the other cashier why she was throwing something smelly into a trash can, which the cashier mistakenly interpreted as him saying that she smelled bad. Kuture talked to the two cashiers, helped them to correct the misunderstanding, and the two cashiers apologized to each other.

2. Analysis

The Article 18 contractual grievance procedure requires a grievant to file a written grievance with the employee's "immediate supervisor" within specified timeframes and provides that, at step one of the procedure, the "immediate supervisor" has the authority to meet on the grievance and attempt to resolve the dispute. Contrary to the Employer's contention, the mere existence of this contractual provision does not establish that the supervisors possess Section 2(11) grievance-adjustment authority. As noted herein, the Board does not base supervisory status determinations on mere "paper authority." See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Moreover, the record does not include evidence that affirmatively shows that the Employer has had its supervisors take on the contractual grievance-adjustment role of the "immediate supervisor." The record does not include any testimony or documentary evidence showing that the Employer actually has charged any supervisor with accepting contractual grievances or that any supervisor actually has accepted such grievances. Nor is there any evidence showing that supervisors actually met with grievants and/or their SEIU representatives to attempt to resolve any disputes. Asfaw Kuture is the only supervisor who actually testified about his authority in the grievance process, and he

testified that he is not aware of any supervisor ever performing the role set forth in the collective-bargaining agreement for the immediate supervisor. Absent affirmative evidence showing that supervisors actually have performed the grievance-adjustment role set forth in the collective-bargaining agreement, there is no basis for concluding that the contractual grievance procedure establishes that the supervisors have supervisory grievance-adjustment authority. See, e.g., *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057-1058 (2006).

The Employer also relies on Assistant General Manager Jorgensen's testimony that in almost all grievances the supervisors "stand" for the Employer and explain why the discipline issued and what happened. This testimony, again, lacks the detail that would be necessary to prove supervisory grievance-adjustment authority. Moreover, this testimony can be read to mean that the supervisors merely provide factual information in the grievance process about the reasons why discipline issued. The testimony is not sufficient to show that the supervisors are the ones who actually adjust the grievances.

Jorgensen also testified that supervisors provide input into what the Employer should do and that the Employer relies on the supervisors' judgment in handling grievances over discipline. This testimony, without more, establishes only that the supervisors may make recommendations as to how the Employer should handle grievances. Alone, that conclusory evidence does not establish that the supervisors have the power to adjust the grievance or that any recommendations they make as to disposition amount to effective recommendations within the meaning of Section 2(11).

The Employer also relies on the evidence showing that Lane Supervisor Kuture talked to two cashiers about the situation in which one cashier made the other cashier

cry by asking about why she was throwing something into a trash can. The evidence shows that Kuture merely intervened informally to mediate between the two cashiers to fix a misunderstanding between them by helping to facilitate communication so that the employees could work out their differences. The Board has held that alleged supervisors' authority to rely on their personal relationships with employees to informally resolve complaints is insufficient to establish supervisory status. See *Ohio Masonic Home*, 295 NLRB 390, 392-394 (1989); *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 891 (1997).

G. Monthly Meetings

The Employer also relies on the supervisors' holding of monthly meetings with employees to support its contention that the supervisors are statutory supervisors. I conclude that the holding of such meetings does not make them statutory supervisors.

1. Factual Findings

The record evidence shows that supervisors hold monthly meetings with the employees on their teams. The basic purpose of these meetings is to provide information to the employees. The supervisors pass on information from the assistant general managers and operations managers, and they can bring up any issues that they want to raise. The subject matter of the meetings usually includes work-related issues, such as customer service issues, any problems during the previous month, seasonal safety issues related to inclement or dangerous weather such as tornados, safety issues such as how to handle robberies, the status of any construction projects at DIA that could impact parking, and any other issues that managers or employees raise.

2. Analysis

The supervisors' role in conducting monthly meetings with their team member employees does not confer supervisory status. The authority to hold meetings with employees merely is a secondary indicia of supervisory status, which on its own is insufficient to establish supervisory status. See, e.g., *DirectTV*, 357 NLRB No. 149, slip op. at 2, 4 (December 22, 2011).

CONCLUSION

Based on the foregoing, I conclude that the Employer has not met its burden of proving that the lane supervisors, traffic supervisors, license plate inventory supervisors, finance supervisors, and audit supervisors are statutory supervisors under Section 2(11) of the Act. Accordingly, it is appropriate to direct an election in this proceeding.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by:

TEAMSTERS LOCAL UNION NO. 455

The date, time, and place (or dates, times, and places) of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Direction of Election.

VOTING ELIGIBILITY

Eligible to vote are those in the unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election including employees who did not work during that

period because they were ill, on vacation or temporarily laid off. 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 a strike who have retained their status as strikers but who have been permanently 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 are 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 of that strike 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.

EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure 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).

Accordingly, it is hereby directed that within seven (7) days from the date of this Direction of Election, the Employer must submit to the Regional Office an election eligibility list, containing the full name and address of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The list must be sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process,

the names on the list should be alphabetized (overall or by department, etc). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Towers, 600 Seventeenth Street, Denver, Colorado 80202-5433 on or before **September 13, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. 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 electronic filing through the Agency's website, www.nlr.gov,⁹ by mail, or by facsimile transmission to (303) 844-6249. The burden of establishing timely filing and receipt of the list will continue to be placed on the sending party.

Since the list is to be made available to all parties to the election, please furnish a total of two (2) copies of the list, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to the Board's Rules and Regulations, Section 103.21, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and

⁹ To file the list electronically, go to www.nlr.gov and select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the service and filing of papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **September 20, 2012**, unless filed electronically. **Consistent with the Agency's E-Governing initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹⁰

A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

¹⁰ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as utilized in filing the request with the Board.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed directions. The responsibility for the receipt of the request for review rests exclusively with the sender.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Denver, Colorado this 6th day of September, 2012.



Wanda Pate Jones
Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Towers
Denver, Colorado 80202-5433

ATTACHMENT

* * *

Section 103.20 Posting of Election Notices.

(a) Employers shall post copies of the Boards official Notice of Election in conspicuous places at least three (3) full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least five (5) working days prior to the election that it has not received copies of the election notice.

(d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under provisions of Section 102.69(a).

Dated, Washington, D.C., June 30, 1987, by direction of the Board.

National Labor Relations Board
Lester A. Heltzer, Executive Secretary

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