

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

Wichita, Kansas

UNIVERSAL LUBRICANTS, LLC¹

Employer

and

Case 14-RC-105696

UNITED STEEL WORKERS, AFL-CIO-CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (Act), as amended, a hearing was held on June 5, 2013, before a hearing officer of the National Labor Relations Board (Board) to determine whether the petitioned-for unit of employees constitutes an appropriate unit for the purpose of collective bargaining. At the close of the hearing, the parties were afforded the opportunity to file briefs addressing the issues raised during the hearing. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based on a thorough review of the record, I make the following findings:

(1) The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; (2) The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein;² (3) The Petitioner is a

¹ The Employer's name has been corrected in accordance with the parties' stipulation.

² At the hearing, the parties stipulated to the following commerce facts: The Employer is a Delaware limited liability company operating an oil refinery in Wichita, Kansas. During the preceding 12 months, a representative period, the Employer in conducting its operations purchased and received goods and services valued in excess of \$50,000 directly from sources outside the State of Kansas. During the same period, the Employer sold and shipped goods valued in excess of \$50,000 to customers outside the State of Kansas.

labor organization which claims to represent certain employees of the Employer; and (4) 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.

I. ISSUES

The Petitioner seeks an election in the following unit: All full-time and regular part-time refinery operations and maintenance employees employed by the Employer at its refinery located at 2824 North Ohio Street, Wichita, Kansas, excluding all non-refinery employees, office personnel, engineers, managers, guards, and supervisors, as defined by the Act.³ The sole issue to be resolved is whether lead operators Terry Stamper, Bob LaGasse, Ray Gates, and Andrew Doggett are supervisors within the meaning of Section 2(11) of the Act.

The Employer contends that the above-named lead operators are supervisors and must be excluded from the unit found appropriate based on their authority to discipline, reward, assign and responsibly direct employees. The Petitioner argues that the record fails to establish that the lead operators are supervisors.

For the reasons discussed in detail below, I conclude that the evidence fails to establish that lead operators Terry Stamper, Bob LaGasse, Ray Gates, and Andrew Doggett possess sufficient indicia of supervisory status to warrant concluding that they are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I find that the petitioned-for employees constitute a

³ The unit description has been modified in accordance with the parties' stipulation.

unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.⁴

II. FACTS

A. Employer's Operations

The Employer operates an oil refinery in Wichita, Kansas. Brent Frahm serves as the Employer's plant manager. The Employer also employs a maintenance manager, a process engineer, an operations manager, and, until recently, a health and safety manager, all who report directly to Frahm.⁵ Don Sanders occupies the Operations Manager position and directly supervises the Employer's twelve operators.

Operators are primarily responsible for operating the Employer's refining facility, which, except during shutdown periods, runs continuously and produces approximately 25,000 gallons of motor oil every 18 hours. The Employer classifies its operators according to their experience and skills and pays them based on a six-step progressive pay scale. Whereas an entry-level operator is classified as Operator 1, lead operators are classified as Operator 6. The record establishes that the Employer's current complement of operators range in skill level from Operator 4 to Operator 6.

⁴ The appropriate unit is: All full-time and regular part-time refinery operations, including lead operators, and maintenance employees employed by the Employer at its refinery located at 2824 North Ohio Street, Wichita, Kansas, but EXCLUDING all non-refinery employees, office personnel, engineers, managers, guards, and supervisors, as defined by the Act.

⁵ The parties stipulated during the hearing that Plant Manager Frahm, Operations Manager Don Sanders, Maintenance Manager Dale Hammerschmidt, and former Health and Safety Manager Kim Anderson are supervisors within the meaning of Section 2(11) of the Act, in that the aforementioned positions have the authority to hire, fire, discipline or to effectively recommend the same. The unit specifically excludes engineers and there is no contention that Process Engineer Benjamin Root is properly included in the Unit. Accordingly, I find that it is appropriate to exclude Frahm, Sanders, Hammerschmidt, Anderson, and Root from the unit.

