

Nos. 15-70329 & 15-70345

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

Nos. 15-70329 & 15-70345

DIRECTV HOLDINGS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 947**

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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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before this Court on the petition of DIRECTV Holdings, LLC,
("DIRECTV") to review, and the cross-application of the National Labor Relations

Board (“the Board”) to enforce, the Board’s Order in *DirectTV U.S. DirectTV Holdings LLC*, 361 NLRB No. 124, 2014 WL 6853886 (Dec. 4, 2014). (EOR 56-61.)¹ This case involves DIRECTV’s refusal to bargain with the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 947 (“the Union”), after DIRECTV’s employees voted in favor of union representation in a Board-conducted election. The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. §§ 151, 160(a). The Board’s Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f).

DIRECTV filed its petition on December 8, 2014,² and the Board filed its cross-application on February 3, 2015. These filings were timely because the NLRA imposes no time limit on the initiation of review or enforcement proceedings. The Union has intervened on behalf of the Board.

The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because the unfair labor practices were committed in California. Because the

¹ Citations are to the Excerpts of Record (“EOR”) filed with DIRECTV’s brief and to the Board’s Supplemental Excerpts of Record (“SER”) filed with the Board’s brief. When a record citation contains a semicolon, references preceding it are to the Board’s findings, and references following it are to the supporting evidence.

² DIRECTV filed its petition in the Sixth Circuit, but the case was later transferred to this Court based on an order from the United States Judicial Panel on Multidistrict Litigation, and was consolidated with a petition for review filed by the Union, which the Union subsequently withdrew.

Board's Order is based on findings made in a representation proceeding, the record in that proceeding (Board Case No. 21-RC-21191), is before the Court pursuant to Section 9(d) of the Act, which provides the Court with jurisdiction to review the Board's actions in the representation case solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *accord Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 550 n.2 (9th Cir. 1997). The Board retains authority to resume processing the representation case in a manner consistent with the Court's rulings. 29 U.S.C. § 159(c); *see also Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF ISSUES

The ultimate issue is whether the Board reasonably found that DIRECTV violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with the Union and provide certain information. DIRECTV admits that it committed these acts. Thus, this case turns on whether substantial evidence supports the Board's findings that DIRECTV failed to meet its burden of proving that its 13 field supervisors have the authority to effectively recommend discipline within the meaning of Section 2(11) of the Act, 29 U.S.C. § 152(11), and therefore are not statutory supervisors who engaged in conduct materially affecting the election.

STATEMENT OF THE CASE

On April 16, 2012, the Board (Chairman Pearce and Members Hayes and Griffin) found that DIRECTV violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which the Board had previously certified as the collective-bargaining representative of field technicians, warehouse employees, dispatchers, and quality control employees at DIRECTV's Rancho Dominguez facility. DIRECTV petitioned this Court for review of that Order, and the Board filed a cross-application for enforcement (Case Nos. 12-72526, 12-72639), which were later consolidated. After briefing but before argument, the Court put this case into abeyance pending the Supreme Court's decision in *NLRB v. Noel Canning*, No. 12-1281.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board in January 2012 were invalid, including the appointment of Member Griffin. Subsequently, this Court granted the parties' requests to vacate the Board's earlier Order and remand the case to the Board for further proceedings consistent with *Noel Canning*.

On December 4, 2014, the Board issued the Decision and Order now before the Court. (EOR 56-61.) The Board found that DIRECTV violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by refusing to provide

certain information to the Union, though it remanded a portion of the case for the Regional Director to make further determinations regarding some of the requests for information. DIRECTV does not dispute that it refused to bargain or provide information, but rather contests only the Board's finding in the representation case that DIRECTV's field supervisors are not supervisors, and therefore did not engage in objectionable pre-petition pro-union conduct. Relevant portions of the factual and procedural history of the case before the Board are set forth below, followed by a summary of the Board's Decision and Order.

I. THE BOARD'S FINDINGS OF FACT

A. DIRECTV's Rancho Dominguez Facility

DIRECTV provides digital television services. It maintains a facility in Rancho Dominguez, California, run, as of May 2010, by Site Manager Mike Schultz. Three operations managers and the human resources department report directly to Schultz. (EOR 44; 66, 74.)

DIRECTV employs approximately 215 employees at the Rancho Dominguez facility, including approximately 150 field technicians, as well as warehouse, dispatch, and quality control employees. (EOR 44; 66.) Field technicians install, upgrade, and repair equipment at customer jobsites and work alone in the field. (EOR 44; 66.) On average, each technician is expected to

complete four jobs daily and is subject to discipline for failing to meet minimum productivity standards. (EOR 45 n.8; 112-13, 136, 160.)

