

**Nos. 17-1124 & 17-1148**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MATSON TERMINALS, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MATSON TERMINALS INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 17-1124 & 17-1148
	)	
v.	)	Board Case No.
	)	20-CA-187970
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties, Intervenors, and Amici:** Matson Terminals, Inc. (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Hawaii Teamsters & Allied Workers Union, Local 996 (“the Union”), was the charging party before the Board. The Board’s General Counsel was also a party before the Board.

**B. Ruling Under Review:** This case is before the Court on the Company’s petition for review and the Board’s cross-application for enforcement of a Decision and Order issued by the Board on April 7, 2017, which is reported at 365 NLRB No. 56.

**C. Related Cases:** This case has not previously been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, DC  
this 1st day of November 2017

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## **GLOSSARY**

A.	Deferred Appendix
Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	Opening brief filed by Matson Terminals, Inc.
Company	Matson Terminals, Inc.
Employees	Employees classified as Supervisors and Senior Supervisors, employed by Matson Terminals, Inc. on the Island of Hawaii
Local 142	International Longshore and Warehouse Union, Local 142, AFL-CIO
Union	Hawaii Teamsters & Allied Workers Union, Local 996

**UNITED STATES COURT OF APPEALS  
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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR  
ENFORCEMENT OF AN ORDER OF  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Matson Terminals, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against the Company on April 7, 2017, which is reported at 365 NLRB No. 56. (A. 1-3.) The Board found that the Company unlawfully refused to recognize and bargain with Hawaii

Teamsters & Allied Workers Union, Local 996 (“the Union”), as the duly certified collective-bargaining representative of employees the Company classifies as Supervisors and Senior Supervisors (“the Employees”) at its operations on the Island of Hawaii. (A. 2.)

The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 et seq. (“the Act”). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of Board orders may be filed in this Court, and that the Board may then cross-apply for enforcement. The Board’s Order is final with respect to all parties. The Company’s May 1, 2017 petition for review and the Board’s June 6, 2017 cross-application for enforcement are timely, as the Act places no time limit on those filings.

Because the Board’s Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding, Case No. 20-RC-173297, is also before the Court under Section 9(d) of the Act, 29 U.S.C. § 159(d). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board’s actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board’s

unfair-labor-practice order in whole or in part. The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

### **RELEVANT STATUTORY PROVISIONS**

The addendum to the Company's brief includes all relevant statutory provisions.

### **STATEMENT OF THE ISSUE**

The issue before the Court is whether substantial evidence supports the Board's finding that the Company failed to meet its burden of proving its claim that the employees it classifies as Supervisors and Senior Supervisors are supervisors under Section 2(11) of the Act. If so, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union those individual selected to represent them.

### **STATEMENT OF THE CASE**

In the underlying representation case, the Board found that the Company failed to prove its claim that the Employees are supervisors. After the Employees voted for union representation, the Board certified the Union as their bargaining representative. The Company refused to bargain to seek court review of the certification, and the Board found (A. 2) that the Company's refusal violated

Section 8(a)(5) and (1) of the Act. The relevant factual and procedural background and the Board's conclusions and Order are summarized below.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Company's Organizational Structure**

The Company operates a container-vessel service transporting goods between the West Coast of the United States and the state of Hawaii. (A. 5; A. 95.) Its largest line-haul vessels load and unload cargo at the port of Honolulu. (A. 5; A. 96-97, 99.) There, the Company transfers some shipping containers and vehicles onto two barges which service the ports of Kawaihae and Hilo on the Big Island of Hawaii. (A. 5-6; A. 95, 99.)

Laurence "Rusty" Leonard, the Company's Vice-President and Director of Stevedoring Operations, is based in Honolulu and oversees all of the Company's stevedoring and terminal operations in Hawaii. (A. 6; A. 94-95.) Terminal Manager Michael Leite, based in Hilo, reports to Leonard and manages the Company's Big Island operations. (A. 6; A. 103, 119-120, 130-131, 145-146.)

The seven Employees at issue in this case, whom the Company classifies as Supervisors and Senior Supervisors, report to Leite. (A. 6; A. 103.) The Employees rotate through four distinct roles, which are described below (pp. 7-12), in planning and monitoring the Company's day-to-day operations on the Big Island. The "senior" designation applies to three of the Employees who worked

for a prior port operator; it does not indicate any difference in their duties. (A. 6 n.3; A. 129, 139-140, 235-36.)

The manual labor of moving cargo at the Big Island ports is performed by 26 longshoremen and 8 wharf clerks (collectively, “laborers”), who are represented by International Longshore and Warehouse Union Local 142. (A. 6; A. 103-04.)

Collective-bargaining agreements between the Company and Local 142 dictate, in exhaustive detail, the terms and conditions of employment for the longshoremen and clerks, including staffing levels, scheduling, and work rules. (A. 6; A. 132-33, 220, 226, 259-60, 299-416.) In particular, the agreements specify the number and classifications of laborers to be assigned to various operations and tasks. (A. 6; A. 132-33, 220, 226, 259-60, 304-06, 343-52, 439-41.) Laborers are scheduled strictly based on work opportunity; that is, individuals who have worked fewer hours must be scheduled before those who have worked more hours. (A. 6; A. 132-33, 220, 259-60, 264-65.)

## **B. The Company’s Big Island Operations**

The Company services its Big Island ports three times a week using two barges, the Mauna Loa and the Waialeale. (A. 6-7; A. 99-102.) The barges call at Kawaihae and Hilo on different days of the week. Because the barges ordinarily do not operate simultaneously, only 13 to 17 laborers work on discharging or loading a vessel at any given time. (A. 6-7; A. 109-111, 148.)

The Mauna Loa is a lift-on, lift-off barge, which means that it transports containers that longshoremen discharge and load back using a crane on board the vessel. (A. 6-7; A. 101-102, 112.) The Waialeale is a roll-on, roll-off barge that primarily carries automobiles and containers on chassis that are driven onto and off of the vessel. (A. 6-7; A. 102, 105.) The Mauna Loa operation requires about 13 longshoremen and clerks; the Waialeale approximately 17. (A. 6-7; A. 148.)

Different classifications of longshoremen perform distinct, predetermined tasks in each operation. (A. 6-7; A. 148.) The Mauna Loa operation, for example, is carried out by a clerk, a machine operator, two crane operators, two pin men, a signal man, and five rig drivers. (A. 6; A. 148.) When the barge arrives, the pin men unlock containers stowed on the vessel as needed. (A. 6-7; A. 104, 112.) There is one crane, and the two crane operators split up the work of operating it between themselves. (A. 149.) The crane operator on duty lifts the containers indicated by the Barge Supervisor, and moves them off the vessel and onto a chassis as directed by the signal man. (A. 6-7; A. 148-50, 205.) If the ocean is rough, the crane operator may instead place containers on the ground for the machine operator to move onto chassis using a top pick. (A. 149.) Pin men secure containers to the chassis, and rig drivers drive them into the yard, where the Yard Supervisor tells the drivers where to park. (A. 6-7; A. 148-150, 202-205.) The

clerk, meanwhile, monitors and documents the flow of containers and vehicles.

(A. 7; A. 104, 173, 228.)

### **C. The Employees' Duties**

The Employees rotate through the positions of Timekeeping and Dispatch (“Timekeeper”), Barge Planner (“Planner”), Yard Supervisor, and Barge Supervisor. (A. 7; A. 107, 217-218.) Two of those positions—Timekeeper and Planner—are more specialized and are carried out exclusively from Hilo, typically by the same two Employees. (A. 7; A. 122, 123-24, 134, 138, 143, 176, 228-29, 231-32, 248, 251.) No Employees are permanently stationed at Kawaihae; Barge and Yard Supervisors are dispatched as needed from Hilo, which is 75 miles, or an hour-and-a-half drive, away. (A. 6 n.5; A. 141-43, 147.)