Operators work 12 hour shifts over a rotating four-day period, switching from the day shift (7:00 a.m. to 7:00 p.m.) to the night shift (7:00 p.m. until 7:00 a.m.) every two months. Each shift includes three operators, and one of the operators on every shift is a lead operator. The record indicates that the operators generally rotate responsibilities on a daily basis, with one of the operators manning the control board, and the remaining two operators working on the plant floor. The control board operator is responsible for monitoring the refining process to ensure that the Employer's equipment is running properly and that its product meets specifications. The control board operator communicates with the other operators, who are responsible for checking equipment, performing minor maintenance work, and monitoring operating and inventory levels.

B. Supervisory Authority

1. Disciplinary Authority

The Employer's employee handbook sets forth a progressive discipline policy. Although the Employer reserves the right to immediately impose more extreme discipline for serious violations, its progressive policy includes four steps: first notice, second notice, final notice with or without suspension, and termination. Although the lead operators' most recent job description does not specifically authorize them to discipline employees, under the heading "Supervision of operations personnel," it describes a number of essential functions that include the following responsibilities: "motivate employees and improve production methods," "explain rules, policies and regulations," and "coach direct reports and monitor worker performance and document in a timely manner." The Employer introduced a copy of Lead Operator Terry Stamper's 2010 performance appraisal, which demonstrates that Operations Manager Sanders and Plant Manager Frahm recommended that Stamper receive "[s]upervisory training in employee motivation,

employee coaching and employee disciplinary action” in order to improve Stamper’s patience with subordinates. Thereafter, in June 2011, the Employer enrolled its four lead operators in a six-course supervisor training program.

Plant Manager Frahm testified that lead operators have exercised authority to discipline and effectively recommend discipline, and he explained that the Employer maintains copies of any disciplinary actions in its personnel records. The Employer introduced a series of four corrective action/disciplinary notices that bear lead operators’ signatures. Each notice was issued in late 2010 to operator Jose Ruiz.

The first, “a corrective action notice” dated September 16, 2010, which is signed by Lead Operator Stamper and initialed by Operations Manager Sanders, reminded Ruiz of the importance of donning personal protective gear at all times, ending, “[u]ntil you can demonstrate that you can follow the safety programs do not expect an increase in pay.” Thereafter, on September 19, 2010, Lead Operator Bob LaGasse issued a second corrective action notice after Ruiz arrived late to work without following the appropriate reporting procedures. The notice, which was again initialed by Sanders, instructed Ruiz as follows: “Need to talk to Brent [Frahm] and Don [Sanders].”

A written warning dated October 10, 2010, signed by Stamper and initialed by Sanders, advised Ruiz, “...on September 24 you were informed to be at work at 6:30am to begin your shift for the duration of Turnaround. You have repeatedly failed to do so(Oct 1,2,3,4,5,6,9,10).” In the section labeled “Corrective action to be taken,” the notice provides, “If this continues you will be sent home for 1 shift without pay. If this continues further discipline measures will be taken[.]”

A Final Written Warning was issued on November 8, 2010, signed by Lead Operator Stamper, and initialed by Operations Manager Sanders, addressed Ruiz's failure to follow proper safety procedures when unbolting a piece of equipment, informing Ruiz:

It is the expectation of the company that all company rules and instructions are to be carried out without fail. All safety procedures are to be strictly adhered to going forward including but not limited to all safety measures mandated by the re-refinery staff. As this is a final written warning, should there be another incident of this nature, Mr. Ruiz will be immediately terminated.

Although the record does not indicate when, Ruiz was subsequently discharged. Plant Manager Frahm testified that the above-referenced safety infraction was "the straw that broke the camel's back" and ultimately led to Ruiz's discharge.