There are 22 designated “field supervisors.” Thirteen lead a team of 10-15 field technicians. The remaining 9, who do not work with teams, handle complex or high-profile jobs.³ (EOR 44; SER 2, 12.)

B. DIRECTV’s Field Supervisors

DIRECTV’s field supervisors receive phone calls from technicians on their team seeking technical assistance, requesting additional equipment, or reporting problems with job assignments. (EOR 44; 138-39.) They monitor the field technicians’ productivity, inspect their vans, conduct weekly meetings, and visit jobsites to review field technicians’ work, point out any errors, and provide hands-on training. (EOR 44; 81,100-01,114, 76-77, 109, SER 10-11, 18.)

Field supervisors may verbally counsel technicians for performance issues or tardiness, which are recorded in “manager notes” that are not reviewed by management or retained in personnel files. (EOR 44; SER 8-9.) If conduct might warrant more than verbal counseling, the field supervisor may complete an Employee Consultation Form (“ECF”), on which the field supervisor describes the

³ DIRECTV no longer contends that these 9 so-called “Field Supervisors without a team” are statutory supervisors. (EOR 45 n.10.)

technician's conduct and suggests an appropriate level of discipline. (EOR 44-45 & n.4; 68, SER 3.)

Field supervisors do not have the authority to issue ECFs directly to technicians, but must submit drafts to management, where they are reviewed by an operations manager, the site manager, and the human resources department. (EOR 44-45; 68, SER 6-7.) At each of the review stages, the reviewer may alter how the ECF was written, change the proposed level of discipline, or decide against issuing the ECF. (EOR 45; SER 4-5, SER 13-14.) At the site manager stage of the process, Schultz reviews the employee's past performance and any prior corrective measures. (EOR 45 n.5, 46; 95.) DIRECTV did not present any evidence regarding the extent or the components of the review conducted by the operations managers or human resources. (EOR 46.)

If DIRECTV decides to issue an ECF that imposes discipline less than suspension or termination, the field supervisor and a witness meet with the employee. (EOR 45; SER 15-16.) The employee may then include his comments on the ECF. (EOR 45; 160.) Finally, the employee, field supervisor, and witness sign the ECF, which is placed in the employee's personnel file. (EOR 45; 76.)

In cases involving possible suspension or termination, the field supervisor must consult with his operations manager before drafting an ECF. (EOR 45 n.6, 47 n.14; 115-16.) Management and human resources consider a technician's

overall performance when deciding whether to approve a recommended termination or suspension. (EOR 45 n.6, 47 n.14; 115-16.) If DIRECTV decides to discharge or suspend the employee, the operations manager, not the field supervisor, runs the meeting in which the ECF is presented and signed. (EOR 45 n.6; 115-16.)

II. THE PROCEEDINGS BELOW

A. The Representation Proceeding

On March 8, 2010, the Union filed with the Board a petition seeking to represent a unit of DIRECTV's field technicians, warehouse employees, dispatchers, and quality control employees at the Rancho Dominguez facility. (EOR 44; SER 19.) The field supervisors were not included in the proposed unit. Pursuant to a stipulated election agreement, a secret-ballot election was conducted on April 16. (EOR 44; SER 20-21.) The tally of ballots showed a union victory, 85-80; there were 2 challenged ballots, which were insufficient to affect the results. (EOR 44; SER 22.)

DIRECTV filed objections to the election, arguing, *inter alia*, that, before the Union filed its petition, the field supervisors—whom DIRECTV contended are statutory supervisors within the meaning of the Act—improperly organized union meetings and solicited and coerced employees to sign union authorization cards

and support the Union. (EOR 44 & n.2; SER 23-25.) The Regional Director ordered a hearing to resolve the objections. (EOR 2.)

After conducting a hearing, the Hearing Officer issued his Report and Recommendations on July 7, 2010, finding that DIRECTV's field supervisors are supervisors within the meaning of the Act. (EOR 1-43.) Although he rejected DIRECTV's arguments that the field supervisors have the authority to assign, adjust grievances, and discipline technicians by issuing undocumented verbal warnings, he found that they effectively recommend discipline and thus are statutory supervisors. (EOR 33.) He found that the nature and extent of the field supervisors' pre-petition, pro-union conduct was objectionable and recommended that the Board sustain the objection, set aside the union's victory, and conduct a second election. (EOR 39.) He found insufficient evidence supporting DIRECTV's other objections. (EOR 40-41.)

