
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PAC TELL GROUP, INC. d/b/a U.S. FIBERS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY,
ALLIED-INDUSTRIAL AND
SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Pac Tell Group, Inc. d/b/a U.S. Fibers (“the Company”) to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order (362 NLRB No. 4) issued against the Company on January 29, 2015. (A. 772-74.)¹ Local 7898 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union (“the Union”) has intervened on the Board’s side.

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Order is final with respect to all parties, and the Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practice occurred in Trenton, South Carolina. The Company’s petition for review and the Board’s cross-application for enforcement were timely; the Act places no time limit on such filings.

¹ “A” references are to the joint appendix. “Br” references are to the Company’s brief. “Tr” references are to the transcript of the April 2013 hearing. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

Because the Board's Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding (Case No. 10-RC-101166) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice Order in whole or in part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).²

² *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy's* holding that the Board lacks the authority to resume processing the representation case rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once they have been considered by a reviewing court. See *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent fraud or mistake, the Board is not entitled to have a court's enforcement order vacated so the Board can enter a new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993) (once a court enforces the Board's order in an unfair labor practice proceeding, the Board lacks authority to reopen the proceeding to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982) (rejecting employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was pending in court); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981) (the Board lacks jurisdiction to adjudicate a union's unfair labor practice

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether the Board reasonably found that the Company violated the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the Company's unit employees. Resolution of this issue turns on two subsidiary ones: whether substantial evidence supports the Board's finding that the Company did not carry its burden of proving that employees Eduardo Sanchez, Jose Lal, David Martinez, and Aduco Torres are statutory supervisors within the meaning of Section 2(11) of the Act; and whether the Board acted within its discretion in overruling the Company's election objections based on their conduct.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Union after its employees voted in favor of union representation in a Board-conducted election. The Company does not dispute its refusal. Instead, it claims that the Board erred in the underlying representation proceeding by finding that the Company failed to meet its burden of proving that unit employees Sanchez, Lal,

claim when an earlier court decision implicitly rejected that claim). Should the Court disagree with the Board's unit determination, the Board asks that the case be remanded for further processing consistent with the Court's opinion. *See NLRB v. Local 347*, 417 U.S. 1, 8 (1974) (holding appeals court should have remanded question of remedy to the Board rather than deciding the issue).

Martinez, and Torres are statutory supervisors, and that they engaged in objectionable pre-election conduct warranting a new election. The relevant factual and procedural background and the Board's conclusions and Order are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations and Organizational Structure

The Company manufactures recycled polyester fibers at its Trenton, South Carolina plant. Raw scrap materials are processed in the plant's recycling department and then converted into useable fiber products in the extrusion and finishing departments. (A. 699; A. 19-23, 31-32, 490-91.) The plant normally operates around the clock with 12-hour day and night shifts. (A. 699-700; A. 36, 329, 533.)

Vice President of Operations Ted Oh is responsible for overseeing all plant operations. (A. 699; A. 17, 29, 77-78, 235.) Javier Alcorta serves as the plant's Safety Manager.³ Director of Manufacturing Kevin Corey reports directly to Oh. (A. 699; A. 29, 148, 154, 235.) Production Managers Glenn Jang and Kyong Kang report directly to Corey. Jang oversees the recycling and extrusion departments while Kang oversees finishing. (A. 699; A. 31-32, 113, 235.)

³ Alcorta works at the Trenton plant about one day per week. He also serves as acting plant manager at a nearby company facility. (A. 699; A. 29, 148, 154.)

Beneath the production managers are the hourly production employees, including the four putative supervisors, Sanchez, Lal, Martinez, and Torres. (A. 699-700; A. 18, 31-32, 40, 97, 235.) Sanchez and Lal work in the extrusion department and report to Production Manager Jang. They work on opposite, rotating shifts; when one works day shift, the other works at night. (A.699; A. 33-34, 62, 113, 176-77, 235, 313.) Martinez works in recycling and also reports to Jang; he rotates opposite shifts with unit employee Jose Ferro, a “High Lead Man.” (A.699-700; A. 33-34, 113, 235, 520-23.) Torres works in the finishing department and reports to Production Manager Kang; he rotates opposite shifts with unit employee Edwin Vicente, the “Finish Lead Man.” (A. 699-700; A. 31, 34, 235, 493, 569-70, 587.) About 110 additional hourly employees work in the recycling, extrusion, and finishing departments. Those employees work in groups; each work group includes one designated lead employee. (A.700, 703; A. 38-40, 101, 119, 178, 197, 235, 283, 564.)

B. Departmental and Job Assignments, and Scheduling

Production Managers Jang and Kang assign employees to the recycling, extrusion, and finishing departments; Sanchez, Lal, Martinez, and Torres are not involved in that decision. Similarly, only a manager can change an employee’s department, or his job within a department. (A. 703, 712; A. 15-16, 348, 370, 387-88, 390, 429, 486, 490, 501, 525, 588.)

Managers determine the number of employees who work on each shift in each department. (A. 703; A. 86-87, 128, 180, 522, 572, 574.) They also decide the number of work groups on each shift and the number of employees in each work group. Additionally, managers designate employees to serve as work group leadpersons. (A. 702-03, 712; A. 38-41, 181, 200, 235, 348, 387-88, 390, 429, 501, 522-25, 572-74, 588.) Sanchez, Lal, Martinez, and Torres have no part in those decisions.

The Company's 12-hour shifts are fixed, and turn over daily at 8:00 a.m. and 8:00 p.m. (A. 700, 712; A. 36, 211-12, 329, 504, 533, 605.) All employees periodically alternate between the day and night shifts. (A. 700; A. 62, 86, 161, 210, 220-21, 345.)

In the extrusion department, Production Manager Jang created a written schedule format that includes coded grids and designated spaces to list the names of employees in each work group. (A. 702-03; A. 119, 139, 145, 200, 242-43.) Sanchez and Lal periodically fill in the spaces with employees' names to form or revise a work group's composition. In doing so, they follow the Company's pre-established practice of combining two or more employees with one of the leadpersons previously identified by managers. Sanchez and Lal also adhere to the managers' prior determinations establishing the number of work groups per shift

and the number of employees per group. (A. 702-03, 712; A. 38-41, 86-87, 119, 128-29, 180-81, 200-01, 235, 242-43.)

In the recycling and finishing departments, Martinez and Torres play no part in drafting or revising schedules, or in forming or revising work groups. In those departments, only managers perform those tasks. (A. 703, 712; A. 139, 522-24, 572-74, 589-90, 614.)

C. The Performance of Production Work

Production Managers Jang and Kang give Sanchez, Lal, and Torres lists of the work orders to be completed by employees on each shift in the extrusion and finishing departments. In recycling, Jang conveys the list orally, either directly to Martinez or to other employees, who then relay it to Martinez. (A. 703, 712; A. 176-78, 195, 333, 522, 535, 570-71, 589-90, 600, 603, 605, 618.) Sanchez, Lal, Martinez, and Torres then disperse the work orders among the work groups. (A. 703, 705, 712-13; A. 195, 213, 226, 509.) Because the work is highly repetitive and routine, employees know how to perform it without guidance or instruction. (A. 703, 705, 712-13; A. 101, 168, 195, 220, 341-42, 497, 524-25, 548, 615.) In the recycling department, employees rotate tasks within each work group. (A. 703; A. 160, 446, 457, 462, 522-25, 539.)

During their shifts, Sanchez, Lal, Martinez, and Torres walk around their departments monitoring the work, assisting coworkers, retrieving materials and

supplies, and attending to machine problems. (A. 704-05, 713; A. 195, 308-10, 328, 341-42, 423-24, 456-57, 564, 570, 600, 602-03.) At times, they may temporarily shift an employee to fill a vacancy when someone is absent, or in response to a machine breakdown. The rule of thumb is that idled employees will clean their work area if a breakdown is of short duration; if it is prolonged, then the four individuals may temporarily switch them to another task or machine. (A. 703-05, 712; A. 48, 121, 161-63, 229, 302, 337, 348, 370, 386-87, 420, 490, 495, 497, 506, 525, 531, 583, 616.) Torres and Sanchez seek their production manager's permission or consult with him about any temporary switch. (A. 704; A. 302, 583, 616.)