2. Authority To Reward

Although lead operators do not independently reward employees, the Employer argues that the submitted evidence demonstrates that they can effectively recommend raises and promotions. Specifically, a June 17, 2010 e-mail from Operations Manager Sanders to Plant Manager Frahm provides: "Both [Lead Operators] Terry [Stamper] and Bob [LaGasse] tell me that Jose definitely knows more than they or us gave him credit for knowing. Both recommend that his pay be increased to an operator in training." In a June 25, 2010 e-mail, Sanders informed Frahm: "[Lead Operator] Ray [Gates] tells me that he thinks Kent [Clayburn] should be at a minimum an operator in training based on what he does, knows, and his exemplary work ethic." Finally, a January 20, 2011 e-mail from Sanders to Frahm provides: "Terry [Stamper] and Bob [LaGasse] both agree that Harry [Tate] is ready for his first increase in pay."

Plant Manager Frahm testified that the operators received a wage increase as a result of the lead operators' recommendation. Additionally, Lead Operator Gates acknowledged making the recommendation regarding Clayburn's status.

3. Authority To Assign And Responsibly Direct

As described above, lead operators work alongside and share job duties with the operators on their shifts. Nevertheless, Plant Manager Frahm testified that lead operators have authority to direct their fellow operators' work when circumstances require it. For example, lead operators are responsible for monitoring the Employer's equipment and are authorized to submit work requests to the Employer's maintenance department in those instances in which an operator is unable to make the necessary repairs. Additionally, lead operators can instruct an operator to change out a malfunctioning pump, and they even have authority to shut down the Employer's operations if there is a safety issue. Finally, if an operator does not report to work, a lead operator might be required to find a replacement and seek a volunteer from the preceding shift to remain at work until the replacement arrives.

4. Secondary Indicia

As noted above, lead operators work alongside other operators, dress in the same protective gear, and work the same hours. Lead operators receive approximately \$2 per hour more than an Operator 5, the next-highest operator payroll classification, and there are occasions, particularly on night shift and on weekends, when a lead operator is the highest-ranking individual at the Employer's facility. Lead operators attend meetings with the Employer's management team every month to six weeks. Unlike operators, lead operators are periodically assigned to participate in the Employer's monthly safety audit to search for potential safety issues. Plant

Manager Frahm testified that lead operators are included in discussions about the staffing levels required during the Employer's periodic scheduled outages. The record also indicates that lead operators were provided the opportunity to complete a six-part supervisor training course, and, like the Employer's undisputed managers, were required to watch a training video regarding substance abuse in the workplace.

III. ANALYSIS

A. Lead Operators' Supervisory Status

1. Applicable Analytical Framework

Section 2(11) of the Act defines the term "supervisor" to include 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. Furthermore, possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an employee, provided that authority is exercised with independent judgment on behalf of management and not in a routine manner. See, e.g., *Airline Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *Browne of Houston*, 280 NLRB 1222, 1223 (1986). "Independent judgment" is a hallmark of supervisory authority and applies to each of the indicia specified in Section 2(11). To demonstrate independent judgment, the claimed supervisor "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." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-693 (2006).

The Board construes supervisory status narrowly “because the employee who is deemed a supervisor is denied the rights which the Act is intended to protect.” *Chevron Shipping Co.*, 317 NLRB 379, 380-381 (1995). The party asserting that an individual possesses supervisory authority has the burden of establishing this fact by a preponderance of the evidence. See *Dean & Deluca*, 338 NLRB 1046, 1047 (2003); *Youville Health Care Center*, 327 NLRB 237, 238 (1998). Conclusory testimony cannot form the basis for finding that an employee is a supervisor. See, e.g., *Volair Contractors, Inc.*, 341 NLRB 673, 674 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). And any lack of evidence is construed against the moving party. See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 535 fn. 8 (1999).

2. Disciplinary Authority

Based on my review of the record, I find that the Employer has failed to meet its burden of establishing that the lead operators exercise or possess independent authority to discipline employees or to effectively recommend such action. Although the Employer presented several records to support its assertion that the lead operators exercise disciplinary authority, the evidence is ultimately inconclusive.

As explained above, the Employer maintains a progressive discipline policy, and the record includes four disciplinary warnings of varying levels that ostensibly demonstrate lead operators’ disciplinary authority. When issued within the scope of a progressive discipline policy, even a verbal warning may evince authority to discipline or to recommend discipline. See *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007), citing *Progressive Transportation Services*, 340 NLRB 1044 (2003) and *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474-75 (2004). Nevertheless,

a disciplinary warning, whether verbal or written, must demonstrate more than a reportorial function before it will connote Section 2(11) status. See, e.g., *Passavant Health Center*, 284 NLRB 887, 889 (1987). To establish genuine disciplinary authority, a warning must have the potential of impacting the employee's job status or tenure, and the evidence must establish that higher management adopted the putative supervisors' findings/recommendations without conducting an independent investigation. Compare *Sheraton Universal*, 350 NLRB at 1116 with *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999). In this case, the evidence fails to establish that the lead operators exercise independent disciplinary authority.

First, with respect to the "corrective action notices" signed by Lead Operators Stamper and LaGasse on September 16 and 19, 2010, respectively, the record does not clearly establish that the documents are disciplinary. The corrective action documents indicate that they are informal, and Plant Manager Frahm testified accordingly. Furthermore, the Employer's employee handbook specifically provides: "**First Notice is not official unless it has been documented as a first notice,**" (emphasis in original), and neither of the notices is identified as a warning. In fact, rather than specifying the potential for future discipline, the notice signed by Stamper simply advised the employee "do not expect any increase in pay," and the notice signed by LaGasse instructed the employee to speak with Operations Manager Sanders and Plant Manager Frahm. There is no evidence that Ruiz was ever formally disciplined in connection with either event, and the other disciplinary warnings included in the record do not reference them.

Second, even with respect to the "Written Warning" and "Final Written Warning" signed by Stamper, the record does not clearly establish his participation in the disciplinary process. Although Stamper signed each warning, the warnings are also initialed Operations Manager

Sanders. Notwithstanding Plant Manager Frahm's testimony that Sanders' initials merely signal his concurrence, neither Sanders nor Stamper testified. Consequently, one is left to speculate whether Sanders conducted an independent investigation of the events or whether Stamper either effectively recommended disciplinary action or independently issued discipline. Considering that Sanders issued the blank disciplinary forms to the lead operators with the admonition "you can use them on your own but I do want to be kept in the loop," the record does not support an inference that Stamper necessarily independently exercised supervisory authority. See *Wilson Tree Co.*, 312 NLRB 883, 885 (1993) (declining to attribute supervisory authority to employees based on disciplinary forms without testimony regarding whether the employees exercise independent discretion in completing them).

Third, it is noteworthy that each of the disciplinary warnings addresses either an issue regarding an employee's attendance or a violation of the Employer's safety procedures. Although supervisory authority is not necessarily diminished because it is exercised exclusively within the confines of explicit policies,⁶ attendance and safety violations are particularly black and white issues -- i.e., either employees wear the appropriate protective gear and timely report for work or not. In these circumstances, it is difficult to distinguish between a document that is truly disciplinary and one that is simply reprobatory. Although lead operators might exercise some discretion in deciding whether to report or address a safety or attendance issue, there is little discretion involved in discerning whether the offending employee is in violation of the Employer's policies. Again, without additional evidence regarding the investigatory process, it is impossible to conclude that the lead operators exercise supervisory authority based on the fact

⁶ See *Oakwood*, 348 NLRB at 693.

that they signed disciplinary notices. See, e.g. *Ken-Crest Services*, 335 NLRB 77, 778 (2001) (discussing lack of evidence regarding the disciplinary procedure).

Fourth, even though Frahm testified that Ruiz was discharged for the same safety violation that was the subject of the Final Written Warning bearing Stamper's signature, the record does not indicate who made the discharge decision or how it was reached. There is no evidence that Stamper recommended such action and no basis for inferring that he participated in the decision. Even assuming that the final written warning entered into evidence constitutes Stamper's independent disciplinary decision or recommendation, the evidence indicates that higher management either disregarded his recommendation or imposed different discipline. Either way, the final written warning fails to establish Stamper's disciplinary authority.