The Union filed exceptions to the Hearing Officer's findings that the field supervisors effectively recommend discipline and to the recommendation to set the election aside. (EOR 44.) DIRECTV did not file exceptions to the Hearing Officer's findings that the field supervisors lack other indicia of supervisory authority. (EOR 45 & n.9.)

On December 22, 2011, the Board (Chairman Pearce and Members Becker and Member Hayes, dissenting) issued a Decision and Certification of

Representative finding, contrary to the Hearing Officer, that DIRECTV failed to prove that field supervisors possess statutory supervisory authority. (EOR 44-48.)

The Board found that DIRECTV failed to establish that it accepts field supervisors' disciplinary recommendations without conducting an independent investigation; failed to establish what weight, if any, it gives to those recommendations; and failed to present evidence addressing what impact those recommendations have on an employee's job status or tenure. Having found that DIRECTV failed to meet its burden of proof that the field supervisors' are statutory supervisors, the Board concluded that the field supervisors' pronoun activity did not constitute objectionable conduct. (EOR 44.) Accordingly, the Board overruled DIRECTV's objection and certified the Union as the employees' exclusive collective-bargaining representative. (EOR 44.)

B. The Unfair Labor Practice Proceeding

After the Board issued the Certification of Representative, the Union requested that DIRECTV bargain and furnish it with certain information. DIRECTV refused both requests. Acting on unfair-labor-practice charges filed by the Union, the Acting General Counsel⁴ issued a complaint alleging that DIRECTV's refusals violated Section 8(a)(5) and (1) of the Act. In its answer,

⁴ As the Board explained (EOR 56 n.1), although some actions in this proceeding were taken by the then-Acting General Counsel, this case is currently being litigated by the Board's Senate-confirmed General Counsel.

DIRECTV admitted that it refused to bargain and furnish requested information but maintained that it was not obligated to do so because it contested the Union's certification as the employees' bargaining representative. (EOR 56.) The Acting General Counsel moved for summary judgment and the Board issued a notice to show cause why it should not grant the motion. (EOR 56.) In response, DIRECTV again admitted its refusal to bargain and furnish information but contested both the validity of the certification and the relevance of some of the requested information. (EOR 56.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Hirozawa and Johnson) found that all of the election challenges raised by DIRECTV were or could have been litigated in the prior representation proceeding, and that DIRECTV did not offer to adduce any newly discovered and previously unavailable evidence or allege any special circumstances that would require reexamination of the Board's decision in the representation proceeding. (EOR 56.) Accordingly, the Board found that DIRECTV violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.⁵ (EOR 59.)

⁵ Member Johnson did not participate in the underlying representation proceeding and expresses no opinion whether it was correctly decided. He agreed that the Company presented no new matters that were properly litigable in this unfair labor practice case. (EOR 56 n.2.)

With respect to the Union's request for information, the Board found that there were no factual issues warranting a hearing with respect to most of the items that the Union requested, and that DIRECTV violated Section 8(a)(5) and (1) by refusing to provide nonduplicative information regarding unit employees.

(EOR 56, 59.) The Board found, however, that the Union's request for certain information was not presumptively relevant and accordingly remanded those issues to the Regional Director for further appropriate action. (EOR 57-58.)

The Board ordered DIRECTV to cease and desist from failing and refusing to recognize and bargain with the Union, refusing to furnish the Union with relevant information, and, 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. (EOR 59.) Affirmatively, the Board's Order requires DIRECTV to bargain with the Union on request; furnish the Union with the presumptively relevant information it requested; and post a remedial notice. (EOR 59-60.)

SUMMARY OF ARGUMENT

DIRECTV does not dispute that it refused to bargain with and furnish the Union with relevant information. Rather, it challenges the validity of the Board's certification of the Union, contending that the Board wrongly found that DIRECTV failed to prove that its field supervisors have supervisory authority

within the meaning of the Act. Although the field supervisors are not included in the bargaining unit, DIRECTV maintains that they engaged in prounion conduct before the Union filed its representation petition, and thereby unlawfully interfered with the employees' free choice in the election.

