

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION**

WOODMAN'S FOOD MARKET, INC.

and

Case 30-CA-078663

**UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 1473**

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE
LAW JUDGE**

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Andrew S. Gollin, Counsel for the Acting General Counsel, respectfully submits this Answering Brief to Respondent's Exceptions to the Decision of Administrative Law Judge Jeffrey D. Wedekind ("ALJ").

I. INTRODUCTION¹

On April 12, 2012, Woodman's Food Market, Inc. ("Respondent") unlawfully withdrew recognition of the United Food and Commercial Workers, Local 1473 ("Union") as the collective-bargaining representative for a unit of employees working at Respondent's Appleton, Wisconsin location based upon a petition that Robert Wydeven, the Auto Center Manager/Department Head, prepared, circulated, and actively solicited employees to sign. The ALJ correctly found that this conduct--which is undisputed--violated the National Labor Relations Act ("Act") because the evidence establishes Mr. Wydeven is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

The ALJ concluded that Mr. Wydeven is a Section 2(11) supervisor because he has: (1) the authority to effectively recommend whether employees will be retained in the Auto Center following their initial probationary period; and (2) the authority to responsibly direct the Auto Center employees. The ALJ concluded that Mr. Wydeven is a Section 2(13) agent because Respondent holds him out as a member of management and utilizes him as a "conduit" for transmitting information to employees on matters relating to their employment.

¹ The Acting General Counsel's Exhibits will be referred to as (G.C. Exh. __); Respondent's Exhibits will be referred to as (R. Exh. __). Transcript citations will be referred to by page number and line number as (Tr. __: __), unless the Transcript cite covers multiple pages. The ALJ's decision will be referred to as (ALJD __).

Respondent excepts to the ALJ's findings and conclusions relating to Mr. Wydeven's supervisory and agency status.² Respondent, in general, asserts the ALJ erred because he relied upon conclusory statements, accepted unsubstantiated testimony, ignored relevant evidence, drew impermissible or flawed inferences, and failed to apply the governing case law. For the reasons set forth below, each of Respondent's exceptions should be rejected as having no merit, and the Board should adopt the ALJ's findings, conclusions, and proposed remedy.

II. FACTUAL SUMMARY³

Respondent operates a grocery store and an Auto Center at its Appleton, Wisconsin location. (G.C. Exhs. 1(e) and 1(i)). The Auto Center is a stand-alone facility about a quarter of a mile away from the grocery store. (Tr. 17-18). The Auto Center includes a gas station and a "lube center" with three attached bays where cars drive in to have the oil changed, etc.

Robert Wydeven began working for Respondent at its Appleton location on May 13, 2002. (Tr. 38-39) (G.C. Exh. 20). Initially, he worked in the grocery store. In October 2006, he transferred over to the Auto Center, where he worked as a lube technician for about five years.

² Respondent also contends that the Board lacks the necessary authority to decide this case because members of the current Board were appointed by the President while the Senate was still in session—in direct contravention to the Recess Appointments Clause of the U.S. Constitution. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), there is no merit to this argument.

³ The record consists of Mr. Wydeven's testimony and numerous documents relating to his employment and his current duties and responsibilities as the Auto Center Manager/Department Head. The ALJ fully and fairly evaluated the evidence when making his findings and conclusions, including Mr. Wydeven's credibility as a witness. Several of Respondent's exceptions relate to the ALJ's credibility determinations on pages 4, 5, and 6 of the ALJ's decision, which Respondent mischaracterizes as erroneous factual findings. A review of these pages make clear that the ALJ was explaining, with reference to specific lines of questioning, why he did not credit Mr. Wydeven. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The evidence more than adequately supports the ALJ's credibility resolutions.

Respondent is aware of the *Standard Drywall* decision, as it is cited in its brief. Respondent, however, cites it as authority for why the Board reviews the ALJ's factual and legal findings de novo. Respondent chooses to ignore the portion of the decision holding that the Board does not review credibility findings de novo, but, instead, examines whether such findings are not clearly incorrect.

(G.C. Exh. 20). During that time, he reported to Jamie Cortazzo, the then Auto Center Manager/Department Head. (Tr. 19-20).

On May 31, 2011, Respondent posted a "Job Opportunity" form seeking applicants to fill Mr. Cortazzo's position. (G.C. Exh. 2). The posting states the Auto Center Manager position is responsible for "directing the workforce and maintaining customer service." (G.C. Exh. 2). Mr. Wydeven applied for and was eventually selected for the position. (Tr. 20-21) (G.C. Exh. 3). His promotion to Auto Center Manager/Department Head was effective June 19, 2011. (G.C. Exh. 3). The "Change of Status" form reflects that, as part of the promotion, Mr. Wydeven received an additional \$2 an hour in premium pay, plus \$.75 an hour in "sales points" for "being in charge of the Auto Center."⁴ (G.C. Exh. 3). Mr. Wydeven has since received three additional raises. (G.C. Exh. 20).⁵

There are about six to eight employees who work in the Auto Center. Four are full-time. (Tr. 18:19-25). Mr. Wydeven is full time. He works from 9:00 a.m. to 5:30 p.m. on Mondays, Thursdays, Fridays, and Saturdays, 9:30 a.m. to 6:00 p.m. on Tuesdays, and 10:00 a.m. to 3:00 p.m. on Sundays. He is off on Wednesdays. (Tr. 27-28). When Mr. Wydeven is not there, Taylor Keeseey is the "fill in supervisor for the Auto Center." (G.C. Exh. 4). There are no other supervisors or managers there.

Since his promotion, Mr. Wydeven is the highest ranking employee working in the Auto Center. (Tr. 19:3-6). Mr. Wydeven reports directly to the Store Manager, Patti Frederick. (Tr. 29-30). Ms. Frederick's office is located inside the grocery store. Mr. Wydeven speaks with Ms.

⁴ Mr. Wydeven testified he did not know what "sales points" were. But he did not receive them prior to becoming the Auto Center Manager/Department Head. (Tr. 22-24) (Jt. Exh. 1) (no reference to "sales points" for bargaining unit employees).

⁵ All three increases occurred within two months of Respondent's withdrawal of recognition. (G.C. Exh. 20). The first occurred on April 8, 2012, two days before Respondent sent the letter to the Union withdrawing recognition. (Jt. Exh. 2). The second increase came a month later, and the third increase came a month after that. (G.C. Exh. 20).

Frederick a couple of times a week. (Tr. 30-31). Ms. Frederick seldom comes out to the Auto Center. Mr. Wydeven testified as follows about Mr. Frederick's presence in the auto center:

- Q: ... And how often does she come over to the auto center?
A: Once to twice a week. She usually comes out after she goes and gets – checks gas prices and tells us to change the gas prices up or down.
Q: All right. And what does she do when -- so when she comes out, she's checking the gas prices?
A: Well, she goes all -- to all the gas stations and checks the gas prices and then dictates what the price will be and then tells us, and then we change it.
Q: Okay. And as far as amount of time, how much time does she spend at the actual lube center?
A: Generally between 15 to 30 minutes.

(Tr. 30:9-21).