#### **1. The Timekeeper applies collectively bargained rules to schedule laborers to work**

The Timekeeper schedules longshoremen and clerks for each operation and logs each individual's time on a spreadsheet which is sent to the Company's accounting division in Honolulu for payroll purposes. (A. 7; A. 107-108, 113, 132-35, 189-91.) The Timekeeper schedules laborers exclusively based on work opportunity, as required by the Local 142 collective-bargaining agreements. (A. 7; A. 132-33, 220-21, 226, 259-60, 264-65.) If a laborer loses hours as a result of being assigned incorrectly, the Timekeeper can authorize payment to compensate the laborer. (A. 7; A. 120, 214-15, 220-21, 255.) The collective-bargaining

agreement governing longshoremen provides that if they are misassigned, they “shall be paid for the lost work opportunity.” (A. 13; A. 341.)

## **2. The Planner lays out detailed plans for handling containers**

The Planner prepares documents that show where containers should go on a barge and in what sequence they should be moved. (A. 8-9; A. 114-116, 123.)

When a barge is coming from Honolulu, the Planner receives a document electronically from remote planners in Salt Lake City, Utah, showing where containers are stored on the vessel, and that document serves as the discharge plan for the incoming vessel. (A. 8; A. 114-116, 136-137, 151-54, 225, 262-63.) The Planner reviews the discharge plan and annotates it with additional information, such as the number of chassis the operation will require. (A. 8; A. 227, 455-66.)

The Planner also creates a plan for loading containers back onto the barge, known as a load plan or stow plan, which indicates where and in what sequence each container should be loaded. (A. 8; A. 115-16, 123, 137, 151-54, 162.) The computer program the Planner uses to create plans ensures the even distribution of weight across a vessel. (A. 8; A. 252-53, 262.) The Planner gives a copy of the load plan to the Yard Supervisor, Barge Supervisor, and clerks on duty for each operation, but not to the longshoremen. (A. 8; A. 153-55, 273.)

**3. The Yard Supervisor monitors and records the movement and placement of containers in the yard**

The Yard Supervisor controls the flow of cargo as it is discharged from a barge, placed in the yard, and picked up by local truckers. (A. 8; A. 117, 142, 185, 203-05, 266.) In doing so, the Yard Supervisor instructs longshoremen to move containers and chassis, but the longshoremen know their work well enough to begin working before receiving instructions. (A. 8; A. 266.) The Yard Supervisor also prepares and updates a yard plan, which is a detailed document that identifies the locations of containers in the yard, and helps find containers for rig drivers loading a barge and local truckers picking up cargo. (A. 8; A. 142, 185, 188, 469-78.) The Yard Supervisor counts the available chassis and checks the temperature of refrigerated containers each day. (A. 8; A. 185-88.) At the end of the day, the Yard Supervisor provides copies of the yard plan to the Planner and the Yard Supervisor for the next day. (A. 8; A. 188.)

**4. The Barge Supervisor relays instructions to laborers from the container-handling plans and makes routine adjustments as needed**

A Barge Supervisor oversees the discharging and loading back of each barge. (A. 8; A. 113, 148, 192.) Before each barge operation, the Barge Supervisor reviews the plans prepared by the Planner. (A. 8; A. 156, 199-200.) Throughout the operation, the Barge Supervisor uses those plans to tell the crane operator which containers to move and where to put them, and to tell the rig

drivers which vehicles to bring to the barge. (A. 9; A. 112-14, 163-64, 180, 201-03, 207-08, 270-71.)

Various circumstances may require the Barge Supervisor to depart from the plans, but in that case routine patterns generally govern the order in which a vessel is loaded and unloaded. (A. 8-9; A. 114, 164-65, 206, 223, 228, 270-71.) For example, if a barge becomes unbalanced and begins to list, the Barge Supervisor may instruct the crane operator to move containers out of order to correct it, though a crane operator may also do so independently. (A. 8; A. 206-07, 272-73.) At times, the Planner will inform the Barge Supervisor that the plan has to be reprioritized because certain containers must be delivered immediately. (A. 8-9; A. 206, 224.)

The Barge Supervisor also completes a Productivity Report Worksheet which documents the amount of time an operation takes, the number of containers discharged from and loaded back onto the vessel at each port, and reasons for any delays. (A. 10; A. 183, 199-200.)

##### **5. Barge and Yard Supervisors also handle other personnel matters**

Employees, in their capacity as Barge or Yard Supervisor, have permitted laborers to leave work for a brief period to attend to personal matters, as long as the laborer has found someone willing to cover her position during that time. (A. 10; A. 168-71, 192-95, 241-42, 276-77.) Section 8.01 of the longshore collective-

bargaining agreement provides that “a[] [longshoreman] may leave his job for good and sufficient cause providing he first reports his intention to leave and his reasons for leaving to his foreman and continues with his work until his assigned replacement arrives.” (A. 11; A. 253-54.)

While serving as Barge or Yard Supervisor, some former Employees have also “padded” or “tacked on time” to laborers’ timesheets. (A. 11-12; A. 171-72, 211-14.) Specifically, when laborers have been required to work overtime or when they have completed a large operation quickly, those Employees have added 10 or 15 minutes to their timesheets. (A. 11-12; A. 171-72, 211-14.) No company rule permits them to do so, and the “padded” timesheets do not indicate that time not worked was added. (A. 12; 175, 225-26.) The only current Employee to testify on the subject at hearing has never tacked on time during his two years as an Employee, and the Company has never told him that he has the authority to do so. (A. 12; A. 267-68.)

Employees also prepare incident reports to document accidents, injuries, and other issues that arise each day. (A. 12-13; A. 197, 267.) For example, they have prepared incident reports when laborers have arrived late for work or left the premises without permission before completing their shifts. (A. 12-13; A. 195-96, 197-99, 242-44, 267, 488-91.) The Employees provide incident reports to the Terminal Manager. (A. 13; A. 216, 267.) There is no evidence that any laborer

has suffered any adverse consequence as a result of an incident report. (A. 12-13; A. 267.) Laborers can fill out incident reports as well. (A. 260.)

The Company has instructed the Employees to call the Terminal Manager if a problem arises during an operation, and they do so. (A. 10; A. 121, 135, 230, 233, 256, 265, 271.) Employees may also call the Planner for information. (A. 10; A. 230.) The Terminal Manager is available by phone at any time of day or night. (A. 10; A. 121, 183, 230, 236-37, 230, 256.)

## **II. THE PROCEDURAL HISTORY**

### **A. The Representation Proceeding**

The Union filed an election petition with the Board to represent the Employees. (A. 5; A. 4.) The Company opposed the petition, asserting that the Employees are supervisors under Section 2(11) of the Act. (A. 5; A. 492.) After holding a hearing on the issue, the Board's Regional Director issued a Decision and Direction of Election finding that the Company had not met its burden of establishing supervisory status. (A. 5-21.)

In a secret-ballot election held on May 19, 2016, the Employees voted six to zero to be represented by the Union for purposes of collective bargaining. (A. 22.) The Regional Director accordingly certified the Union as their representative. (A. 1-2; A. 23.) The Company filed a request with the Board for review of the

Regional Director's decision, which the Board denied. (A. 70-71 (then-Chairman Pearce and Member McFerran; then-Member Miscimarra dissenting in part).)

**B. The Unfair-Labor-Practice Proceeding**

On August 15, 2016, the Union requested that the Company recognize and bargain with it. (A. 2; A.69.) The Company refused, stating that it intended to seek judicial review of the Board's determination. (A. 2; A. 72.) The Board's General Counsel issued a complaint, based on a charge filed by the Union, alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act. (A. 1; A. 73-79.) In its answer, the Company admitted its refusal to bargain, but denied that it was unlawful, contending that the certification was improper because the unit employees were statutory supervisors. (A. 1; A. 80-81.)

The General Counsel filed a motion for summary judgment with the Board. (A. 82-88.) The Board issued an order transferring the case to itself and directed the Company to show cause why the motion should not be granted. (A. 1.) The Company filed a memorandum in opposition incorporating by reference the arguments it had made during the representation proceedings. (A. 90.) In addition, the Company raised for the first time arguments that then-Member Miscimarra had made in dissenting from the Board's order denying review of the Regional Director's Decision and Direction of Election. (A. 90-91.)

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

On April 7, 2017, the Board issued its Decision and Order in the unfair-labor-practice case, granting the General Counsel's motion for summary judgment. (A. 1-3 (then-Acting Chairman Miscimarra and Members Pearce and McFerran).) The Board found that "[a]ll representation issues raised by [the Company] were or could have been litigated in the prior representation proceeding." (A. 1.) The Board also found that the Company did not "offer to adduce at a hearing any newly discovered and previously unavailable evidence" or "allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." (A. 1.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees. (A. 2.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A. 2.) Affirmatively, the Board's Order requires the Company, upon request, to bargain with the Union, and to post a remedial notice. (A. 2-3.)

## SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company did not carry its burden of proving its claim that the Employees are supervisors within the meaning of the Act. To establish supervisory authority, the Company had to demonstrate that it authorized Employees to engage in at least one of the functions listed in Section 2(11), and that doing so requires Employees to use independent judgment. The Board reasonably found that the Company's evidence fell short. Accordingly, the Union was properly certified as the Employees' collective-bargaining representative, and the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

The Company advances arguments as to five supervisory functions—that the Employees have authority to reward, assign, responsibly direct, and discipline employees, and to adjust their grievances—all of which lack merit. First, the Board reasonably found that the record does not establish that the Company authorized its current Employees to reward laborers, or that the acts the Company characterizes as rewarding required independent judgment. The Company asserts that Employees can add time not worked to laborers' timesheets, but only former Employees testified that they had done so. Those former Employees admitted that the Company never told them they had that authority, and the only current Employee to testify on the subject also denied having been authorized to round up

employees' time. In any event, the former Employees described rounding up time on a routine basis whenever laborers met specific predetermined goals, which did not require independent judgment. The Company also argues that Employees have allowed laborers to run quick errands during the workday, but it does not explain how that constitutes a reward at all. And even if granting permission for short departures is a reward, the Board reasonably found that it is governed by a collective-bargaining agreement, and is routine in any event. The Company therefore failed to establish that it requires independent judgment.

Second, the Board reasonably found that the Company failed to meet its burden of showing that Employees assign laborers using independent judgment. Employees acting as Planner, Barge Supervisor, and Yard Supervisor have no role at all in assigning laborers. And the record supports the Board's finding that Employees serving as Timekeeper exercise no independent judgment when they schedule laborers in accordance with collective-bargaining agreements that dictate every aspect of the assignments.

Third, although Barge and Yard Supervisors give laborers certain discrete instructions, the Company failed to meet its burden of showing that doing so constitutes responsible direction under the Act. It was the Company's burden to establish, by concrete, tangible evidence, both (1) that Employees have authority to take corrective action to ensure that their instructions are followed, and (2) that

Employees are held accountable if laborers perform poorly. The Company demonstrated neither. The Company also failed to show that Barge or Yard Supervisors direct laborers using independent judgment. Those Employees give instructions that are largely dictated by plans prepared by a Planner—who does not direct laborers at all, much less responsibly—and to the extent they depart from those plans, their discretion is constrained by routine patterns and company policies.

Fourth, the Board reasonably rejected the Company’s claim that two incident reports documenting clerks’ unauthorized absences constituted discipline. The incident reports were just that—reports—which did not describe or recommend any kind of discipline, and the record does not indicate that they had any impact on the clerks’ job status or tenure. Under Board law and the law of this Court, the incident reports therefore did not establish disciplinary authority. In any event, the violations they described were obvious and the Company failed to show that Employees needed independent judgment to document them.

Fifth, the Company failed to establish that Employees have authority to use independent judgment in adjusting laborers’ grievances. Although Employees serving as Timekeepers can compensate laborers if they lose work due to a mistaken assignment, those adjustments are governed by collectively bargained rules and require no independent judgment.

Finally, the Company does not establish supervisory authority by citing various secondary indicia, such as job descriptions, which the Board and the Court have concluded cannot alone meet an employer's burden. The Company's secondary-indicia arguments regarding what it calls "real-world implications" are also waived because the Company did not raise them during the representation proceeding, as Board law requires. In any event, the Board has reasonably rejected those contentions, which have no basis in the Act. The practical implication of the Board's Order is simply that the Company must bargain with the collective-bargaining representative chosen by Employees who were not shown to be supervisors. That outcome, contrary to the Company's claims, is not implausible or improper. Rather, it is what the Act requires.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY FAILED TO PROVE SUPERVISORY STATUS AND THUS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

Section 8(a)(5) and (1) of the Act prohibits an employer from refusing to bargain collectively with the representative of its employees.<sup>1</sup> 29 U.S.C. § 158(a)(5) and (1). The Company admits (Br. 3) that it has refused to bargain with the Union. It asserts, however, that its refusal did not violate Section 8(a)(5) and (1) because the Employees are statutory supervisors excluded from the Act’s coverage. As shown below, substantial evidence supports the Board’s finding that the Company failed to prove that Employees are supervisors within the meaning of the Act.

#### **A. Applicable Principles and Standard of Review**

Section 7 of the Act, 29 U.S.C. § 157, guarantees collective-bargaining rights to all workers who meet the Act’s definition of “employee.” 29 U.S.C. § 152(3). Section 2(3) of the Act excludes from that definition “any individual employed as a supervisor.” *Id.* See *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999). In turn, Section 2(11) of the Act provides, in pertinent

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<sup>1</sup> A violation of Section 8(a)(5) produces a “derivative” violation of 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.” See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

part, that a “supervisor” is “any individual having authority, in the interest of the employer, to . . . assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances,” provided that “the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11).

Thus, as relevant here, the Act dictates that individuals are not statutory supervisors unless (1) they have the authority to engage in at least one of the listed supervisory functions, and (2) their exercise of that authority requires the use of independent judgment. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001); *VIP Health*, 164 F.3d at 648; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). To exercise independent judgment, “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB at 692-93. A judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Id.* at 693. *See Kentucky River*, 532 U.S. at 713-14.

The Court has warned that “the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organization rights.” *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963

(D.C. Cir. 1999). Thus, in interpreting Section 2(11), the Board is mindful of the distinction Congress intended to draw between truly supervisory personnel—who are vested with “genuine management prerogatives”—and employees who enjoy the Act’s protections even though they perform “minor supervisory duties.”

*Oakwood*, 348 NLRB at 688 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (internal quotation marks omitted)).

The burden of demonstrating Section 2(11) supervisory status is on the party asserting it. *Kentucky River*, 532 U.S. at 711-12. The assertion must be supported with specific examples, based on record evidence. *See Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“*Oil Workers*”).

Conclusory or generalized testimony does not suffice. *See, e.g., Beverly Enters.-Mass.*, 165 F.3d at 963; *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir.

1983); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006). And

“[s]upervisory status is not proven where the record evidence is in conflict or otherwise inconclusive.” *Brusco Tug & Barge, Inc.*, 359 NLRB 486, 490 (2012),

*enforced*, \_\_ F. App’x\_\_, 2017 WL 3754003 (D.C. Cir. Aug. 15, 2017) (citation

and internal quotation marks omitted). *Accord Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 92-93 (4th Cir. 2015). Further, it is settled that designations of theoretical

or “paper power”—as in a job description—are insufficient to prove supervisory status. *Beverly Enters.-Mass.*, 165 F.3d at 962-63; *Oil Workers*, 445 F.2d at 243.

Given the Board’s expertise in evaluating the “infinite variations and gradations of authority” that may exist in the workplace, the Board’s findings with regard to supervisory status “are entitled to great weight.” *Oil Workers*, 445 F.2d at 241 (citation and internal quotation marks omitted). Those findings must be upheld as long as they are supported by substantial evidence. *VIP Health*, 164 F.3d at 648. Under the substantial evidence test, a reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

Accordingly, the issue before the Court is not, as the Company appears to believe, whether it can marshal substantial evidence to support its position. (*See, e.g., Br. 34.*) Substantial evidence review “does not allow a court to ‘supplant the [Board]’s findings merely by identifying alternative findings that could be supported by substantial evidence.’” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992)). 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.’” *Id.* (quoting *Robinson v. Nat’l Transp. Safety Bd.*, 28 F.3d 210, 215 (D.C. Cir. 1994)).

The Company also errs in citing out-of-circuit authority in support of a “more probing” standard of review that this Court does not apply. (Br. 29 (quoting *NLRB v. Mo. Red Quarries, Inc.*, 853 F.3d 920, 925 (8th Cir. 2017) (emphasis omitted)). This Court recognizes that “[g]iven the Board’s expertise, it enjoys a large measure of discretion on the question” of individuals’ status as supervisors or employees. *Allied Aviation Serv. Co. v. NLRB*, 854 F.3d 55, 65 (D.C. Cir. 2017).

**B. The Board Reasonably Found that the Company Failed To Carry Its Burden of Proving that the Employees Are Supervisors Under the Act**

Before the Court, the Company repeats the claims it made before the Board that the Employees are supervisors because they have authority to reward, assign, responsibly direct, and discipline employees, and to adjust their grievances. (Br. 27-28.) For the reasons explained below, the Board reasonably rejected those claims.

**1. The Company failed to show that Employees reward laborers using independent judgment**

Substantial evidence supports the Board’s finding (A. 17-18) that the Company did not meet its burden of establishing that Employees have authority to reward longshoremen and clerks and that doing so requires independent judgment. There is no merit to the Company’s arguments (Br. 35-50) that Employees are supervisors because they have rounded up laborers’ hours when certain conditions

were met and routinely granted their requests to leave for short periods during working hours.

**a. The Company did not demonstrate that it authorized Employees to reward laborers by tacking on time, or that doing so requires independent judgment**

The Company's evidence regarding tacking on time falls short for three reasons. First, it was the Company's burden to show that Employees "hav[e] authority" to reward laborers by adding time not worked to their timesheets. 29 U.S.C. § 152(11). See *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 306 (6th Cir. 2012) ("unauthorized" disciplinary act by charge nurse did not demonstrate supervisory authority). But as the Board noted, the purported practice of tacking on time was an unwritten one. (A. 18.) Indeed, former Employees who had tacked on time admitted that the Company had never informed them they had that authority. (A. 175, 225-26.) And the Company admits that those former Employees did not notify the Company that they had added time, nor did laborers' timesheets indicate that they were to be paid for time not worked. (Br. 37.) Because the Company failed to show that it ever authorized padding of laborers' timesheets, the fact that some former Employees did so does not make the Employees supervisors.

Second, even if Employees' unauthorized conduct could transform them into supervisors, the Company failed to provide "tangible examples" showing that any

current Employees had tacked on time. *Oil Workers*, 445 F.2d at 243 (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”) The only current Employee to testify about the matter stated that, in his two years on the job, he had never tacked on time and the Company had never told him he could do that. (A. 267-68.) The Company cannot establish supervisory status based on authority Employees did not know they had. *See NLRB v. ADCO Elec. Inc.*, 6 F.3d 1110, 1118 n.5 (5th Cir. 1993) (“Alleged supervisors who are never informed that they possess supervisory status are rank-and-file employees.” (internal quotation marks omitted)); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004) (employee was not a supervisor where there was “no evidence that [he] was ever made aware of any disciplinary authority or ever exercised it”). And the testimony of individuals who were no longer Employees did not meet the Company’s burden in this regard. *See Loparex LLC v. NLRB*, 591 F.3d 540, 551 (7th Cir. 2009) (upholding Board’s finding that shift leaders did not exercise independent judgment in making assignments, where Board gave no weight to testimony of individual who “was no longer a shift leader at the time of the hearing”); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (even if employer’s staff nurses once had supervisory authority, the evidence must show that “individuals working as staff nurses at the time of the hearing possessed that authority”). Nor was the Board required to give weight to

the Company's generalized testimony (Br. 37-38) that other Employees had tacked on time, without explaining when, under what circumstances, or on what authority. *See, e.g., Beverly Enters.- Mass.*, 165 F.3d at 963. At most, the evidence was inconclusive, and therefore insufficient. *See Pac Tell*, 817 F.3d at 92-93.

Third, even if current Employees were authorized to tack on time, the Company failed to show that doing so requires independent judgment. As the Board found, the former Employees who testified that they had tacked on time said they did so as a matter of course if a vessel was unloaded quickly or if laborers were required to work overtime. (A. 18; A. 171-72, 211-14.) If Employees routinely added time based on pre-determined criteria, that action did not require the exercise of meaningful discretion. *Cf. Park 'N Go of Minnesota LP*, 344 NLRB 1260, 1268 (2005) ("deciding which employee could leave early based on hours worked" did not require independent judgment). The Company cites no record support for its claim (Br. 35-36) that Employees independently created their own standards to determine when laborers had earned extra time, which is mere speculation.

The Company does not advance its case by citing an unpublished decision in which a Regional Director found that putative supervisors were authorized to

reward employees. (Br. 36-37.) The Board denied review in that case,<sup>2</sup> and in that circumstance the Regional Director’s decision has no precedential value. *See Boeing Co.*, 337 NLRB 152, 153 n.4 (2001); *Watkins Sec. Agency of DC, Inc.*, 357 NLRB 2337, 2338 (2012). Nor is that case instructive here. The passage quoted by the Company does not reveal the basis for the Regional Director’s finding that, unlike in this case, the putative supervisors there exercised independent judgment. And the quoted language suggests that the record there established that the putative supervisors were actually ““authorized”” to reward employees. (Br. 36.) Here, as shown, the Company did not meet its burden in that regard.

**b. The Company did not establish that approving laborers’ requests to briefly leave work constitutes a reward, or that it requires independent judgment**

The Company also failed to show that the Employees exercise supervisory authority by approving individual laborers’ requests to leave work a few minutes early or briefly during the day to take care of personal business. (A. 17.) As an initial matter, the Board reasonably found (A. 17) that the Company failed to show that granting those requests is a reward at all. A reward, ordinarily, recognizes or incentivizes good work. *See Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1079 (10th Cir. 2005) (“[W]hen one thinks of a supervisor rewarding an employee, one generally thinks of the supervisor as doing so with the purpose of

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<sup>2</sup> *See A. 576 (Order, Matson Terminals, Inc. and Int’l Longshore & Warehouse Union, Local 142, Case 37-RC-3922 (Jan. 24, 2001) (unpublished)).*

influencing the employee's job performance . . . ." (emphasis omitted)); *Pine Manor Nursing Ctr.*, 270 NLRB 1008, 1009 (1984) (charge nurses had authority to "reward [employees] for special effort or quality work," using independent judgment). The Company, however, has never attempted to explain *what* it believes Employees reward by granting requests to run errands. There is certainly no evidence that laborers do anything to earn that permission beyond asking for it.

In addition, as the Board observed (A. 17), Employees' practice of approving a laborer's request to leave the premises if someone is there to cover the job merely implements a collective-bargaining agreement provision allowing laborers to leave once a replacement arrived. (A. 11, 17; p. 11, above.) The Board properly found that adherence to the contract does not constitute a reward, nor does it require independent judgment. (A. 17.) *See St. Francis Med. Ctr.-W.*, 323 NLRB 1046, 1048 (1997) (putative supervisor's "grant of permission to [an employee] to stay home another day did not involve the exercise of independent judgment because she would, in any event, have had the right to take the extra time off if she so desired"); *Sears, Roebuck & Co.*, 304 NLRB 193, 197 (1991) (no supervisory authority where individual "followed the store's stated procedures and policies whenever she was notified by an employee that he or she wanted to leave work early"). In arguing that the Board lacked authority to interpret the collective-bargaining agreement in this regard, the Company relies on out-of-circuit authority

that it quotes out of context. (Br. 38-39.) This Court has long recognized that the Board is empowered to “interpret and give effect to the terms of a collective bargaining contract” as necessary to resolve cases properly before it, *Office & Prof’l Emp. Int’l Union, Local 425 v. NLRB*, 419 F.2d 314, 318 (D.C. Cir. 1969) (citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967)), as the Board did here.

In any event, even if permission to run errands during work time could be considered a reward, the Company still failed to show that granting it requires independent judgment. The Board has found similar authority to “permit an employee to leave work shortly before the end of the workday” to be merely routine. *Shaw, Inc.*, 350 NLRB 354, 357 & n.23 (2007). *See also C&W Super Mkts., Inc. v. NLRB*, 581 F.2d 618, 622 (7th Cir. 1978) (no supervisory authority where night manager could “allow employees to go home early if they were sick or if there was no work left for them to do”); *Azusa Ranch Mkt.*, 321 NLRB 811, 812 (1996) (authority “to allow employees to leave early on request” was merely routine). Here, as the Board noted (A. 10), the handling of longshoremen’s requests for brief absences from the workplace is so routine that the record discloses no instance of such a request being denied.

The Company appears to argue that Employees exercise independent judgment because, under the contract, they are responsible for evaluating whether a

longshoreman's reason for leaving is "good and sufficient." (Br. 39.) The Company cites nothing to establish that Employees have that responsibility, much less that they exercise meaningful discretion in carrying it out. In particular, the Company makes no showing as to the factors Employees would weigh in evaluating a laborer's request to leave. *See Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (no independent judgment shown where employer "adduced almost no evidence regarding the factors weighed or balanced by the lead persons in making production decisions and directing employees"). Thus, the Company failed to establish supervisory authority to reward using independent judgment.

**2. The Company failed to show that Employees assign laborers using independent judgment**

Substantial evidence supports the Board's finding that the Company failed to show that the Employees assign laborers using independent judgment. Under well-established Board law that the Company does not challenge, the term "assign" under Section 2(11) refers to "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood*, 348 NLRB at 689-90. By contrast, the Board has explained, an individual does not "assign" by giving an "ad hoc instruction that the employee perform a discrete task." *Id.* at 689. Nor does a putative supervisor assign by

“choosing the order in which the employee will perform discrete tasks within th[eir] assignments.” *Id.*

Applying those standards, the Board reasonably found (A. 15) that the Employees do not assign laborers using independent judgment. As the Board found, the designation of longshoremen and clerks to particular operations, shifts, and overall duties is entirely “routine and dictated by the [Company]’s detailed collective-bargaining agreements with Local 142.” (A. 15; *see* pp. 5-8, above.) Employees are involved in that process only when they serve as Timekeeper. And in that capacity, they schedule laborers based strictly on work opportunity, as required by the contract. (A. 7; pp. 5, 7.) Before the Court, the Company does not argue that scheduling laborers on that basis requires independent judgment, and that argument is therefore waived. *See Dunkin’ Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004). It is firmly established, in any event, that assignments dictated by a collective-bargaining agreement do not require independent judgment. *Oakwood*, 348 NLRB at 693. *See also, e.g., Loparex*, 591 F.3d at 551 (assignments that “did not take into account the personal characteristics” of the employees did not require independent judgment); *St. Petersburg Limousine Serv.*, 223 NLRB 209, 210 (1976) (assignments based on collective-bargaining agreement did not require independent judgment).

Nor do Employees acting in any other capacity assign laborers to a time, place, or overall duties. As discussed further below (pp. 33-34), the Planner prepares documents that serve as blueprints for the movement and placement of containers, but the Planner does not specify what any individual longshoreman or clerk will do to effectuate those plans. And although Barge and Yard Supervisors implement the plans by conveying discrete instructions to laborers, those instructions do not constitute assignment. (A. 7; A. 107.) *See Oakwood*, 348 NLRB at 689. When, for example, a Barge Supervisor tells a crane operator to lift a particular container, or tells a rig driver to relocate a particular chassis, the Barge Supervisor is not “assigning” those laborers; instead, he is merely issuing instructions consistent with the assignments they received from the Timekeeper before the workday began. *See Frenchtown*, 683 F.3d at 311-12; *Brusco Tug*, 359 NLRB at 491.

**3. The Company failed to show that Employees responsibly direct laborers using independent judgment**

Substantial evidence also supports the Board’s finding (A. 16) that the Company did not establish that Employees responsibly direct laborers using independent judgment. The Board has explained that a putative supervisor engages in direction if he “has men under him” and “decides what job shall be undertaken next or who shall do it.” *Oakwood*, 348 NLRB at 691. That direction is responsible, within the meaning of the Act, only if two conditions are met. First,

the putative supervisor must have “authority to take corrective action, if necessary” to ensure that the direction is followed. *Id.* at 692. *Accord Loparex*, 591 F.3d at 550. Second, the putative supervisor must be held “accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” *Oakwood*, 348 NLRB at 691-92. *Accord Allied Aviation*, 854 F.3d at 65-66. And finally, for responsible direction to be supervisory, it must require independent judgment. *Oakwood*, 348 NLRB at 691.

Preliminarily, we note that the Company does not offer, and has therefore waived, any argument that Employees engage in responsible direction in their capacity as Timekeepers. Similarly, the Company makes no effort to demonstrate that Employees serving as Planners direct laborers at all, much less responsibly. The Planner has no “[laborers] under him,” and while the plans he makes indicate where containers will go on a vessel, they do not dictate “what job shall be undertaken next or who shall do it.” *Oakwood*, 348 NLRB at 691. “[I]t is not responsibility per se” that signifies Section 2(11) status; “[r]ather, responsibility for directing other *employees* is the critical factor in characterizing someone as a supervisor.” *Exxon Pipeline Co. v. NLRB*, 596 F.2d 704, 705 (5th Cir. 1979) (per curiam) (footnote omitted). *See Ne. Utilities Serv. Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994) (although pool coordinators were “highly trained” and

“implement[ed] complex technical decisions,” they did not responsibly direct other employees).

In any event, with respect to all four roles Employees fulfill, the Board reasonably found that the Company failed to show that they (1) can take corrective action, (2) are held accountable for laborers’ work, and (3) use independent judgment in directing others.

**a. The Company has not argued, much less demonstrated, that Employees take corrective action**

The Board found that there is no record evidence that the Employees possess authority to take corrective action against laborers who perform poorly or fail to follow instructions. (A. 16 & n.9.) The Company’s opening brief mentions that finding in passing (Br. 43), but offers no coherent argument against it. Any challenge to that finding is therefore waived, *see Dunkin’ Donuts*, 363 F.3d at 441, and the Company’s responsible-direction argument fails for that reason alone. *See Oakwood*, 348 NLRB at 695 (nurses did not responsibly direct where there was no evidence that they “must take corrective action” if employees perform inadequately).<sup>3</sup>

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<sup>3</sup> The Company has waived any claim that Employees take corrective action by documenting laborers’ conduct in incident reports. In any event, that claim would also fail because, as explained below (pp. 43-47), those documents are purely reportorial. *See Loparex*, 591 F.3d at 550 (upholding Board’s finding of no authority for corrective action where, in responding to misconduct, a “shift leader’s

**b. The Company did not show that it holds Employees accountable for laborers' performance**

In addition, the Company cannot establish responsible direction because, as the Board found (A. 16), there is no evidence that Employees face adverse consequences if laborers fail to perform their duties. The Company makes two limited arguments in this regard (Br. 43-44), which both fall short.

First, the Company notes that when a longshoreman causes over \$4,000 in damage, both the longshoreman and the Employee “in charge of the operation” are drug tested. (Br. 43 (citing A. 246-47).) The Company, however, cites no authority for the proposition that a drug test alone constitutes an adverse consequence. Furthermore, it is not enough to show that Employees “are accountable for their *own* performance or lack thereof, not the performance of *others*.” *Oakwood*, 348 NLRB at 695. *See Allied Aviation*, 854 F.3d at 66 (no evidence of responsible direction where putative supervisors “testified about being written up for their own, not others’, mistakes”); *NLRB v. KDFW-TV*, 790 F.2d 1273, 1278 (5th Cir. 1986); *Buchanan Marine, L.P.*, 363 NLRB No. 58, 2015 WL 7873627, at \*4 n.4 (2015). And with regard to drug testing, the Company does not establish that Employees are held accountable for longshoremen’s conduct, as opposed to their own actions. (A. 246-47.)

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only option is to submit a factual report detailing the issue to her team manager for consideration”).

Second, the Company cites its Terminal Manager’s conclusory testimony that “[t]he barge supervisor’s responsible for everything that happens on the barge.” (Br. 44 (citing A. 162).) As the Board has explained, however, “the employer bears the burden of showing that the [Employees] are held accountable for the errors of [the laborers], rather than simply stating that they are.” *Buchanan Marine*, 363 NLRB No. 58, 2015 WL 7873627, at \*2. *Accord Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012). The Company’s “conclusory and general statements” that the Barge Supervisor is responsible for everything that happens on the barge cannot satisfy the Company’s burden. *Frenchtown*, 683 F.3d at 314. *See also Ne. Utilities*, 35 F.3d at 625; *Brusco Tug*, 359 NLRB at 492-93.

**c. The Company failed to prove that Employees use independent judgment in directing laborers**

Given the Company’s failure to establish that the Employees responsibly direct laborers, the Court need not address whether they exercise independent judgment in carrying out any other task. *See NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 21 (1st Cir. 2015). In any event, substantial evidence supports the Board’s finding that the Employees do not exercise independent judgment in carrying out any of the tasks the Company incorrectly characterizes as responsible direction. As we will show, the Board reasonably found that any discretion the Planner may have is constrained by the remotely prepared discharge plan and weight-equalizing

software the Planner uses to prepare plans. (A. 16.) As for the Barge and Yard Supervisors, the Board reasonably found that if they depart from the plans during an operation, any changes they make are routine and do not require independent judgment. (A. 16.)

To begin, as noted above, because Planners do not direct anyone, whether they do other tasks independently is “beside the point.” *NSTAR Elec.*, 798 F.3d at 21. In any event, Board precedent and the record evidence fully support the Board’s finding (A. 16) that the Planner’s work of laying out the placement and sequence of containers does not require independent judgment. The Board has reached the same conclusion before with regard to employees performing essentially the same role for the Company. In *Matson Terminals, Inc.*, 321 NLRB 879, 883 (1996), *enforced*, 114 F.3d 300 (D.C. Cir. 1997), the Board found that vessel planners did not exercise independent judgment in preparing stow plans. That task, the Board found, was of a “merely routine nature” because the allocation of containers within a vessel was guided by “established standards and reference guides,” and generally followed basic rules, such as placing heavy containers on the bottom and refrigerated containers near outlets. *Id.* at 883.

The Planners’ range of discretion here is equally narrow. The Board found, and the Company does not dispute, that remote planners in Salt Lake City supply Planners on the Big Island with files showing the placement of containers on

incoming vessels. (A. 8; Br. 8-9, 42.) Thereafter, when the Planner indicates that certain containers are high priority and must be discharged first, he is simply relaying information received from the Company's sales office or the Terminal Manager. (A. 162, 223-24, 263-64.) And when the Planner plots out the placement of containers on outgoing vessels, a software program ensures that their weight is properly balanced. (A. 228, 252-53, 262.) Even if, as the Company asserts (Br. 42), other factors such as container size and availability affect the Planner's work, the Company fails to show that applying them requires the exercise of independent judgment with regard to the responsible direction of laborers.

The Company misses the point in arguing that the Planner's job takes all day and is necessary to the operation. (Br. 46.) "[I]mportant roles are played by many people who are not supervisors." *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 148 (1st Cir. 1999). Whether the Planner's work is important simply has no bearing on whether it involves the exercise of independent judgment in connection with responsibly directing employees.

The Board also reasonably found (A. 16) that Barge and Yard Supervisors do not exercise independent judgment with regard to the responsible direction of laborers. The primary function of Barge Supervisors is to deliver instructions to implement plans prepared by others, which does not require supervisory discretion. (E.g., A. 270.) See *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 274

(1st Cir. 1997) (technical directors who “do little more than implement the instructions contained in the program’s script” were not supervisors); *Artcraft Displays, Inc.*, 262 NLRB 1233, 1234-35 (1982); *Int’l Ass’n of Bridge, Etc., Local Union No. 28*, 219 NLRB 957, 961 (1975) (“There appears to be no independent judgment exhibited in parceling out work that is dictated by instructions and blueprints.”). To the extent they depart from the plans, their discretion is limited. In particular, Barge Supervisors are expected to tell crane operators to pursue high-priority containers first, followed by refrigerated containers, and to adjust the operation as necessary to maintain the barge’s stability. (A. 206, 223-24.) Otherwise, they generally follow a routine pattern, telling the crane operator to discharge from the center outward and to load from the outside in. (A. 263.) *See CGLM Inc.*, 350 NLRB 974, 984 (2007) (warehouse manager issued only “routine or clerical” directions where “[l]oading trucks was performed in a set pattern”), *enforced*, 280 F. App’x 366 (5th Cir. 2008); *Croft Metals*, 348 NLRB at 722 (no independent judgment where lead persons tell workers what to load, but “follow a preestablished delivery schedule and generally employ a standard loading pattern”).

As the Board concluded, the Company’s operation “involves the same repetitive work performed by the same skilled workforce on the same two vessels.” (A. 16.) Each laborer “serves in a specific job classification with specific job

duties, which they perform over and over again, day in and day out,” subject to detailed collective-bargaining agreements that the Employees must observe. (A. 16; A. 265.) Every participant in the Company’s operations has an important but narrowly predefined role, from the Barge Supervisor who identifies a container, to the pinman who unlocks it, to the crane operator who moves it as directed by a signalman, to the rig driver who takes it away. The skilled, regimented character of the workforce and the repetitive nature of the work further limit the discretion required of the Employees. *See Telemundo*, 113 F.3d at 274 (technical director’s orders were “perfunctory and routine” where “each technician has his own assignment and performs repetitive tasks day after day, [and] the crew members require minimal supervision”); *Shaw*, 350 NLRB at 356; *Croft Metals*, 348 NLRB at 722. Considering the nature of the Employees’ work and the Company’s operations as a whole, the Board reasonably concluded that Barge Supervisors do not exercise sufficient independent judgment to be considered supervisors.<sup>4</sup>

The Company’s arguments to the contrary are meritless. It asserts (Br. 45) that “every operation is different,” but despite some day-to-day variation the same general patterns and procedures determine how vessels are loaded and unloaded.

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<sup>4</sup> The Company does not appear to argue that Yard Supervisors exercise independent judgment in directing laborers. (Br. 40-48.) In any event, the Board reasonably found that the work they oversee is also routine. (A. 16.) As the Board noted, laborers know their work well enough to start it even before receiving instructions. (A. 16.)

(A. 16.) *Sun Refining Co.*, 301 NLRB 642 (1991), which the Company cites (Br. 45) does not suggest otherwise. In that case, the Board found that operation of the supertankers at issue involved “constantly changing conditions,” but it also found evidence that putative supervisors actually engaged in “frequent use of independent judgment” in responsibly directing their subordinates. *Id.* at 649. That evidence, the Board reasonably determined, is lacking here.

The Company also contends that independent judgment may exist notwithstanding the existence of employer-provided guidelines. (Br. 46-47.) But the cases it cites predate *Kentucky River*, in which the Supreme Court recognized that “the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.” 532 U.S. at 713-14. As the Court observed, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifie[s].” *Id.* at 713. As shown above, in this case the Board reasonably applied the standards it has developed after *Kentucky River* in finding that the Employees are sufficiently constrained in their work that their judgment is not independent. (A. 16.)<sup>5</sup>

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<sup>5</sup> The Board expressly did not rely on the Regional Director’s observation that the Employees use their skill and experience in instructing laborers (A. 70 n.1), so the Company raises a nonissue in attacking that language as inconsistent with *Kentucky River*. (Br. 45-46.)

The Company's remaining arguments are equally misguided. The Company takes issue with the Board's finding that Barge Supervisors make "occasional adjustments, when necessary," to the plans prepared by the Planner. (Br. 44 (citing (A. 16).) But even if adjustments are "made constantly," as the Company asserts (Br. 44), that makes them no less routine. The Company also disputes the Board's finding that a crane operator could decide how to extract a hidden container. (Br. 44.) That finding, however, is supported by Terminal Manager Leite's testimony that a skilled crane operator "will just go over there and he'll be able to feel his way over there and be able to discharge the container." (A. 161.) And further testimony confirmed that sometimes a crane operator will independently decide which container to move in order to correct a list, and tell the Barge Supervisor instead of the other way around. (A. 272.) In any event, if the evidence on the subject is ambiguous or conflicting, that simply means that the Company's burden of proof was not met. *See Brusco Tug*, 359 NLRB at 490.

**4. The Company failed to show that Employees discipline laborers using independent judgment**

Substantial evidence supports the Board's finding (A. 16-17) that the Company failed to establish that the Employees discipline longshoremen or clerks, or that they do so using independent judgment. The Company bases its entire argument to the contrary on two incident reports that Employees filled out regarding clerks' unauthorized absences. (Br. 48-51, A. 488-91.) As the Board

found, however, there is no evidence that the incident reports at issue were ever used for disciplinary purposes, or that filling them out required independent judgment. (A. 16-17.)

**a. The incident reports do not establish disciplinary authority**

The Board reasonably found that the two incident reports on which the Company relies merely documented obvious rules violations, but did not constitute discipline. (A. 16-17.) Indeed, there is not even any evidence that the reports represented warnings that could lead to discipline. In any event, as the Court has recognized, the power to issue “written warnings that do not alone affect job status or tenure do[es] not constitute supervisory authority.” *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (quoting *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989) (internal quotation marks omitted). Further, “[h]aving a role as witnesses, or reporters of fact, within a disciplinary process is legally insufficient to establish the effective exercise of disciplinary authority.” *Allied Aviation*, 854 F.3d at 65. *Accord VIP Health*, 164 F.3d at 648.

As their name implies, the incident reports the Company cites were plainly reportorial rather than disciplinary. In the first report, then-Employee Leite documented that clerk Sherri Wilson was assigned to a particular operation, but did not return after lunch. (A. 488.) The second report, signed by Employee Norman Nakamura, states that clerk Crystal Kekela “was not to be found anywhere” on the

premises during her shift, and that “[t]here was no communication from her to indicate a family emergency, doctor’s appointment, or any type of scenario which would dictate that she tend to a situation off-premises.” (A. 490.) Nakamura tentatively concluded: “Believe this situation constitutes an unauthorized absence from work and a violation of work attendance policy.” (A. 490.)

Neither report described or recommended disciplinary action of any kind. And there no evidence that either one adversely affected anyone’s employment. (A. 17.) Moreover, as the Board noted, both reports were made using a form that was, on its face, primarily concerned with documenting safety matters such as accidents, injuries, and near misses. (A. 17; A. 488-91.) The form made no reference to potential disciplinary uses. The fact that laborers, too, can fill out incident reports confirms that they are merely reportorial. (A. 260.) *See Palmetto Prince George Operating, LLC v. NLRB*, 841 F.3d 211, 218 (4th Cir. 2016). Because the incident reports documented clerks’ absences but did not purport to administer discipline, the Board properly determined that the Employees who filled them out did not exercise supervisory authority. (A. 16-17.)

In its statement of facts, the Company claims that Leite disciplined Sherri Wilson by “cutting her time and writing her up.” (Br. 24.) The record, however, indicates that Wilson’s pay was simply adjusted to reflect the time she actually worked. (A. 221-22.) The Company does not develop any argument that the

adjustment constituted discipline. (Br. 48-51.) *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (the Court will not address “an asserted but unanalyzed” contention). In any event, adjusting pay to reflect a laborer’s unauthorized departure would require no independent judgment. *See Shaw*, 350 NLRB at 357 (putative supervisor did not exercise independent judgment in amending timesheets so that employees who left early would be paid only for time worked).

The Company also appears to contend that Nakamura’s report constituted discipline under the clerks’ collective-bargaining agreement because a handwritten note indicates that Kekela and Kirkland Chandler, the other clerk assigned to work with Kekela that day, were “advised of writeup.” (A. 490.) Terminal Manager Dexter Shimabukuro further testified that the Company “advised” the Local 142 unit chair. (A. 245.) But the contractual provision the Company cites requires that “[w]ritten warnings . . . be provided to the employee with a copy to the Union (BA and Unit Chair).” (A. 391.) The Company has not established that the incident report was a “written warning” in the first place, or if it was, that a copy of it was given to Kekela and the appropriate Local 142 representatives. (A. 17.)

The Company’s reliance (Br. 50) on *Progressive Transportation Services*, 340 NLRB 1044 (2003), is misplaced. In that case, the Board found authority effectively to recommend discipline, which the Company has not attempted to show here. *Id.* at 1045-47. In any event, that case is distinguishable because the

warnings recommended by the supervisor were cited in later disciplinary actions, including a suspension. *Id.* at 1046. Thus, specific record evidence showed that the warnings were a concrete step in a progressive disciplinary system. *Id.* The Company cites no such evidence here. Further, the record in *Progressive Transportation* showed that the supervisor had actually exercised discretion in deciding whether to recommend discipline or handle disciplinary issues herself. 340 NLRB at 1046-47. By contrast, as the Board found here (A. 17), the Company failed to establish such discretion. *See Shaw*, 350 NLRB at 356-57 (supervisory status not shown where foreman completed “‘writeup’ sheets to memorialize incidents,” but “did not testify that he had discretion to decide which incidents to record”).

The Company also errs in asserting (Br. 50-51) that a reprimand or warning can constitute discipline if it has even the potential to lead to future employment action. This Court has recognized that if “[a] writeup created the ‘possibility’ of discipline, nothing more,” then “[u]nder established case law, this is not enough to show supervisory status.” *Jochims*, 480 F.3d at 1170. *Accord Frenchtown*, 683 F.3d at 309; *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 322 (2d Cir. 1998) (holding it “irrelevant” to the issue of supervisory status that discipline “may *result*” from employee’s factual report). Moreover, *GGNSC Springfield LLC v. NLRB*, which the Company cites (Br. 50), involved written warnings that undisputedly

constituted a definite step in the employer's progressive disciplinary system. 721 F.3d 403, 410 (6th Cir. 2013). Here, by contrast, the Company failed to show that the incident reports were a step in any such system.

**b. The Company did not establish that Employees use independent judgment in disciplining laborers**

Even if the incident reports the Company cites constitute discipline, which they do not, there is no evidence that preparing them required independent judgment. As the Board found (A. 17), both of the reports documented the same clear violation of basic company rules against leaving the premises without permission. Addressing obvious violations does not require independent judgment. *See Jochims*, 480 F.3d at 1171-72; *Frenchtown*, 683 F.3d at 309; *Vencor Hosp.-L.A.*, 328 NLRB 1136, 1139 (1999).

The Company cites no record support for its claim that the Employees “have the discretion to not impose discipline.” (Br. 49-50 (emphasis omitted).) In particular, it fails to point to any occasion on which an Employee learned of a longshoreman or clerk leaving the premises without permission and declined to prepare an incident report. More broadly, the claim that Employees exercise discretion by choosing whether or not to impose discipline assumes, contrary to the Board's well-supported finding, that they can impose discipline in the first place. Plainly, if the Employees lack authority to impose discipline, they do not exercise supervisory authority by deciding whether to fill out a nondisciplinary report. *See*

*Allied Aviation*, 854 F.3d at 65 (“neither the discretion to forgo a written report nor the authority to write one suffices to establish independent disciplinary authority”).

**5. The Company failed to show that Employees adjust grievances using independent judgment**

Substantial evidence supports the Board’s rejection (A. 18) of the Company’s claim (Br. 51-53) that Employees have authority to adjust laborers’ grievances and do so using independent judgment. In making that claim, the Company primarily relies on testimony that when laborers are dispatched to a lower-hour job than they should have received under the contract, Employees can adjust their pay. (Br. 52 (citing A. 214-15).) Employees, however, merely “make that correction on [the laborers’] timesheet[s]” so that the laborers receive their contractual entitlement. (A. 215.) As the Board found (A. 18), that sort of routine correction of errors, even if it amounted to the adjustment of grievances, requires no independent judgment, and thus is not supervisory. *See Pub. Serv. Co.*, 405 F.3d at 1080 (“[T]here is a qualitative difference between adjustment of ‘grievances’ and corrections of mere mistakes when an employee calls attention to them.” (quoting *NLRB v. Sheet Metal Workers Int’l Ass’n, Local 104*, 64 F.3d 465, 469 (9th Cir. 1995)) (internal quotation marks omitted)).

The Company does not show otherwise by pointing to a collective-bargaining-agreement provision requiring longshoremen to first present their grievances to their “on-the-job supervisor.” (Br. 52.) That language does not

expressly refer to the Employees. And even if it requires longshoremen to present their grievances to the Employees, it does not prove that Employees have authority to use independent judgment to resolve any grievance a longshoreman may have. As shown above, the only adjustments alleged by the Company involved the ministerial act of correcting pay in accordance with the collective-bargaining agreement.

**6. The Company’s arguments based on secondary indicia are all meritless, and some are also waived**

Because the Company did not establish that the Employees have authority to exercise any of the enumerated supervisory functions with independent judgment, it cannot prevail by citing “secondary indicia” of supervisory status—that is, “indicia not included in the statutory definition of supervisor but that often accompany the status of supervisor.” *Pub. Serv. Co.*, 405 F.3d at 1080. Secondary indicia cannot substitute for “evidence of the actual possession of supervisory responsibility” as defined in Section 2(11). *Oil Workers*, 445 F.2d at 242. *See Jochims*, 480 F.3d at 1173; *Veolia Transp. Servs.*, 363 NLRB No. 188, 2016 WL 2772296, at \*12 (2016).

The job descriptions the Company cites throughout its brief—which it concedes to be secondary indicia (Br. 40, 47-48, 51, 53)—provide only “theoretical or paper power,” *Beverly Enters.-Mass.*, 165 F.3d at 962 (citation, internal quotation marks, and brackets omitted), which cannot carry the Company’s burden.

Equally inadequate is the conclusory testimony the Company cites (Br. 51) from its managers as to what Employees are authorized to do. *See id.* at 963. The fact that Employees arrive earlier than laborers also does not make them supervisors. (Br. 47-48.)

The Court lacks jurisdiction to consider the Company's remaining secondary-indicia arguments, which the Board has previously rejected in any event. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). A party does not preserve an objection for court consideration under Section 10(e) unless it does so "in the time and manner that the Board's regulations require." *See Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011). And the Board, with the Court's approval, has long required an employer who contests a union's certification to raise in the representation proceedings any arguments that can be litigated there, rather than waiting to raise them during related unfair-labor-practice proceedings. *See Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008). The Board properly applied that rule in this case, observing that the Company had "[a]ll representation issues raised by the [Company] were or could have been litigated in the prior representation proceeding." (A. 1.)

Ignoring that rule, the Company’s appellate brief belatedly adopts arguments that one Board member advanced in dissenting from the Board’s decision to deny review of the Regional Director’s decision. (Br. 53-56.) Specifically, the Company now argues that the Employees must be supervisors because, in the Company’s view, it would be implausible to have only one statutory supervisor, Terminal Manager Leite, covering both of its Big Island ports. (Br. 53-56.) The Company, however, did not raise that argument during the representation proceeding, nor did it seek review of the Decision and Direction of Election on that basis. (A. 26-28, 278-84.) Instead, the Company made its argument for the first time in the unfair-labor-practice case. (A. 90-91.) As the Court concluded in a previous case involving the Company, however, “[b]ecause Matson failed to raise that objection in its request that the Board review the underlying representation proceeding, . . . Matson could not raise that issue for the first time in the subsequent unfair labor practice proceeding.” *Matson Terminals, Inc. v. NLRB*, 637 F. App’x 609, 609 (D.C. Cir. 2016).<sup>6</sup>

In any event, the Board reasonably rejected the “plausibility” argument the Company improperly attempts to raise. In its Order denying review (A. 70 n.1),

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<sup>6</sup> It is immaterial that a dissenting Board member raised the arguments independently or that the Board considered and rejected them. (A. 70 n.1.) *See HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) (“[S]ection 10(e) bars review of any issue not *presented* to the Board, even where the Board has discussed and decided the issue.” (citation and internal quotation marks omitted)).

the Board cited its decision in *Buchanan Marine*, 363 NLRB No. 58, 2015 WL 7873627, at \*3, where it expressly declined a dissenting member’s proposal to adopt a new test for supervisory status that would focus on “practical realities” and “whether it is plausible to conclude that all supervisory authority is vested in persons other than the putative supervisors.” *Buchanan Marine*, 363 NLRB No. 58, 2015 WL 7873627, at \*3.)

The Board’s rejection of such a test is fully consistent with this Court’s law. As the Court has recognized, the claim (Br. 54-55) that it is implausible for an employer’s business to operate without a statutory supervisor onsite “is without basis in the statutory definition of supervisors.” *VIP Health*, 164 F.3d at 649. *Accord Buchanan Marine*, 363 NLRB No. 58, 2015 WL 7873627, at \*3. “Congress did not direct that the NLRA be interpreted such that there must be ‘supervisors’ in every workplace.” *VIP Health*, 164 F.3d at 649. And as the Board emphasized in *Buchanan Marine*, “if an individual ‘does not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it.’” 363 NLRB No. 58, 2015 WL 7873627, at \*3 (quoting *VIP Health*, 164 F.3d at 649-50) (brackets omitted). *See also, e.g., KDFW-TX*, 790 F.2d at 1279; *Res-Care*, 705 F.2d at 1467; *Chevron U.S.A.*, 309 NLRB 59, 71 (1992).

Moreover, the Company itself acknowledges that Employees call the Planner when certain issues arise after hours (Br. 15, 55 (citing A. 184, 467)), and the Planner—like the Terminal Manager and the Timekeeper—works from Hilo. (A. 122, 123, 143.) Thus, even according to the Company, problems in Kawaihae may be resolved from a distance. And it is undisputed that at all times, during operations at either port, the Terminal Manager is available to exercise his supervisory authority: he is only a phone call away. *See Frenchtown*, 683 F.3d at 315 (charge nurses were nonsupervisory despite being highest-ranking employees at times, where “at least one manager is available on call”).

The Company does no better by protesting (Br. 53-56) that the “real-world implication” of the Board’s decision will be a high ratio of longshoremen to statutory supervisors. The complaint, first of all, is exaggerated. The Company references its 41 employees on the Big Island (Br. 54), but because the Company’s barge operations do not occur simultaneously, ordinarily only 13 to 17 laborers are discharging or loading back a vessel at any given time. (*See above*, p. 6.) And as the record shows, the Company has structured its Big Island operations so that those laborers require little oversight by individuals exercising “genuine management prerogatives.” *Oakwood*, 348 NLRB at 688 (quoting *Bell Aerospace*, 416 U.S. at 280-81 (internal quotation marks omitted)).

Contrary to the Company's claims, the real practical implication of the Board's Order is simply that the Employees will not be deprived of their statutory right to select union representation and bargain collectively. *Cf. Buchanan Marine*, 363 NLRB No. 58, 2015 WL 7873627, at \*3 (“[A] finding that [tugboat] captains are not supervisors for purposes of the Act does not mean that their commands need not be obeyed by the crew . . . ; it simply means that the captains may vote whether to be represented for purposes of collective bargaining, and be represented as part of a unit that selects a representative.”). Because the Company failed to meet its burden of showing the Employees to be supervisors, that outcome is the one the Act requires.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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National Labor Relations Board

November 2017

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MATSON TERMINALS INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 17-1124 & 17-1148
	)	
v.	)	Board Case No.
	)	20-CA-187970
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,460 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 1st day of November 2017

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MATSON TERMINALS INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 17-1124 & 17-1148
	)	
v.	)	Board Case No.
	)	20-CA-187970
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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