Substantial evidence supports the Board's findings that DIRECTV failed to meet its burden of establishing that field supervisors effectively recommend discipline. DIRECTV did not furnish proof that, at any stage of its three-level review process, it accepted the field supervisors' recommendations without conducting an independent investigation—indeed, it offered almost no evidence about two of them—or otherwise establish what weight, if any, they afford to those recommendations. Additionally, DIRECTV provided no evidence of the impact of a field supervisor's recommendation on an employee's job status or tenure. Because DIRECTV failed to establish that the field supervisors are statutory supervisors, their prounion activity was permissible. As such, DIRECTV's admitted refusal to bargain and to provide the Union with requested information violated Section 8(a)(5) and (1) of the Act.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT DIRECTV VIOLATED SECTION 8(a)(5) AND (1) BY REFUSING TO BARGAIN WITH THE UNION AND REFUSING TO PROVIDE INFORMATION THAT THE UNION REQUESTED

Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), prohibits an employer from refusing to bargain collectively with the representative of its employees. Here, DIRECTV refused to bargain with the Union in order to contest the validity of its certification as the bargaining representative of DIRECTV's employees. The Board reasonably found that DIRECTV failed to meet its burden of proving that the field supervisors possess statutory authority within the meaning of Section 2(11) of the Act. Because they are not statutory supervisors, they were free to engage in prounion activity, and that activity did not interfere with the election. As a result, the Board properly certified the Union as the employees' exclusive bargaining representative and DIRECTV's refusal to bargain and provide the Union with information violated Section 8(a)(5) and (1) of the Act.⁶

⁶ A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1), which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in" Section 7 of the Act." See *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

A. Applicable Principles and Standard of Review

Section 2(3) of the Act, 29 U.S.C. § 152(3), excludes “any individual employed as a supervisor” from the definition of “employee” protected under the Act. Section 2(11) of the Act defines a “supervisor” as:

[A]ny 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.

The Supreme Court has explained that, under this language, “[e]mployees are statutory supervisors if (1) they hold the authority to engage in 1 of the 12 listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001) (internal quotations omitted); *accord Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997).

It is settled that the party asserting that an individual is a supervisor—here, DIRECTV—bears the burden of proving supervisory status. *Kentucky River*, 532 U.S. at 711-12; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). To meet this burden, DIRECTV must support its claim with specific examples based on record evidence. *See Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is

evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”). Conclusory or generalized testimony is insufficient to meet the burden of proof. *See Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *Lynwood Manor*, 350 NLRB 489, 490 (2007). Any lack of evidence in the record will be construed against the party asserting supervisory status. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003); *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n.8 (1999).

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees—such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees”—who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)); *accord Providence Alaska Med. Ctr.*, 121 F.3d at 551. In implementing that congressional intent, the Board, as cautioned by the courts, guards against construing supervisory status too broadly “because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Oakwood Healthcare, Inc.*, 348 NLRB at 688; *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (the Board “must take care to assure that exemptions from NLRA coverage are not so

expansively interpreted as to deny protection to workers the Act was designed to reach”); accord *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981).

On review, the Court recognizes the Board’s “expertise in making the subtle and complex distinctions between supervisors and employees,” and consequently accords the Board’s findings “particularly strong” deference. *Providence Alaska Med. Ctr.*, 121 F.3d at 551 (quotations omitted); *NLRB v. Adrian Belt Co.*, 578 F.2d 1304, 1311 (9th Cir. 1978). This is because the Board is “one of those administrative agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within the field carry the authority of an expertness which courts do not possess and therefore must respect.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord, *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972). As a result, 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.*, 340 U.S. at 488.

A Board finding of nonsupervisory status must be accepted if it is supported by the record and has a reasonable basis in law. See *McDonnell Douglas Corp.*, 655 F.2d at 935. Underlying factual findings are conclusive if supported by

substantial evidence on the record as a whole. *See George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410, 1412 (9th Cir. 1985).

B. DIRECTV Failed to Meet Its Burden of Proving That Field Supervisors Effectively Recommend Discipline

DIRECTV failed to meet its burden of proving its assertion that field supervisors are statutory supervisors that for three reasons. First, it did not prove that it generally accepts field supervisors' disciplinary recommendations without conducting an independent investigation. Second, it did not establish what weight it affords field supervisors' disciplinary recommendations. And, third, it failed to show that field supervisors' ECF recommendations affect job status or tenure. Therefore, the Board reasonably found that DIRECTV did not prove that the field supervisors effectively recommend discipline. Because DIRECTV did not prove that the field supervisors possess any other supervisory indicia under Section 2(11) of the Act, the Board reasonably rejected DIRECTV's arguments that they are statutory supervisors.