Mr. Wydeven never received a job description. He testified that the only information he has received from Respondent regarding his position is the "Job Opportunity" posting, which, as previously noted, states that he is responsible for directing the workforce and maintaining customer service. (Tr. 26-27). Respondent maintains written "Lube Station Policies" that employees are to follow. (G.C. Exh. 21). This 44-page document covers the various tasks performed in the lube center, such as locating or releasing the hood latch, raising or propping the hood, removing the used filter, identifying and installing the appropriate replacement filter, checking the oil cap or oil stick, removing and replacing the oil plug and checking it for damage, checking zerks, checking and replacing fluids (e.g., transmission, power steering, brake, etc.), removing and replacing windshield wipers, and checking for leaks. In each section, employees are instructed to go to their Manager, which is Mr. Wydeven, for instruction and direction if they have any questions or issues. There are at least 15 instances in the document in which employees are instructed to go to their Manager for assistance or instruction. (G.C. Exh. 21, pages 8, 9, 11, 12, 16, 18, 21, 24, 25, 26, 27, 29, 31, 34, 39, 42). The document also states that if

an employee is uncomfortable working on a vehicle for any reason, he/she is required to notify the Lube Manager or Store Manager, and the Lube Manager or Store Manager will make the decision as to whether the work should be performed on the vehicle. (G.C. Exh. 21, page 2). Mr. Wydeven acknowledged that employees do come to him with questions and issues. (Tr. 35-38).⁶

Mr. Wydeven confirmed that employees come to him for direction on how to handle customer issues or complaints.⁷ (Tr. 31-33). Mr. Wydeven testified that if employees come to him, and it is a simple matter, he will handle it on his own. If it is more complicated, he will go to Ms. Frederick and get direction from her on what to do. After Mr. Wydeven has spoken with Ms. Frederick, he then will report back to the Auto Center employee(s) on how she wants the situation handled. (Tr. 33-34).

Mr. Wydeven also is responsible for ordering supplies used in the Auto Center (e.g., oil, filters, wiper blades, fluids, etc.). (Tr. 31-33). He orders supplies once a week or once every other week, depending on inventory. He occasionally performed this task before he assumed his current position. He has never received any instructions on how to perform this aspect of his job. He decides what to order on his own, and is not required to get anyone's prior approval. (Tr. 32-33).

⁶ Mr. Wydeven stated that employees also could go directly to the Ms. Frederick with questions, but acknowledged she personally does not know how to operate the equipment or perform the tasks associated with working in the lube center. (Tr. 19:12-16; 31:10-14).

⁷ Mr. Wydeven testified as follows in response to the ALJ's hypothetical question:

JUDGE WEDEKIND:What if one of your, one of the other employees, the six to eight employees you mentioned, sat in a car with oil, not realizing that they had grease on their pants, and the customer got really mad? This is a hypothetical. What would happen? What would that employee do?

THE WITNESS: That employee would either come to me or the store manager, depending on whether I was there or not.

JUDGE WEDEKIND: Okay. Thank you.

(Tr. 37-38).

Mr. Wydeven frequently works alongside the other Auto Center employees servicing vehicles. (Tr. 108-109). In doing so, he is able to monitor and evaluate their skills, abilities, and performance. The regular employees typically do not receive written performance evaluations. (Tr. 64-68). However, probationary employees in the Auto Center do, and those evaluations determine whether the employee passes probation, fails probation, or has his/her probation extended.⁸

As the Auto Center Manager/Department Head, Mr. Wydeven is responsible for evaluating employees working in the Auto Center once they finish their probationary periods. (Tr. 39-40). Each employee begins as a probationary employee, even if they are transferring in from the grocery store. The probationary period is between 30-45 days. After the probationary period ends, Mr. Wydeven receives a written Performance Evaluation form to complete for the employee. The form will already have the employee's name, position and start date filled out. Mr. Wydeven is responsible for completing the next section--the chart--evaluating the employee in each of the following categories: (1) work quality, (2) job knowledge, (3) work quantity, (4) following instructions, (5) cooperating with others, (6) dependability, (7) safety, (8) respect for property, (9) courtesy towards customers, (10) appearance, and (11) attendance and punctuality. The possible rating for each is "Exceeds Requirements," "Meets Requirements," "Needs Improvement," or "Not Acceptable."⁹ There also is a "Comments" column where Mr. Wydeven can comment about the employee's performance in each of the above categories. Below that is

⁸ According to the parties' collective bargaining agreement, probationary employees have no seniority rights and can be terminated for any reason. That changes once the employee passes probation. (Jt. Exh. 1, page 7).

⁹ Mr. Wydeven testified about how he goes about rating employees. Specifically, he will check the appropriate box based upon his observations. He may place the check or "x" between the boxes if he believes that an employee's rating is in the middle between the two ratings, or he may move the check or "x" closer to one side or any other if he believes the employee's rating is closer to next higher or lower rating. He does this on his own and does not discuss it with anyone beforehand. (Tr. 79-81).

an area for Mr. Wydeven to specifically note any “Strengths” or “Areas for Improvement.” Near the bottom is the “Plan of Action” which has three options: “Passing Probation,” “Not Passing Probation,” or “Extend Probation.” Mr. Wydeven testified he will complete the evaluation of the employee and make his recommendation based upon his personal observation of the probationary employee’s work. He then will meet with the Store Manager, Ms. Frederick, to discuss his evaluation and his recommendation. Ms. Frederick will then check the appropriate “Plan of Action” box based upon Mr. Wydeven’s evaluation. Mr. Wydeven then signs the Performance Evaluation form and gives it to the employee. Mr. Wydeven may meet with the employee and briefly talk about the evaluation, or he may simply give the employee the completed form to sign.

Since becoming the Auto Center Manager/Department Head, Mr. Wydeven has completed Performance Evaluation forms for at least five probationary employees. (Tr. 39-54; 69-70) (G.C. Exhs. 5, 6, 7, 8, and 14). Mr. Wydeven testified about each.¹⁰

Kelly Labby was the first employee Mr. Wydeven evaluated after becoming the Auto Center Manager/Department Head. (G.C. Exh. 5). Mr. Wydeven completed two Performance Evaluation forms for Ms. Labby. The first occurred on around June 25, 2011. (G.C. Exh. 5, page 1). He rated her based upon his observation of her work performance in each of the listed

¹⁰ As the ALJ properly noted, Mr. Wydeven, throughout his testimony, sought to minimize his authority and role as the Auto Center Manager/Department Head. (ALJD 4-6). However, the documents tell the real story, and are far more reliable and credible in this case than Mr. Wydeven’s limited recollections. With regards to the Performance Evaluations, Mr. Wydeven acknowledged that he completed those on his own, based upon his personal observations of the employees’ skills, abilities, and performance. He then gives the evaluations to Ms. Frederick, who reviews his evaluations and takes into account his recommendations in deciding whether the employees pass probation. He claims that she also may meet with other Auto Center employees in deciding whether an employee should pass their probationary period. However, when pressed for specific examples, Mr. Wydeven was unable to identify a single instance since he became the Auto Center Manager/Department Head in which he observed Ms. Frederick talk to any other employee about whether a probationary employee should be allowed to pass probation and be retained as a regular Auto Center employee. Respondent offered no evidence on this point.

categories. (Tr. 40-41). He noted that Ms. Labby “Needs Improvement” in her “Job Knowledge” and her “Work Quantity.” With regards to “Job Knowledge”, Mr. Wydeven commented that Ms. Labby “needs more lube training.” In the “Strengths” section, Mr. Wydeven handwrote that she has “Great customer service. Knows gas station expectations.” In the “Areas for Improvement” section, Mr. Wydeven handwrote “Knowledge in lube center – mainly buttons” and “Remembering Information on vehicles.” Mr. Wydeven signed the form on the line for the “Manager or Supervisor’s Signature.” Mr. Wydeven then met with Ms. Frederick and recommended that Ms. Labby’s probation be extended so that she could get some additional training in oil changing. (Tr. 42-43). Ms. Frederick followed Mr. Wydeven’s recommendation and extended Ms. Labby’s probation. Mr. Wydeven then gave Ms. Labby her Performance Evaluation form, stating that her probation was being extended. Mr. Wydeven asked Ms. Labby to sign the Performance Evaluation form, which she did. There was no one else present. (Tr. 43:4-15).