D. Overtime, Discipline, and Raises

Company overtime is strictly voluntary. (A. 704; A. 164-65, 222, 226, 300, 329, 337, 379, 393, 507, 552-54, 582, 594, 616.) Sanchez, Lal, Martinez and Torres sometimes advise employees when overtime is available to fill in for an absent coworker, but only after obtaining the production manager's permission. (A. 704, 712; A. 120, 189-90, 532, 552-53, 580-82, 587, 593-94, 600, 616.) If the production manager approves, the four individuals inform employees of the opportunity based on their knowledge of who is available and wants extra hours. (A. 704; A. 121, 190, 532, 552-53, 556, 582, 594, 616-17.) Sometimes they contact an off-duty leadperson to see if anyone in his group wants the extra hours;

on other occasions, Production Manager Kang directs Torres to ask a specific employee. (A. 552-53, 587-88, 594.) Also, when employees proactively seek overtime, Sanchez, Lal, Martinez, and Torres answer such requests based on their awareness of whether it is available. (A. 704-05; A. 164-65, 222, 300, 337, 358, 381, 434, 507-08, 531, 533, 580-82, 593; Tr. 194-95.)

Sanchez, Lal, Martinez, and Torres are not involved with employee discipline, except when they carry out production managers' specific directives or instructions concerning employee warnings. (A. 658-60, 706-09, 713-15; A. 115-16, 135, 184-88, 192, 199, 317, 489, 506, 527-28, 576-77, 584-85, 596-99, 613.) For example, Production Manager Kang once ordered Torres to deliver to employee Gabriel Perez a warning that Kang had prepared; Torres did as instructed, although he did not know the reason for the warning. (A. 659-60, 709; A. 596-99, 613.) Similarly, on two occasions, Jang directed Martinez and Lal to give warnings to employees Jose Allende and Christopher Quinones after Jang observed them failing to wear required safety gear. (A. 658-60, 707-09, 714; A. 115, 184-88, 199, 527-28.) Jang also instructed Lal to fill out a warning form whenever he saw an employee failing to follow established work or safety requirements, such as not wearing a safety helmet. (A. 658, 660, 707-08, 714; A. 186-87.)

All decisions regarding employee raises are made by Vice President of Operations Oh, in consultation with the production managers. (A. 666, 710, 715; A. 83, 109-10, 126-27, 141, 320, 526.) In the finishing department, Torres has no involvement at any stage of the process of determining raises. (A. 666, 710; A. 57, 110, 575-76.) Although Sanchez, Lal, and Martinez have provided Jang with initial input concerning employee raises in extrusion and recycling, Jang formulates his own opinions and recommendations and then discusses the matter with Oh, who makes the decisions. (A. 666, 710, 715; A. 83, 109-10, 122, 126-27, 140-42, 182, 244-45, 307, 320, 545-47, 651.)

II. THE PROCEDURAL HISTORY

A. The Representation Proceeding

The Union filed an election petition with the Board, seeking to represent a unit of employees at the Company's Trenton plant. (A. 13.) In response, the Company asserted that employees Sanchez, Lal, Martinez, and Torres were supervisors under Section 2(11) of the Act, and therefore should not be included in the bargaining unit. Following a hearing on the issue, the Board's Acting Regional Director issued a Decision and Direction of Election finding the Company had not met its burden of establishing supervisory status. (A. 246-73.) Accordingly, she directed an election among the unit of employees, to include Sanchez, Lal, Martinez, and Torres. (A. 269-70.)

The Company filed a request with the Board for review of the Acting Regional Director's decision. The Board issued an order stating that although the Company had raised a substantial issue regarding alleged supervisory status, its contention could best be resolved through the Board's challenged ballot procedure. (A. 274.) Accordingly, the Board amended the Decision and Direction of Election to allow the four putative supervisors to vote under challenge, and denied the request for review. (A. 274.)

The Union won the election by a vote of 71 to 59, with seven uncounted challenged ballots, including those cast by Sanchez, Lal, Martinez, and Torres. (A. 282-83.) The Company filed objections, alleging that the four had engaged in objectionable supervisory conduct, and that even if they were employees, their conduct was objectionable under the standard governing third parties. (A. 275-81.) Following a hearing, a Board field attorney, sitting as hearing officer, issued a report and recommendations to the Regional Director. (A. 653-82.) Her report recommended finding that the Company had established the four individuals' authority to assign and responsibly direct employees using independent judgment, but had failed to show they possessed any other statutory indicia of supervisory status. (A. 657-68.) Her report also recommended that the Regional Director overrule certain of the Company's objections, but sustain others, and direct a second election. (A. 669, 680.)

The Union and the Company filed exceptions to the hearing officer's report and recommendations. (A. 683-95.) The Regional Director subsequently issued a Supplemental Decision and Certification of Representative, finding, contrary to the hearing officer's recommendation, that the Company had failed to meet its burden of proving that the four individuals were statutory supervisors under Section 2(11) of the Act. (A. 696-718.) The Regional Director also overruled the Company's objections.

Thereafter, the Board granted the Company's request for review of the Regional Director's finding in his Supplemental Decision that the Company had failed to establish that the four individuals possessed authority to assign and reward using independent judgment within the meaning of Section 2(11) of the Act. (A. 753.) On review, however, the Board affirmed the Regional Director's findings with respect to the supervisory-status issues. (A. 754-55.) The Board also noted its rejection of the Company's contention that, even if they were not supervisors, the four individuals engaged in objectionable third-party conduct. In accordance with the Board's Order, the Regional Director certified the Union as the exclusive collective-bargaining representative of the unit employees. (A. 756-58.)

B. The Unfair-Labor-Practice Proceeding: The Company Refuses To Bargain with the Union

On October 7, 2014, the Union requested that the Company recognize and bargain with it as the representative of unit employees. The Company refused the Union's request. (A. 762, 769.) The Board's General Counsel issued a complaint, based on a charge filed by the Union, alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act. (A. 759-67.) In its answer, the Company admitted its refusal but denied that it was unlawful, contending that the Union's certification was improper and asserting, *inter alia*, that the Board's findings regarding the employee status of the four individuals, and the impact of their conduct on the election, were erroneous. (A. 768-71.)

The General Counsel filed a motion for summary judgment with the Board. The Board issued an Order transferring the case to itself and directed the Company to show cause why the motion should not be granted. The Company filed a response. (A. 772.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On January 29, 2015, the Board (Chairman Pearce and Members Hirozawa and Johnson) issued its Decision and Order in the unfair-labor-practice case, granting the General Counsel's motion for summary judgment. (A. 772-74.) The Board found that all representation issues raised by the Company were or could have been litigated in the prior representation proceeding, and that the Company

did not offer to adduce any newly discovered and previously unavailable evidence, or allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's Order requires the Company, upon request, to bargain with the Union and post a remedial notice. (A. 773-74.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company failed to meet its burden of proving that unit employees Sanchez, Lal, Martinez, and Torres are statutory supervisors. Further, the Board acted within its broad discretion in overruling the Company's election objections. Accordingly, the Union was properly certified as the collective-bargaining representative of unit employees, and the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with it.

The Company failed to establish that Sanchez, Lal, Martinez, and Torres perform any of the supervisory functions enumerated in Section 2(11) of the Act using independent judgment. First, the record does not support the Company's claim that the four individuals have authority to assign through their limited involvement with work schedules that list work groups, or their temporary shifting of coworkers due to absences and machine breakdowns. Martinez and Torres have no involvement with work schedules, which are prepared by production managers, or with forming work groups. As for Sanchez and Lal, their occasional role in forming and revising the composition of work groups is narrowly circumscribed, and does not constitute assignment or require the use of independent judgment. Similarly, the four individuals' limited ability to provisionally shift coworkers is ad hoc instruction, not assignment, and does not involve more than routine discretion.

Likewise, the Company failed to prove that Sanchez, Lal, Martinez, and Torres responsibly direct coworkers with independent judgment. There is no evidence they are held accountable for others' job performance, or utilize independent judgment in dispersing work orders and directing the performance of coworkers' highly routine and repetitive work.

The Company also failed to show that Sanchez, Lal, Martinez, and Torres discipline employees or effectively recommend discipline using independent judgment when they follow production managers' specific instructions to fill out

and deliver employee warning forms. As for the Company's assertion that the putative supervisors reward coworkers with overtime, that contention is not properly before the Court, as the Company abandoned it in the underlying representation proceeding. In any event, the four individuals do not use independent judgment by merely communicating the availability of voluntary overtime to others.

The Company also failed to prove that Sanchez, Lal, Martinez, and Torres have supervisory authority to recommend raises. Torres has no involvement with raises. And the Company did not show that the three others' initial recommendations, offered at the outset of a multi-level review process, are "effective" recommendations under Section 2(11), or formulated using independent judgment. Moreover, because the Company failed to carry its burden of proving that Sanchez, Lal, Martinez, and Torres have authority to perform at least one of Section 2(11)'s enumerated functions with independent judgment, the Board properly rejected its reliance on non-statutory indicia of supervisory status.

Finally, the Board acted well within its discretion in overruling the Company's objections to the four individuals' pre-election conduct. Based on its finding that they are statutory employees, the Board properly assessed their conduct under the standard governing third parties. And the only conduct alleged by the Company as objectionable under that standard consisted of statements by

Lal and Martinez to coworkers suggesting they might lose their jobs if they didn't support the Union. It is settled, however, that such coworker-to-coworker statements are not objectionable under the third-party standard.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) and (1) of the Act prohibits an employer from refusing to bargain collectively with the representative of its employees.⁴ 29 U.S.C. § 158(a)(5) and (1). Here, although the Company's employees chose the Union as their representative in a Board-supervised election, the Company, admittedly, has refused to recognize or bargain with it. (A. 772-73.) The Company contends that its refusal is not unlawful because bargaining-unit employees Sanchez, Lal, Martinez, and Torres are statutory supervisors, and they engaged in objectionable conduct affecting the election results. As shown below, because the Board reasonably rejected the Company's contentions, its admitted refusal to recognize and bargain with the Union violates Section 8(a)(5) and (1) of the Act.

⁴ A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1) by interfering with employees' collective-bargaining rights. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

A. Substantial Evidence Supports the Board’s Finding that the Company Failed to Prove that Sanchez, Lal, Martinez, and Torres are Statutory Supervisors

1. Applicable principles and standard of review

The Act’s protections extend to all workers who meet its definition of “employee.”⁵ As the Supreme Court has repeatedly observed, that definition is strikingly broad. *See, e.g., NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). Moreover, the Court has cautioned “that [the Board] and reviewing courts must take care to assure that exemptions from [the Act’s] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

One such exemption from the definition of “employee” is “any individual employed as a supervisor.” 29 U.S.C. § 152(3). Section 2(11) of Act defines the term “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

⁵ *See* Section 2(3) of the Act (29 U.S.C. § 152(3)) (“The term ‘employee’ shall include any employee . . .”).

29 U.S.C. § 152(11). Thus, as relevant here, the Act dictates that individuals are not supervisors unless (1) they have the authority to engage in at least one of the 12 specified supervisory functions, and (2) their exercise of that authority requires the use of independent judgment. *Kentucky River*, 532 U.S. at 713; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

To exercise independent judgment, “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB at 693; *accord Diversified Enter., Inc.*, 355 NLRB 492 (2010), *incorporating by reference*, 353 NLRB 1174, 1180 (2009), *enforced*, 438 F. App’x 244 (4th Cir. 2011). Judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Oakwood*, 348 NLRB at 693; *see also Kentucky River*, 532 U.S. at 713-14 (“the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer”). Further, the judgment must involve a degree of discretion that rises above the “routine or clerical” in order to indicate supervisory status under Section 2(11). *Oakwood*, 348 NLRB at 693 & n.42; *see also Kentucky River*, 532 U.S. at 713-14 (“Many nominally supervisory functions may be performed without

the exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding of supervisory status under the Act”).

The burden of demonstrating supervisory status rests with the party asserting it. *Kentucky River*, 532 U.S. at 710-12; *Oakwood*, 348 NLRB at 687. To meet its burden, the asserting party must establish Section 2(11) status by a preponderance of the evidence. *Oakwood*, 348 NLRB at 694; *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). It must support its claim with specific examples, based on record evidence; conclusory or generalized testimony does not suffice. *Avista Corp. v. NLRB*, 496 F. App’x 92, 93 (D.C. Cir. 2013); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305, 312 (6th Cir. 2012); *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App’x 54, 57 (2d Cir. 2008); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1056-57 (2006). Nor can a party satisfy its burden with inconclusive or conflicting evidence. *Frenchtown*, 683 F.3d at 315; *The Republican Co.*, 361 NLRB No. 15, 2014 WL 3887221 at *7-*8 & *11 (Aug. 7, 2014). Further, job titles and evidence of merely theoretical power cannot establish supervisory status. *NLRB v. S. Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958); *Frenchtown*, 683 F.3d at 305 & 310; *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 589 & 596 (7th Cir. 2012); *Golden Crest*, 348 NLRB at 731; *Avante*, 348 NLRB at 1057.

In interpreting and applying Section 2(11), the Board must be mindful of the Supreme Court’s admonition that it cautiously delimit exemptions from “employee” status that remove individuals from the Act’s protections (*Holly Farms*, 517 U.S. at 399), as well as Congress’s intent to distinguish truly supervisory personnel, who are vested with “genuine management prerogatives,” from employees—such as “straw bosses, leadmen, set-up men, and other minor supervisory employees”—who enjoy the Act’s guarantees although they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 280-83 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)); *see Oakwood*, 348 NLRB at 688. Drawing the distinction “between gradations of authority . . . infinite and subtle” is a matter that “fall[s] within the special expertise of the Board . . . over which it has a wide discretion.” *Methodist Home v. NLRB*, 596 F.2d 1173, 1177 & 1178 n.4 (4th Cir. 1979) (citation and internal quotations omitted); *accord NLRB v. S. Seating Co.*, 468 F.2d 1345, 1348 (4th Cir. 1972); *see also NLRB v. Labor Ready, Inc.*, 253 F.3d 195, 199 (4th Cir. 2001) (“We extend considerable deference to the [Board’s] interpretation of [Section 2(3) of the Act] and its application of [that] provision to a particular worker or class of workers”).

Accordingly, the Board’s findings regarding supervisory status are entitled to “great deference,” *Methodist Home*, 596 F.2d at 1177, and must be upheld as

long as they are supported by substantial evidence. *NLRB v. Diversified Enter., Inc.*, 438 F. App'x at 245; *S. Seating*, 468 F.2d at 1348. More generally, under the substantial evidence standard, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see also Holly Farms Corp. v. NLRB.*, 48 F.3d 1360, 1369 (4th Cir. 1995) (“Regardless of how we . . . might have resolved the question as an initial matter, we must give appropriate weight to the judgment of the Board, whose special duty is to apply the Act’s broad statutory language to an almost unlimited variety of fact patterns”), *affd*, 517 U.S. 392 (1996).

2. The Company errs in relying on court decisions that predate *Kentucky River* and *Oakwood*

The Company (Br. 26, 28-31, 34, 37-38) heavily relies on decisions of this Court that predate pivotal developments in the law concerning supervisory status. Indeed, the Fourth Circuit cases cited by the Company preceded *Kentucky River*, 532 U.S. at 713-15, where the Supreme Court rejected the Board’s interpretation of the term “independent judgment” as it applied to nurses. Following *Kentucky River*, the Board abandoned its distinctive analysis of nurses’ supervisory status and revisited the issue more broadly in *Oakwood*, 348 NLRB 686 (2006), and two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest*

Healthcare Center, 348 NLRB 727 (2006). In the *Oakwood* trilogy, the Board clarified and refined its interpretation of the terms “independent judgment,” “assign,” and “responsibly to direct,” and made them applicable to all categories of workers.

In these circumstances, the Company errs in relying on this Court’s pre-*Kentucky River* and pre-*Oakwood* decisions. Accordingly, the Company does not help itself by quoting (Br. 26) *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290, 295 (4th Cir. 1999), and *NLRB v. St. Mary’s Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982), where the Court declined to defer to the Board’s resolution of supervisory status issues in cases involving nurses. The language is no longer viable because it was based on perceived faults in a bygone period of Board decision-making, including the Board’s former, nurse-specific analysis that it abandoned more than fourteen years ago. Moreover, because all the decisions cited by the Company predate the *Oakwood* trilogy, the Court plainly was not considering the Board’s current interpretation of the statutory terms “independent judgment,” “assign,” and “responsibly to direct.” And to date this Court has not squarely passed upon the Board’s *Oakwood* standards, which control this case, though the Company repeatedly ignores them. (Br. 29-31, 34, 37-38).⁶

⁶ In *NLRB v. Diversified Enter., Inc.*, 438 F. App’x 244 (4th Cir. 2011), however, the Court enforced a Board decision and order, 355 NLRB 492 (2010), that

Indeed, before the Board, the Company did not challenge the soundness or applicability of the *Oakwood* standards. To the contrary, the Company uncritically relied upon them. (A. 731-32, 734-36, 738-40.) And it is those standards that control this case because they represent the Board’s reasonable construction of ambiguous statutory terms, and they postdate the Fourth Circuit decisions cited by the Company. “If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction . . . even if [it] differs from what the court believes is the best statutory interpretation.” *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984)). And, crucially, a “court’s prior judicial construction of [the] statute trumps [the agency’s] construction . . . only if the prior court decision holds that its construction follows from the unambiguous terms of the statute.” *Brand X*, 545 U.S. at 980. This Court has never held that the pertinent terms of Section 2(11) are unambiguous.

Moreover, the Supreme Court has squarely recognized that “independent judgment” and “responsibly to direct” are ambiguous statutory terms. *Kentucky River*, 532 U.S. at 713 (“the statutory term ‘independent judgment’ is ambiguous with respect to the degree of discretion required . . . [and] [i]t falls clearly within

discussed and applied the *Oakwood* interpretations of “independent judgment,” “assign,” and “responsibly to direct.”

the Board’s discretion to determine, within reason, what scope of discretion qualifies”); *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 579 (1994) (“no doubt true” that the Board “needs to be given ample room” to apply the ambiguous term “responsibly to direct”); *accord Frenchtown*, 683 F.3d at 313. The term “assign” is equally ambiguous. *Id.* at 311 n.8; *accord Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 n.3 (3d Cir. 2011). And, the Board’s *Oakwood* construction of those terms is unassailably “a permissible construction” of Section 2(11) under *Chevron*, 467 U.S. at 843-45. Reviewing courts have unanimously applied the Board’s *Oakwood* standards,⁷ and the Company has not asserted—let alone articulated why—they do not represent a reasonable interpretation of the Act. Therefore, under *Chevron* and *Brand X*, the Board’s *Oakwood* standards govern this case.

3. The Company failed to prove that the four individuals assign employees using independent judgment

The term “assign” under Section 2(11) means “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, 348 NLRB at 689; *accord Diversified Enter., Inc.*,

⁷ *See, e.g., Avista Corp. v. NLRB*, 496 F. App’x 92 (D.C. Cir. 2013); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298 (6th Cir. 2012); *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587 (7th Cir. 2012); *Mars Home for Youth v. NLRB*, 666 F.3d 850 (3d Cir. 2011); *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App’x 54 (2d Cir. 2008).

355 NLRB at 492. By contrast, an individual does not “assign” by giving employees “ad hoc instructions to perform discrete tasks,” or by “choosing the order in which [they] will perform discrete tasks within [their] assignments.” *Oakwood*, 348 NLRB at 689-90.⁸ As with every supervisory function listed in Section 2(11), authority to assign indicates supervisory status only if its exercise requires the use of independent judgment. 29 U.S.C. § 152(11). *Kentucky River*, 532 U.S. at 715.⁹

In contending that Sanchez, Lal, Martinez, and Torres assign coworkers using independent judgment, the Company (Br. 29-36) focuses exclusively on their involvement with work schedules and their temporary shifting of employees in response to absences and machine breakdowns.¹⁰ As demonstrated below, the

⁸ For the reasons noted above pp. 23-26, the Company errs in relying (Br. 29) on *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 342 (4th Cir. 1998), which describes the statutory term as encompassing the type of ad hoc instructions that the Board clarified in *Oakwood* do not constitute assignment under Section 2(11). 348 NLRB at 689-90.

⁹ The Company again errs in relying (Br. 29-30) on *Glenmark*, 147 F.3d at 342, where it states that certain types of assignment are “inseverable” from the exercise of independent judgment. The quoted statement is contrary to *Kentucky River*, 532 U.S. at 710-15, and *Oakwood*, 348 NLRB at 687, 693 & n. 42, which hold that independent judgment is a distinct statutory requirement.

¹⁰ The Company does not assert in its opening brief that the four individuals assign employees significant overall duties, or assign by dispersing work orders and coordinating voluntary overtime. It has therefore waived those contentions. *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 248-49 (4th Cir. 2013) (“[i]t is a well settled rule that contentions not raised in the argument section of the opening brief are abandoned”) (internal quotations and citation omitted); FRAP 28(a). In any event, the record fails to show that Sanchez and Lal’s occasional changes to the

Board reasonably rejected both claims (A. 702-05, 710-12), and found that the Company failed to meet its burden of proving that when the four individuals engage in those tasks, they assign employees using independent judgment.

a. Martinez and Torres are not involved in preparing or revising work schedules; Sanchez and Lal's limited involvement does not constitute assignment or require the use of independent judgment

Initially, contrary to the Company's suggestion (Br. 31-34), Martinez and Torres have never been involved with preparing or modifying work schedules, or forming or revising employee work groups. They unequivocally denied taking part in those tasks. (A. 522-24, 572-74, 589-90.) Indeed, when Production Manager Jang was asked if Martinez "ever had any part in drafting any schedules," he admitted that Martinez "didn't do anything" (A. 139), and Production Manager Kang never testified. Further, the Company conceded to the Board that "Martinez and Torres do not assign employees to work groups." (A. 734.)

As for Sanchez and Lal, their limited involvement with the extrusion department's work schedule does not demonstrate that they possess authority to assign using independent judgment. To be sure, they occasionally form and modify the composition of work groups. In completing that task, however, they

composition of work groups affect employees' overall duties. *See Oakwood*, 348 NLRB at 689-90. Further, with respect to overtime, supervisory authority to assign cannot be shown where, as here, a putative supervisor can merely offer or request, rather than require, overtime. *Golden Crest*, 348 NLRB at 729.

are constrained by managers' choices concerning who works in the department and in what position, and who serves as work-group leadpersons. Managers also determine the number of employees per shift, the number of work groups, and the number of employees per work group. Bound by those constraints, Sanchez and Lal simply follow the Company's pre-established method of composing work groups by combining one leadperson with a predetermined number of regular employees. And the Company did not show that Sanchez and Lal consider any other factors in forming and revising work groups. Accordingly, the Company failed to establish that the pair use independent judgment in connection with the work schedules. *See Frenchtown*, 683 F.3d at 312 ("Giving assignments based on management's instructions does not show the requisite independent judgment"); *Mars Home*, 666 F.3d at 855 (claim of independent judgment undermined by regulations that constrained putative supervisors' role in scheduling); *Pride Ambulance Co.*, 356 NLRB No. 128, 2011 WL 1298935 at *29 (Apr. 5, 2011) (assignments made "in accordance with an [e]mployer's set practice, pattern or parameters, or based on . . . obvious factors" does not require independent judgment) (citation omitted).

Contrary to the Company's claim (Br. 31-32), Sanchez and Lal do not assign coworkers to a time using independent judgment because it is undisputed (Br. 7) that employees simply rotate between two fixed shifts, and there is no evidence

that Sanchez or Lal has any say in the timing or frequency of those rotations.

Moreover, to the extent that the pair carries out the Company's shift-rotation policy through their periodic revisions to the work schedule, they simply follow company dictates, and do not use independent judgment. *See* cases cited at p. 29; *accord Oakwood*, 348 NLRB at 693; *Croft Metals*, 348 NLRB at 722.

The Company also errs in claiming (Br. 31-32) that Sanchez and Lal assign coworkers to a place through their limited involvement with the work schedules. As noted, only managers assign employees to the extrusion department, and the record is ambiguous regarding assignment to locations within the department. Thus, even if, as the Company suggests (Br. 7, 31-32), employees listed on the first page of the work schedule report to Buildings 1 and 2, while those on the second page go to Building 4 (A. 242-43), the Company did not prove that Sanchez and Lal make the decision to place particular employees on a certain page. Further, even if they do, the Company failed to show that such placement involves independent judgment. The record is utterly devoid of evidence concerning the factors, if any, that may be considered, and whether the listing of names on a certain page of the work schedule is circumscribed by company guidelines or established practice.¹¹ *See, e.g., Frenchtown*, 683 F.3d at 312 (employer's failure

¹¹ The Company incorrectly claims (Br. 9) that Sanchez "reassign[ed]" John Williams, Jr., a new employee, from Building 1 to Building 3 based on his lack of experience. As Williams explained, new employees start in Building 3 for

to provide concrete evidence of factors actually considered in adjusting assignments precluded a finding of independent judgment); *The Republican Co.*, 361 NLRB No. 15, 2014 WL 3887221 at *7 (Aug. 7, 2014) (inconclusive evidence insufficient to satisfy burden of party asserting supervisory status).

The Company (Br. 32-35) does not advance its cause by relying on Lal's testimony about grouping regular employees with more experienced ones, or his statement that the latter work better and know more about the materials and operating the machinery. (A. 200-02.) Lal was simply referring to the pre-established distinction between regular employees and company-designated leadpersons, and the Company's practice of including one leadperson in each work group. Accordingly, Lal's testimony does not support the Company's claim that he and Sanchez use independent judgment when they occasionally modify the composition of work groups.¹²

training, then move to Building 1 after being trained. (A. 349, 354-55.) Thus, at most, the record shows only that Sanchez was following an established company rule requiring new employees to begin in Building 3.

¹²Even if Lal's testimony showed (which it does not) that, in revising work groups, he and Sanchez consider what they know regarding how many machines particular employees can operate, such judgment would not rise above the level of the "routine or clerical" under Section 2(11). *Oakwood*, 348 NLRB at 693. *See Shaw, Inc.*, 350 NLRB 354, 356 n.9 (2007); *CHS, Inc.*, 357 NLRB No. 54, 2011 WL 3860606 at *1 n.3 (Aug. 12, 2011); *Diversified Enter., Inc.*, 355 NLRB 492, *incorporating by reference*, 353 NLRB at 1181.

b. Temporarily shifting employees due to coworker absences and machine breakdowns does not constitute assignment or require the use of independent judgment

The Board reasonably rejected the Company's claim (Br. 29, 35) that Sanchez, Lal, Martinez, and Torres "assign" employees within the meaning of Section 2(11) when they temporarily shift them to a different task or machine due to a coworker's absence or a machine breakdown. Such "ad hoc instructions" do not constitute assignment under the Act. *Mars Home*, 666 F.3d at 855 (instructing employees to respond to arising crises does not constitute evidence of assignment); *Pride Ambulance*, 2011 WL 1298935 at *29 (switching drivers to different buses when their vehicles break down constitutes ad hoc instruction, not assignment); *Oakwood*, 348 NLRB at 689-90; *Croft Metals*, 348 NLRB at 722 (leadpersons who shifted or switched tasks among employees when production line was shorthanded or to achieve production goals did not exercise authority to assign).

Nor has the Company satisfied its burden of showing that Sanchez, Lal, Martinez, and Torres use independent judgment when they temporarily shift coworkers due to absences and breakdowns. In both situations, it is the external event that prompts the temporary switch. Moreover, for short-duration breakdowns, it is undisputed that the four individuals simply follow the Company's "rule of thumb" that idled employees should use the time to clean their work areas. (A. 48.) *See Shaw, Inc.*, 350 NLRB 354, 356 (2007) (no independent

judgment when direction given in accordance with prior instructions); *Oakwood*, 348 NLRB at 693; *Croft Metals*, 348 NLRB at 722.

When a breakdown is prolonged, the record shows only that the four individuals can switch idled employees to perform whatever alternate task happens to be available, or to assist coworkers who are particularly busy at the moment. (A. 48, 163, 169-70, 226-29). Temporarily shifting idled coworkers on such a basis does not require the use of independent judgment. *See 735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App'x 782, 784 (D.C. Cir. 2012) (“reall[oc]at[ing] staff to equalize workloads” does not indicate independent judgment); *Pride Ambulance*, 2011 WL 1298935 at *29 (assignments “based on such obvious factors as whether an employee’s workload is light” do not require independent judgment, nor does switching a bus driver to a working bus from whatever vehicles happen to be available when the driver’s bus breaks down); *Sam’s Club*, 349 NLRB 1007, 1013-14 (2007) (independent judgment not shown where putative supervisor shifted employees to work areas where coworkers were absent or behind in their work “simply based on the need to get work done”); *Shaw*, 350 NLRB at 356 & n.13 (no independent judgment in rotating employees to “equalize their burdens” or in directing employees to perform tasks based on their “chance availability,” simply “to get [the task] done”); *Oakwood*, 348 NLRB at 693 (action taken solely on basis of “equaliz[ing] workloads” is merely routine or clerical).

Similarly, in dealing with an absence, Sanchez, Lal, Martinez, and Torres simply shift an employee to fill the resulting vacancy. Because the destination of the shifted employee is dictated by the vacancy itself, in order to equalize workloads, it does not show independent judgment. *See Oakwood*, 348 NLRB at 693, and cases cited above p. 33. Further, the Company failed to show how the four individuals decide which employee to place in the vacancy, and whether Lal and Martinez must seek the permission of or consult with their production manager, as Torres and Sanchez do. *See Frenchtown*, 683 F.3d at 312; *Sam's Club*, 349 NLRB at 1014 (independent judgment not shown where putative supervisor moved personnel after checking with manager); *Oakwood*, 348 NLRB at 693.

The Company surmises (Br. 35) that in temporarily shifting coworkers due to breakdowns and absences, Sanchez, Lal, Martinez, and Torres consider some unspecified, discretionary factors relating to safety and efficiency, as well as “whether the employee is competent to perform the necessary task.” But the Company’s speculation is no substitute for record evidence. Further, assigning or directing employees “according to their known skills” is not evidence of independent judgment. *Shaw*, 350 NLRB at 356 n.9; *accord CHS, Inc.*, 357 NLRB No. 54, 2011 WL 3860606 at *1 n.3 (Aug. 12, 2011) (no independent judgment shown where putative supervisor distributed work based on manager’s

identification of day's priorities and putative supervisor's knowledge of which employees have certain skills); *see also Diversified Enter., Inc.*, 355 NLRB 492, *incorporating by reference*, 353 NLRB at 1181.

4. The Company failed to prove that the four individuals responsibly direct employees using independent judgment

Authority to direct another's work does not indicate supervisory status unless it is both "responsible" and requires the use of independent judgment. *Oakwood*, 348 NLRB at 691. To be "responsible" under Section 2(11), the putative 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 [other] are not performed properly."¹³ *Id.* at 692; *accord Diversified*, 355 NLRB at 492. Evidence showing that a putative supervisor is accountable merely for his own job performance does not establish the requisite responsibility. *Oakwood*, 348 NLRB at 695.

The Company claims only (Br. 36-38) that Sanchez, Lal, Martinez, and Torres responsibly direct coworkers by dispersing work orders and telling them

¹³ The Company erroneously relies (Br. 29, 37-38) on observations about responsible direction articulated in *St. Mary's*, 690 F.2d at 1066, 1068, and *Monongehela*, 657 F.2d at 612-13. To the extent those observations are inconsistent with *Oakwood*, they are not controlling. *See* pp. 25-26 above (discussing *Brand X*, 545 U.S. at 980).

how to perform their jobs and in what order to complete tasks.¹⁴ As the Board reasonably found (A. 713), however, because the Company did not show that the four individuals are held accountable for their coworkers' job performance, it necessarily failed to establish that their direction is responsible. *See 735 Putnam Pike*, 474 F. App'x at 784; *Alstyle Apparel*, 351 NLRB 1287, 1287 (2007); *Oakwood*, 348 NLRB at 692 & 695. There simply is no evidence that the four individuals were ever disciplined or faced the prospect of adverse consequences due to coworkers' poor performance.

To begin, with respect to Lal and Torres, the Company points to no evidence whatsoever regarding their purported accountability (Br. 36-38) for others' job performance. As for Sanchez, it relies (Br. 12, 38) solely on his testimony that he was once told by an unidentified individual to be more attentive to his work. (A. 326-27.) But this statement fails to establish responsible direction under Section 2(11) because it concerns his own job performance, not the performance of others. *See Frenchtown*, 683 F.3d at 314-15; *Rochelle*, 673 F.3d at 596; *Mars Home*, 666 F.3d at 854; *Oakwood*, 348 NLRB at 692 & 695. In any event, the remark fails to

¹⁴ The Company waived any contention that the four individuals responsibly direct coworkers by temporarily shifting them in response to breakdowns and absences. Simply put, the Company failed to adequately argue that claim in its opening brief. *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 153 n.6 (4th Cir. 2012), as amended (May 9, 2012) (scattered, passing references to argument in brief's statement of issues, standard of review, and argument sections resulted in waiver of argument).

show that Sanchez faced an actual risk of adverse consequences.¹⁵ *See Rochelle*, 673 F.3d at 596 (manager’s conversations with putative supervisor, which he referred to as “oral reprimand[s],” did not show risk of adverse consequences).

With regard to Martinez, the Company cites (Br. 12, 38) his testimony that Jang threatened him with discipline concerning production problems (A. 555). The Company, however, fails to acknowledge that the threat concerned his own alleged performance problems when he was previously employed as a machine operator, before the Company purportedly made him a supervisor. (A. 555.) The Company also relies (Br. 12, 38) on Martinez’s testimony that Jang “yelled” at him about production (A. 530, 555). His testimony, however, does not establish responsible direction because it fails to show he faced the actual prospect of adverse action. *See id.; Frenchtown*, 683 F.3d at 314-15 (educational “in-services” and written evaluations did not show risk of adverse consequences); *Alstyle Apparel*, 351 NLRB at 1287 (actual accountability cannot be established through “tenuous inference”).

Additionally, Jang conceded that none of the four individuals had ever been warned for production reasons. (A. 132.) Although he speculated that they would

¹⁵ The Company incorrectly labels the statement to Sanchez a “disciplinary warning.” (Br. 12.) Although Sanchez initially responded affirmatively when asked if he had ever been disciplined for a product-quality problem, he immediately clarified that he was merely told “[t]o put a little bit more attention to my work, to check the material.” (A. 326-27.)

be warned if a certain level of production was not reached (A. 132), his comment cannot be squared with the unequivocal testimony of Vice President Oh and others that the Company does not have production quotas. (A. 92, 321, 530.) In any event, Jang's surmised is insufficient to establish that the four individuals faced the actual risk of adverse consequences. *See Frenchtown*, 683 F.3d at 314 (conclusory and general testimony that putative supervisors held responsible does not satisfy burden of proof); *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App'x 54, 57 (2d Cir. 2008) (conclusory testimony that adverse consequences were likely is insufficient).

Finally, the Company failed to carry its burden of proving that Sanchez, Lal, Martinez, and Torres use independent judgment in directing other employees' work. Although the four individuals disperse among the various work groups the work orders identified on production managers' lists, there is no evidence showing the factors they consider, if any, in performing that task.¹⁶ *See Loparex LLC v. NLRB*, 591 F.3d 540, 551-52 (7th Cir. 2009) (no independent judgment where leadperson dispersed work from manager-created lists by randomly selecting employees, rotating them among different machines, and allowing them to complete projects that were underway). And once the orders are dispersed,

¹⁶Indeed, the Company failed to establish that there are any noticeable differences among the work orders in terms of their size, difficulty, or desirability, or the type of work they require. This further undercuts the Company's claim that work orders are disbursed in a way that requires the use of independent judgment.

employees normally need almost no instruction or guidance, as their work is highly repetitive and routine. As employee Williams testified: “everything is just repetitious,” employees “pretty much after a while would know what to do . . . it’s just routine,” and thus, “[Sanchez and Lal] didn’t have to watch much . . . [j]ust come back periodically and make sure everything is doing good.” (A. 342.) *See Shaw*, 350 NLRB at 356 (no independent judgment in directing work that was in large part routine and repetitive and that was not shown to “requir[e] more than minimal guidance”); *Croft Metals*, 348 NLRB at 722 n.14 (“The degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks”) (citation omitted).

5. The Company failed to prove that the four individuals discipline or reward employees, or effectively recommend such action, using independent judgment

a. The four individuals do not use independent judgment in delivering or filling out employee warning forms

The Company contends (Br. 38-43) that Sanchez, Lal, Martinez, and Torres have supervisory authority to discipline or effectively recommend discipline based on their involvement with employee warning forms. The Board reasonably rejected that claim (A. 660, 706, 711, 713-14), finding that the Company failed to show the four individuals use independent judgment in delivering and filling out

such forms. As explained below, substantial evidence supports the Board's finding.

Of the seven warning forms in the record that involve the putative supervisors, three were issued simultaneously for the same infraction to employees working with Sanchez. (A. 239-41.) Only Sanchez testified about this incident, and his testimony is vague and barren of detail. The entirety of his account is that his three coworkers were disciplined because they "disobeyed an order of work that [they] had to do . . . [w]e asked [them] to check all of the product, and it wasn't done correctly." (A. 297-98.) The Company failed to identify the individual that ordered the product check and found it wanting. Nor does the record disclose the identity of the individual that decided to issue the warnings, or the basis for his determination. On this paltry record, the Company cannot plausibly contend that it carried its burden of proving that Sanchez disciplined or effectively recommended the discipline of coworkers using independent judgment.

As for the next three warnings (A. 236, 649, 652), Lal, Martinez, and Torres merely delivered them to employees pursuant to production managers' express directives. In all three instances, their unrebutted testimony shows that production managers instructed them to give the warnings to specific employees for infractions they did not even observe. (A. 184-86, 199, 528, 596-99, 613.) Indeed, Torres did not even know why Production Manager Kang had prepared the

warning he delivered. Plainly, Lal, Martinez, and Torres did not use independent judgment when they simply complied with their production managers' directives.¹⁷ *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 486-87 (6th Cir. 2003) (putative supervisors did not exercise independent judgment in completing, signing, and delivering warning forms pursuant to manager's instructions).

The final warning in the record (A. 237) was given to Gerron Smart by Lal for failing to wear his safety helmet. Lal, however, prepared this warning pursuant to Jang's specific instructions that he fill out a warning form whenever he saw an employee failing to follow established safety requirements, such as not wearing a safety helmet. (A. 186-87.) Accordingly, since there was nothing left to Lal's discretion, he did not use independent judgment in giving the warning. *Shaw*, 350 NLRB at 356-57 (putative supervisor did not use independent judgment in completing write-up sheets documenting rule violations where employer failed to show he had discretion to decide which incidents to write up). Moreover, Lal warned Smart on the same day that Jang had ordered Lal to warn Quinones for precisely the same infraction. (A. 184-88, 199.) Further, consistent with Vice President Oh's testimony that production managers must approve warnings issued

¹⁷ Contrary to the Company's claim (Br. 42), Martinez's testimony that Jang instructed him to give a warning to employee Allende (A. 528) is consistent with his coworkers' testimony (A. 378, 398, 418-19, 450) that they saw Martinez do exactly that. The coworkers did not say whether they knew Jang had directed Martinez to issue the warning.

by the four individuals, Jang admittedly signed Smart's warning. (A. 46, 94, 115, 237.) Accordingly, the Company failed to show that Lal used independent judgment in issuing the warning to Smart.

Contrary to the Company's suggestion (Br. 39), there is no evidence that Sanchez, Lal, Martinez, and Torres have discretion in determining which boxes to check on the warning forms. In fact, testimony by Lal—the sole witness cited by the Company for this point (Br.39)—shows exactly the opposite. Thus, Lal noted that he checked the box marked “failure to follow procedure” on Quinones and Smart's warning forms because Jang had previously advised him that not wearing required safety gear constitutes a failure to follow procedure. (A. 187.) Lal also explained that he checked the “first warning” box simply because he did not know if they had been warned previously. (A. 187.) Thus, Lal's testimony hardly shows discretion to set varying levels of discipline.¹⁸

¹⁸ The Company therefore errs in relying (Br. 41-42) on *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 660-61 (2007), where putative supervisor Stripling's authority to discipline stemmed from a manager's repeated statements that if employees refused Stripling's instructions, he was independently empowered to “send them home, write them up, or terminate them.” The Board based its finding of independent judgment squarely on Stripling's unfettered discretion “to impose differing levels of discipline.” *Id.* By contrast, Sanchez, Lal, Martinez, and Torres have no such discretion.

b. The Company abandoned its claim that the four individuals reward employees with overtime; in any event, they do not use independent judgment in communicating about available overtime

The Company's claim (Br. 48-49) that Sanchez, Lal, Martinez, and Torres have supervisory authority to reward employees with overtime is not properly before the Court, because it was abandoned long ago in the underlying representation proceeding. Thus, although the hearing officer concluded, in her post-election report on objections and recommendations, that the Company had failed to show the four individuals possessed authority to reward (A. 657, 666-68), the Company never filed an exception claiming they rewarded employees with overtime. (A. 683-87.) Instead, the Company's exceptions only addressed employee raises. (A. 685-86.) The Company thereby waived its claim of overtime rewards, and so was precluded from raising it in any subsequent request for review of a later decision by the Regional Director. *See* 29 C.F.R. 102.67(d) (request for review of regional director's decision in representation proceeding "may not raise any issue . . . not timely presented to the [regional director]").¹⁹ Moreover, when the Company later filed a request for review of the Regional Director's

¹⁹ Various amendments to the Board's representation-case procedures became effective April 14, 2015. *See* 79 Fed. Reg. 74,308, 74,308 (Dec. 15, 2014). The Addendum to this brief, excerpted from http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf, contains Section 102.67 of the Board's rules and regulations, codified at 29 C.F.R. 102.67, in the form it was effective at all material times in this case.

Supplemental Decision and Certification of Representative, it again failed to argue that the four individuals possessed supervisory authority to reward overtime. (A. 719-52.) The Company thus doubly waived the issue. *See* 29 C.F.R. § 102.67(f) (“[t]he parties may, at any time, waive their right to request review”). Further, it is settled that a party cannot raise, in the technical refusal-to-bargain case, issues that it failed to preserve in the underlying representation proceeding. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *NLRB v. 1199, Nat. Union of Hosp. & Health Care Employees, AFL-CIO*, 824 F.2d 318, 323 (4th Cir. 1987); *Pace Univ. v. NLRB*, 514 F.3d 19, 23-25 (D.C. Cir. 2008).

The Supreme Court has cautioned that “courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Here, the Company failed to preserve the issue of whether the four individuals reward coworkers with overtime at the time appropriate under the Board’s practice. Accordingly, the Company abandoned the issue, and the Court should not entertain it now. *Id.* *See also* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v.*

Cast-A-Stone Products Co., 479 F.2d 396, 397-98 (4th Cir. 1973); *NLRB v. Int'l Health Care, Inc.*, 898 F.2d 501, 504 (6th Cir. 1990).

In any event, the Company failed to carry its burden of proving that Sanchez, Lal, Martinez, and Torres use independent judgment when they communicate with employees about overtime opportunities. First, only a production manager can decide to make overtime available, and if he approves it, the four individuals merely advise employees of the opportunity based on their knowledge of who is available and wants extra hours. Additionally, when employees proactively request extra hours, the four simply respond based on their knowledge of whether overtime is available. If they do not know, they inquire with the production manager and duly relay the response to the requesting employee. (A. 189, 222, 381, 434, 531, 533, 580-81.) Thus, the Company failed to show that the four individuals use independent judgment in communicating with coworkers about overtime opportunities.

c. Torres has no involvement in recommending raises; the other three individuals do not effectively recommend raises using independent judgment

The Company failed to carry its burden of demonstrating that Sanchez, Lal, Martinez, and Torres effectively recommend raises using independent judgment. To begin, it is undisputed (see Br. 44-47) that Torres plays no part in the raise process. With regard to the three others, the Company's claim is defeated by its

failure to prove that their recommendations are effective and involve independent judgment. *See Children's Farm Home*, 324 NLRB 61, 61 (1997) (authority to effectively recommend raises means recommendations are accepted without independent evaluation by superiors, not simply that recommendations are ultimately followed); *Oakwood*, 348 NLRB at 693 (defining independent judgment).

Multiple levels of manager assessment, review, recommendations, and decision-making separate Sanchez, Lal, and Martinez's preliminary recommendations from the raises that employees actually receive. Thus, after the three individuals give Jang their initial input, he formulates his own opinions and recommendations, and then discusses the matter with Vice President Oh, who makes the decisions about raises. Moreover, because the record fails to show how Sanchez, Lal, and Martinez's initial input factors into this multi-level process, the Company cannot sustain its assertion that their recommendations are effective. Critically, the Company failed to show the weight, if any, that managers give to their initial input, and, as noted above, Jang admitted that he independently assesses employee raises, and formulates his own recommendations. *See The Republican*, 2014 WL 3887221 at *7 (effective recommendation generally requires that recommended actions are taken without independent investigation).

The Company stakes its claim (Br. 44-47) that Sanchez, Lal, and Martinez possess supervisory authority to recommended raises on events that purportedly took place in October 2012 and in April 2013. With respect to October 2012, however, the Company relies on nothing more than Jang's conclusory testimony that the Company "accept[ed]" about 90 percent of the recommendations made by the three individuals at that time. (A. 127, 141.) The Company did not enter the purported recommendations into the record, or offer any other evidence about what the recommendations were or the raises that were given. Accordingly, Jang's remark cannot carry the day. *Frenchtown*, 683 F.3d at 307, 309, 312 & 314 (conclusory testimony insufficient to establish supervisory status); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (same).

The Company also failed to present probative, reliable evidence supporting its claim that Sanchez, Lal, and Martinez's April 2013 recommendations (A. 244-45, 651) were effective. Although Jang and Oh testified at the pre-election hearing in April 2013 that they had received those recommendations, they readily admitted, as the Company concedes (Br. 45), that none of the additional steps in the multi-level raise-determination process had been taken at that time. (A. 84-85, 109, 126-27.) Thus, at the pre-election hearing, Jang and Oh could not testify about how

Sanchez, Lal, and Martinez's initial input might have factored into the process.²⁰ Moreover, although the raises had been granted by the time of the post-election hearing in July 2013, the Company declined to recall Jang or Oh. Nor did it establish, at the July hearing, that it followed Sanchez, Lal, and Martinez's April recommendations. To the contrary, if anything, the post-election hearing showed only that in two instances out of three, the Company gave employees a raise that differed from their initial recommendations. (A. 245, 405, 456, 472, 651.) Accordingly, substantial evidence supports the Board's finding that the Company failed to meet its burden of showing that Sanchez, Lal, and Martinez effectively recommend raises.

The Company also failed to establish that the putative supervisors use independent judgment in making recommendations. Only Sanchez testified about the factors he considers, and his claim that he forms individualized assessments is at odds with his April recommendations (the only ones in the record), which proposed an across-the-board raise of 50 cents per hour for all extrusion employees, save those whom Jang had instructed him to exclude. (A. 710; A. 84, 126-27, 141, 182, 244.) Therefore, the limited and conflicting record evidence is

²⁰ Furthermore, while Oh testified in general terms that the Company does not give across-the-board raises (A. 83), an across-the-board raise is exactly what Sanchez recommended for extrusion employees in April 2013. (A. 710; A. 84, 126-27, 141, 182, 244.) Thus, if Oh's testimony is taken as true, it only underscores the Company's failure to show that the initial recommendations are effective.

insufficient to demonstrate that Sanchez, Lal, and Martinez use independent judgment in recommending raises. *See Frenchtown*, 683 F.3d at 315; *The Republican*, 2014 WL 3887221 at *7-*8, *11.

6. The Company’s resort to non-statutory indicia of supervisory authority is unavailing

The Company does not salvage its claim of supervisory status by relying on factors nowhere mentioned in Section 2(11) of the Act—most prominently, the fact that Sanchez, Lal, Martinez, and Torres are at times the highest-ranking employees in the plant, when production managers are absent. (Br. 30-31.) It is well established that such “secondary indicia” of supervisory status are not dispositive where, as here, the asserting party fails to prove authority to perform at least one of Section 2(11)’s enumerated functions with independent judgment. *Frenchtown*, 683 F.3d at 315; *735 Putnam Pike*, 474 F. App’x at 784; *Golden Crest*, 348 NLRB at 730 n.10. The mere fact that the four individuals may be “the highest-ranking employees on-site at a given time” does not “ipso facto ma[k]e them into supervisors simply because of their presence” or relieve the Company of its burden of proving Section 2(11) status. *Frenchtown*, 683 F.3d at 315; *accord 735 Putnam Pike*, 474 F. App’x at 784; *Shaw*, 350 NLRB at 356 n.15; *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047-48 n.13 & n.15 (2003).

St. Mary’s Home and *Glenmark*, cited by the Company (Br. 29, 31), are not to the contrary. The Court in those cases did *not* hold that non-statutory factors

such as being the highest-ranking employee on site can establish Section 2(11) status in the absence of authority to perform at least one statutorily enumerated function. To the contrary, in those cases the Court found that the putative supervisors possessed such authority. *See NLRB v. St. Mary's Home, Inc.*, 690 F.2d at 1067-69; *Glenmark Associates, Inc. v. NLRB*, 147 F.3d at 340-44. Additionally, the Court in *St. Mary's Home*, 690 F.2d at 1068, identified as “[p]erhaps the most significant fact” in its Section 2(11) analysis that the nurse in question rotated with, and had the same duties and authority as, another nurse who was found by the Board to be a supervisor. Here, by contrast, Martinez and Torres rotate their jobs with admitted employees. Moreover, the import that the *Glenmark* court attributed to the nurses being the highest-ranking individuals on site stemmed from their role in evaluating patient health, plainly not an issue here.

In any event, the Company’s arguments regarding non-statutory factors ring hollow on the facts. Its assertion that the four individuals must be supervisors because they are sometimes the highest-ranking people on site is belied by its position (Br. 4-5) that they only became supervisors in October 2012. Thus, according to the Company, it operated its plant for years without requiring supervisors to be present when the production managers were out. (A. 27, 282, 392-93.) Similarly, because Martinez and Torres rotate their jobs with admitted

employees, their departments indisputably operate without supervisors about 50 percent of the time. (A. 31, 33-34, 113, 235, 493, 520-23, 569-70, 587.)

The Company does not further its claim of supervisory status by citing (Br. 30) language differences between the salaried production managers and those who earn an hourly wage. Even if the record showed that any of the four individuals served as interpreters, that would hardly be an indicator of supervisory status. In any event, the record is unclear regarding the communication challenges that exist in the plant. (A. 114, 133, 155, 166-67, 177, 296, 355, 526, 547-52, 562, 572-73, 591-92; Tr. 104.) Jang testified that he communicates with Spanish-speaking employees by using phone translators, calling on employees who speak some English, and using short English sentences and phrases. (A. 114, 133.)

Additionally, there is no evidence that Sanchez, Lal, Martinez, and Torres can communicate with the production managers or other hourly employees any better than most of their coworkers. Oh admitted that when he speaks to Sanchez and Lal in English, they understand him only “[s]ometimes,” and he must use an interpreter if he wants to go into detail. (Tr. 104.)

B. The Board Did Not Abuse Its Discretion in Overruling the Company’s Election Objections

1. Applicable principles and standard of review

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free

choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); accord *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000); *NLRB v. Flambeau Airmold Corp.*, 178 F.3d 705, 707 (4th Cir. 1999); *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 334 (4th Cir. 1987).

Accordingly, the results of a Board-supervised representation election are presumptively valid. *NLRB v. Media Gen. Operations, Inc.*, 360 F.3d 434, 441 (4th Cir. 2004); *Elizabethtown*, 212 F.3d at 262; *Flambeau*, 178 F.3d at 707. “The Board’s conclusion that an election resulted in a fair vote for union representation” must be accorded “great deference.” *Media Gen. Operations*, 360 F.3d at 440-41.

A party seeking to overturn the results of such an election “bears a heavy burden.” *Media Gen. Operations*, 360 F.3d at 441; accord *Elizabethtown*, 212 F.3d at 262; *Flambeau*, 178 F.3d at 708; *NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). The challenging party “must prove by specific evidence not only that campaign improprieties occurred, but also that they prevented a fair election.” *Media Gen. Operations*, 360 F.3d at 441 (quoting *Elizabethtown*, 212 F.3d at 262); accord *Flambeau*, 178 F.3d at 708. The identification of such a degree of interference with employees’ free choice “require[s] a quality and degree of expertise uniquely within the domain of the Board.” *Hydrotherm*, 824 F.2d at 334 (citation and internal quotation omitted). Therefore, a reviewing court may uphold the objecting party’s challenge and

overturn the Board-supervised election “only if the Board has clearly abused its discretion.” *Media Gen. Operations*, 360 F.3d at 441; *accord Elizabethtown*, 212 F.3d at 262.

The Board and this Court have recognized that third-party pre-election conduct—i.e., conduct not attributable to the employer or the union—is accorded lesser weight when assessing the probable impact on an election. *Hydrotherm*, 824 F.2d at 337; *accord Flambeau*, 178 F.3d at 708; *Herbert Halperin*, 826 F.2d at 290. The Board’s test in evaluating such third-party conduct, which includes conduct by statutory employees, is “whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *see also Flambeau*, 178 F.3d at 708 (“an election will be set aside for third-party misconduct ‘only if the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice as to bargaining representative’”) (quoting *Herbert Halperin*, 826 F.2d at 290).

2. The Board acted within its discretion in overruling the Company’s election objections; the four individuals are not supervisors, and their conduct as employees was not objectionable

As shown above pp. 19-51, the Board reasonably concluded that the Company did not prove that Sanchez, Lal, Martinez, and Torres are statutory

supervisors. Accordingly, the Board assessed their conduct under the standard applicable to third parties. (A. 754 n.1.)

The only conduct that the Company targets (Br. 57-60) as objectionable under the third-party standard consists of statements by Lal and Martinez to coworkers suggesting that employees might lose their jobs if they did not support the Union.²¹ It is well settled that such predictions of job loss, conveyed by statutory employees to their coworkers, do not constitute objectionable conduct under the third-party standard. *See Herbert Halperin*, 826 F.2d at 292 (employees' pre-election statements to coworkers predicting job loss for not supporting union did not require a hearing on objections); *Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003); *Bonanza Aluminum Corp.*, 300 NLRB 584, 584 (1990); *Duralam, Inc.*, 284 NLRB 1419, 1419 n.2 (1987). Thus, the Company failed to carry its heavy burden of establishing that the Board "clearly abused its direction" by overruling its objection alleging third-party misconduct. *Media Gen. Operations*, 360 F.3d at 441.

²¹ The Company errs in suggesting (Br. 59) that because the four individuals attended union meetings, it somehow shows the statements about job loss were disseminated to "virtually the entire bargaining unit." The statements were not made at union meetings.

STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of widely accepted Board law governing determinations of supervisory status to facts that are largely undisputed.

Nevertheless, because this Court has not yet squarely considered the issue since the Supreme Court decided *Kentucky River* and the Board issued the *Oakwood* trilogy, the Board believes that oral argument may assist the Court.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
June 2015

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1111
15-1186

Caption: PAC TELL GROUP, INC. V. NLRB

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

- this brief contains 12,887 [state number of] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
- this brief uses a monospaced typeface and contains _____ [state number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 [identify word processing program] in 14-point, Times New Roman [identify font size and type style]; or
- this brief has been prepared in a monospaced typeface using _____ [identify word processing program] in _____ [identify font size and type style].

(s) Linda Dreeben

Attorney for National Labor Relations Board

Dated: June 3, 2015

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PAC TELL GROUP, INC. d/b/a U.S. FIBERS)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1111
)	15-1186
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	10-CA-139779
Respondent/Cross-Petitioner)	
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED-INDUSTRIAL AND SERVICE WORKERS)	
INTERNATIONAL UNION, LOCAL 7898)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1099 14th Street, NW

Washington, DC 20570

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Dated at Washington, DC
this 3rd day of June, 2015

ADDENDUM

The Board's Rules and Regulations

Section 102.67 (29 C.F.R. § 102.67)

Proceedings before the Regional Director; further hearing; briefs; action by the Regional Director; appeals from action by the Regional Director; statement in opposition to appeal; transfer of case to the Board; proceedings before the Board; Board action.

(a) The Regional Director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the Regional Director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause the hearing officer may grant an extension of time not to exceed an additional 14 days. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special leave of the Regional Director.

(b) A decision by the Regional Director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the Regional Director shall be final: *Provided, however,* That within 14 days after service thereof any party may file a request for review with the Board in Washington, D.C. The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the Regional Director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition thereto, which shall be served in accordance with the requirements of paragraph (k) of this section. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) The granting of a request for review shall not stay the Regional Director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs

with the Board. Such briefs may be reproductions of those previously filed with the Regional Director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) In any case in which it appears to the Regional Director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) If any case is transferred to the Board for decision after the parties have filed briefs with the Regional Director, the parties may, within such time after service of the order transferring the case as is fixed by the Regional Director, file with the Board the brief previously filed with the Regional Director. No further briefs shall be permitted except by special permission of the Board. If the case is transferred to the Board before the time expires for the filing of briefs with the Regional Director and before the parties have filed briefs, such briefs shall be filed as set forth above and served in accordance with the requirements of subsection (k) of this section within the time set by the Regional Director. If the order transferring the case is served on the parties during the hearing, the hearing officer may, prior to the close of the hearing and for good cause, grant an extension of the time within which to file a brief with the Board for a period not to exceed an additional 14 days. No reply brief may be filed except upon special leave of the Board.

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the Regional Director, and shall direct a secret ballot of the employees or the appropriate action to be taken on impounded ballots of an election already conducted, dismiss the petition, affirm or reverse the Regional Director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

(k)(1) All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 8-1/2-by 11-inch paper, and shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. Requests for review, including briefs in support thereof;

statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(2) The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. A statement of such service shall be filed with the Board together with the document.

(3) Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed with the Board or the Regional Director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.