1. DIRECTV failed to establish that it accepts a field supervisor's recommendation without conducting an independent investigation

The Board, with approval of several reviewing courts, has consistently applied the principle that to possess authority to effectively recommend generally means that an action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. In *Jochims v. NLRB*, the

court acknowledged that “under Board precedent, . . . authority [to write written reprimands] is not supervisory unless it results in personnel action . . . taken without independent investigation or review by others.” 480 F.3d 1161, 1170 (D.C. Cir. 2007) (internal quotation omitted). Likewise, in *NLRB v. Hilliard Development Corp.*, the court deferred to the Board’s standard that, to effectively recommend reward, there must be a direct correlation between the putative supervisor’s recommendation and the employee’s receipt of the reward without independent investigation, and the court found that substantial evidence supported the Board’s findings that the employer failed to establish either requirement. 187 F.3d 133, 145 (1st Cir. 1999). *Accord Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390, 392 (1989), *enforced*, 933 F.2d 626 (8th Cir. 1991); *PHT, Inc.*, 297 NLRB 228, 234 (1989), *enforced*, 920 F.2d 71, 74 (D.C. Cir. 1990) (*per curiam*). The Board’s interpretation of “effectively recommend” discipline under Section 2(11) is reasonably defensible and therefore entitled to deference. *See Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995); *accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

In light of major gaps in the evidence surrounding the ECF review process, the Board reasonably concluded that DIRECTV did not meet its burden of showing that field supervisors’ effectively recommended discipline without independent investigation. It is undisputed that each ECF drafted by a field supervisor is

subjected to a three-level review process, going first to an operations manager then to the site manager and the human resources department. At the site manager level, the ECFs are subject to an independent investigation. This was made evident by Schultz's testimony (EOR 95) that, in deciding whether or not to approve an ECF, he reviews the employee's past performance and any prior corrective measures and might, for example, look at the employee's file or ask questions about the employee.

The Board stated (EOR 45 & n.11) that, even assuming Schultz's review does not constitute an independent investigation it would not find that field supervisors effectively recommend discipline because DIRECTV failed to produce any evidence regarding what occurs at the other two levels of review—none of the three operations managers testified, nor did anyone from the human resources department, and the record is otherwise silent. The record does reveal, however, that at each stage the reviewer may alter the language of the ECF, change the proposed level of discipline, or decide that the ECF should not be issued. (EOR 45; Tr. 43-44, 180-81.)

In challenging the Board's finding that field supervisors do not effectively recommend discipline, DIRECTV misapprehends the burden of proof. It claims (Br. 43) that the Board, having found that DIRECTV "adduced no evidence" regarding the reviews conducted by the operations managers and human resources

department, assumed that the review was an independent investigation. This is not so. In accordance with the well-established burden allocation, the Board explained (EOR 46) that, in the absence of any evidence addressing those stages of review, the Board could not find that the field supervisors effectively recommend discipline.

DIRECTV claims (Br. 41-42) that because the hearing officer found that no one speaks with the employee before an ECF is issued, and that upper management accepted the field supervisor's "assertion of a violation . . . at face value," it does not conduct independent investigations. But even assuming that DIRECTV does not always speak to an employee before deciding whether to issue an ECF, that simply establishes that upper management accepts the factual assertions in the ECF, not that any recommended discipline was accepted. Indeed, of the 16 ECFs entered into evidence, all involved objective fact reporting: 8 were issued to technicians who failed to meet DIRECTV's productivity standards (an average of three or four jobs per day, depending on the month); 5 were issued to technicians for calling in sick, 2 were issued to technicians who were late to meetings, and the last was issued to a technician because someone called in to complain about his driving. (EOR 46 n.8; 163-78.)

Indeed, it is undisputed that the ECFs—and their recommended discipline—were subject to three levels of review and the reviewer could change the ECF at

each of these levels. Thus, as the Board made clear (EOR 46), even if Site Manager Schultz's review did not constitute an independent investigation, DIRECTV failed to produce any evidence concerning the review conducted by the operations manager and human resources, and thus failed to establish that the field supervisors effectively recommend discipline.