A couple of weeks later, on July 16, 2011, Mr. Wydeven completed a follow-up Performance Evaluation form for Ms. Labby. He again evaluated her performance in each of the listed categories based upon his observation of her work. He noted that her “Job Knowledge” still “Needs Improvement” but commented that she was “Getting Better Every day.” (G.C. Exh. 5, page 2). He rated her “Work Quantity” as “Meets Requirements” and commented that she “keeps up with pace.” In the “Strengths” section, Mr. Wydeven handwrote “Good customer service. Getting better every day with Lube Center knowledge.” In the “Areas for Improvement” section, he handwrote “Problem solving while down working buttons.” Mr. Wydeven believed that Ms. Labby had addressed the concerns he had about her, and he then met with Ms. Frederick and recommended that she allow Ms. Labby to pass probation. (Tr. 45-46).

Ms. Frederick agreed. (Tr. 46-48).¹¹ Mr. Wydeven later met with Ms. Labby to give her the second Performance Evaluation form, notifying her that she had passed probation. He asked her to sign it. He signed the form on the line for the “Manager or Supervisor’s Signature.” (G.C. Exh. 5, page 2). There was no one else present. (Tr. 46:3-7).

Mr. Wydeven also evaluated Taylor Keeseey upon the completion of his probationary period. (G.C. Exh. 6). As previously noted, Mr. Keeseey is the “fill-in supervisor” when Mr. Wydeven is not working. (Tr. 47-48). Mr. Wydeven evaluated Mr. Keeseey based upon his observations of Mr. Keeseey’s performance. Mr. Wydeven concluded that Mr. Keeseey “Meets Requirements” in each of the twelve categories. In the “Strengths” section, Mr. Wydeven handwrote that Mr. Keeseey has “Good Customer Service, always wants to learn more about lube.” In the “Areas for Improvement” section, Mr. Wydeven handwrote that Mr. Keeseey is “Working on order of doing things.” Mr. Wydeven signed the form on the line for “Manager or Supervisor’s Signature.” He met with Ms. Frederick about his evaluation of Mr. Keeseey, and he recommended that Ms. Frederick allow Mr. Keeseey to pass probation. Ms. Frederick followed his recommendation and allowed Mr. Keeseey to pass probation. Mr. Wydeven then met with Mr. Keeseey to give him the completed Performance Evaluation form and explain the ratings and comments on the form. There was no one else present. Mr. Keeseey signed the form. (Tr. 48-50).

Mr. Wydeven next evaluated Jesse Gosz upon the completion of his probationary period. (G.C. Exh. 7). Mr. Wydeven evaluated Mr. Gosz based upon his observation of Mr. Gosz’s performance. Mr. Wydeven concluded that Mr. Gosz “Meets Requirements” in all but two of the categories. With regards to “Dependability,” Mr. Wydeven determined that Mr. Gosz “Exceeds

¹¹ Mr. Wydeven confirmed Ms. Frederick did not come out and observe Ms. Labby perform her job. He added that she asked him and “other employees” how Ms. Labby was doing. However when asked who else she spoke to, Mr. Wydeven did not know. He was the only person he knows that she spoke to about Ms. Labby’s performance. (Tr. 47:14-22)

Requirements.” However, with regards to “Appearance,” Mr. Wydeven concluded that Mr. Gosz “Needs Improvement.” There is no commentary for either explaining why. However, in the “Strengths” section, Mr. Wydeven handwrote that Mr. Gosz has “Great customer service” and “always stays busy and finds something to do when we are slow.” In the “Areas of Improvement” section, Mr. Wydeven handwrote “Working gas station, order of things in lube center, trying to stay clean working buttons.” Mr. Wydeven signed the form on the line for “Manager or Supervisor’s Signature.” Mark Anderson, the Assistant Store Manager, signed below his signature. Mr. Wydeven then met with Ms. Frederick about his evaluation of Mr. Gosz, and he recommended that Ms. Frederick allow Mr. Gosz to pass probation. Ms. Frederick followed Mr. Wydeven’s recommendation and allowed Mr. Gosz to pass probation. Mr. Wydeven could not recall whether or not gave Mr. Gosz the completed Performance Evaluation form. (Tr. 51-52).

Mr. Wydeven then evaluated Tara Forster. (G.C. Exh. 8). He evaluated her based upon his observation of her performance. (Tr. 52-54). With regards to “Work Quality,” Job Knowledge,” and “Work Quantity, Mr. Wydeven rated Ms. Forster as “Needs Improvement.” There is no commentary explaining why. In the “Strengths” section, he handwrote “Customer Service.” In the “Areas for Improvement” section, he handwrote “Unable to perform tasks in the lube center.” Mr. Wydeven signed the form on the line for “Manager or Supervisor’s Signature.” Mr. Wydeven then met with Ms. Frederick to discuss Ms. Forster. Mr. Wydeven testified as follows about his recommendation:

- Q: Did you make -- did you make any recommendation to Patti as to whether or not Ms. Forster should or should not pass probation?
- A: Yes.
- Q: What was your recommendation?
- A: I asked Patti that we should probably pass her, because she was more than capable of doing the gas station job, which was the majority of her job. I

know that every now and then she might be called to fill in in the lube center, but I thought that that didn't really matter, because generally that 1 position didn't work the lube center. So I thought that she would just be fine working in the gas station, because she was doing that part of it fine. But Patti said that she must be able to do the things in the lube center, and she couldn't -- she just physically couldn't do some of the things out there, which I thought, like I said earlier, I mean, I could help with something if they needed help, like -- but she generally wasn't able to do really anything out there at all.

(Tr. 86-87).

Based on Mr. Wydeven's evaluation that Ms. Forster was unable to adequately perform the duties associated with working in the lube center, Ms. Frederick did not allow Ms. Forster to pass probation and become a regular Auto Center employee. Ms. Frederick transferred her back to work in the grocery store. (Tr. 53-54; 111-112).

Finally, Mr. Wydeven evaluated Mark Radtke. (G.C. Exh. 15). Like the others, Mr. Wydeven evaluated him based upon observing Mr. Radtke's performance. (Tr. 69-70). Mr. Wydeven rated Mr. Radtke as "Meets Requirements" in every category, except "Work Quantity." With regards to "Work Quantity," Mr. Wydeven rated Mr. Radtke as "Needs Improvement." He did not comment as to why. In the "Strengths" area, Mr. Wydeven handwrote "Asks questions when unsure. Keeps work area clean and always stocks filters and fluids often." In the "Areas for Improvement" area, Mr. Wydeven handwrote "Needs to improve on working gas station." Mr. Wydeven then met with Ms. Frederick about Mr. Radtke's evaluation and recommended that she allow Mr. Wydeven to pass probation. Ms. Frederick followed Mr. Wydeven's recommendation and allowed Mr. Radtke to pass probation. Thereafter, Ms. Frederick and Mr. Wydeven met with Mr. Radtke and presented him with his

Performance Evaluation form, stating that he was passing probation.¹²

In addition to evaluating probationary employees, Mr. Wydeven is responsible for issuing discipline to Auto Center employees. On December 8, 2011, Mr. Wydeven gave Mr. Keesey a "Notice of Failure to Follow Work & Safety Rules" disciplinary form. (G.C. Exh. 9). According to the document, which Mr. Wydeven handwrote, Mr. Keesey failed to follow procedure in performing an oil change. He did not tighten the filter causing leaking. Mr. Wydeven wrote that Mr. Keesey must finish the job he is on before moving on to the next one, and that Mr. Keesey was guilty of a lack of communication. Mr. Wydeven signed his name under the line for "Management Signature." The document was later given to Mr. Keesey, and he signed it. Respondent considered this a verbal warning, which is reflected on the document. (G.C. Exh. 9).

At around the same time Mr. Keesey received this verbal warning, Ms. Frederick completed a Performance Evaluation form for him. (G.C. Exh. 10). Attached to the form was a detailed explanation of Respondent's concerns about Mr. Keesey's performance. (G.C. Exh. 10, page 3). According to the document, Mr. Keesey was instructed to demonstrate common courtesy toward all fellow employees, and not humiliate or degrade another individual. He also was told not to hang up on customers, and not to use inappropriate language. There also is a

¹² Respondent introduced two Performance Evaluation forms Mr. Wydeven and others signed in 2010, prior to him becoming the Auto Center Manager/Department Head (R. Exhs. 1 and 2), arguing that they were evidence that non-supervisors or non-managers complete evaluation forms and/or are asked their opinions as to whether an employee should pass probation and become a regular Auto Center employee. Respondent's goal in presenting these documents was to attempt to minimize or trivialize the evaluations Mr. Wydeven signed since becoming the Auto Center Manager/Department Head. Mr. Wydeven's recollection regarding these documents was incomplete and filled with uncertainty, and Respondent offered nothing else to support its argument. The ALJ thoroughly analyzed this evidence (or lack thereof) regarding these 2010 evaluations, ultimately concluding that the evidence offered by Respondent was too incomplete, and, in the end, had no relevance in deciding whether Mr. Wydeven, in his current capacity, is a statutory supervisor or agent. The evidence establishes that since Mr. Wydeven became the Auto Center Manager/Department Head, Ms. Frederick has consulted with him and relied upon his evaluation in deciding whether or not the employee should pass probation and become a regular Auto Center employee. There is no other reference to any other employee being consulted in the evaluations completed since this time, and there is no other evidence that Ms. Frederick has asked anyone other than Mr. Wydeven to evaluate an employee and/or provide her with the same recommendation.

comment that Mr. Keesey needs to work together as a team. It specifically states, "All are equal in the lube station excluding Rob Wydeven who is the lube manager. We do not have a second in charge." According to the form, which was signed by Ms. Frederick, Mr. Keesey was to be re-evaluated in 60 days, and that he had some proving to do.

Approximately sixty days later, Respondent re-evaluated Mr. Keesey to determine if his performance had improved. (G.C. Exh. 14). Mr. Wydeven acknowledged that he completed the Performance Evaluation form re-evaluating Mr. Keesey. (Tr. 59-60). He rated Mr. Keesey in each of the listed categories, and handwrote comments in the "Strengths" section. Mr. Keesey thereafter was deemed to have passed the 60-day disciplinary probation Respondent had placed him on. (G.C. Exh. 14).

On around February 14, 2012, Ms. Frederick gave Mr. Wydeven a periodic performance evaluation entitled "Department Head Performance Evaluation." (G.C. Exh. 11).¹³ According to the document, which speaks for itself, Ms. Frederick found that Mr. Wydeven has met all of the requirements for each of the listed categories, which include, among others, "Ability to handle customers/employees" and "Ability to Direct Workforce." In the Manager Expectations and Comments section, Ms. Frederick wrote the following brief narrative:

Robbie has taken over the job of Lube Manager and is doing a very nice job. He is very dedicated to the company and the position and wants to do the best job possible. He has learned the hard way that the customer can sometimes be very vicious. This has been an eye opener for Robbie. He however, can handle any situation that comes about and he handles it with professionalism.

Robbie is also very much a Woodman's backer. He understands all policies and procedures and continues to make his people accountable. I am very excited to have a lube manager that I can relate to and he keeps me informed of what is happening out there.

¹³ Prior to becoming the Auto Center Manager/Department Head, Mr. Wydeven had not received a periodic performance evaluation. Mr. Wydeven further testified that he was not aware of any bargaining unit employee who received a periodic performance evaluation. (Tr. 67-68).

Continue on Robbie, learning as you go. I appreciate your dedication and hard work. I truly enjoy working with you and I am glad you are the Lube Manager.

(G.C. Exh. 11). Ms. Frederick later gave the document to Mr. Wydeven and told him that he was doing a good job. (Tr. 64-65). Mr. Wydeven received the first of three wage increases about a month and a half following this evaluation. (G.C. Exh. 20).

III. ANALYSIS¹⁴

A. Overview

An employer may not withdraw recognition based on a petition that it unlawfully assisted, supported, or otherwise unlawfully encouraged, even absent specific proof of the misconduct's effect on employee choice. *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16, slip op. at 1 (2011). The Board considers it unlawful assistance for a statutory supervisor and/or agent of the employer to “initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures....” *Sociedad Espanola de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 459 (2004), quoting *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). See also *Narricot Industries, L.P.*, 353 NLRB 775 (2009) (citing *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 270-271 (2008); *Cypress Lawn*

¹⁴ As stated above, the Acting General Counsel’s case consisted of Mr. Wydeven’s testimony, as well as numerous documents related to his employment and his duties and responsibilities as the Auto Center Manager/Department Head. Respondent claims that the ALJ erred in failing to draw adverse inferences based upon the Acting General Counsel’s failure to call additional witnesses beyond Mr. Wydeven. The Acting General Counsel’s burden in this case is to prove Mr. Wydeven is a statutory supervisor or a statutory agent. The Acting General Counsel proved Mr. Wydeven is both based upon Respondent’s own documents and the portions of Mr. Wydeven’s testimony that were credible. Respondent made the tactical decision not to present any witnesses, and, instead argue that the Acting General Counsel failed to meet its burden. That tactical decision proved unsuccessful. Respondent is now arguing that in addition to affirmatively proving that Mr. Wydeven is a statutory supervisor or a statutory agent, the Acting General Counsel has the burden to call additional witnesses, including the Store Manager, disprove that Mr. Wydeven was not a supervisor or agent. This argument must be rejected. Respondent was in a unique position of knowing exactly what Ms. Frederick would have testified to had she been called to the stand. The Acting General Counsel did not. If Ms. Frederick had evidence that could have undermined the Acting General Counsel’s case regarding Mr. Wydeven’s status, Respondent could and should have called her to testify. Respondent’s decision not to do so--particularly since she was sitting in the room for the whole hearing--should be construed against Respondent, not the Acting General Counsel.

Cemetery Assn., 300 NLRB 609, 617-626, 627-628 (1990); and *Tyson Foods, Inc.*, 311 NLRB 552, 561-566 (1993).

There is no dispute that Mr. Wydeven prepared, circulated, and solicited employees to sign a petition to get rid of the Union, and there is no dispute that Respondent relied upon Mr. Wydeven's petition to withdraw recognition of the Union as the employees' bargaining representative. The sole dispute was over Mr. Wydeven's status, because Respondent is liable if he is found to be a statutory supervisor or a statutory agent.¹⁵ (Tr. 72-76).

¹⁵ The parties' stipulation was as follows:

JUDGE WEDEKIND: ... What, exactly, are you stipulating to? What are you agreeing to, so that we don't have to --

MR. GRUBB: Well, okay, let me be clear, because I think I understand where you are going. If Your Honor finds that Mr. Wydeven is a supervisor, we are not going to argue that his involvement in the petition was minimal, and therefore the petition stays. If you find that he is a supervisor, that is the end of it for us, we are not going to make an argument. We know that his involvement was substantial in the -- in the procurement of the petition.

JUDGE WEDEKIND: A supervisor or agent.

MR. GRUBB: Pardon me, supervisor or agent, yes, either way.

JUDGE WEDEKIND: Okay. So that is the only issue in this case.

MR. GRUBB: The only issue is supervisor or agent in this case, yes.

JUDGE WEDEKIND: Okay.

MR. GOLLIN: Your Honor, if he is willing to stipulate, like I have said -- and I just want to be clear, because I don't want to have any confusion -- if he is stipulating that the company stipulates that Mr. Wydeven was instrumental in the circulation of the petition to -- with regards to the Union, and that the Employer, then, relied upon that petition -- that he was instrumental in preparing, circulating, and gathering signatures for -- to withdraw recognition, then I won't need to introduce these documents.

JUDGE WEDEKIND: Will you stipulate to that?

MR. GRUBB: I stipulate it exactly as he said.

JUDGE WEDEKIND: Okay --

MR. GOLLIN: Okay.

JUDGE WEDEKIND: -- done.

(Tr. 71-72).

With regards to the alleged independent Section 8(a)(1) violation concerning Mr. Wydeven's solicitation of signatures, the parties stipulated as follows:

MR. GRUBB: Yes, Your Honor, there is an independent 8(a)(1) charge in the Complaint, and in order to have an 8(a)(1) charge there must be a finding that Mr. Wydeven was a supervisor. If Your Honor finds that Mr. Wydeven is a supervisor or agent of the Employer, the Employer will stipulate to the 8(a)(1) violation.

JUDGE WEDEKIND: In paragraph 6?

B. The ALJ properly concluded that Mr. Wydeven is a “supervisor” within the meaning of Section 2(11) of the Act.

Section 2(11) of the Act provides that a supervisor is one who possesses, “authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly 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.” Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia listed above, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)). The party asserting supervisory status bears the burden of proof on the issue.¹⁶ *Oakwood Healthcare, Inc.* 348 NLRB at 686.

MR. GRUBB: In paragraph 6.

JUDGE WEDEKIND: Okay. Is that --

MR. GOLLIN: That is fine.

JUDGE WEDEKIND: Okay.

MR. GOLLIN: And based upon his earlier stipulation, which I don't want to misrepresent, is that the stipulation was that Mr. Wydeven was the person who prepared, circulated, and gathered signatures in support of the Petition, which I think we already have established.

MR. GRUBB: Well, instrumental enough that --

JUDGE WEDEKIND: I think we already have that.

MR. GOLLIN: Okay.

MR. GRUBB: Yes.

(Tr. 76:2-21).

¹⁶ Respondent argues throughout its exceptions that the ALJ erred by shifting the burden of proof to Respondent to disprove evidence establishing Mr. Wydeven is a statutory supervisor and a statutory agent. As explained below, the Acting General Counsel introduced more than sufficient evidence to meet its burden. At points when finding that the Acting General Counsel had met its burden, the ALJ noted that the evidence to contrary, whether testimonial or documentation, was insufficient or nonexistent. Contrary to Respondent's assertions, it is not reversible error for a judge to point out in his/her decision that the defense failed to refute the affirmative evidence against it.

The ALJ correctly concluded Mr. Wydeven is a statutory supervisor because: (1) he evaluates probationary employees and effectively recommends whether they be retained and hired as regular Auto Center employees, and (2) he responsibly directs Auto Center employees in the performance of their duties.

1. Evaluates and Effectively Recommends Probationary Employees

The authority to evaluate is not listed among the Section 2(11) indicia, but the Board will rely upon it as evidence of supervisory status when the evaluation is proven to affect the wages and/or job status of the employee(s) being evaluated. See e.g., *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1423 fn 13 (2010); *Williamette Industries*, 336 NLRB 743, 744 (2001); and *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). The Board has held that the authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Children's Farm Home*, 324 NLRB 61, 61 (1997).

There is no dispute that Mr. Wydeven has the authority (and responsibility) to evaluate probationary employees working in the Auto Center to determine if they possess the necessary skills and abilities to work in both the gas station and lube center, and he then submits these evaluations to Ms. Frederick with his recommendation as to whether the employee should pass, fail, or have his/her probation extended.¹⁷ As previously stated, Ms. Frederick seldom goes out to the Auto Center, and, when she does, it is for a short period of time, primarily to change and

¹⁷ Respondent argues Mr. Wydeven’s role regarding the evaluation is limited to signing the document, which under *Connecticut Humane Society*, 358 NLRB No. 31 (2012), is insufficient to establish Section 2(11) status. Respondent ignores the fact that Mr. Wydeven’s role is far more than simply being directed to sign a document. He, not Ms. Frederick, is the one who observes the employees on a daily basis, evaluates them in both objective and subjective criteria, provides detailed commentary on their skills and performance, submits his commentary to Ms. Frederick, and, when necessary, discusses with her what action should be taken and why. Once that is done, and the evaluation is completed, Mr. Wydeven signs the evaluation on behalf of management and then gives it to the employee in question.

check the gasoline prices. Additionally, even if she were to observe the probationary employee at work, she does not know how to operate the equipment or perform the duties necessary to work in the lube center, and, therefore, cannot evaluate what she may observe. As such, the only information that she has is Mr. Wydeven's evaluation of the employees' skills, abilities, and performance, as well as his recommendation, in making the final decision.¹⁸

Based upon the record evidence, the ALJ correctly concluded that Mr. Wydeven has Section 2(11) authority to effectively recommend whether probationary employees are retained in the Auto Center, finding that Ms. Frederick follows Mr. Wydeven's recommendations and makes her decision based solely on his evaluations and without conducting an independent investigation. The ALJ also addressed Respondent's claim regarding Ms. Forster. He noted that, even in the one instance (out of six) that Ms. Frederick disagreed with Mr. Wydeven's recommendation, and transferred the employee back to the grocery store, it was based on Mr. Wydeven's conclusion that the employee was unable to perform lube work.

In performing these evaluations, the ALJ concluded that Mr. Wydeven uses his independent judgment. In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006), the Board defined "independent judgment" to mean that it is "free from the control of others" and not "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." Mr. Wydeven testified that he has never received any instructions, written or oral,

¹⁸ Mr. Wydeven acknowledged that, in every instance, Ms. Frederick reviewed his evaluation of the employee, spoke to him, and asked for his recommendation, before deciding whether the employee passed probation. There also is no evidence that Ms. Frederick ever changed an evaluation that Mr. Wydeven completed on a probationary employee. Finally, Mr. Wydeven does not perform these evaluations sporadically or on a limited basis. There have been five employees hired or transferred into the Auto Center since he became the Auto Center Manager/Department Head. Mr. Wydeven completed the evaluations for all five. There was not a single employee who began his/her probationary period after Mr. Wydeven became the Auto Center Manager/Department Head that Mr. Wydeven was not involved in evaluating.

explaining his position or how he is to perform his job. (Tr. 26-27). He evaluates the probationary employees based upon his observations of their skills, abilities, and performance in both the gas station and the lube center. Some of the areas of evaluation require him to make objective assessments, while others require him to make subjective assessments. The ALJ concluded that Mr. Wydeven exercises independent judgment. (ALJD 8:6-16).

Respondent continues to point to the situation involving Ms. Forster as evidence that Ms. Frederick does not follow Mr. Wydeven's recommendations. This argument must be rejected. First, the Board does not require that the employer follow the recommendation of the purported supervisor in each instance in order to find effective recommendation. See *Venture Industries, Inc.*, 327 NLRB 918, 919 (1999) (department and line supervisors were effectively recommending discipline when the manager followed 75% of the recommendations). See also *Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1045 (2003) (employee was effectively recommending discipline when her manager followed all but one of her recommendations for discipline). Second, the evidence does not establish that Ms. Frederick failed to follow Mr. Wydeven's recommendation regarding Ms. Forster. Ms. Frederick did not decide to fail Ms. Forster because she did not agree with or accept Mr. Wydeven's evaluation of Ms. Forster, or because she conducted an independent investigation into Ms. Forster's skills, abilities, or performance. She failed to pass Ms. Forster because Mr. Wydeven concluded, based upon his observations, that Ms. Forster was unable to perform the duties necessary to work in the lube center alone. Mr. Wydeven confirmed this in his testimony:

Q: Okay. And based upon your assessment that Ms. Forster was unable to do the functions in the lube center, you relayed that to Ms. Frederick, and Ms. Frederick checked the box saying "Not passing probation," correct?

A: Correct.

Q: Okay.

JUDGE WEDEKIND: So she checked the box in your presence?

THE WITNESS: That I am not sure of.
JUDGE WEDEKIND: You don't know?
THE WITNESS: I don't know.
JUDGE WEDEKIND: So do you know why she checked the box? Did she tell you why she was not going to pass this person?
THE WITNESS: Yes, she said that she has to be able to do both the jobs.
JUDGE WEDEKIND: Okay.
THE WITNESS: Like I said that I thought she could get by
JUDGE WEDEKIND: Okay.
THE WITNESS: -- because we would be able to help her, but she said that she can't do it, she might have to be it [work in the lube center] by herself.
JUDGE WEDEKIND: Got it.

(Tr. 112:2-23).

In other words, Ms. Frederick failed to pass Ms. Forster because Mr. Wydeven concluded that Ms. Forster was unable to perform the duties necessary for her to work alone in the lube center, and that was the sole reason Ms. Forster was not retained and promoted to a regular Auto Center employee. That is the epitome of effective recommendation.

Based on the foregoing, there is no merit to Respondent's exceptions concerning the ALJ's findings and conclusions regarding Mr. Wydeven's authority to effectively recommend probationary employees be retained and promoted to regular Auto Center employees.

2. Responsibly Direct

The same is true regarding the ALJ's findings and conclusions regarding Mr. Wydeven's authority to responsibly direct employees in the Auto Center. The Board has held that for there to be responsible direction the alleged supervisor "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." *Oakwood Healthcare*, 348 NLRB at 692. In *Golden Crest Healthcare, Inc.*, 348 NLRB 727, 731 (2006), the Board held that accountability requires "evidence that a putative supervisor's rating for direction of subordinates may have, either by itself or in combination with other performance

factors, an effect on the person's terms and conditions of employment." "Such an effect may be positive—such as, for example, a merit increase, bonus, or promotion – or negative – such as, for example, the denial of one or more of the foregoing, or some form of counseling or discipline." *Id.* at 731, fn. 13.

The ALJ concluded Mr. Wydeven responsibly directs employees working in the Auto Center based upon the totality of the evidence. One piece of evidence the ALJ considered is the job positing for the Auto Center Manager/Department Head position, which lists two primary duties; one being that the position is responsible for directing the workforce in the Auto Center. Another piece of evidence the ALJ considered is the "change in status" form given to Mr. Wydeven when he became the Auto Center Manager/Department Head, stating that he would be "in charge of the Auto Center." The ALJ also considered Respondent's "Lube Station Policies," which repeatedly direct the employees in the Auto Center to their Manager, which would be Mr. Wydeven, for direction when they have questions or issues. Respondent argues that these are isolated, conclusory statements, which alone are insufficient to establish Section 2(11) status. These are not simply words on paper; these are statements in Respondent's own documents that outline Mr. Wydeven's duties and responsibilities. Although Mr. Wydeven repeatedly sought to minimize his role so that he would not be found to be a supervisor or agent, he acknowledged that employees come to him for direction in performing their duties and responsibilities. Furthermore, while employees also can go to the Store Manager, Mr. Wydeven concedes that she lacks the necessary knowledge or skills to provide any meaningful direction. If Respondent was correct, and Mr. Wydeven does not responsibly direct, then no one responsibly directs the Auto Center employees in the performance of their duties, which is simply not plausible.

Respondent also excepts to the ALJ's finding and conclusion that Mr. Wydeven is evaluated and held accountable for his performance in responsibly directing the employees. According to his "Department Head Performance Evaluation," Ms. Frederick evaluated Mr. Wydeven on his "Ability to handle customers/employees' and his "Ability to Direct Workforce." In the "Manager Expectations and Comments" section, Ms. Frederick went beyond simply checking boxes and specifically commented that Mr. Wydeven "understands all policies and procedures and continues to make his people accountable." (G.C. Exh. 11).

Respondent claims these are conclusory statements that alone cannot be relied upon to establish that Mr. Wydeven is held accountable. These are much more than generalized, conclusory statements; these are directed comments personal to Mr. Wydeven offered by his supervisor as part of a narrative addressing particular positive aspects of his performance since becoming the Auto Center Manager/Department Head. Respondent argues that these statements are meaningless because Ms. Frederick never explained to Mr. Wydeven what they meant when she gave him his evaluation. No additional explanation is necessary--the document itself clearly explains the basis for the evaluation.¹⁹

The ALJ further noted that, within a month and a half of this evaluation, Mr. Wydeven received a wage increase, and concluded that this additional evidence establishes accountability. (ALJD 10-11). Respondent argues that the ALJ erred in making this correlation, claiming there is no direct testimony or documentation linking the two. The Board regularly relies upon timing when evaluating the facts and drawing conclusions. See generally, *ManorCare Health Services-*

¹⁹ A constant throughout Respondent's exceptions is its assertions that the ALJ erred in relying upon statements contained in Respondent's own documents (job postings, change of status forms, policies, performance evaluations, disciplinary documents, etc.) that were prepared prior to the filing of the petition, rather than the specious testimony Mr. Wydeven offered after he was accused of engaging in unlawful conduct that, if proven true, would invalidate his directed efforts to get rid of the Union. The ALJ did not err in relying upon the documentary evidence in this case. See *Alvin J Bart and Co., Inc.*, 236 NLRB 242, 243 (1978).

Easton, 356 NLRB No. 39, slip op. at 21 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011); *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003); *Hewlett Packard Co.*, 341 NLRB 492, 498 (2004); and *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992). In this case, the raise followed a positive performance evaluation; one in which the supervisor specifically commented on how he directs his employees and, specifically, holds them accountable. It is by no means reversible error for the ALJ to make conclusions based upon the evidence in the record, which consists of written documents stating that Mr. Wydeven is responsible for directing the Auto Center employees, his acknowledgement that he responsible for doing so and that employees come to him for direction, and his subsequent evaluation addressing his performance in that regard. All of which support the ALJ's conclusion.²⁰

Based on the foregoing, the ALJ did not err in his findings and conclusions related to Mr. Wydeven's authority to responsibly direct the employees in the Auto Center.²¹

²⁰ The ALJ properly considered secondary indicia in concluding Mr. Wydeven is a Section 2(11) supervisor. Secondary indicia, including the individual's job title or designation as a supervisor or manager, may be used in making supervisory determinations when evidence of primary indicia is present. See, e.g., *Monarch Federal Savings and Loan Association*, 237 NLRB 844 (1978); *Flexi-Van Service Center*, 228 NLRB 956 (1977). The Board also may consider whether the employee receives different or enhanced pay or benefits. In this case, Respondent's documents identify Mr. Wydeven as a "manager" or "department head." He received a raise of \$2 an hour in premium pay when he assumed his current position. Also, he receives "sales points" and "service points" which are not paid to unit employees. Finally, Ms. Frederick made clear to at least one other employee that there is no "second in charge" and that the other Auto Center employees are not equal to Mr. Wydeven. (ALJD 11-12).

²¹ Respondent argues for the first time in his brief to the Board that it should rely upon a prior representational decision (30-RD-1488) from several years ago to support its claim that Mr. Wydeven is not a statutory supervisor. This decision was not introduced into the record, and Respondent did not request that the ALJ take judicial notice of the decision. Respondent's argument is essentially that it did not make this request because it did not know that the ALJ would make the findings and conclusions that he did in his decision. That is an insufficient basis on which to introduce this argument and this evidence at this time. Even if it were, this prior representational decision has no bearing in this case. The case involved multiple locations, and multiple positions. More importantly, it did not involve Mr. Wydeven, or his predecessor, Jamie Cortazzo. In fact, it does not involve anyone who held the Auto Center Manager/Department Head position at Respondent's Appleton, Wisconsin facility.

C. The ALJ correctly concluded that Mr. Wydeven is an “agent” within the meaning of Section 2(13) of the Act.

The Board applies common law agency principles to determine whether an employee is an “agent” of the employer within the meaning of Section 2(13) of the Act. See *D&F Industries, Inc.*, 339 NLRB 618 (2003); *Pan Oston Co.*, 336 NLRB 305, 306 (2001); and *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998). It is well-established that where an employer places an employee in a position in which other employees would reasonably believe that the employee acts or speaks on behalf of management, the employer has vested that employee with apparent authority to act or speak as the employer’s agent within the meaning of Section 2(13) of the Act, and the employee’s actions therefore are attributable to the employer. See *D&F Industries, Inc.*, supra; *Mid-South Drywall Co.*, 339 NLRB 480 (2003) and *Waterbed World*, 286 NLRB 425 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992). In particular, the Board repeatedly has held an employee has apparent authority when the employer holds the employee out as a “conduit for transmitting information from management to other employees.” *Cooper Industries*, 328 NLRB 145 (1999); *Hausner Hard-Chrome of Ky.*, supra; and *Debber Electric*, 313 NLRB 1094, 1095 (1994).²²

Specific factors the Board considers as evidence of agency status include when: (1) the individual is the only manager or supervisor regularly at the jobsite; (2) employees were instructed to report to the individual for instructions; (3) the individual is involved in monitoring

²² There are several other cases in which the Board found an employee to be an “agent” because he/she was used as a conduit for information from management to employees. See *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997), enfd. in pertinent part 188 F.3d 508 (6th Cir. 1999) (agency found where individual was conduit for relaying and implementing employer’s decisions, directions, policies and views); *Victor’s Café*, 321 NLRB 504, fn 1 (1996) (agency found where employee was “conduit for communicating management’s views and directives to employees”); and *Reno Hilton*, 282 NLRB 819 (1987) (same); *Speed Mail Service*, 251 NLRB 476 (1980) (agency found where individual placed “in a status visibly superior to that of the other employees” and in which he “served as conduit from employer to the employees with respect to such important matters as job assignments and layoffs.”).

and evaluating the skills and competencies of the other employees; and/or (4) the individual is involved in informing employees of adverse employment actions (e.g., discipline, layoff, or discharge). See *Mays Electric Co., Inc.*, 343 NLRB 121, 125 (2004) and *Mid-South Drywall Co.*, 339 NLRB 480 (2003). Each of these is present in this case.²³

To begin with, Mr. Wydeven holds the highest ranking position in the Auto Center. Respondent has designated him as being “in charge of the Auto Center.” (G.C. Exh. 3). There is “not a second in charge.” (G.C. Exh. 10, page 3). There are no other managers or supervisors who regularly work in the Auto Center. The Auto Center is a separate facility, which is about a quarter of a mile from the grocery store. Ms. Frederick comes out to the Auto Center once or twice a week, for a total of about 15-30 minutes, to check and change the gas prices. (Tr. 29-30). The rest of the time Mr. Wydeven is the only manager present.

Regarding his authority, Respondent’s policies clearly state that employees are to go to him with issues or questions related to their jobs, and he will provide them with necessary instruction or guidance. (G.C. Exh. 21). The policies state that employees also can go to the

²³ Respondent excepts to the ALJ’s reliance on fact that Mr. Wydeven is the Auto Center Manager/Department Head--a position outside of the bargaining unit--in evaluating his agency status. Respondent appears to suggest the ALJ erred in finding that Mr. Wydeven was not part of the unit. However, Respondent admitted in its Answer that Mr. Wydeven is a Manager and a Department Head (G.C. Exhs. 1(g) and 1(i)), and later stipulated at the hearing that Mr. Wydeven’s position is not part of the bargaining unit. These facts all establish Mr. Wydeven was not part of the unit. Contrary to Respondent’s assertions, there is no evidence that Mr. Wydeven was paying dues, believed he was in the unit, or, more importantly, that any of the other employees viewed him as being in the unit. Moreover, the Board applies an objective standard in determining whether an individual is a statutory supervisor or agent, which means that an individual’s subjective views regarding his/her status has no relevance in deciding whether or not he/she is a statutory supervisor or agent. Similarly, Respondent presented no evidence that any of the other employees viewed Mr. Wydeven as being part of the unit.

While exclusion from the bargaining unit is relevant in evaluating agency status, it is by no means dispositive, and the ALJ never stated that it was. The ALJ cited to Mr. Wydeven’s exclusion from the unit in distinguishing this case from *Comau, Inc.*, 358 NLRB No. 73 (2012), which clearly involves different facts. Regardless, the ALJ’s primary focus in concluding that Mr. Wydeven is an agent is that Respondent held him out as speaking on behalf of management and used him as a conduit of information between management and the unit employees. It, therefore, was reasonable for employees to infer that Mr. Wydeven is an agent and was acting with apparent authority in circulating the petition for signatures.

Store Manager for certain matters, but the undisputed reality is that Ms. Frederick does not know how to operate the equipment or perform the tasks associated with working in the lube center. As such, Mr. Wydeven is the only manager employees realistically can--and do--go to for instruction and direction while working in the Auto Center.

Employees also go to Mr. Wydeven for direction in handling customer complaints or issues. He testified that if it is a straightforward matter, he will handle it on his own. If it is more complex, he will go to Ms. Frederick for guidance on what to do. In those instances Mr. Wydeven confirmed that he will relay Ms. Frederick's instructions to the other employees involved. In doing so, he clearly acts as a conduit of information between upper management and the unit employees.²⁴

Mr. Wydeven also acts as a conduit by monitoring and evaluating the skills, abilities, and performance of the probationary employees working in the Auto Center, and when he recommends whether they should pass probation, fail probation, or have his/her probation extended. There is no dispute that he signs the Performance Evaluation forms on behalf of management and gives it to the employees. Mr. Wydeven stated that he may meet with the employee to discuss the evaluation, or he may simply give it to the employee to sign. The bottom line is he typically is the only representative from management probationary employees interact with regarding their evaluations and in learning their fate as to whether or not they passed probation.

Finally, Mr. Wydeven also acts as a conduit between upper management and unit employees when it comes to discipline. That is evident from the disciplinary warning issued to

²⁴ Ms. Frederick noted Mr. Wydeven's role as a conduit in his performance evaluation. In the narrative portion of the evaluation, Ms. Frederick commented that "I am very excited to have a lube manager that I can relate to and he keeps me informed of what is happening out there." (G.C. Exh. 11).

Taylor Keeseey.²⁵ (G.C. Exh. 9). Mr. Wydeven handwrote the explanation form issued to Mr. Keeseey, and he then signed it on the line for “Management Signature.” There were no other managerial signatures on the document.

Based on the above, the ALJ correctly concluded that Mr. Wydeven is an “agent” within the meaning of Section 2(13) of the Act. He is the sole managerial representative working in the Auto Center, which is a stand-alone facility located about a quarter of a mile from the grocery store. Managerial instruction or direction regularly comes through him, either directly or indirectly. Respondent regularly holds him out as being a conduit of information between management and the rank-and-file employees on various employment related matters. As a result, it is reasonable for employees to conclude that he acts with apparent authority on behalf of Respondent in his statements and conduct.

D. The ALJ did not err relating to his findings and conclusions regarding Mr. Wydeven.

Starting on the bottom of page 4 and continuing through the bottom of page 6 of the decision, the ALJ explains, in detail, why he did not credit several aspects of Mr. Wydeven’s testimony. As previously stated, the Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The evidence more than adequately supports the ALJ’s credibility resolutions.

Respondent excepts to several of these findings and argues that they constitute reversible errors which the ALJ relied upon in reaching his conclusions regarding Mr. Wydeven’s supervisory status. Respondent’s assertions are incorrect.

²⁵ There has been one disciplinary document issued since Mr. Wydeven became the Auto Center Manager/Department Head, and that was the document issued to Mr. Keeseey. (Tr. 114-115).

First, Respondent excepts to the ALJ's findings on pages 5 and 6 relating to Mr. Wydeven's role in the discipline issued to Mr. Keesey. (Exceptions 8 and 9). The ALJ cited to Mr. Wydeven's testimony on this topic as an example of him not being credible. The ALJ noted that Mr. Wydeven sought to minimize his involvement in the entire Keesey disciplinary matter, testifying that he was asked by Ms. Frederick to fill out the form, and that he had no other role in the matter. The ALJ found this testimony to not be credible. The ALJ offered several reasons for this conclusion. One of the reasons he gave was that there was no evidence from any other witness (Mr. Keesey or Ms. Frederick) to corroborate Mr. Wydeven's testimony that he really had no other role. The ALJ opined that based upon Mr. Wydeven's position and responsibilities, he likely had more of a role than simply acting as Ms. Frederick's scribe, particularly when there were several other documents Ms. Frederick signed herself.

Respondent argued that the ALJ erred in these findings and, in effect, shifted the burden of proof onto Respondent to present evidence to refute his conclusions. A review of the ALJ's decision makes clear that was not what he was doing or saying. The ALJ was providing his assessment of Mr. Wydeven's testimony and why it was not credible. More importantly, the ALJ never relied upon this testimony regarding Mr. Keesey in evaluating whether Mr. Wydeven is a statutory supervisor, because this discussion dealt with Mr. Wydeven's role in Mr. Keesey's discipline. However, in evaluating Mr. Wydeven's authority, the ALJ never made a finding as to whether or not Mr. Wydeven had the authority to issue or recommend discipline. As a result, the ALJ's holding in this regard played no role in the ultimate decision as to whether Mr. Wydeven was a statutory supervisor.

The same is true regarding the ALJ's analysis of Mr. Wydeven's testimony regarding his role in Mr. Gosz's termination meeting. The ALJ cited Mr. Wydeven's testimony regarding his

involvement in that meeting, and found it not to be credible based upon the overall circumstances. The ALJ, however, did not rely upon this testimony to decide whether or not Mr. Wydeven had the authority to effectively recommend termination.

Consequently, the ALJ cited to these and other instances in determining that Mr. Wydeven was not a credible witness, but the ALJ did not rely upon them in deciding the ultimate issue of Mr. Wydeven's supervisory status.

IV. CONCLUSION

As the ALJ correctly found, Mr. Wydeven is statutory supervisor and a statutory agent. He is a statutory supervisor because he evaluates and effectively recommends probationary employees for retention and promotion, and because he responsibly directs employees in the Auto Center. He is a statutory agent with apparent authority because Respondent regularly uses him as conduit for information between upper management and the unit employees. As a result, his solicitation of signatures for the petition to get rid of the Union, and Respondent's decision to withdraw recognition based upon that petition, violate the Act. The Board, therefore, should adopt the ALJ's findings, conclusions and proposed remedial order.

Respectfully submitted this 14th day of November, 2012.



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