UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
MISSOURI RED QUARRIES, INC.,	)	
	)	
Employer,	)	**Case No. 14-RC-151115**
	)	
and	)	
	)	
EASTERN MISSOURI LABORERS' DISTRICT COUNCIL,	)	
	)	
Petitioner.	)	

REQUEST FOR REVIEW
OF REGIONAL DIRECTOR'S DECISION
AND CERTIFICATION OF REPRESENTATIVE

Missouri Red Quarries, Inc. (hereinafter "the Employer"), by and through its attorney of record, hereby files, pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, this Request for Review of the Regional Director's Decision and Certification of Representative issued on August 5, 2015. The Employer disagrees with the Regional Director's granting of one of the Petitioner's exceptions, and thereby reversing the result of the Hearing Officer's Report on Challenged Ballot (and recommendation).

I. Overview:

At issue in this case is whether the ballot of Steve Johnston, one (1) of ten (10) employees at the Employer's quarry location in Missouri, should be opened and counted, and added to the tally of ballots which currently shows five (5) employees voting for representation by the Petitioner, and four (4) employees voting against representation by the Petitioner. The ballot obviously could be determinative of the election results.

The Petitioner filed the Petition on April 29, 2015. An election was held on May 19, 2015, at which ten (10) employees showed up to vote. Nine (9) employees were allowed

to vote, and the Petitioner challenged the ballot of employee Steve Johnston, claiming that Johnston was a supervisor as defined by the Act, and thereby not allowed to vote in the election.

A Hearing on the challenged ballot was scheduled and held by the Region before Hearing Officer Neale K. Sutcliff on June 8, 2015. The Hearing Officer professionally and competently presided over a nine (9) hour Hearing, involving six (6) witnesses (with some called to testify more than once), relating to Petitioner's challenge of a single ballot. The Hearing Officer then issued a lengthy, logical, and thorough thirteen (13) page Report, explaining in detail her credibility determinations, and appropriately addressing and thoroughly covering and ruling the issues in accordance with Board precedent. Her Report included the following overall findings, which are clearly supported by the Record:[1]

(at p. 1):

> After conducting a hearing and carefully reviewing the evidence as well as the arguments made by the parties, **I conclude that Steve Johnston does not possess the indicia required to be a supervisor as defined by the Act, that Johnston is otherwise employed in the collective-bargaining unit**, and therefore recommend that Petitioner's challenge to his ballot be overruled and the ballot be opened and counted.

(at p. 5):

> The Petitioner challenged the ballot of Steve Johnston on the ground that he is a supervisor within the meaning of Section 2(11) of the Act. **Johnston does not possess the indicia required to be a statutory supervisor; rather, he is a bargaining unit employee who spends the vast majority of his time performing bargaining unit work. Johnston is subject to the same working conditions as all other bargaining unit employees.** After the termination of Laird, Oglesby divided up Laird's duties and bestowed four individuals, including Johnston, with authority to manage the day-to-day operations of the Employer. While Johnston performs duties

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[1] Copies of the Hearing Officer's Report on Challenged Ballot and the Regional Director's Decision and Certification of Representative are attached hereto for the Board's easy reference.

outside of unit work, these duties are managing certain paperwork and being a conduit of information from and to the Ironton quarry.

(at p. 6):

> While the Petitioner averred that it was relying on all 12 indicia to establish Johnston's supervisory status, it presented evidence on only two of the indicia: hire and discipline. The Petitioner's assertions that Johnston is a supervisor under the Act are based primarily on perceived authority and secondary indicia. **Taken together, the asserted possession of the two indicia, the perceived authority, and secondary indicia are insufficient to cloak Johnston in statutory supervisory status.** (Emphasis added.)

Petitioner filed Exceptions to the Hearing Officer's Report. The Regional Director issued his Decision and Certification of Representative on August 5, 2015. In that Decision, the Regional Director affirmed all of the Hearing Officer's rulings made at the Hearing, and affirmed all of the the Hearing Officer's credibility resolutions. (RD Decision, at p. 1). Notwithstanding, and though denying three (3) of Petitioner's four (4) Exceptions, the Regional Director granted one (1) of Petitioner's Exceptions, and thereby reversed the result of the Hearing Officer's Report, and certified the Union. The Employer asserts the Regional Director's Decision should be reviewed by the Board

II. Reasons for Review:

A. Legal Standard for Review –

Section 102.67(d) outlines the grounds for review by the Board as follows:

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

For the reasons outlined below, the Employer asserts that review should be granted by the Board in this case based upon Subsections (1)(ii) and (4) of the Rule.

B. <u>Comparison of the HO's Report and the RD's Decision</u> –

The only basis relied on by the Regional Director for reversing the Hearing Officer's recommendation, and refusing to allow the ballot of Steve Johnston to be opened and counted, is the Regional Director's finding that "Johnston had the independent authority to recommend for hire." (RD Decision, at p. 3).

In this regard, the Hearing Officer found and analyzed as follows (Hearing Officer's Report, at p. 8):

> Oglesby testified that he does the hiring and firing at the Ironton quarry, and the record evidence supports his testimony. The record evidence establishes that all three final hiring decisions were made by Oglesby. As for the only two hires that Johnston was involved in, the record does not reflect whether Johnston made a "recommendation" to Oglesby about whether to hire Horn or Moses, or whether that recommendation required the use of independent judgment, which is the Petitioner's burden to establish. **Johnston merely reporting that he knew the families or the family work of a potential hire does not require the formulation of an opinion through the process of "discerning and comparing data" and does not require the use of independent judgment.** *Oakwood Healthcare*, supra at 693. The power to effectively recommend a hire, as used in Section 2(11), contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. *J.C. Penney Corporation, Inc.*, 347 NLRB 127, 129 (2006). **Johnston's actions were more akin to providing a personal reference to Oglesby about Horn and Manness rather than a recommendation, and thus Johnston provided ministerial participation in the hiring process.** Moreover, even if Johnston made some kind of a recommendation to Oglesby about whether to hire Horn or Moses, there is no record evidence of what Oglesby did with that recommendation. The authority to effectively recommend means that the recommendation was taken without any independent review or investigation by higher management, not that the recommendation was eventually followed. *Children's Farm Home*, 324 NLRB 61 (1997). The Petitioner did not provide the specific circumstances surrounding what other factors, if any, were taken into account when making a particular hiring decision and thus failed to demonstrate the decision was based solely on any recommendation Johnston might have made without any independent review or investigation

> by Oglesby. Therefore, the record fails to reflect Johnston has the authority to effectively recommend on hiring decisions. *Children's Farm Home*, supra; see also *Ten Broeck Commons*, 320 NLRB 806, 813 (1996). (*Italicized* emphasis in original; **bold** emphasis added.)

However, after outlining and analyzing the facts, the Regional Director found the opposite, as follows (RD Decision, at p. 4):

> Accordingly, I find merit to Petitioner's exception that **the evidence in the record establishes that Johnston effectively recommended both Moses and Horn for hire**. This indication of supervisory status is sufficient to conclude that Johnston was a supervisor. (Citation omitted.) (Emphasis added.)

The Employer disagrees.

Bottom line, the Regional Director found that Steve Johnston was a statutory supervisor under the Act, and thereby lost his rights under the Act, simply by, as a trusted employee in a small rural community, telling his employer that he or a co-worker knew the families of two applicants. Such simple and brief references surely do not confer supervisory status on an employee.

C. <u>Departure from Board Precedent</u> –

In requesting review by the Board, the Employer first asserts that the Regional Director's finding is a departure from the following Board precedent:

- In *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Pipe Fitters Local Union No. 195, AFL-CIO*, 237 NLRB 1099 (1978), the Board stated:

> . . . He has made recommendations for the hiring of welders to the Jefferson Chemical Personnel Department by vouching for their character and qualifications, and thereafter they were hired.
>
> . . . The fact that a recommendation for the employment of an applicant is approved out of respect for the judgment of another, rather than because of his delegated authority to

> participate in the hiring process, is also not an indicium of supervisory authority. *Dubin-Haskell Lining Corp. v. N.L.R.B.*, 386 F.2d 306 (C.A. 4, 1967). In testing supervisory authority, the Fifth Circuit pointed out in *N.L.R.B. v. Security Guard Service, Inc.*:
>
> > The statutory words "responsibility to direct" are not weak or jejeune but import active vigor and potential vitality.
>
> One who engages in an isolated incident of supervision is not necessarily a supervisor under the Act. If this were the criterion and the hallmark of supervision then practically all employees would be supervisors. Even the traffic director tells the president of the company where to park his car. *Supra*, 384 F.2d 143, at 147, 149, 151 (1967).