2. DIRECTV failed to establish what weight, if any, it gives to the field supervisors' recommendations

In addition to finding that DIRECTV failed to establish that it does not independently investigate proposed discipline, the Board found (EOR 46) that DIRECTV failed to establish what weight, if any, it gives to the field supervisors' recommendations. Schultz did not testify about the weight given to the recommendations and DIRETV failed to call any of the three operations managers, or anyone from the human resources department, to testify at the hearing. Once again, this failure of proof sets this case apart from those relied on by the DIRECTV in which employers established that putative supervisors' recommendations were given significant weight. *See Caremore, Inc. v. NLRB*, 129 F.3d 365, 369-70 (6th Cir. 1997) (manger testified he gave a lot of weight to disciplinary reports); *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 89 (6th Cir. 1964) (testimony that recommendations were given "great weight"); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004) (reliance on recommendations was "weighty").

Having failed to adduce such evidence, DIRECTV now argues (Br. 37) that, because it followed one of the field supervisors' recommended discipline most of the time, that should be enough to establish that the recommendations are effective. But the Board reasonably rejected this argument (EOR 46 & n.11), which runs afoul of the Board's well-established principle that merely having recommendations "ultimately followed" in many cases does not establish that these recommendations are effective.⁷ *See, e.g., Third Coast Emergency Physicians, P.A.*, 330 NLRB 756, 760 (2000).

The Board's decisions in *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004) and *Venture Industries, Inc.*, 327 NLRB 918, 919 (1999), are not, as DIRECTV maintains (Br. 38-39), to the contrary. In *Mountaineer Park*, the Board found that a manager credibly testified that he had "*a policy* of routinely 'signing off' on the disciplinary recommendations," which "[was] evidenced by the fact that [the manager] received three to five such recommendations from [one of the individuals] and, without conducting *any* sort of investigation, . . . followed her recommendations in *all* cases." 343 NLRB at 1475 (emphasis added). Thus the fact that the manager followed the recommendations each time only served to

⁷ Moreover, DIRECTV presented no specific evidence concerning the extent and frequency that it modifies the ECFs that are not rejected. It is undisputed that those ECFs may be revised at each stage of the three-stage review process and the only field supervisor who testified acknowledged that management will, at times, instruct him to change the ECFs. (SER 4-5, 13-14.)

further support the manager's testimony that he simply "sign[ed] off" on the recommendations. And the Board's decision in *Venture Industries, Inc.*, 327 NLRB at 919, does not establish a numerical, per se rule that recommendations are effective if followed 75 percent of the time. Instead, the Board found that individuals were supervisors because they had the undisputed authority to issue oral or written reprimands, which alone was sufficient to confer supervisory status. Although they also recommended disciplinary actions, which were followed 75 percent of the time, the majority of those recommendations were not subjected to independent investigation. These cases do not establish that the mere frequency with which a recommendation is ultimately followed satisfies the statutory requirement that an individual "effectively recommends" discipline.

DIRECTV also incorrectly insists (Br. 41) that the Board's decision runs afoul of *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003). To the contrary, consistent with its rationale here, the Board in that case found that the individual was a supervisor based on its findings that management did not conduct an independent investigation. *Id.* at 1045. Specifically, the "Deck Lead Supervisor" at issue effectively recommended discipline because he held the authority to either address employee misconduct on his own with a verbal reprimand or recommend discipline that was always followed. *Id.* Moreover, as discussed below, in *Progressive Transportation* unlike here, the employer

established that it followed a progressive discipline policy that included the supervisor's warnings, thus establishing that the putative supervisor's recommendations affected employees' job status. *Id.* at 1046.

3. DIRECTV failed to present evidence addressing what impact a field supervisor's recommendation has on an employee's job status or tenure

Finally, the Board found (EOR 46) that DIRECTV did not meet its burden of producing evidence regarding what impact, if any, the field supervisors' ECFs have on the technicians' job status or tenure. Under the Board's court-approved principle, such evidence is vital to establishing that an individual's disciplinary recommendations are effective:

[T]he issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority.

....

[F]or the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.

Jochims v. NLRB, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (quoting *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989)).

DIRECTV did not introduce any evidence establishing the existence of a progressive disciplinary policy. While the ECF form contains boxes for both suspensions and terminations, this does not, as DIRECTV asserts (Br. 46),

“establish a progressive disciplinary system.” Although the Board found, in *Progressive Transportation Services*, 340 NLRB 1044 (2003), that the format of similar notices supported a finding that the employer maintained a progressive discipline system, the record also included suspension notices issued to employees that referenced prior, lesser disciplinary sanctions. In sharp contrast, here none of the 16 ECFs that DIRECTV entered into evidence—14 “verbal” warnings and 2 written warnings—referenced any prior discipline.⁸ Indeed, as the Board pointed out (EOR 46 n.13), although field supervisor Nick Fernandez issued technician Jose Angulo two ECFs—both verbal warnings (EOR 165, 169)—in a short period of time, the second warning did not reference the first.