The remaining evidence also fails to establish that lead operators exercise disciplinary authority. Despite Plant Manager Frahm's testimony that lead operators are authorized to send employees home on their own initiative if they detect a substance abuse issue, there is no evidence that such an incident has occurred. Furthermore, even assuming that lead operators have such authority, sending employees home in response to egregious misconduct is routine in nature and does not indicate supervisory authority. See *Washington Nursing Home*, 321 NLRB 366, 366 fn. 4 (1996). Accord *Vencor Hospital*, 328 NLRB at 1139.

3. Authority To Reward

I also find that the Employer has failed to meet its burden of establishing that the lead operators are supervisors based on their authority to recommend raises and promotions. Although the Employer submitted evidence which it claims demonstrates several instances in

which lead operators have recommended operators for promotion, the evidence ultimately falls short of establishing that they thereby exercise supervisory authority by recommending a reward.

An employee effectively recommends a reward within the meaning of Section 2(11) when the evidence establishes that his or her recommendations are relied on without any independent determination by a higher authority. See *Children's Farm Home*, 324 NLRB 61, 66 (1997). Despite Plant Manager Frahm's conclusory testimony that the lead operators' recommendation led to the operators' promotions, the record is inconclusive.

The record establishes that operators matriculate through a progressive pay scale as they gain additional experience and advance their skills. Thus, as demonstrated by the Employer's payroll records, just like every lead operator earns \$29.87 per hour, every Operator 4 earns \$25.75. Once an Operator 4 demonstrates the necessary skills to advance to Operator 5, his or her pay increases to \$27.81. Accordingly, the evidence fails to establish that lead operators independently recommend a reward in the form of a wage increase. Furthermore, to the extent that lead operators offer recommendations concerning whether an operator has attained a particular level of competence, those recommendations are necessarily circumscribed by the established performance benchmarks for each pay level. See *Valley Supermarkets*, 264 NLRB 156, 160 (1983) (finding evaluations in connection with a time and grade pay system did not establish authority to reward absent evidence regarding the weight they were afforded). Even assuming that the lead operators recommend promotions independent of performance benchmarks, the record still fails to establish that their recommendations are relied on without any independent determination by higher management. On those instances in which the lead operators made recommendations, the record simply establishes that Operations Manager

Sanders notified Plant Manager Frahm. Frahm did not testify whether he simply accepted the lead operators' recommendations or whether he or Operations Manager Sanders conducted an independent review. Absent affirmative evidence that the Employer relies on the lead operators' assessments, I find insufficient evidence to infer that they effectively recommend rewards.

4. Authority To Assign And Responsibly Direct

The record also fails to establish that the lead operators assign or responsibly direct their fellow operators or other employees within the meaning of Section 2(11). Although the Employer contends that lead operators possess authority to assign work and direct their fellow employees, its assertion is not supported by the limited evidence regarding the way in which the operators' work is distributed.

Lead Operators Ray Gates and Andrew Doggett testified that they do not have authority to assign work or to responsibly direct employees. Although the Employer argues otherwise,⁷ the record demonstrates that lead operators predominately share the same responsibilities with their fellow operators. On each shift, one of the operators is responsible for operating the control board. The control board operator generally dictates the other operators' tasks, and the record establishes that operators rotate the control board operator's responsibilities on a daily basis. Although lead operators write work requests, this does not appear to be a supervisory function. First, other operators also write work requests. Second, even to the extent that the lead operators' work requests result in additional tasks for maintenance employees, the Employer's

⁷ The Employer questions Doggett's and Gates' credibility and implies that the Union's failure to present documentary evidence warrants an adverse inference. I reject each assertion. Credibility resolutions are not appropriate in a non-adversarial representation proceeding, and the Employer has the burden of establishing the lead officers' supervisory status. See *Marion Manor for the Aged and Infirm, Inc.*, 1084, 1084 (2001).

maintenance manager actually assigns the work to maintenance employees and determines which employee will complete the requested repairs.

Although Lead Operator Gates acknowledged that he would expect a more-experienced operator to man the control board on those occasions that the Employer's refinery experiences difficulties, it is not clear that lead operators possess sufficient control over the Employer's operations to establish that they independently assign tasks or provide responsible direction. Lead operators unquestionably possess greater knowledge and skills than the other operators. Despite this fact, the record establishes that operators routinely meet with Operations Manager Sanders before their shifts to discuss their assignments. Although circumstances might require lead operators to instruct another operator about a particular task without first discussing the matter with Sanders, the record suggests that they provide this direction based on their superior experience and knowledge. The Board holds that a putative supervisor does not independently assign work by providing direction and guidance to employees based on his or her experience and craft skill. See, e.g. *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111, 111 (1996). In this case, the record fails to show that lead operators do no more than attempt to share their wisdom with their less-experienced colleagues.

Contrary to the Employer's argument, I also find that the record fails to establish that the Employer holds the lead operators accountable by evaluating them based on their supervisory skills. "[T]o 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.... [and] [i]t also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Oakwood*,

348 NLRB at 692. First, the record does not establish that lead operators have independent authority to discipline other operators if the operators fail to follow their instructions. As Lead Operator Gates explained, if an operator ignores his instructions about how to perform a particular task, his recourse is limited to notifying Operations Manager Sanders.⁸ Second, the record fails to establish that the lead operators face the prospect of adverse consequences if they fail to adequately direct the other operators. Although the Employer introduced the lead operators' 2010 annual evaluations and argues that they demonstrate that it holds the lead operators accountable for their supervisory skills, the record fails to support its assertion. Actual accountability must be demonstrated by evidence that the putative supervisors' terms and conditions of employment have been affected by their performance in directing their subordinates, and "there must be more-than-merely-paper showing that such prospect exists." *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). In this case, the lead operators' evaluations do not establish that they suffer potential adverse consequences based on the other operators' performance. See *id.* at 731-732. The Employer simply encouraged several of the lead operators to obtain supervisory training and subsequently enrolled them in training courses. Even assuming that the supervisory training classes could be considered an adverse consequence, the record fails to establish whether the Employer actually required the lead operators to attend the classes.⁹

The record also fails to establish that lead operators exercise independent supervisory authority by directing employees to cover a shift when a vacancy exists. According to Lead

⁸ The record does not support the Employer's argument that Lead Operator Gates exercised supervisory authority by sending an employee home for failing to report for work. The testimony indicates that after employee Mike Moore failed to report for work, Gates found a replacement. When Moore later called in to find out whether he needed to report, Gates told him that his position had been filled and he was not needed.

⁹ Lead Operator Doggett did not recall participating.

Operator Doggett's testimony, when an employee fails to report for work, one of the operators notifies Operations Manager Sanders or Plant Manager Frahm and attempts to find replacement. Although a lead operator might be the individual who seeks a volunteer to cover the absent employee's shift, the record demonstrates that this responsibility may also be accomplished by another operator. Accordingly, I do not find that the lead operators utilize independent judgment by assigning work based on those occasions in which they might be required to find a replacement employee.

For the above reasons, I do not find that the lead operators assign work or responsibly direct employees. While the Employer relies heavily on lead operators' job descriptions as demonstrating their supervisory status, the job descriptions do not constitute evidence of supervisory authority. See *Adco Electric, Inc.*, 307 NLRB 1113, 1113 fn. 3 (1992). Furthermore, the record does not contain any specific examples demonstrating that lead operators independently assign work or responsibly direct employees.

5. Secondary Indicia

It is well established that secondary indicia of supervisory authority alone is insufficient to establish supervisory authority. See, e.g. *Ken-Crest Services*, 335 NLRB at 779; *McClatchy Newspapers*, 307 NLRB 773, 779 (1992). Lead operators clearly earn a higher hourly wage than other operators, and they occasionally attend management meetings. Nevertheless, lead operators work in the same area as other operators, they wear the same protective clothing, and, unlike the stipulated supervisors, the lead operators are paid on an hourly basis.

On balance, I find that the secondary evidence supports the conclusion that lead operators do not possess supervisory authority. Although lead operators occasionally are the highest-ranking

employee at the refinery, this fact does not establish that they are supervisors. See *Dean & Deluca*, 338 NLRB at 1047 fn. 13 (holding that supervisory authority is not established by the mere fact that an employee is in charge during a certain period); *Ken-Crest*, 335 NLRB at 779 fn. 16. Likewise, it is not dispositive that the lead operators consider the lower-ranking operators to be their subordinates. See, e.g., *Shaw, Inc.*, 350 NLRB 354, 356 (2007); *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985) (recognizing the well-established principle that an employee may not be transformed into a supervisor by the vesting of a title). The lead operators share predominately the same responsibilities as other operators, and, as described above, the evidence fails to establish that they exercise independent judgment with respect to any one of the indicia specified in Section 2(11). Furthermore, if the lead operators are supervisors, the Employer's organizational chart indicates that it would employ less than two employees for every supervisor. See *Wilson Tree*, 312 NLRB at 893 (considering the ratio of supervisors to employees in evaluating whether a claimed supervisor holds supervisory status).

B. The Employer's Motion To Dismiss

The Employer moves to dismiss the Petition based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (petition for certiorari filed April 25, 2013), arguing that under that decision, the President's January 4, 2012 recess appointments to the Board were invalid. For the reasons below, I find that dismissal of the Petition is unwarranted.

It is not appropriate for the Board, or the Board's appointed agents, to suspend its activities in response to a claim that Presidential appointments to the Board are not valid. On April 25, 2013, the Board filed a petition for certiorari with the United States Supreme Court seeking review of the D. C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No.

77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the “question [of the validity of the recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”¹⁰ This conclusion is equally applicable to the Employer’s contention that the Acting General Counsel was not properly appointed and its contention that the Regional Director for Region 14 has no authority to proceed on this petition. See also *STG Int’l Inc.*, Board Case 21-RC-097525 (April 25, 2013).

Finally, there is a strong public interest in addressing representation disputes as soon as possible that are of concern to employees and employers alike. Most representation disputes have long been resolved administratively without the necessity of court litigation. And even where, as here, there is a challenge to the authority of the Board to act, our experience in continuing to process cases during the analogous dispute leading to *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), was that most of the cases decided during that time helped finally resolve labor disputes because the parties either accepted the Board’s decision or settled the dispute.

¹⁰ The Third Circuit’s decision in *NLRB v. New Vista Nursing and Rehabilitation*, -- F.3d --, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

IV. CONCLUSION

For the above reasons, I find that the record fails to establish that Lead Operators Terry Stamper, Bob LaGasse, Ray Gates, and Andrew Doggett are supervisors within the meaning of Section 2(11) of the Act. Additionally, I find that it is appropriate to proceed to an election in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are all employees employed in the bargaining unit during the payroll period ending immediately preceding the date of this Decision (payroll cutoff date), 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 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 who are employed in the unit 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 thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently

replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **UNITED STEEL WORKERS, AFL-CIO-CLC**.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

LIST OF VOTERS

In order to insure 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 Company*, 394 U.S. 759 (1969). Accordingly, it is directed that **two** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*,

315 NLRB 359 (1994). The list must be of sufficiently large type to be clearly legible. The undersigned shall make this list available to all parties to the election.

In order to be timely filed, such list must be received in Region 17's Office, Suite 100, 8600 Farley, Overland Park, Kansas 66212, on or before **June 24, 2013**. 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 facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is to be submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized. If you have questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m. (ET) on **July 1, 2013**.

This request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov, but may not be filed by facsimile. Refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in filing electronically. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the E-Gov tab and click E-Filing. Then select the NLRB office

for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file documents electronically will be displayed.

SIGNED at Overland Park, Kansas, this 17th day of June 2013.

/s/ Naomi L. Stuart

Naomi L. Stuart, Officer In Charge
National Labor Relations Board
Subregion 17
8600 Farley, Suite 100
Overland Park, Kansas 66212