- In *American River Transportation Co.*, 2001 WL 1603863 (2001), reversed on other grounds, 347 NLRB 925 (2006), the ALJ stated (Slip Op., at p. 19):

> Moreover, an individual's influence on hiring decisions is not supervisory in nature unless that influence is based on "delegated authority to participate in the hiring process," and not merely on the employer's respect for the judgment of the individual making the recommendation. *Local Union No. 195*, 237 NLRB 1099, 1102 (1978). **The facts present in this case lead me to conclude that whatever weight was given to referrals made by pilots was based on the Respondent's trust in the pilot's expertise and judgment, not on delegated authority to participate in the hiring process.** The Respondent did not ask its pilots to evaluate applications or to submit evaluations in any systematic way as one would expect if such activities were part of pilots' job duties. **Rather, pilots' involvement was limited to referring candidates about whom they had personal knowledge.** Furthermore, there was no evidence that any pilots were ever informed that they were not performing their duties because they did not refer candidates, or because their referrals were of insufficient number or quality. Based on the evidence in this case, **I conclude that while some pilots referred prospective employees, doing so was not one of their job duties and did not involve the exercise of delegated authority to participate in the hiring process**. (*Italicized* emphasis in original; **bold** emphasis added.)

- In *J.C. Penney Corporation, Inc.*, 347 NLRB 127, 129 (2006), the Board stated:

> . . . The power to effectively recommend a hire, as used in Section 2(11), contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. See id. at 1225 (assistant foreman who interviewed applicants and advised management of the experience of at least one of them did not make hiring decision or effective recommendations to hire, as management also interviewed all applicants and had final hiring authority); *The Door*, 297 NLRB 601, 601-602 (1990) (finding that an employee lacked authority to effectively recommend hire where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with others, in applicant interviews).
>
> No testimony indicated that Pawlak herself made hiring decisions. Ioanna's credited testimony was that Pawlak lacked hiring authority and simply steered applicants through the system and completed their hiring paperwork. . . .

- In *USF Reddaway, Inc.*, 349 NLRB 329, 340 (2007), the Board cited and applied the *J.C. Penney Corp.* case.

Applying such legal reasoning to the facts in this case, the following **factual** findings of the Hearing Officer (and affirmed by the Regional Director) should have resulted in the Regional Director adopting/affirming the Hearing Officer's Report on the issue:

- Johnston testified without contradiction that he spends 90% of his time performing labor in the saw plant and in the quarry and 10% of his time doing other (non-bargaining unit work) duties. (Hearing Officer's Report, at p. 5).

- Johnston punches a time clock, is paid hourly, and has similar hours of work as other bargaining unit employees. (Hearing Officer's Report, at p. 5).

- Johnston is eligible to receive the same attendance bonus, service day program bonus, and safety bonus as can be received by all other bargaining unit employees. (Hearing Officers Report, at p. 5).

- Johnston is eligible to receive [the safety bonus]. (Hearing Officer's Report, at p. 6).

- Johnston testified that he did not directly contact Horn, but that he assumed Beckman did because Horn came to the office. (Hearing Officer's Report, at p. 7).

- Perhaps the most relevant testimony from Horn about his hiring process was on cross-examination when he admitted that he did not know whether Oglesby or Johnston hired him. (Hearing Officer's Report, at p. 7).

- With respect to Mannes, Johnston testified without contradiction that he had no involvement in Manness' [sic] hiring process. (Hearing Officer's Report, at p. 7).

- Oglesby told Johnston to bring Moses in for a drug test and if he passes it to give him a shot. (Hearing Officer's Report, at p. 7).

- Oglesby testified that he does the hiring and firing at the Ironton quarry, and that the record evidence supports his testimony. (Hearing Officer's Report, at p. 8).

In addition, the Employer outlines the following additional testimony of Steve Johnston:

- He did NOT have any independent business discretion to hire people, but, rather, Tom Oglesby made all decisions on hire. (Tr. 181-82).

- There are no qualifications for an applicant to work on the ledge of the quarry, but, rather, it is simply laborer's work. (Tr. 218-19).

Given the above-outlined Board precedent, the confirmed findings of the Hearing Officer, and the additional cited testimony of Steve Johnston, the Regional Director's finding that "Johnston had the independent authority to recommend for hire" is a departure from officially reported Board precedent, and should be reviewed by the Board.

D. **Other Considerations Compelling Review** –

The Employer also asserts the Regional Director's Decision should be reviewed because it violates the Board's long-standing policy of narrowly construing supervisor status, so as not to lightly deprive individuals of their rights and protection under the Act.

As the Hearing Officer outlined in her Report (at p. 2): "The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997)."

Should the Board accept the standard for supervisor status applied by the Regional Director in this case, then virtually all employees of companies who recommend or give a background reference for applicants would be statutory supervisors under the Act. Such a result would obviously not be in accordance with prior Board precedent, and not reasonable for future application, thereby serving as a compelling reason under Section 102.67(d)(4) for the Board to grant review in this case. This very point was made by the Administrative Law Judge in *American River Transportation Co.*, where he stated (2001 WL 1603863 Slip Op., at p. 18): "Something more than an employer's accepting referrals from its workforce, and placing some reliance [on] them, is necessary to constitute a supervisory recommendation. Otherwise an employer's generalized use of word-of-mouth referrals could confer supervisory status on its entire workforce."

For the above-outlined reasons, the Employer respectfully requests that the Board grant review of the Regional Director's Decision, and reverse the Decision and the Regional Director's Certification of Representative.

E. **Errors of RD's Decision Relating to Secondary Indicia**[2] –

After finding a single primary indicia of the supervisor status of Steve Johnston, the Regional Director's Decision cites certain secondary indicia of Johnston's supervisor status. However, the Regional Director makes several errors in addressing such secondary indicia.

First, the Regional Director states (at p. 7): "It is not credible that the facility operates without a supervisor at the facility for all but one day a month." However, the Regional Director did not mention or address the key case on this issue cited to the Hearing Officer by the Employer at the Hearing, *Rochelle Waste Disposal v. National Labor Relations Board*, 673 F.3d 587 (7th Cir. 2012). In that case, the court found that an employee at a municipal landfill whose job title was "landfill supervisor," who spent eighty (80) to ninety (95)% of his day performing manual work, and was one of five (5) permanent employees assigned to the location without any supervisor on premises, was **not** a statutory supervisor under the Act. *See also*, *National Labor Relations Board v. McEver Engineering, Inc.*, 784 F.2d 634 (5th Cir. 1986).

Second, the Regional Director states (at p. 8): "Johnston is the only person at the quarry who has signed and issued disciplinary notices." However, this statement directly contradicts the Regional Director's earlier statements (at pp. 5-6):

- "Prior to the election in May, the evidence in the record fails to show that Johnston ever considered disciplining employees but chose not to do so;"

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[2] Given the Regional Director's finding that "Johnston had the independent authority to recommend for hire" is the only primary indicia of supervisor status relied on by the Regional Director, the Board's reversal of the Regional Director's finding on that issue would require reversal of the ultimate finding of the Regional Director, and reversal of the Regional Director's Certification of Representative.

- "As the hearing officer noted, discipline issued after the election is not relevant to the determination of supervisory status;" and
- "Johnston lacked independent authority to issue discipline."

Further, the Regional Director's reliance on such post-election events violates Board product, as cited by the Hearing Officer. (Hearing Officer's Report, at p. 2). *See Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

Third, the Regional Director stated (at p. 8): "Johnston authorized absences from the quarry." This statement also directly contradicts the Regional Director's earlier statements (at p. 6):

- "The record reflects Johnston did not act on his own authority in instructing the employee to schedule the doctor's appointment; rather, he was instructed to do so by HR representative Kelly Gibson;"
- "There's no other record evidence of Johnston approving requests to leave early, and no record evidence that he can refuse to approve leave requests;" and
- "The Petitioner offers no specific record evidence of Johnston assigning employees or directing employees using independent judgment."

Finally, the Regional Director (at p. 7) states: "Oglesby also testified that there are around 140 employees at the other facilities who report directly to him. This far exceeds other ratios of employees to supervisors that have been found to be credible." However, the undersigned counsel for the Employer objected several times at the Hearing to any evidence regarding the operations and supervisory authority of other quarries owned by Tom Oglesby, in that the only legal entity present before the Board in this case is the

Missouri Red corporation, with its single quarry location at Ironton, Missouri. (Tr. 14-15, 28, 45, 79-80).

The Hearing Officer correctly addressed and ruled that Tom Oglesby is the supervisor of the Employer's quarry. Such finding is clearly supported by the Record, including by Tom Oglesby's direct testimony to such fact (Tr. 16-18), and should have been affirmed by the Regional Director.

F. Summary:

The Hearing Officer, in a very detailed, logical, and thorough fashion, outlined the case, the evidence, and the issues. The Hearing Officer's Report was consistent with the Record, and was consistent with the case law of the Board and courts. Notwithstanding, the Regional Director reversed the result of the Hearing Officer's Report, refused to open and count the ballot of Steve Johnston, and certified the election results.

III. Conclusion:

For the reasons stated above, the Employer respectfully requests that the Board grant review of this case and reverse the Regional Director's Decision and Certification of Representative, and for any other relief the Board deems just and proper.

Respectfully submitted,

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Attorney for the Employer

DATED: This 28th day of August, 2015.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Request for Review of Regional Director's Decision and Certification of Representative** was served upon the following individuals, to-wit:

Regional Director
National Labor Relations Board, Region 14
1222 Spruce St., Rm. 8.302
St. Louis, MO 63103

James I. Singer, Esq.
Christopher N. Grant, Esq.
Schuchat, Cook, & Werner
1221 Locust, 2nd Floor
St. Louis, MO 63103

by electronic filing with the National Labor Relations Board's E-File, and via e-mail, on this 28th day of August, 2015.

/s/ Rick E. Temple
Rick E. Temple

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

MISSOURI RED QUARRIES INC.

Employer

and

Case 14-RC-151115

EASTERN MISSOURI LABORERS' DISTRICT COUNCIL

Petitioner

HEARING OFFICER'S REPORT ON CHALLENGED BALLOT

On May 19, 2015 an agent of Region 14 conducted an election among certain employees of the Employer. However, the parties disagreed about whether an individual is an eligible voter and he voted utilizing the Board's challenged ballot procedure. The subsequent count of the ballots revealed that the challenged ballot was sufficient to affect the results of the election.

The determinative challenged ballot, the party challenging eligibility and the reason for the challenge are as follows:

Steve Johnston	Petitioner	Supervisor

After conducting a hearing and carefully reviewing the evidence as well as the arguments made by the parties, I conclude that Steve Johnston does not possess the indicia required to be a supervisor as defined by the Act, that Johnston is otherwise employed in the collective-bargaining unit, and therefore recommend that Petitioner's challenge to his ballot be overruled and the ballot be opened and counted.

After recounting the procedural history below, I will discuss the applicable burden of proof, and the Employer's operation. Finally, I will discuss Steve Johnston's challenged ballot.

PROCEDURAL HISTORY

The Petitioner filed the petition on April 29, 2015. The parties agreed to the terms of an election and the Region approved their agreement on May 5, 2015. The election was held on May 19, 2015. The employees in the following unit voted on whether they wished to be represented by the Petitioner:

> All full-time and regular part-time production and maintenance employees employed at the Employer's Ironton, Missouri facility, excluding, office clerical and professional employees, guards and supervisors as defined in the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that five ballots were cast for the Petitioner, and that four ballots were cast against representation. According to the tally, there is also one challenged ballot, a sufficient number to affect the outcome of the election. No objections to the election were filed.

The Regional Director for Region 14 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the challenged ballot. I was designated as the hearing officer to conduct the hearing and to make recommendations to the Regional Director on the challenged ballot. I conducted the hearing on June 8, 2015. All parties were afforded an opportunity to present testimony and other relevant evidence.

The order directing hearing in this matter instructed me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of my discussion of the challenged ballot related to the witnesses' testimony.

THE BURDEN OF PROOF

The burden of proof rests on the party seeking to exclude a challenged individual from voting. *Sweetener Supply Corp.*, 349 NLRB 1122 (2007), citing *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). Thus, Petitioner has the burden to establish that the challenged voter is ineligible to vote. Further, because the Petitioner contends that Johnston is a supervisor within the meaning of Section 2(11) of the National Labor Relations Act (the Act), it is the Petitioner's burden to prove supervisory status.

The Petitioner contends that Steve Johnston is a supervisor within the meaning of the Act and that the challenge to his ballot should be sustained. The traditional test for determining supervisory status is: (1) whether the individual has the authority to engage in, or effectively recommend, any 1 of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the individual holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994). The burden of proving supervisory status lies with the party asserting that such status exists. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital - Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, supra at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003); *Michigan Masonic Home*, 332 NLRB 1409 (2000). "[W]henever the evidence is in conflict or otherwise

inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

THE EMPLOYER'S OPERATION

The Employer operates a quarry located in Ironton, Missouri, and is engaged in the production and non-retail sale of granite under the overall management of Tom Oglesby. Oglesby began directly managing the Employer's Ironton quarry after the June 2013 termination of then supervisor, Ronnie Laird.

Oglesby has managerial interests in three other quarries and a manufacturing facility. The Employer is a separate legal entity from the other three quarries and the manufacturing facility. One of the three quarries is located in Mill Creek, Oklahoma. The two remaining quarries and the manufacturing facility are located in Elberton, Georgia, which is where the Employer's principal offices and Oglesby's office are housed. The distance between the Elberton, Georgia office and the Employer is 621 miles.

The Employer began operating its business in 1983. It quarries blocks of granite to manufacture monuments and building stone. The Ironton quarry is located on 400 acres of land, 88 acres of which are permitted for quarry work and dumping. Within the 88 acres, the Employer has three different places, collectively called the Ledge, where the blocks are removed. The Ledge contains four different ledge areas: 1, 2, 4 and 5[1] There is a saw plant on the Employer's premises that contains diamond wire saws used to saw the granite into various widths. There is also an office at the Employer's facility where employee files are maintained along with a telephone, fax machine, and living quarters. Finally, there is a "smoke shack", where the time clock is kept and where employees take breaks. While the operating hours of the quarry are unknown, saws in the saw plant are operational 24 hours a day, seven days a week.

Once the granite has been removed and sawed to the appropriate width, it is transported to the Elberton, Georgia manufacturing plant, Keystone Memorials, to be manufactured for sale. Truck drivers employed by Keystone Memorials transport the granite.

The Employer is subject to the jurisdiction of the Mine Safety and Health Administration (MSHA).

In terms of Oglesby's contact with the Ironton quarry, he testified that, on average, he visits the Ironton quarry about once per month for about a day at a time. Oglesby spends the night in the above-mentioned living quarters during each visit. Oglesby also testified that he and his Human Resource employee, Kelly Gibson, whose office is located in Elberton, Georgia,

[1] The record is silent as to why there is not a Ledge 3.

regularly communicate with individuals at the Employer via phone and fax. Gibson performs Human Resource functions for the three other quarries and the manufacturing facility.

As of the date of the election, the Employer employed 10 individuals. Seven of the ten work on the Ledge and three of the ten work in the saw plant. Those who work on the Ledge are John Beckman, Arthur Casteel, Larry Holbert, Shane Horn, Roy Hughes, Matthew Moore and Donald Wade. Those who work in the saw plant are Stephen Jaycox, Steve Johnston and Jimmy Manness. Only two individuals were identified on the voter list as having a classification: Stephen Jaycox was classified as the Saw Plant Supervisor and Steve Johnston was classified as the Quarry Supervisor.

The Termination of Ronnie Laird

Between approximately 2007 and June 2013, the Employer's employee complement fluctuated between 14, at its peak, and 10, at its floor. These numbers included Ronnie Laird who the Employer admits was a supervisor within the meaning of Section 2(11) of the Act. As of early June 2013 there were 10 individuals employed by the Employer, including Laird.

On Monday, June 3, 2013, Laird was terminated from the Employer. Oglesby credibly testified that a colleague in the quarry business previously suggested that instead of having one person in charge, Oglesby should put a team together and let them be working foremen. Oglesby testified that on June 4, 2013, he met with his employees and designated four employees to be working foremen with equal authority: Larry Holbert, Stephen Jaycox, Steve Johnston, and Matthew Moore. Holbert was assigned to be in charge of the burner and the drill used on the Ledge. Jaycox was assigned to maintain equipment in the saw plant, train employees, and coordinate paperwork associated with Workers' Compensation, Occupational Safety and Health Administration (OSHA) and MSHA. Johnston was assigned to submit payroll information to the Georgia office and mark the size and weight of blocks. Moore was assigned overall charge of the Ledge. Jaycox and Johnston were the only two foremen assigned to do paperwork duties. Johnston and Jaycox were also assigned to escort MSHA representatives on any site visits. Johnston testified that during Oglesby's one meeting held after Laird's departure, Oglesby told employees there would no longer be one supervisor; rather, there would be four lead positions. Johnston did not specify when the meeting was held.

Employee Arthur Casteel testified that two different meetings took place after Laird was terminated, one meeting to announce the departure of Laird and one meeting a couple of months later to break out Laird's former duties to Larry Holbert, Stephen Jaycox, Steve Johnston and Matthew Moore. Casteel testified that right after Laird left, employees answered to Johnston until the second meeting divvying up Laird's former responsibilities. Casteel's testimony substantively matched Oglesby's and Johnston's testimony concerning the subject of how Laird's work would be divided. To the extent Oglesby's and Casteel's testimony conflict on the number of and timing of the meeting(s), I credit Oglesby over Casteel. Oglesby, having taken notes of the meeting contemporaneous with the meeting that were entered into the record, was confident and consistent in his testimony regarding one meeting being held the day after Laird was terminated. Casteel's version of there being two meetings, suggesting that Johnston was solely in charge for a couple of months, was unconvincing. It is more plausible for me to believe

that one meeting would have been held very soon after Laird's termination given the subject matter of the meeting—a major departure from past practice of having one supervisor to having four lead men.

THE CHALLENGE TO STEVE JOHNSTON'S BALLOT

The Petitioner challenged the ballot of Steve Johnston on the ground that he is a supervisor within the meaning of Section 2(11) of the Act. Johnston does not possess the indicia required to be a statutory supervisor; rather, he is a bargaining unit employee who spends the vast majority of his time performing bargaining unit work. Johnston is subject to the same working conditions as all other bargaining unit employees. After the termination of Laird, Oglesby divided up Laird's duties and bestowed four individuals, including Johnston, with authority to manage the day-to-day operations of the Employer. While Johnston performs duties outside of unit work, these duties are managing certain paperwork and being a conduit of information from and to the Ironton quarry.

Johnston's Duties and Working Conditions

Johnston is classified by the Employer as Quarry Supervisor, but Johnston testified he was given the title "Foreman" by Oglesby after Laird left. Johnston has been employed by the Employer for almost five years. Johnston works in the saw plant operating and maintaining the saws that cut the granite brought in from the employees working in the quarry and measuring and marking the granite blocks. Johnston occasionally runs the portable wire saw in the quarry. Bargaining unit members Stephen Jaycox, also designated as a Foreman, and Jimmy Manness work in saw plant operating the saws in the same manner Johnston does. Johnston testified without contradiction that he spends 90% of his time performing labor in the saw plant and in the quarry and 10% of his time doing other (non-bargaining unit work) duties.

Johnston punches a time clock, is paid hourly, and has similar hours of work as other bargaining unit employees. As of the May 19, 2015 election, the wage rates for the six non-foremen range from $10 per hour to $13.45 per hour. The wage rates for the four foremen, Holbert, Jaycox, Johnston and Moore, range from $16.30 per hour to $16.50 per hour with Johnston and Jaycox both making $16.50 per hour. Former supervisor Laird was paid a salary when he was employed by the Employer. While Johnston's normal hours of work are unknown, documentary evidence revealed that Johnston worked a total of 162.5 hours in the month of April 2015. In comparison to other bargaining unit employees for the month of April 2015, the hours of work ranged from 148.5 to 172 with Jaycox working 160 hours and Manness working 153 hours. Johnston testified without contradiction that because the saws in the saw plant run 24 hours a day, he, Jaycox, and Manness take turns working Saturdays and Sundays in the saw plant. Jaycox, Johnston and Manness are each eligible to receive overtime, which can accumulate up to four hours each Saturday and Sunday, to check that the saws are operational.

Johnston is eligible to receive the same attendance bonus, service day program bonus, and safety bonus as can be received by all other bargaining unit employees. The attendance bonus is calculated on a monthly basis. Employees earn 40 cents for every hour worked as long as they are not tardy or have an unexcused absence. The Employer provided uncontested

documentary evidence showing that the seven employees who worked hours in all four weeks in April 2015, including Johnston, received a payout ranging from $59.40 to $68.80 depending on the hours worked. Johnston received a payout of $65.00. Johnston testified without contradiction that all employees receive eight hours of leave or pay for every three years of service, which is called the service day program. Johnston testified that he received said service day bonus upon completion of his three years of service. While Employer witnesses were unable to provide details of how much the safety bonus is or how it is calculated, Oglesby testified without contradiction that Johnston is eligible to receive it.

Johnston's non-bargaining unit duties consist of transmitting employees' time to the Georgia office and checking the answering machine three times a day for any messages. Johnston testified without contradiction that every Monday he gathers the time cards from the smoke shack, makes copies of them, and spends about an hour in the morning filling out a log of employees' hours of work. Johnston further testified that he merely writes on the log each employee's start and end times per day as well as whether there was an excused absence due to a rain day, doctor's excuse, or bereavement. The time cards and the log are then faxed to the Elberton, Georgia office for payroll to be completed. Johnston has a key to the office, which is where the above duties are performed.

Oglesby and Johnston testified without contradiction that Foreman Jaycox also has access to the office and fax machine because he has a key to the office. Oglesby testified that Jaycox has paperwork responsibilities and performs other non-bargaining unit duties. Oglesby testified that Jaycox trains employees about MSHA rules and regulations and other safety issues and maintains the paperwork associated with this training in employees' personnel files as well as forwarding that paperwork to the Georgia office. Oglesby testified that Jaycox also maintains files and paperwork associated with Worker's Compensation issues. Johnston testified that Jaycox is in charge of ordering all the safety equipment for the employees, such as masks, gloves, glasses and hard hats.

Analysis of Johnston's Supervisory Status

While the Petitioner averred that it was relying on all 12 indicia to establish Johnston's supervisory status, it presented evidence on only two of the indicia: hire and discipline. The Petitioner's assertions that Johnston is a supervisor under the Act are based primarily on perceived authority and secondary indicia. Taken together, the asserted possession of the two indicia, the perceived authority, and secondary indicia are insufficient to cloak Johnston in statutory supervisory status.

1. Hire

The Petitioner contends Johnston has the authority to effectively recommend hiring. With respect to hiring, there is no record evidence that Johnston has this authority, nor is there any evidence he participated in the hiring process beyond providing paperwork to hires and relaying personal information about hires to Oglesby.

There are three record examples of hiring that took place after Laird was terminated: First is Shane Horn, whose start date is August 12, 2014, and who was still employed by the Employer on the date of the hearing. Second is Jimmy Manness, whose start date was November 17, 2014, and who was still employed by the Employer on the date of the hearing. Third is Josh Moses, who was hired sometime in 2014 and quit before the date of the hearing. As for Horn, Johnston testified that he has known Horn since Horn was a child. At a date unknown, bargaining unit employee John Beckman told Johnston that Horn was interested in a job. Johnston testified without contradiction that he advised Oglesby what Beckman had said about Horn. Oglesby suggested Horn be brought in based on Beckman's opinions about Horn. Oglesby testified that he told Johnston to bring Horn in and if he passed the drug test, Johnston was to hire him. Johnston testified that he did not directly contact Horn, but that he assumed Beckman did because Horn came to the office. Johnston testified that he showed Horn what paperwork he needed to fill out (W-2 and employee information), which Horn filled out, and advised Horn that he would need to take a drug test. Johnston testified that he faxed every piece of paper Horn filled out to Gibson at the Georgia office. The record is silent as to what, if any, conversations took place between Johnston and Gibson concerning Horn's hiring paperwork.

Horn's testimony matched that of Johnston's regarding Beckman's involvement in getting him to begin work at the Employer. Horn also corroborated Johnston's testimony regarding Johnston knowing his family. Horn further testified that he went to the Employer's office and met with Johnston because that is who he heard he should talk to. It is unknown how or by whom Horn was advised he should speak to Johnston. It is also unknown why Horn was advised he needed to speak to Johnston. Horn stated that he filled out an application and talked to Johnston for no more than 30 minutes about the paperwork and what he would be doing at work. Horn was not a confident witness and admitted on direct that he did not recall what Johnston told him about what he would be doing at work. Horn testified that he took his drug test, passed it, and then went to work the same day. Perhaps the most relevant testimony from Horn about his hiring process was on cross examination when he admitted that he did not know whether Oglesby or Johnston hired him.

With respect to Manness, Johnston testified without contradiction that he had no involvement in Manness' hiring process. According to Johnston, Oglesby was present at the Ironton quarry on the day Manness applied, and Oglesby handled Manness' hiring process without any input from Johnston.

With respect to Moses, Johnston testified that there was an opening on the Ledge after an employee left. Johnston said he thought of then 18-year old Josh Moses because Johnston had gone to school with Moses' parents, and had known Moses as a child. Johnston testified that he told Oglesby about Moses and Moses' family, how he had known Moses grew up on a farm, and that he thought Moses would be a hard worker. Oglesby told Johnston to bring Moses in for a drug test and if he passes it to give him a shot. Moses came in and filled out paperwork, took the drug test, passed it, and went to work the same day. The record is silent as to what, if any, conversations took place between Johnston and Gibson or Johnston and Oglesby concerning Moses' hiring paperwork.

Oglesby testified that he does the hiring and firing at the Ironton quarry, and the record evidence supports his testimony. The record evidence establishes that all three final hiring decisions were made by Oglesby. As for the only two hires that Johnston was involved in, the record does not reflect whether Johnston made a "recommendation" to Oglesby about whether to hire Horn or Moses, or whether that recommendation required the use of independent judgment, which is the Petitioner's burden to establish. Johnston merely reporting that he knew the families or the family work of a potential hire does not require the formulation of an opinion through the process of "discerning and comparing data" and does not require the use of independent judgment. *Oakwood Healthcare*, supra at 693. The power to effectively recommend a hire, as used in Section 2(11), contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. *J.C. Penney Corporation, Inc.*, 347 NLRB 127, 129 (2006). Johnston's actions were more akin to providing a personal reference to Oglesby about Horn and Manness rather than a recommendation, and thus Johnston provided ministerial participation in the hiring process. Moreover, even if Johnston made some kind of a recommendation to Oglesby about whether to hire Horn or Moses, there is no record evidence of what Oglesby did with that recommendation. The authority to effectively recommend means that the recommendation was taken without any independent review or investigation by higher management, not that the recommendation was eventually followed. *Children's Farm Home,* 324 NLRB 61 (1997). The Petitioner did not provide the specific circumstances surrounding what other factors, if any, were taken into account when making a particular hiring decision and thus failed to demonstrate the decision was based solely on any recommendation Johnston might have made without any independent review or investigation by Oglesby. Therefore, the record fails to reflect Johnston has the authority to effectively recommend on hiring decisions. *Children's Farm Home*, supra; see also *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

2. Discipline

The Petitioner contends Johnston has the authority to discipline employees and has done so. With respect to disciplining employees, there is no record evidence that Johnston can issue discipline with independent judgment, nor is there any evidence Johnston disciplined employees prior to or on the day of the election, which was May 19, 2015.

Oglesby testified that no formal written discipline was issued to employees prior to May 29, 2015. With respect to tardiness, Johnston testified that prior to May 29, 2015, Oglesby informed him that Oglesby was noticing that employees were clocking in late and that Johnston should advise them Oglesby is watching the time cards, which Johnston did. Oglesby testified that on May 29, 2015, he faxed a memo to Johnston directing him to write up anyone who comes in late on a triplicate incident report and send him a copy of the write up. Oglesby stated that he directed Johnston to write tardiness on the incident report because that was the only way he knew to keep track of the disciplines.

The Petitioner presented four incident reports of disciplinary notices issued by Johnston. The first is a verbal warning issued to employee Roy Hughes on May 29, 2015 for being tardy. The second is a verbal warning issued to Jimmy Manness on May 29, 2015 for being tardy. The

third is a verbal warning issued to Shane Horn on May 29, 2015 for being tardy. The fourth is a written warning issued to Shane Horn on June 4, 2015 for being tardy. These four incident reports are the only disciplinary records produced and show progressive discipline can be issued. Johnston testified that he thought there may have been an incident report filled out when employee Mike Driemeier was discharged, which was sometime after former supervisor Laird left. There was scant testimony about Driemeier's discharge, but Johnston testified that Driemeier was hurt on the job and refused to take a urine test. The record is silent as to who made the decision to discharge Driemeier and no incident report was entered into the record, if one even exists.

In terms of authority to discipline employees, the record does not reflect any evidence of Johnston having authority to issue disciplinary incident reports prior to May 29, 2015, which is the Petitioner's burden to establish. In fact, Johnston testified that he was not aware he had the authority to issue discipline prior to May 29, 2015. The Board will not find individuals to be supervisors based on authority they have not been notified they had. *Golden Crest Healthcare Center*, 348 NLRB 730 fn. 9. Merely informing employees that a manager is watching time cards, without more, is insufficient to confer supervisory status. As for the disciplinary incident reports Johnston issued for tardiness, they were issued *after* the election, based on Oglesby's direction to Johnston *after* the election that he should issue them, and thus have no probative value upon my analysis concerning Johnston's supervisory status. The Board does not determine voter eligibility based on evidence that occurred after the election[2], and neither will I.

3. Perceived Authority

A large part of the Petitioner's attempts to establish Johnston's supervisory authority was focused on the Employer's handbook as well as testimony from employees Shane Horn and Arthur Casteel on who they believe to be in charge. However, the record evidence established that the handbook issued on the day of the election was a haphazard attempt to codify policies and procedures rather than bestowing statutory supervisory authority upon Johnston; and, employees' perceptions are of little value when faced with the task of conferring a status that will remove someone from the protection of the Act.

Oglesby testified that employees employed at the Georgia quarries and manufacturing facility are subject to a handbook. Oglesby also testified that right before the May 19, 2015 election, Ironton quarry employees asked him what the Employer's policies were and if these policies could be reduced to writing. Oglesby testified that in response, the Employer produced to employees a handbook on the day of the election. Oglesby testified this handbook was similar to the one used at the Georgia facilities he manages, but that the name on the cover page was changed to read the Employer. Oglesby admitted that the only change made to the handbook before issuing it to the Ironton quarry employees was to change the name on the cover. Johnston testified that the handbook was sent to him by fax from Human Resource employee Gibson, and that Gibson directed him to pass a copy out to employees. Gibson further directed Johnston to

[2] *Georgia-Pacific Corp.*, 201 NLRB 831, 832 (1973).

gather employees around a speakerphone so she could discuss the handbook. The record is silent regarding what Gibson told employees about the handbook. Johnston testified that prior to the handbook being issued to Ironton quarry employees, he was not aware of any written policies applicable to the Ironton quarry employees. Johnston also testified that he was never told by Oglesby or Gibson that he is responsible for instituting the handbook or making sure employees comply with the handbook. The Petitioner's attorney examined Oglesby and Johnston at length about the Employer's handbook. A summary of the testimony is all that is required: the words "supervisor" and "company supervision" appear at least 10 times in connection with various policies, such as reporting work related injuries, reporting unsafe acts, and carrying out instructions. At first on direct examination, Oglesby testified that when the words "company supervision" were used, it applied to all four of the foremen. Later on direct examination, Oglesby testified that the four foremen were not "company supervision" When I asked Oglesby to clarify who "company supervision" is, Oglesby testified those words refer to the four foremen. Oglesby also testified that the use of the term "supervisor" was a mistake, because there is no supervisor at the Ironton quarry. I found Oglesby's explanation about the words "supervisor" and "company supervision" to be incredible. It appeared to me that Oglesby made up these conflicting explanations while on the witness stand because he was concerned that the Petitioner's attorney was somehow making a probative point that was contrary to the Employer's position. It is not contradictory that I have credited Oglesby's testimony with respect to the circumstances concerning designating Holbert, Jaycox, Johnston and Moore to be lead men after Laird left as described above and not credited Oglesby's testimony with respect to the handbook. In fact, "nothing is more common in all kinds of judicial decision than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). Oglesby outlined that the Georgia facilities that use the similar handbook have distinct chains of command that are not present at the Ironton quarry, which would explain the use of the words "supervisor" and "company supervision" When the Petitioner's attorney questioned Johnston about the handbook, he had nothing of value to say about it because he had never seen it prior to when it was issued. The record testimony was unclear as to what, if any, of these policies were in force prior to the handbook's issuance on the day of the election. Moreover, there is no record testimony that when the handbook was issued, that Johnston was held out by Employer representatives as the "supervisor" or "company supervision" referred to in the handbook. Overall, I found the handbook line of inquiry to be immaterial to whether Johnston is a statutory supervisor. It was clear no real thought went into issuing the handbook other than to put it in the employees' hands because employees had requested written policies. The handbook was written for facilities that have clear lines of supervision not present at the Ironton quarry and appeared to me to be an attempt to fit a square peg into a round hole. Thus, the Petitioner failed to meet its burden to establish Johnston's supervisory authority with regard to the handbook as the record was devoid of testimony intelligently or clearly establishing what authority the handbook purports to assert Johnston had prior to or on the day of the election, which is the only relevant inquiry. As such, the handbook has no probative value.

As for employee perception, employees Horn and Casteel, who testified for the Petitioner, believe Johnston is in charge. Casteel testified on direct examination that after Laird left, he and other employees answered to Johnston. On cross examination, when pressed about

the basis for that assertion, Casteel admitted no one from Employer management told him that he should answer to Johnston or that Johnston was the supervisor in the same way that Laird was. Moreover, Casteel had no basis to disagree with Johnston's testimony that 90% of his work was manual in nature.

Horn testified that, as far as he knew, Steve Johnston was "the top person" at the Ironton quarry. However, on cross examination Horn admitted that no one ever told him Johnston was in charge, and he just assumed that was the case. Conclusionary statements such as those made by Horn and Casteel, without detailed, specific evidence of Johnston's authority, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, supra; *Avante at Wilson, Inc.*, supra.

4. Secondary Indicia

The Petitioner contends that Johnston is a supervisor because he has the title of supervisor, was designated by the Employer as its authorized representative for the representation proceeding, has a key to the office, approves time cards, approves employee requests for benefits related to the service day program, and has check writing authority. While the Board has examined secondary indicia not set forth in Section 2(11) of the Act, these secondary factors, without more, are insufficient to establish supervisory status. *International Transportation Service, Inc.*, 344 NLRB 279, 285 (2005), enf. denied on other grounds, 449 F.3d 160 (D.C. Cir. 2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000).

The Petitioner asserts that Johnston is a statutory supervisor because he was listed on the voter list as the Quarry Supervisor, he was designated by the Employer as its authorized representative for the representation proceeding, and he signed off on the tally of ballots at the May 19, 2015 election. Oglesby testified that he filled out the Board's Statement of Position in this representation case, which is dated April 30, 2015, and submitted it to the Petitioner and Region 14. Section 9 of the Statement of Position asks the drafter of the document to list in block 9a "The Representative who will accept service of all papers for purposes of the representation proceeding." Oglesby testified he wrote Steve Johnston's name in block 9a. Oglesby testified that he wanted all of the correspondence to be sent to the Ironton quarry office and then have it sent to him in Georgia. When I asked Oglesby why he listed Johnston in block 9a, he testified that it was his understanding that someone at the Ironton quarry had to be designated to receive the paperwork and Johnston has access to the fax machine. When I questioned Oglesby further regarding Jaycox having the same access to the fax machine, and why Jaycox was not listed, Oglesby stated that he could just as easily have listed Jaycox. I find Oglesby's testimony that he could have just as easily named Jaycox as its authorized representative to be self-serving. On the other hand, I find it plausible that Oglesby, being a lay person unfamiliar with Board procedures and not being physically present at the Ironton quarry, would have thought that someone at the Ironton quarry should be designated as the Employer representative. It does not strain credulity to assume Oglesby would designate Johnston, since Johnston is already responsible for managing paperwork related to payroll.

As for the tally of ballots issued on May 19, 2015, Steve Johnston signed on the line designated for the Employer. Johnston testified without contradiction that Human Resource employee Kelly Gibson instructed him to sign the tally of ballots. Johnston's job title and designation as authorized representative for the proceeding are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, supra; *Training School at Vineland,* 332 NLRB 1412, 1416 (2000).

Johnston has a key to the office where the fax machine is. Oglesby and Johnston testified without contradiction that bargaining unit employee Stephen Jaycox also has a key to the office since he is the only other foreman who performs paperwork duties.

With respect to Johnston's forwarding the log of employees' time and timecards to the Georgia office, the Board has consistently held that the authority to verify employees' time is routine and clerical and does not indicate supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 730, fn. 10.

As far as other elements of secondary indicia, such as approving requests for benefits related to the service day program or for leaving early, there is no evidence that Johnston can approve benefits related to service day requests or leaving early with independent judgment.

As mentioned above, bargaining unit employees have a service day benefit. Johnston testified that employees are entitled to take this benefit as time off with pay or receive the benefit as cash. Employees fill out a time off request form to designate which way they want to receive the service day benefit. Johnston testified that employee Ray Hughes filled out a time off request to request his three-day service day award as cash and submitted this form to Johnston along with his timecard. Johnston testified that he signed the form and faxed it to Gibson at the Georgia office. The record is silent as to what, if any, conversations took place between Johnston and Gibson concerning Hughes' request. Johnston did not indicate when Hughes made this request, but Johnston testified that Hughes' request resulted in him writing Hughes a check for $259.59 on May 29, 2015. Such lack of specific evidence of whether Johnston exhibited independent judgment with respect to Hughes' service award request is construed against the Petitioner. *Dean & Deluca New York, Inc.*, supra. Moreover, the Employer provided undisputed documentary evidence that on January 17, 2014 foreman and bargaining unit employee Stephen Jaycox signed on the supervisor line of a time off request form that employee Larry Holbert submitted.

As far as requests to leave early, there is only one record example of an employee requesting to leave early and it relates to bargaining unit employee Matt Moore attending a doctor visit. Employer employees are required to have hearing tests because of the nature of their work in the quarry. Prior to May 29, 2015, Moore had failed his hearing test. At a date unknown, Gibson advised Johnston to tell Moore to set up an appointment with his doctor for a new hearing test. Johnston testified that Moore told him the appointment was set at a time that required him to leave work 15 minutes early. The date of Moore's doctor appointment is unknown. Johnston testified without contradiction that he relayed this information to Gibson who advised him to tell Moore he was allowed to leave work early and that he would not be

docked pay for leaving early. Johnston relayed to Moore that he was allowed to leave early. Assuming Johnston's action in this instance constituted granting time off, simply granting leave, without the discretion to deny such requests, does not require the use of independent judgment and therefore is not supervisory. *Hydro Conduit Corp.*, 254 NLRB 433, 439 (1981). Moreover, there is no record evidence of Johnston making any determination on his own to send employees home or to excuse absences using independent judgment. With respect to absences, Oglesby testified without contradiction that Johnston does not have to bring to Oglesby's attention any absence that is due to rain out, doctor's excuse, or bereavement. Moreover, Oglesby testified without contradiction that there were very few instances of absences that involved issues other than rain out, doctor's excuse, or bereavement after Laird left, and that when it did occur, Johnston would merely notify Oglesby of the issue and Oglesby would make the final determination on whether to grant the absence as excused.

The Petitioner contends that Johnston is a statutory supervisor because he has the authority to write checks on behalf of the Employer. On direct examination by the Petitioner, Oglesby testified that Johnston has the same check-writing authority that former supervisor Laird had, but was unclear about whether Johnston has a dollar limit in writing these checks. Oglesby testified that Johnston, like Laird, would normally advise him or Human Resource employee Kelly Gibson when he writes a check. Despite the unclear testimony about Johnston's authority to write checks, there are only two record examples of Johnston writing a check on behalf of the Employer, both of which occurred after the election. Johnston credibly testified that on May 29, 2015, he wrote one check for $259.59 to employee Roy Hughes for three service days awarded to him and one check for $30.00 to employee Matt Moore to pay for Moore's doctor office visit co-pay mentioned above. Johnston testified without contradiction that Gibson instructed him to write both of those checks. Johnston also testified that he never writes a check unless directed to do so by Gibson. I find the weight of the documentary evidence and Johnston's own testimony to be controlling over Oglesby's vague and non-specific testimony concerning authority levels bestowed upon Johnston. As Johnston wrote both checks after the election, they have no probative value and I will not rely on them in my analysis concerning Johnston's supervisory status. *Georgia-Pacific Corp.*, supra.

CONCLUSION

Based on the foregoing, I recommend that the Petitioner's challenge to the ballot of Steve Johnston be overruled and that his ballot be opened and counted, and that a revised Tally of Ballots issue.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 14 by July 24, 2015. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Region 14, 1222 Spruce Street, Room 8.302, St. Louis, Missouri 63103.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business 4:30 p.m. on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: July 10, 2015

Neale K. Sutcliff, Hearing Officer
NLRB, Region 14

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

MISSOURI RED QUARRIES INC.

Employer

and

Case 14-RC-151115

EASTERN MISSOURI LABORERS' DISTRICT COUNCIL

Petitioner

RECEIVED
AUG 7 2015

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on Tuesday, May 19, 2015 in a unit of the Employer's full-time and regular part-time production and maintenance employees employed at the Employer's Ironton, Missouri facility, excluding office clerical and professional employees, guards, and supervisors as defined in the Act. The tally of ballots showed that of the approximately 10 eligible voters, 5 cast ballots for Petitioner, and 4 cast ballots against representation. There was 1 challenged ballot that was determinative of the results of the election. The Petitioner challenged Steve Johnston as a supervisor within the meaning of the Act.

The parties could not resolve the challenge and a hearing was held on June 8, 2015. The Employer took the position that Johnston was an employee and the Petitioner contended that Johnston was a statutory supervisor. Both parties were fully given an opportunity to present evidence and examine witnesses. On July 10, 2015, the hearing officer issued her Report on Challenged Ballot. She concluded that the Petitioner had failed to carry its burden of establishing that Johnston was a supervisor. Accordingly, she recommended that Petitioner's challenge to Johnston's ballot be overruled and his ballot be opened at counted. On July 24, the Petitioner filed exceptions and a supporting brief contending the hearing officer erred in not finding Johnston to be a supervisor. On July 31, the Employer filed an answering brief to the Petitioner's exceptions arguing in support of the hearing officer's findings that Johnston was not a supervisor.

After careful review of the evidence and the hearing transcript, I conclude that the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1] However, I have considered the evidence and the arguments presented by the parties and, as discussed below, I find that Petitioner carried its burden of establishing that Johnston was

[1] The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). I have carefully examined the record and find no basis for reversing the findings.

a supervisor within the meaning of the Act. I sustain Petitioner's challenge to Johnston's ballot. Accordingly, I am issuing a Certification of Representative.

I. THE CONTENTION OF THE PARTIES

The Employer is in the business of quarrying granite out of its Ironton, Missouri facility. The Employer is owned by Tom Oglesby, who also owns a manufacturing facility in Elberton, Georgia as well as another quarry in Oklahoma and two quarries in Georgia. Oglesby's main office is in Elberton, Georgia. HR representative Kelly Gibson also works from the Elberton facility.

The Employer's Ironton facility has a staff of ten individuals, seven of whom work in the quarrying area with the remaining three working primarily out of a saw plant. The saw plant is in continuous operation so there are individuals at the facility every day through the year. The Ironton facility also has an administrative office with a phone, fax machine, and files.

There is no dispute that there was a supervisor at the facility until June 2013, when the employment of that supervisor was terminated. The Employer contends that after it dismissed the prior supervisor in June 2013, it implemented a decentralized system of having four foremen but no supervisors at the Ironton facility. Two of the foremen, Larry Holbert and Matthew Moore, work in the quarrying area. The other two foreman, Steve Johnston and Stephen Jaycox, work in the saw plant and the administrative office. Only Johnston and Jaycox have keys to the administrative office.

According to the Employer, Oglesby is the supervisor for the facility. Once a week, he has a 10-minute phone conversation with Johnston. No more than once a month, Oglesby travels to the Ironton, Missouri facility for one day and meets with employees for a few minutes. There were no disciplines issued at the facility from the time the previous supervisor was dismissed until the election. Three employees were hired during this time. One was hired directly by Oglesby during one of his visits to the facility. The other two were hired after Johnston called Oglesby to present the candidates. Oglesby did not talk to the new hires in either of these two cases.

II. PETITIONER'S EXCEPTIONS

Section 2(11) of the Act provides 12 primary indicia of supervisory status. Among these are the ability to hire, to discipline, to assign work, and to direct work. An individual who performs any one of these 12 indicia is a supervisor if the task is done with independent judgment and in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001). Further, an individual is a supervisor if he or she can effectively recommend any one of these indicia and those recommendations are followed by management without independent investigation. *Children's Farm Home*, 324 NLRB 61, 65 (1997).

Petitioner filed four exceptions to the Hearing Officer's Report. Petitioner argued that the hearing officer incorrectly failed to: (a) find that Johnston had the independent authority to

recommend for hire without independent investigation by management; (b) credit the Employer's written admissions that Johnston was a supervisor; (c) find that Johnston had the independent authority to issue discipline; and (d) find that Johnston had the independent authority to direct employees and assign work. I sustain Petitioner's exception that the record establishes that Johnston had the independent authority to recommend for hire.

A. *The record establishes that Johnston effectively recommended for hire.*

Credible evidence in the record establishes that Johnston effectively recommended two employees for hire. The ability to recommend for hire entails more than merely screening applicants or making a word of mouth recommendation. *See J.C. Penny Corp.*, 347 NLRB 127, 129 (2006); *Plumbers Local 195*, 237 NLRB 1099, 1102 (1978). The test is to determine the weight that the employer affords to the recommendation and whether the Employer conducts an independent investigation of the recommendation. *See USF Reddaway, Inc.*, 349 NLRB 329, 340 (2007).

Here, the Employer has hired three employees since the prior supervisor was dismissed in June 2013. Of the three, one was hired directly by Oglesby while he was at the facility. The other two employees, Shane Horn and Josh Moses, were hired after speaking to Johnston but without ever speaking to Oglesby. In both cases, Johnston effectively recommended the employees for hire.

Josh Moses was hired at some point in 2014 after a prior employee quit. Johnston testified that he knew Moses' parents and thought that Moses would work hard. Based on his personal appraisal of Moses, Johnston called Oglesby and proposed that he be hired. There is no evidence in the record that Oglesby asked any questions about Moses. As Johnston testified, "I just told him that I went to school with his parents, he's young and needs a job." Based on Johnston's recommendation alone, Oglesby agreed that Moses should be hired to fill this vacancy.

The hiring process for Shane Horn in August 2014 proceeded in an identical manner. An employee named John Beckman mentioned to Johnston that Horn was looking for a job. Johnston had known Horn since he was a child. This provided Johnston with an independent basis to evaluate Horn's suitability apart from Beckmann's endorsement. Johnston called Oglesby to discuss hiring Horn. Oglesby told Johnston to hire Horn if he passed his drug test. There is no evidence in the record that Oglesby asked any questions about Horn's qualifications before hiring him.

In both of these cases, Johnston effectively recommended the employees for hire. Nothing in evidence suggests that Oglesby conducted any sort of independent review of Moses or Horn. Oglesby did not talk to either candidate and there is no evidence of Oglesby questioning Johnston about the candidates' qualifications. Johnston simply put forward both candidates and Oglesby deferred to these recommendations. This is clearly an example of management implementing a recommendation to hire without independently investigating the circumstances. *See USF Reddaway, Inc.*, 349 NLRB at 340.

Moreover, in both cases Johnston's recommendation to hire proved determinative. Johnston recommended Moses on his own accord, so this alone is enough to establish the primary indicia of supervisory status. This finding is only buttressed by Johnston's recommendation to hire Horn. The record is clear that coworker Beckmann originally proposed the idea of hiring Horn to Johnston. However, Johnston had known Horn for many years and Johnston ultimately made the recommendation to hire Horn when he called Oglesby. To the extent that it is argued that Johnston simply relayed Beckmann's recommendation, the evidence in the record does not support such a conclusion. Because Johnston had an independent basis for assessing Horn's readiness to work, similar to the assessment he made of Moses, he was not merely parroting another employee's word-of-mouth recommendation. Instead, it logically follows that Johnston had to make a conscious decision to forward Beckmann's suggestion to Oglesby in light of whatever Johnston knew about Horn. Moreover, while Johnston testified that Oglesby mentioned Beckmann's recommendation when approving the decision to hire Horn,[2] Oglesby's testimony is that he did not specifically name the coworker who made the initial recommendation. Oglesby clearly remembered talking to Johnston about hiring Horn, but when it came time to say who made the initial recommendation, Oglesby testified that Horn was recommended "by another fellow who works in the quarry." Oglesby likely would have mentioned Beckmann's name if Beckmann's recommendation had been the determinative factor in making the hire, which occurred only 10 months before the hearing. This suggests that Oglesby put more weight on Johnston's ultimate recommendation than on the unnamed coworker's original suggestion. Further, even though Beckmann thought Horn would be a good candidate, he did not feel empowered to make a word-of-mouth recommendation directly to Oglesby. Instead, Beckmann gave his recommendation to Johnston, who then made the recommendation to Oglesby. Thus, Johnston's recommendation to hire Horn, not Beckmann's initial suggestion, proved determinative in this case.

Accordingly, I find merit to Petitioner's exception that the evidence in the record establishes that Johnston effectively recommended both Moses and Horn for hire. This indication of supervisory status is sufficient to conclude that Johnston was a supervisor. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. at 712-13.

B. <u>There is insufficient evidence in the record to establish that the Employer made a written admission that Johnston is a supervisor.</u>

Petitioner argues that the hearing officer erred by failing to find that the Employer made a written admission that Johnston is a supervisor. Specifically, Petitioner contends that the Employer listed Johnston as the quarry supervisor on the voter eligibility list. Petitioner further asserts that the employee handbook establishes that Johnston was a supervisor. These arguments are ultimately unavailing.

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[2] Johnston testified that when he called Oglesby about Horn, Oglesby responded, "If John [Beckmann] said that he would be a good worker, have him come in."

Petitioner is correct that the Employer listed Johnston as the quarry supervisor on the voter eligibility list. Job descriptions, job titles, and similar "paper authority," without more, do not demonstrate actual supervisory authority. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). They are, at best, secondary indications of such authority.

Petitioner next argues that the employee handbook, which was issued just before the election and which codified pre-existing rules, establishes that Johnston is a supervisor and is therefore an admission of his supervisory status. First, the handbook itself does not define the terms "supervisor" or "company supervisor", and does not indicate to whom these terms refer at the Ironton facility at issue here. Therefore, there is no specific designation of Johnston as a supervisor in this handbook and therefore no admission that Johnston is a supervisor. Second, even assuming Johnston was specifically designated in the handbook as a "supervisor," that title, alone, does not confer supervisory status. Third, and finally, the handbook sections referred to by the Petitioner do not by themselves establish that Johnston would be exercising independent judgment without review by higher management in carrying out any of the handbook policies. As explained by the Board in *Golden Crest Healthcare Center*, evidence of independent judgment must be detailed and specific. 348 NLRB 727, 731 (2006). It is the Petitioner's burden to present such evidence as the party contending Johnston is a supervisor, and the Petitioner has not met its burden with respect to the handbook items listed in this exception. Thus, I cannot sustain Petitioner's exception that the handbook and other documents constitute a written admission that Johnston was a supervisor.[3]

C. There is insufficient evidence in the record to establish that Johnston had the authority to exercise independent judgment in disciplining employees.

Petitioner next argues that Johnston had the authority to discipline employees. The record shows that no employees were disciplined from the time the previous supervisor was dismissed in June 2013 until the election. Petitioner argues that Johnston had the authority to discipline employees and he exercised his discretion by deciding not to issue any discipline.

Prior to the election in May, the evidence in the record fails to show that Johnston ever considered disciplining employees but chose not to do so. Johnston compiled timesheets that showed whether employees arrived at work on time. He then sent those time sheets to the Elberton, Georgia, office. There was no evidence that Johnston ever considered issuing disciplines prior to the election or that he had the authority to do so if he believed discipline was warranted. The Board will not find individuals to be supervisors based on authority they have not been notified they had. *Golden Crest Healthcare Center,* 348 NLRB 727, 730 fn. 9 (2006). The record reflects no instances in which Johnston refused to turn in time sheets or that he had any discretion in turning in time sheets. The Board has consistently held that the authority to

[3] Petitioner also argues that an adverse inference should be drawn against the Employer for failing to call the human resources representative to testify. Petitioner bore the burden of proving that Johnston was the supervisor. *Barstow Community Hospital*, 352 NLRB 1052, 1052 (2008). Petitioner could have issued a subpoena for the HR representative's testimony if it believed that such testimony was relevant.

verify employees' time cards is routine and clerical and does not indicate supervisory authority. *Golden Crest Healthcare Center*, supra at 732. As the hearing officer noted, discipline issued after the election is not relevant to the determination of supervisory status. Further, as also noted by the hearing officer, the discipline issued by Johnston for tardiness was issued at the specific written instructions of the owner. Thus, Johnston lacked independent authority to issue discipline and I find no merit to this exception.

D. There is insufficient evidence in the record to establish that Johnston had the authority to direct or assign work.

The Petitioner's final exception is that Johnston could direct or assign employees. There is insufficient evidence in the record to find that Johnston could assign or direct the work of employees. The Petitioner claims Johnston instructed an employee to schedule a doctor's appointment after having failed a hearing test, and decided that this employee would be paid for the 15 minutes he had to leave work early to make the requisite doctor's appointment. The record reflects Johnston did not act on his own authority in instructing the employee to schedule the doctor's appointment; rather, he was instructed to do so by HR representative Kelly Gibson. The employee scheduled the appointment and had to leave 15 minutes early to attend the required appointment. The employee did not ask permission but rather advised Johnston he was leaving early to attend the doctor's appointment, and Johnston responded "okay." Even assuming Johnston's actions constitute approval of a request to leave early, the record fails to reflect that this approval was not subject to higher review by management, including Gibson. Further, the limited authority to allow employees to leave early when they are ill, or to attend a doctor's appointment specifically required by the Employer, does not require independent judgment and is insufficient to confer supervisory status. See *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). There is no other record evidence of Johnston approving requests to leave early, and no record evidence that he can refuse to approve leave requests. Automatically granting time off, or approving leave, without the discretion to deny such requests, does not require the use of independent judgment and therefore is not supervisory. *Hydro Conduit Corp.*, 254 NLRB 433, 439 (1981). Lastly, the record evidence is insufficient to establish that this incident occurred prior to the election on May 19. Johnston wrote a check for the co-pay for this doctor's appointment, at Gibson's instruction, on May 29, 10 days after the scheduled election.

The Petitioner offers no specific record evidence of Johnston assigning employees or directing employees using independent judgment. There is no evidence that Johnston assigns employees to a set place or time, or assigns employees significant overall duties, or that he does so exercising independent judgment. Thus, the Petitioner has failed to meet its burden of establishing that Johnston possesses the supervisory authority to assign work using independent judgment as defined by the Board in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Similarly, the Petitioner offered no record evidence of Johnston directing employees to perform work, or doing so using independent judgment. There is no showing that Johnston has the authority to take corrective actions if his directives are not followed, or that Johnston was held accountable for the work performance of other employees or ever advised that he could be held accountable for performance mistakes. The Petitioner has failed to meet is burden of

establishing Johnston possesses the supervisory authority to responsibly assign work. See *Golden Crest Healthcare Center*, 732-733.

Thus, there is insufficient evidence in the record to find that Johnston had the authority to direct or assign employees. Accordingly, I find no merit to Petitioner's exception.

III. SECONDARY INDICIA

As noted above, there was sufficient evidence in the record to find that Johnston effectively recommended individuals for hire, which is one of the primary indicia of supervisory status. Once it has been established that an individual has one of the primary indicia of supervisory status, secondary indicia may then be considered. *See Ken-Crest Services*, 335 NLRB 777 (2001). There are multiple secondary indicia that Johnston is a supervisor.

First, the Employer described Johnston as the "Quarry Supervisor" on the voter list. This was not an isolated incident, as Oglesby submitted a completed statement of position in this case which listed Johnston as the "authorized representative" of the facility, and, on the appendix, listed Johnston as the "Quarry Supervisor." The Employer's designation of Johnston as the "Quarry Supervisor" and its representative at the facility should be given considerable weight as a secondary indicia of his supervisory status. *See Wilshire at Lakewood*, 345 NLRB 1050, 1051 (2005) (noting that title is corroborating evidence of supervisory status), revd. on other grounds by *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

Next, the ratio of employees to supervisors points to Johnston being a supervisor. Oglesby comes to the facility once a month from Sunday afternoon until Monday afternoon. He only meets with the employees for around 15 minutes. If Oglesby is the only supervisor at the facility, the ten employees would operate without contact with a supervisor for the overwhelming majority of time the facility operates. It is not credible that the facility operates without a supervisor at the facility for all but one day a month. See, *Mayrath Co.*, 132 NLRB 1628, 1655 (1961) (affirming ALJ's conclusion that "it is self-evident that even a small plant like Respondent's can operate – regardless of efficiency – only if there is some authority to supervise its activity."). Oglesby also testified that there are around 140 employees at the other facilities who report directly to him. This far exceeds other ratios of employees to supervisors that have been found to be credible. See, *Iron Mountain Forge Corp.*, 278 NLRB 255, 262 (1986) (finding a ratio of sixty employees to one supervisor to be not credible).

Further, no one at the facility is paid more than Johnston, although one employee is paid the same.[4] Johnston's hourly wages are nearly equivalent to the prior supervisor's salary. Higher pay is a secondary indicia of supervisory status. *American River Transportation Co.*, 347 NLRB 925, 927 (2006).

Once a week, Johnston has a brief one-on-one phone call with Oglesby. Johnston also has several phone conversations each week with the human resources representative. Of the other foremen, only Jaycox also has regular calls with Oglesby or Gibson. Since Oglesby is not present at the Ironton quarry the overwhelming majority of the time and Gibson even less so, these calls must go to the operations at the quarry. Participation in regular management meetings is a secondary indicia of supervisory status. *Wilshire at Lakewood*, 345 NLRB at 1051.

Only Johnston and Jaycox have keys to the administrative office at the facility. Possession of limited-access keys is another secondary indication of supervisory status. *Thriftway Supermarket*, 276 NLRB 1450, 1450 (1985).

Coworkers perceived that Johnston was the supervisor. Employee Art Casteel, Jr. testified at the hearing that he believed that all of the employees answered to Johnston. When Shane Horn sought a job, he was under the impression that he needed to go speak to Johnston. Further, when Beckman identified a potential applicant for employment, he also recognized that he needed to make this recommendation through Johnston. Employee perception of Johnston's authority is established by Johnston being the conduit between the Employer's home offices and the employees and communicating employment matters to the employees, as reflected by Johnston gathering the employees and distributing the employee handbook noted earlier to them. Johnston has the authority to sign and issue checks to employees. Johnston is the only person at the quarry who has signed and issued disciplinary notices. Johnston authorized absences from the quarry. Perceived status as a supervisor is a secondary indication of supervisory status. *General Security*, 326 NLRB 312, 317 (1998).

None of these secondary indicia can establish that Johnston is a supervisor. However, when coupled with the primary indicia of his status as a supervisor, all of these secondary indicia present overwhelming evidence that Johnston was in fact a supervisor.

IV. CONCLUSION

Based on the above and having carefully reviewed the entire record, the hearing officer's report and recommendations, and the exceptions and arguments made by Petitioner and the

[4] Johnston's pay is the same as that of foreman Stephen Jaycox. In fact, Johnston and Jaycox share many responsibilities and authorities. Both have keys to the administrative office, complete administrative reports, and have signed time off requests. Jaycox was apparently not challenged by either party during the election. The Employer argues that because Jaycox was not challenged he must be a bargaining-unit member and then argues that Johnston cannot be a supervisor because he shares some of his supervisory indicia with bargaining-unit member Jaycox. The parties' agreement that Jaycox is not a supervisor is not binding because the issue simply was not litigated. *Clark's Stores,* 168 NLRB 273, 274 (1967). There is therefore "no evidentiary basis for using" Jaycox's status "as determinative" of Johnston's status. *Id.*

Employer, I sustain Petitioner's exception to the hearing officer's report and find that Steve Johnston was a supervisor within the meaning of Section 2(11) of the Act. The challenge to his ballot is sustained. Because Johnston could not vote in the election, the tally of ballot stands as five in favor of Petitioner and four votes against. The majority of eligible voters have cast their ballots in favor of Petitioner as their exclusive collective-bargaining agent.

V. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for Eastern Missouri Laborers' District Council, and that it is the exclusive representative of all the employees in the following bargaining unit:

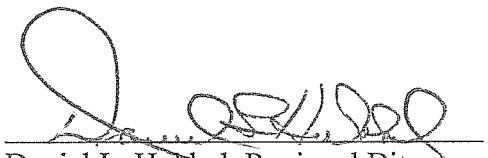
> All full-time and regular part-time production and maintenance employees employed at the Employer's Ironton, Missouri facility, excluding, office clerical and professional employees, guards and supervisors as defined in the Act.

VI. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **August 19, 2015.** If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at St. Louis, Missouri, this 5th day of August, 2015



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