DIRECTV’s evidence concerning the field supervisor’s role in suspensions and terminations is likewise insufficient to establish supervisory status. Field supervisor Flores acknowledged (EOR 115) that that field supervisors cannot even draft an ECF recommending suspension or termination without first consulting with an operations manager. Indeed, DIRECTV produced no ECFs documenting either a suspension or termination. Instead, it relied entirely on the testimony of two witnesses, consisting chiefly of conclusory responses to leading questions by

⁸ Although Site Manager Schultz testified (EOR 95) that he considers “[p]ast performance and what corrective measures have been implemented so far” in deciding whether to issue discipline, he failed to explain what impact, if any, prior corrective measures have on his assessment of the proposed ECF, nor did he point to any progressive system of discipline.

counsel, to support its assertion that field supervisors effectively recommend suspensions and terminations.⁹ Neither witness provided any specific example of the role played by a field supervisor in the discharge of an employee or of what procedures or criteria govern the decisions of the operations managers, site manager, or human resources department.¹⁰ This type of generalized testimony, lacking any specific examples of discipline, is insufficient to establish supervisory status. *See G4S Regulated Sec. Solutions*, 362 NLRB No. 134, 2015 WL 3932757, *1-2 (2012); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

⁹ For instance, Schultz offered the following general testimony (EOR 69):

Q BY MR. WOLFLICK [counsel for DIRECTV]: Do field supervisors have any authority with regard to the termination of employees?

A Yes.

Q What is their authority in that regard?

A Recommendation.

Q And have you known field supervisors to make a recommendation to terminate employees?

A Yes.

Q Is that an uncommon thing?

A No.

¹⁰ Additionally, DIRECTV overstates the field supervisors' involvement in this review process by suggesting (Br. 42) that field supervisor Juan Flores testified that he participates in "any discussion" that takes place regarding termination. To the contrary, Flores acknowledged (EOR 125) that he did not know "what level of discussion happens between the operations manager and human resources" concerning potential terminations, though he participates in some discussions between the operations manager and the site manager.

The absence of specific evidence establishing the impact, if any, of ECFs on an employee's job status or tenure, further supports the Board's finding (EOR 47) that DIRECTV failed to establish that field supervisors possess statutory authority to make effective recommendations. As the D.C. Circuit explained, "what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). DIRECTV produced no such tangible examples.

C. DIRECTV's Remaining Arguments Lack Merit

For the first time in this proceeding, DIRECTV attacks (Br. 31-37) the Board's consideration of an independent investigation in assessing supervisory status, arguing that consideration of this factor is "legally erroneous." Under Section 10(e) of the Act, this Court is without jurisdiction to consider this challenge. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, . . . [absent] extraordinary circumstances."); *see also* *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) ("[t]he § 10(e) bar applies even though the Board [dismissed the complaint allegation because the petitioner] could have objected to the Board's decision in a petition for reconsideration or rehearing.") *Accord* *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126-27 (9th Cir. 2011). At

no point did DIRECTV ask the Board to re-examine this factor, or consider the cases it now claims are pertinent. In its answering brief to the Union's exceptions (SER 26-43), DIRECTV did not argue that the Hearing Officer erred by analyzing whether the field supervisors' ECFs were subjected to independent investigation. Nor did it address this issue in a motion for reconsideration after the Board issued its decision. Accordingly, this Court is without jurisdiction to consider these arguments. *See Int'l Union of Painter & Allied Trades, Dist. 15, Local 159 v. J & R Flooring, Inc.*, 656 F.3d 860, 867 (9th Cir. 2011) (holding that Board's decision to reverse employer's win before the administrative law judge did not permit employer to raise challenges in court that it should have first argued to the Board in a motion for reconsideration).

Moreover, the fact that the Board discussed the independent investigation, does not excuse DIRECTV's failure to object to the Board's use and analysis of this consideration. The Supreme Court has explained that 10(e) bars a party from raising an issue in court that it failed to raise before the Board, even if the Board discussed that issue. *Woelke & Romero*, 456 U.S. at 666; *accord Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir.1999) (“[S]ection 10(e) bars review of any issue not presented to the Board, even where the Board has discussed and decided the issue.”); *see also Int'l Union of Painter & Allied Trades, Dist. 15, Local 159*, 656 F.3d at 867 (“the Board should have the first opportunity to apply its labor

relations expertise to address a party's arguments, so that [the court] may have the benefit of the Board's opinion").

