

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**and**

**EASTERN MISSOURI LABORERS' DISTRICT COUNCIL**

**Intervenor**

**v.**

**MISSOURI RED QUARRIES, INC.**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of Missouri Red

Quarries, Inc. (“the Company”) to review, a Board Order issued against the Company on February 1, 2016, and reported at 363 NLRB No. 102.

(A 532-34.)<sup>1</sup> The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”) by refusing to bargain with the Eastern Missouri Laborers’ District Council (“the Union”) as the duly certified collective-bargaining representative of the production and maintenance employees at the Company’s Ironton, Missouri facility. (A 533.) The Board’s Order is final with respect to all parties.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s application for enforcement and the Company’s cross-petition for review are timely, as the Act places no time limitation on such filings. This Court has jurisdiction over these proceedings pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the unfair labor practice occurred in Missouri. The Union has intervened on the side of the Board in this proceeding.

The Board’s Decision and Order is based, in part, on findings made in an underlying representation proceeding, Board Case No. 14-RC-151115. The record

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<sup>1</sup> Record references in this brief are to the Joint Appendix (“A”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

in that representation case is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Warren Unilube, Inc. v. NLRB*, 690 F.3d 969, 973-74 (8th Cir. 2012). The Court may review the Board's actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, *id.* § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

### **STATEMENT OF THE ISSUE PRESENTED**

The ultimate issue before the Court is whether the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified representative of employees at the Company's Ironton, Missouri facility after the Union prevailed in a Board-conducted election. The subsidiary issue is whether the Board properly exercised its discretion in sustaining a challenge to the ballot cast by Quarry Supervisor Johnston based on the Board's finding, which is supported by substantial evidence, that he is a supervisor under Section 2(11) of the Act.

*NLRB v. Chem Fab Corp.*, 691 F.2d 1252 (8th Cir. 1982).

*NLRB v. Joe B. Foods, Inc.*, 953 F.2d 287 (7th Cir. 1992).

*Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

*Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001).

## **STATEMENT OF THE CASE**

In this unfair-labor-practice case, the Board found that the Company unlawfully refused to bargain with the Union as the representative of the production and maintenance employees at the Company's Ironton, Missouri facility. (A 532.) The Company does not dispute that it refused to bargain in order to contest the validity of the Board's certification of the Union in the underlying representation proceeding, where the Board sustained the Union's challenge to the ballot cast by Quarry Supervisor Johnston in the May 19, 2015 election. (*See Br.* 10.) The Board's findings regarding the Company's operations, Johnston's duties and responsibilities, and his recommendations to hire two new employees, as well as the Board's Decision and Order, are summarized below.

### **I. STATEMENT OF RELEVANT FINDINGS OF FACT**

#### **A. The Company's Operations and Staff**

The Company excavates large blocks of granite from a quarry in Ironton, Missouri. (A 438; 23-24.) The quarry is located on 400 acres of land, 88 acres of which are permitted for quarry work and dumping. (A 438; 22.) Within those 88 acres, the Company has three work areas, collectively called "the Ledge," where the blocks are removed. (A 438; 23.) There is also a saw plant for cutting granite

which operates 24 hours a day, 7 days a week. (A 438; 20, 139.) In addition, the Ironton facility has an office with a phone, fax machine, a living quarter, and employee files. (A 438; 138.) Finally, there is a “smoke shack,” where the time clock is housed and employees take breaks. (A 438; 68, 138.) The Ironton facility has a staff of ten individuals. (A 438.)

The Company is owed by Tom Oglesby, who also owns a manufacturing facility in Elberton, Georgia, in addition to three other quarries in Georgia and Oklahoma. (A 438; 20.) The Georgia and Oklahoma facilities employ about 140 workers. Oglesby’s main office is in Elberton, which is 621 miles away from Ironton. (A 438; 20.) A human resources representative, Kelly Gibson, also works from the Elberton office. (A 438; 26, 27.)

Oglesby visits the Ironton facility once every 4 to 6 weeks. (A 438; 19, 235.) He typically arrives on a Sunday evening and spends an evening in the office’s living quarter. (A 438; 22.) When employees arrive on Monday morning, he occasionally meets with them for approximately 10-15 minutes before leaving to return to Georgia. (A 438; 235.)

Until June 2013, the Company’s Ironton facility supervisor was Ronnie Laird. (A 438; 17, 43.) After Laird became ill and was discharged, Oglesby announced a new management structure, where instead of hiring a replacement supervisor, four foremen took on additional leadership responsibilities. (A 438;

17-18.) Two of the foremen, Larry Holbert and Matthew Moore, work in the quarrying area. (A 438; 17-18.) The other two, Steve Johnston and Stephen Jaycox, work in the saw plant and the administrative office. (A 438; 25.) Only Johnston and Jaycox have keys to the Ironton office and do paperwork. (A 438; 25, 56.)<sup>2</sup>

**B. Johnston's Duties and Responsibilities as Quarry Supervisor**

Prior to Laird's termination, Johnston worked in the saw plant at the Ironton facility. (A 438; 137.) As part of the Company's restructuring after Laird's departure, Oglesby assigned Johnston to manage the quarry's payroll paperwork in addition to his regular duties in the saw plant. (A 438; 98-100, 138, 176.) Oglesby also changed Johnston's title to "foreman" and "quarry supervisor," and told the employees to bring any issues or problems they had to Johnston, so that they understood he was a supervisor. (A 443; 137, 152, 175, 222, 234.) Additionally, Oglesby gave Johnston a \$4 per hour raise, bringing his income to the level previously earned by Laird, so that it exceeded the amount earned by all other quarry workers except Jaycox. (A 444; 178.)

In managing the payroll paperwork, Johnston compiles timesheets from the smoke shack once a week, makes copies of them, completes an hours log, and sends the timesheets to the Elbertson office for processing. (A 59, 61, 68, 144.)

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<sup>2</sup> Jaycox's status was not challenged or litigated before the Board. (A 444 n.4.)

For the log, he writes in the times employees come and leave, and makes a notation of whether any absence was excused. (A 70-71.)

Johnston has phone conversations with Oglesby once a week about the quarry's operations. (A 444; 198.) In addition, Johnston speaks with human resources representative Gibson several times a week. (A 444; 198-99.) Johnston also checks the answering machine several times throughout the day, primarily to learn if any of the workers called to inform the Company they would be late or absent. (A 55-58.) Johnston also has check writing authority, signs incident reports for all quarry employees, and handles any citations that Laird formerly processed. (A 444; 62-63, 65, 186-87.)

### **C. Johnston Recommends Hiring Two New Employees**

After Laird's departure, Johnston proposed hiring two new employees. In both instances, Johnston informed Oglesby of his desire to hire the employee and Oglesby approved the hiring without speaking to the candidate.

First, in August 2014, Johnston recommended to Oglesby that the Company hire Shane Horn. Johnston learned about Horn's interest in a job from employee John Beckman, who recognized that he needed to bring the matter to Johnston's attention. (A 439; 115, 152.) Johnston had known Horn since he was a child, and based on his assessment of Horn's readiness for work, called Oglesby to obtain approval to hire him. (A 439; 43, 115, 152, 154.) Without asking questions about

Horn, Oglesby told Johnston to hire Horn if he passed a drug test, a standard procedure for all new hires. (A 439; 152, 155.) Horn came to meet with Johnston about the job, and Johnston told him to fill out the necessary paperwork, which Johnston then faxed to Gibson. (A 439; 115, 152-53, 155.) Johnston met with Horn for approximately 30 minutes before Horn left to take the drug test. (A 223.) After receiving the test results, Johnston told Horn he was hired. (A 439; 49, 153, 155, 173, 224.) Prior to being hired, Horn did not speak with Oglesby. (A 439; 48-49.) At the time of the hearing, Horn had only spoken to Oglesby once. (A 224.)

Second, in late 2014, the Company hired Josh Moses in a similar manner. Johnston, who had known Moses' parents for years, learned Moses was looking for work and felt he would "work hard" because of his family background and experience growing up working on a farm. (A 439; 157, 212, 215, 219-20.) Based on Johnston's assessment of Moses, and without asking questions about Moses or speaking to him, Oglesby approved Johnston's recommendation that the Company hire him. (A 439; 213, 215.)

## II. PROCEDURAL HISTORY

### A. The Board's Representation Proceeding

On April 29, 2015, the Union filed a petition with the Board seeking to represent the production and maintenance employees at the quarry. (A 391.) Pursuant to a stipulated election agreement entered into by the parties, the Board conducted a secret-ballot election on May 19, 2015. (A 391.) The employees voted in favor of union representation by a margin of 5 to 4, with the Union challenging the ballot cast by one voter, Quarry Supervisor Johnston, on the ground that he was a supervisor under Section 2(11) of the Act and thus excluded from the bargaining unit and ineligible to vote in the election. (A 392.) His challenged ballot was sufficient to affect the election outcome because, if it was opened and his vote was found to be cast against the Union, the final tally would be 5 to 5 tie, and there would not be a majority vote for union representation. (A 392.)

The Board's Regional Director directed that a hearing be held to adduce evidence on the challenge. (A 392.) On June 8, 2015, a hearing officer held a hearing and on July 10, issued her report, finding that Johnston was not a supervisor under Section 2(11) of the Act. (A 391-404.) Accordingly, the hearing officer recommended that the Board overrule the Union's challenge to his ballot and the ballot be opened and counted. (A 403.) Thereafter, the Union filed with

the Regional Director exceptions to the hearing officer's recommended decision. (A 405-424.) On August 5, the Regional Director issued a Decision and Certification of Representative, disagreeing with the hearing officer's legal conclusion, and finding that the Union carried its burden of establishing that Johnston was a supervisor under Section 2(11) of the Act. (A 437-45.) The Regional Director thus sustained the challenge to Johnston's ballot and certified the Union. (A 445.) On August 28, the Company filed with the Board a request for review of the Regional Director's decision, which the Board denied on November 18. (A 450-85, 506.)

#### **B. The Board's Unfair-Labor-Practice Proceeding**

Following its certification as the employees' collective-bargaining representative, the Union requested that the Company bargain, but the Company refused. (A 532.) Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act. (A 532; 508-16.) The Company filed an answer admitting its refusal, but contesting the Board's decision to certify the Union after sustaining the challenge to Johnston's ballot. (A 532; 517-20.)

On December 21, the General Counsel filed a motion for summary judgment with the Board, and the Board issued a notice to show cause why the motion

should not be granted. (A 532; 521-28.) The Company filed a response in which it reiterated its position with respect to the underlying certification. (A 532; 529-31.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On February 1, 2016, the Board (Chairman Pearce and Members Hirozawa and McFerran) granted the General Counsel's motion for summary judgment, and found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §158(a)(5) and (1)) by refusing to bargain with the Union. (A 532-34.) The Board found that all representation issues raised by the Company were or could have been raised in the representation proceeding, and that the Company neither offered to adduce newly discovered evidence or previously unavailable evidence nor alleged any special circumstance that would require the Board to reexamine the decision made in the representation case. (A 532.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A 533.) Affirmatively, the Order requires the Company to bargain with the Union upon request, to embody an understanding reached in a signed agreement, and to post copies of a remedial notice. (A 533.)

## SUMMARY OF ARGUMENT

The Board acted within its discretion in sustaining the Union's challenge to Quarry Supervisor Johnston's ballot based on the finding, which is supported by substantial evidence, that he is a supervisor within the meaning of Section 2(11) of the Act because he exercises authority using independent judgment to effectively recommend the hiring of employees. His supervisory status required his exclusion from the unit of voting employees and precluded the ballot he cast in the election from being counted. Excluding his ballot, the Union prevailed in the election by a vote of 5 to 4. Accordingly, the Board properly certified the Union as the employees' collective-bargaining representative, and found that the Company violated Section 8(a)(5) and (1) of the Act by admittedly refusing to bargain.

Substantial evidence supports the Board's finding that Johnston is a statutory supervisor because he exercises independent judgment in effectively recommending employees for hire. Indeed, the Company hired two employees based solely on his recommendation, and without conducting any independent investigation or even speaking with them. Thus, his hiring recommendations were effective. They also involved the exercise of independent judgment, as he based them on his independent assessment of the individuals' fitness for quarry work. The Company primarily argues that Johnston's role in the hiring process is limited to screening applicants, but as the Board explained, his role goes well beyond that.

The remainder of the Company's challenges should also be rejected, as they amount to little more than an unpersuasive attempt to argue that the Board's finding of Section 2(11) status contradicts cases that determined this very fact-intensive question under different circumstances.

### STANDARD OF REVIEW

In reviewing the Board's certification of a union, the Court's role is limited to determining whether the Board acted within the "wide degree of discretion" entrusted to it by Congress for resolving questions arising during the course of representation proceedings. *NLRB v. A.J. Tower*, 329 U.S. 324, 330 (1946). The scope of judicial review, therefore, is "extremely limited." *Timisco Inc. v. NLRB*, 819 F.2d 1173, 1176 (D.C. Cir. 1987). *Accord Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 261 (8th Cir. 1993).

The Board's discretion in representation proceedings extends to its disposition of challenged ballots. In reviewing that issue, courts "will uphold a Board's exercise of discretion unless its action is unreasonable, arbitrary or unsupported by the evidence," and "must therefore uphold a Board decision if it is rational and in accord with past precedent." *Desert Hosp. v. NLRB*, 91 F.3d 187, 191 (D.C. Cir. 1972) (internal citation and quotation marks omitted). *See also Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997) (the Court will not overturn a Board decision to certify a union absent abuse of discretion.)

On the issue of supervisory status, the Board's determinations are fact-intensive questions that fall within the Board's special expertise of applying the statutory framework of the Act to "the infinite gradations of authority within a particular industry." *NLRB v. Broyhill*, 514 F.2d 655, 658 (8th Cir. 1975) (citing *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)). The Board will therefore be afforded "a large measure of informed discretion." *NLRB v. Chem. Fab Corp.*, 691 F.2d 1252, 1256 (8th Cir. 1982); *Iowa Elec. Light and Power Co. v. NLRB*, 717 F.2d 433, 437 (8th Cir. 1983) ("[w]e do not consider that it is our role to draw the [supervisory status] line; that is the role of the NLRB"). For this reason, the Board's factual findings and its application of the law to those facts are conclusive if they are supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951); *NLRB v. St. Clair Die Casting*, 423 F.3d 843, 848-49 (8th Cir. 2005).

Finally, "[a] reviewing court may not displace the Board's choice between two fairly conflicting views" in a particular case, "even though the court would justifiably have made a different choice had the matters been before it de novo." *NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1313 (8th Cir. 1981). *Accord Securitas Critical Infrastructure Servs., Inc. v. NLRB*, \_\_\_ F.3d \_\_\_, 2016 WL 1161220, at \*3 (8th Cir. Mar. 24, 2016); *Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268, 271 (8th Cir. 1984). Rather, the Board's decision "may be

supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quotation marks and citation omitted).

## ARGUMENT

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

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees . . . .” 29 U.S.C. § 158(a)(5).<sup>3</sup> Here, the Company admits that it refused to bargain with the Union, but contends that the Board erred in certifying the Union because it incorrectly determined that Quarry Supervisor Johnston is a supervisor under the Act. *See Warren Unilube*, 690 F.3d at 973 (“[A]n employer may obtain judicial review of the Board’s certification decision by refusing to bargain and defending the ensuing unfair labor practice charge on the ground that the election was flawed.”). *See also Greyhound Corp.*, 376 U.S. at 477; *NLRB v. Superior of Mo., Inc.*, 233 F.3d 547, 550 (8th Cir. 2000). If substantial evidence supports the Board’s finding that he is a statutory supervisor, then the Board did not abuse its

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<sup>3</sup> An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . .” 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

discretion in sustaining the Union's challenge to his ballot, the Board's finding that the Company violated Section 8(a)(5) and (1) must be upheld, and its Order is entitled to enforcement. *A.J. Tower Co.*, 329 U.S. at 330; *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998).

### **A. Applicable Principles**

Section 2(3) of the Act excludes "any individual employed as a supervisor" from the statutory definition of "employee." 29 U.S.C. § 152(3). In turn, Section 2(11) of the Act defines the term "supervisor" as:

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

*Id.* § 152(11). Because the statutory definition is written in the disjunctive, it is settled that an individual who has the authority to use independent judgment in the execution of any one of the 12 statutory functions listed in Section 2(11) is a statutory supervisor. *See NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (supervisor is one who has authority to engage in any one of the enumerated functions, if the exercise of such authority is "not of a merely routine or clerical nature, but requires the use of independent judgment") (citations

omitted). *Accord Beverly Enters.*, 148 F.3d at 1045 (“if the employee has any one of the enumerated functions, he satisfies the . . . definition”).

Moreover, the Act “does not require the exercise of supervisory power, merely the existence of the power.” *Waverly–Cedar Falls Health Care Ctr., Inc. v. NLRB*, 933 F.2d 626, 629 (8th Cir. 1991) (citing *NLRB v. Harmon Indus.*, 565 F.2d 1047, 1049 (8th Cir.1977)). Indeed, “the relevant consideration is effective recommendation or control rather than final authority.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 683 n.17 (1980). *See also Beverly Enters.*, 148 F.3d at 1045 (“the actual exercise of the enumerated power is irrelevant so long as the authority to do so is present”).

Specifically, it is well-settled that an individual who exercises independent judgment in effectively recommending the hiring of employees is a statutory supervisor. *Donaldson Bros.*, 341 NLRB 958, 959 (2004); *Venture Indus.*, 327 NLRB 918, 919 (1999). *See also NLRB v. Prime Energy Ltd. P’ship*, 244 F.3d 206, 212 (3d Cir. 2000) (individual who “had substantial influence in [a] hiring decision” was a supervisor). The party alleging supervisory status has the burden of establishing its existence. *St. Clair Die Casting*, 423 F.3d at 848-49.

To be sure, as the Company notes (Br. 21-22), the Board construes Section 2(11) narrowly so as to avoid disenfranchising employees from participating in the election and collective bargaining process. Nevertheless, the Board must take care

not to construe Section 2(11) too narrowly lest it fail to give effect to the statutory language and the Act's underlying policy of differentiating between persons vested with supervisory authority and employees vested with Section 7 rights. This is because supervisors owe a duty of loyalty to their employer that is inconsistent with their possession of Section 7 rights. *See NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 581 (1994). Moreover, employees with Section 7 rights are entitled to protection against supervisors interfering with or dominating their organizational and bargaining rights. *See NLRB v. Metro. Life Ins. Co.*, 405 F.2d 1169, 1178 (2d Cir. 1968) ("The exclusion of supervisors from the protections of the Act and from bargaining units was designed . . . to protect employees from supervisor influence within the union's organization").

**B. Substantial Evidence Supports the Board's Finding that Johnston Is a Statutory Supervisor**

The credited record evidence amply supports the Board's finding (A. 438) that Johnston is a statutory supervisor because he exercises independent judgment in effectively recommending the hiring of employees. Accordingly, the Board did not abuse its discretion in sustaining a challenge to his determinative ballot and certifying the Union.

As the Board emphasized, Johnston played a pivotal role in the hiring of two employees. (A 439-40.) Thus, it is undisputed that Shane Horn and Josh Moses were hired immediately after they met with Johnston, and that Oglesby never even

spoke with them or asked Johnston any questions about them. Regarding Horn, Johnston decided to call Oglesby about hiring him after he learned that Horn—whom Johnston had known for years—was looking for a job. Johnston based his recommendation on his independent assessment of Horn’s readiness for work. (A 440.) In response to Johnston’s call, Oglesby did not ask him any questions about Horn. Instead, he simply told Johnston to “have him come in,” fill out required paperwork, and take a drug test. Accordingly, Johnston met with Horn for about 30 minutes, and when his drug test results arrived, Johnston told Horn to start work the same day.<sup>4</sup> (A 152-56, 223.) Johnston then faxed Horn’s paperwork to the Company’s human resources representative, Gibson. He had no further discussions with her or Oglesby about hiring Horn. (A 155-56.)

Employee Moses was hired in a similar way. Johnston learned that Moses, a child of Johnston’s former classmates, was looking for a job. (A 157.) Johnston told Oglesby that Moses had grown up on a farm and that he believed Moses would be “a hard worker.” (A 214, 219-20.) The following day, the Company hired Moses. (A 216.) Thus, the Company hired him based solely on Johnston’s

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<sup>4</sup> Contrary to the Company’s claim (Br. 18), Johnston was not simply relaying a recommendation from employee Beckmann to hire Horn. As the Board found, “[b]ecause 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.” (A 440.)

personal appraisal of Moses' capabilities, and the hiring recommendation that Johnston made to Oglesby. Oglesby did not independently evaluate Moses' qualifications. (A 439-40.)

Moreover, Johnston's recommendations to hire Horn and Moses were not only effective, they "proved determinative," as the Board noted. (A 440.) Thus, as the Board found, "[t]his is clearly an example of management implementing a recommendation to hire without independently investigating the circumstances." (A 439.) Far from conducting any independent review of the candidates, Oglesby did not even talk to either candidate prior to their hire. Instead, as the Board found, "Johnston simply put forward both candidates and Oglesby deferred to these recommendations."<sup>5</sup> (A 439.)

On these facts, the Board was well warranted in finding that Johnston made effective hiring recommendations. Moreover, ample precedent supports the Board's finding. Thus, in *USF Reddaway, Inc.*, 349 NLRB 329, 340 (2007), the Board found that an individual made effective hiring recommendations where no independent investigation followed his recommendation. Similarly, in *Donaldson Brothers*, 341 NLRB 958, 962 (2004), the Board found that an individual made effective hiring recommendations because he alone reviewed candidates and

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<sup>5</sup> By contrast, the Company rejected employee Art Casteel's request not to hire an applicant because of a personal conflict, and hired him anyway. (A 156, 236.)

recommended hiring, and in *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001), the Board found that an individual made effective hiring recommendations because he hired an employee before upper management met the candidate. *See also Detroit Coll. of Bus.*, 296 NLRB 318, 319 (1989) (individual's power to recommend hiring, subject to dean's approval, established supervisory status). Those cases, like the instant one, are distinguishable from cases cited by the Company (Br. 17), such as *J.C. Penney Corporation*, 347 NLRB 127, 128-129 (2006), where the Board found that a training supervisor did not effectively recommend hiring because the applicants he "recommended" were subsequently interviewed by other managers who had hiring authority.

Finally, Johnston's recommendations required independent judgment. As the Board explained in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006), assessing an applicant's experience, ability, and character involves the exercise of independent judgment. Here, Johnston alone met with the applicants, and he used independent judgment in assessing their qualifications based on his personal knowledge of their background, character, and work ethic. In that respect, this case is similar to *Fred Meyer Alaska*, 334 NLRB at 648-49, where the Board found that meat and seafood managers exercised independent judgment in making effective hiring recommendations "based on their own assessments of what skills

are needed and whether the individuals they are considering hiring have the appropriate skills or qualifications.”

In sum, based on all of this evidence, the Board was warranted in finding that Johnston had the authority to make effective hiring recommendations, and used independent judgment in doing so. *See, e.g., NLRB v. Prime Energy Ltd. P’ship*, 244 F.3d 206, 212 (3d Cir. 2000) (individual who “had substantial influence in [a] hiring decision” was a supervisor); *NLRB v. Joe B. Foods, Inc.*, 953 F.2d 287, 296 (7th Cir. 1992) (supervisory status found where manager met with applicants and his recommendation was accepted by a higher management official); *Peoples Serv. Drug Stores, Inc. v. NLRB*, 375 F.2d 551, 554 (6th Cir. 1967) (supervisory status found where food managers “interview applicants for jobs” and their “recommendations are generally followed” by higher management).

### **C. Ample Secondary Indicia Supports the Board’s Finding**

As the Board noted, the record contains secondary indicia that support a finding of supervisory status even though they do not establish any of the powers enumerated in Section 2(11). *Pony Express Courier Corp. v. NLRB*, 981 F.2d 358, 365 (8th Cir. 1992); *Harmon Indus.*, 565 F.2d at 1051. For example, the ratio of employees to supervisors supports the Board’s finding that Johnston is a supervisor. *See Schnuck Markets v. NLRB*, 961 F.2d 700, 706 (8th Cir. 1992) (“courts are often aided by calculating the resulting mix of supervisors to non-

supervisory workers”). Without Johnston, around 150 employees would report directly to Oglesby. As the Board observed, “[t]his far exceeds other ratios of employees to supervisors that have been found to be credible.” (A 443 (citing *Iron Mountain Forge Corp.*, 278 NLRB 255, 263 (1986) (finding a ratio of 1 supervisor to 60 employees was not believable)).

Moreover, Oglesby’s primary office is located 621 miles away from the Ironton facility. As a result, he visits the facility only once every 4 to 6 weeks and speaks with employees for just a few minutes during each visit. If Oglesby was the only supervisor, the Ironton facility would operate without supervisory contact nearly all of the time. As the Board found (A 443), “it is not credible that the facility operates without a supervisor at the facility for all but one day a month.” *See James E. Matthews & Co. v. NLRB*, 354 F.2d 432, 435 (8th Cir. 1965) (if foremen were not supervisors, employees would be unsupervised); *Laser Tool Inc.*, 320 NLRB 105, 108 (1995) (if individual was not a supervisor, employees would be “unsupervised and an open, operating plant with an inventory of costly machinery and tools would be functioning on weekends and on regular occasions during the week with no onsite supervision”).

Moreover, the Company listed Johnston as the “quarry supervisor” on the voter eligibility list and in a position statement submitted to the Board. (A 443; 26, 32-33, 147-48.) In addition, the Company identified him as its “authorized

representative” for the election. (A 443; 32, 147-48.) Thus, the Company held Johnston out as a supervisor. *See Great Am. Prods.*, 312 NLRB 962, 962 (1993) (leadman held out by management as supervisor); *Aurora & East Denver Trash Disposal*, 218 NLRB 1, 10 (1975) (owner’s statement that individual was a supervisor supports finding of supervisory status).

Under the circumstances, it is not surprising that unit employees regarded Johnston as having authority comparable to their former supervisor, Laird. That perception is a further factor supporting the Board’s supervisory finding. *See NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 531 (7th Cir. 1986) (perception of supervisory status is a “secondary” indicator of supervisory status properly recognized by the Board.); *D&T Limousine Serv., Inc.*, 328 NLRB 769 (1999) (fact that employees regard individual as a supervisor secondary indicia of supervisory status).

Finally, Johnston also regularly participated in management meetings with Oglesby and the Company’s human resource representative; he has keys to the office; he signs checks; he is the only person at the facility authorized to issue disciplinary notices; and no one earns more than he does. *See Am. Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 896-97 (7th Cir. 1981) (participation in management meeting an indication of supervisory status); *Starwood Hotels*, 350 NLRB1114 (2007) (secondary indicia of “supervisor” title, attending management

meetings, signing documents); *Donaldson Bros.*, 341 NLRB at 962 (higher pay with access to office indicators of supervisory status).

**D. The Company's Challenges to the Board's Findings Are Without Merit**

The Company primarily seeks to unsettle the Board's reasonable finding that Johnston is a statutory supervisor by claiming (Br. 13), essentially, that his hiring recommendations were inconsequential and that he merely provided personal references for candidates. As shown above, however, substantial evidence supports the Board's contrary finding. Moreover, the Company gains no ground by noting (Br. 13-14) that the Board's Regional Director drew different legal conclusions from those proposed by the attorney who sat as a hearing officer. This case turns on facts that are largely undisputed; credibility is not an issue. And it is settled that "the substantial evidence standard is not modified in any way" where the Board disagrees with the legal conclusions recommended by the hearing examiner. *NLRB v. Pacific Intermountain Exp. Co.*, 228 F.2d 170, 172 (8th Cir. 1955) (quoting *Universal Camera Corp.*, 340 U.S. at 496). *Accord Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 n.4 (D.C. Cir. 2011) ("in the end it is the Board that is entrusted by Congress with the responsibility for making findings under the statute") (internal quotation and citation omitted).

The Company also contends (Br. 15-25) that the Board's ruling here departs from precedent, but in making that claim it relies on wholly inapposite cases. To

begin, the Company erroneously relies (Br. 15-16, 22-23) on cases that predate pivotal developments in the law concerning supervisory status. Thus, the Company cites *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700 (8th Cir. 1992), but fails to note that the ruling issued nearly a decade before *Kentucky River*, where the Supreme Court rejected the Board's interpretation of the statutory term "independent judgment" as it applied to nurses. Following *Kentucky River*, the Board abandoned its distinctive analysis of nurses' supervisory status and revisited the issue more broadly in *Oakwood*, 348 NLRB 686 (2006), and two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). In the *Oakwood* trilogy, the Board clarified and refined its interpretation of "independent judgment" and other statutory terms not at issue here, and made them applicable to all categories of workers.

In these circumstances, the Company errs in relying on pre-*Kentucky River* and pre-*Oakwood* decisions like *Schnuck*, which critiqued perceived faults in a bygone era of Board decision-making. It is settled that a "court's prior judicial construction of [the] statute trumps [the agency's] construction . . . only if the prior court decision holds that its construction follows from the unambiguous terms of the statute." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). This Court has never held that the pertinent terms of Section 2(11) are unambiguous.

Moreover, *Schnuck* is factually distinguishable. The ability to effectively recommend hiring was not at issue there. *Schnuck*, 961 F.2d at 706 (individual in question had authority to effectively discipline, transfer, and discharge employees).<sup>6</sup>

Nor does the Company help itself by reciting (Br. 15-17) a litany of cases where the Board found that a party failed to meet its burden of proving supervisory status. As noted above pp. 15-18, the inquiry is highly fact-specific. Thus, it is of no moment that in other cases the Board has found, on different facts, a failure to establish Section 2(11) status.

For this reason, the Company errs in relying (Br. 15-16) on cases like *Local 195*, 237 NLRB 1099 (1978), a ruling that merely illustrates the fact-specific nature of the Board's inquiry. There, the Board found that a welder was not a supervisor even though he occasionally recommended former students for employment because the evidence failed to show that his recommendations were effective. *Local 195*, 237 NLRB at 1102. By contrast, here Johnston's role in the hiring process was more extensive and qualitatively different from that played by the welder in *Local 195*. As demonstrated above, Johnston's recommendations

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<sup>6</sup> *PacTell Group, Inc. v. NLRB*, 817 F.3d 85 (4th Cir. 2016), another case mistakenly relied upon by the Company (Br. 24-25), is likewise distinguishable. In *PacTell*, the Fourth Circuit upheld the Board's findings regarding authority to assign work, evaluate employees, discipline them, and responsibly direct them. *Id.* at 91-95. The Court did not address authority to effectively recommend hiring.

included his assessment of the applicants' work ethic and ability to do the job. Moreover, Johnston alone met with potential hires, and the Company did not conduct an independent investigation or even speak to the candidates. Thus, ample evidence supports the Board's finding that not only did Johnston have the authority to effectively recommend; he had, in fact, effectively recommended the hiring of two employees. This concrete evidence strongly supports the Board's finding of supervisory status. *Cf. Securitas Critical Infrastructure Servs.*, 2016 WL 1161220, at \*4 (upholding Board finding that individual lacked supervisory status given the absence of specific examples).

Finally, the Company does not help itself by mistakenly relying (Br. 16-17, 22) on the administrative law judge's recommended ruling in *American River Transportation Co.*, slip op. at 18, 2001 WL 1603863 (NLRB Div. of Judges March 1, 2001), where he concluded that individuals were not supervisors because their involvement in the hiring process was "limited to referring candidates about whom they had personal knowledge." The Company fails to note that the Board did not adopt the judge's recommended finding. Instead, the Board found—contrary to the judge—that the individuals were supervisors because they responsibly directed and assigned work to employees. In so ruling, the Board

explicitly found it “unnecessary to pass on” the judge’s analysis and findings concerning effective recommendation of hiring. 347 NLRB 925, 925 n.3 (2006).<sup>7</sup>

In sum, substantial evidence supports the Board’s finding that Johnston had sufficient independent judgment in effectively recommending the hiring of employees to make him a supervisor under the Act. It follows that the Board properly sustained the challenge to his ballot and certified the Union as the employees’ collective-bargaining representative. Accordingly, the Company violated the Act by refusing to bargain with the Union and the Board’s Order is entitled to enforcement.

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<sup>7</sup> In any event, contrary to the Company’s suggestion (Br. 22), there is no inconsistency between the instant case and others cited by the judge, where he noted that recommendations for hire are effective and involve independent judgment if “management is prepared to implement the recommendation without an independent investigation of the relevant circumstances.” *Am. River Transp.*, slip op. at 18, 2001 WL 1603863 (internal quotation and citation omitted). Such is the case here.

## CONCLUSION

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

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National Labor Relations Board

May 2016

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

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 16-1450
	*	16-1682
and	*	
	*	
EASTERN MISSOURI LABORERS’ DISTRICT COUNCIL	*	Board Case No.
	*	14-CA-165057
	*	
Intervenor	*	
	*	
v.	*	
	*	
MISSOURI RED QUARRIES, INC.	*	
	*	
Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,660 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 16th day of May, 2016

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

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	*	
Intervenor	*	
	*	
v.	*	
	*	
MISSOURI RED QUARRIES, INC.	*	
	*	
Respondent/Cross-Petitioner	*	
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 16, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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Dated at Washington, DC  
this 16th day of May, 2016