In any event, as fully discussed above, the Board reasonably examines this factor in analyzing the employer's proof that the putative supervisor has authority to "effectively recommend" discipline as it demonstrates the limits of the putative supervisor's actions and, as such, the general effectiveness of the recommendation on management.

Notwithstanding DIRECTV's efforts to divert this Court from its failure of proof, the record amply supports the Board's finding that DIRECTV simply failed to prove that the field supervisors "effectively recommend" discipline. As discussed above, it is undisputed that the ECFs are subjected to three levels of review; at each step there may be changes made to the language or the discipline issued, including whether to issue the ECF at all. Indeed, Site Manager Schultz testified that he frequently rejects the field supervisors' recommendations—3 to 5 of the 15 to 20 ECFs submitted each week. And, there was no evidence whatsoever about the other two levels of ECF review, as none of the three operations managers, or anyone from the human resources department, testified about the process. Simply put, DIRECTV's case was insufficient to establish that its field supervisors effectively recommend discipline. *See Elmhurst Extended*

Care Facilities, Inc., 329 NLRB 535, 536 n.8 (1999) (lack of evidence will be construed against the party asserting supervisory status).

DIRECTV also did not provide evidence of a progressive discipline system that would demonstrate that the ECFs “initiated” by the field supervisors had an impact on the employees’ job status or tenure, as demonstrated above (pp. 25-26). Lacking such evidence, the Board reasonably concluded (EOR 52) that DIRECTV failed to meet its burden of proof.

Finally, DIRECTV asserts incorrectly (Br. 48) that the Board erred by not considering any secondary indicia of supervisory authority. In order for secondary indicia to be relevant, a party seeking to establish supervisory status must first prove that the individuals in question possess statutory indicia of supervisory authority. *See NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 531 (9th Cir. 1986). Finding that DIRECTV did not satisfy this standard, the Board reasonably found (EOR 47) any secondary indicia is immaterial.¹¹

In sum, the Board reasonably found that DIRECTV failed to meet its burden of proving that field supervisors are supervisors within the meaning of Section 2(11) of the Act. The field supervisors participation in prounion conduct before

¹¹ Should the Court conclude that the record does not support the Board’s finding that DIRECTV failed to establish that field supervisors effectively recommend discipline, the Board asks the Court to remand the case so that the Board may determine in the first instance whether their conduct before the Union filed its representation petition was objectionable and warrants setting aside the election.

the election was therefore not objectionable. Accordingly, by refusing to bargain with the Union or to furnish relevant information requested by the Union, DIRECTV violated Section 8(a)(5) and (1) of the Act.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying DIRECTV's petition for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Board counsel is unaware of any related cases pending in the Ninth Circuit.

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National Labor Relations Board
July 2015

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

DIRECTV HOLDINGS, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 15-70329
)	15-70345
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	21-CA-071591
Respondent/Cross-Petitioner)	
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO, DISTRICT LODGE 947)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,041 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 22nd day of July, 2015

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)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth 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

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Dated at Washington, DC
this 22nd day of July, 2015

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 15-70329, 15-70345

I, Linda Dreeben, certify that this brief is identical to the version submitted electronically on [date] Jul 22, 2015.

Date Jul 22, 2015

Signature s/ Linda Dreeben
(either manual signature or "s/" plus typed name is acceptable)

STATUTORY ADDENDUM

The following statutory provisions are excerpted below pursuant to FRAP 28(f) and Circuit Rule 28-2.7:

National Labor Relations Act

Section 2(3) (29 U.S.C. § 152(3)).....	1
Section 2(11) (29 U.S.C. § 152(11)).....	1
Section 7 (29 U.S.C. §157).....	2
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2
Section 9(c) (29 U.S.C. § 159(c)).....	2
Section 9(d) (29 U.S.C. § 159(d)).....	4
Section 10(a) (29 U.S.C. § 160(a)).....	4
Section 10(e) (29 U.S.C. § 160(e)).....	4
Section 10(f) (29 U.S.C. § 160(f)).....	5

NATIONAL LABOR RELATIONS ACT

Sec. 2. [§152.] When used in this Act [subchapter]—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(11) The term "supervisor" means 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.

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9 [§ 159.]

(c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being

currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 [29 U.S.C. § 160] [Prevention of Unfair Labor Practices]

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and

shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .