

ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1124

IN THE 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 OF A FINAL ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

**FINAL REPLY BRIEF FOR PETITIONER/CROSS-RESPONDENT
MATSON TERMINALS, INC.**

Barry W. Marr (Bar No. 55494)
Christopher S. Yeh (Bar No. 60392)
MARR JONES & WANG LLP
Pauahi Tower
1003 Bishop Street, Suite 1500
Honolulu, Hawaii 96813
Tel. No. (808) 536-4900
Fax No. (808) 536-6700
Email: cyeh@marrjones.com

Counsel for Petitioner/Cross-Respondent
Matson Terminals, Inc.

TABLE OF CONTENTS

	Page(s)
I. STATUTES AND REGULATIONS	1
II. SUMMARY OF THE ARGUMENT	1
III. ARGUMENT	5
A. The Petitioned-For Employees Exercise Independent Judgment When They Reward	5
B. The Petitioned-For Employees Exercise Independent Judgment When They Assign	8
C. The Petitioned-For Employees Responsibly Direct.....	9
1. The Petitioned-For Employees Exercise Independent Judgment When Directing Employees.....	9
2. The Petitioned-For Employees Are Accountable	12
D. The Petitioned-For Employees Exercise Independent Judgment When They Discipline	13
E. The Petitioned-For Employees Exercise Independent Judgment When They Adjust Grievances.....	16
F. Secondary Indicia Must Be Considered	18
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allstate Ins. Co.</i> , 332 NLRB No. 66 (2000)	17
<i>Barstow Community Hosp.</i> , 352 NLRB 1052 (2008)	17
<i>Beverly Enterprises-Minnesota, Inc., d/b/a Golden Crest Healthcare Center</i> , 348 NLRB 727 (2006)	9
<i>Beverly Enters. d/b/a Carter Hall Nursing Home v. NLRB</i> , 165 F.3d 290 (4th Cir. 1999)	10
<i>Granare, Inc. v. NLRB</i> , 137 F.3d 372 (6th Cir. 1998)	10, 19
<i>Hawaiian Dredging Constr. Co., Inc. v. NLRB</i> , 857 F.3d 877 (2017).....	19
<i>Legal Aid Bureau, Inc.</i> , 319 NLRB 159 (1995)	17
<i>Matson Terminals, Inc.</i> , 321 NLRB 879 (1996)	11
<i>Micro Pac. Dev., Inc. v. NLRB</i> , 178 F.3d 1325 (D.C. Cir. 1999).....	5, 7
<i>Midwest Reg'l Joint Board, et al. v. NLRB</i> , 564 F.3d 434 (D.C. Cir. 1977).....	14
<i>NLRB v. Gray Line Tours, Inc.</i> , 461 F.2d 763 (9th Cir. 1972)	17
<i>Oak Park Nursing Care Ctr.</i> , 351 NLRB 27 (2007)	15

Oakwood Healthcare, Inc.,
348 NLRB 686 (2006)8, 9, 10, 15

Palace Sports & Entm't v. NLRB,
411 F.3d 212 (D.C. Cir. 2005).....14

Public Serv. Co. v NLRB,
405 F.3d 1071 (10th Cir. 2005)7

GLOSSARY

D&DE	Decision and Direction of Election by the Acting Regional Director of the National Labor Relations Board, Region 20
BIS	Big Island Stevedores
Board	National Labor Relations Board
Board Order	Board's Order dated October 7, 2016
ILWU	International Longshore and Warehouse Union
Matson	Petitioner/Cross-Respondent Matson Terminals, Inc.
NLRA	National Labor Relations Act, 29 U.S.C. § 151 <i>et seq.</i>
NLRB	National Labor Relations Board
Petitioned-For Employees	Supervisors and Senior Supervisors at Big Island Stevedores
Regional Director	Regional Director of NLRB, Region 20
Supervisors	Supervisors and Senior Supervisors at Big Island Stevedores
Union	Hawaii Teamsters and Allied Workers, Local 996

I. STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief of Petitioner/Cross-Respondent Matson Terminals, Inc. (“**Matson Brief**”) and Brief for the National Labor Relations Board (“**Board Brief**”).

II. SUMMARY OF THE ARGUMENT

The Petitioned-For Employees are statutory supervisors because they have the authority to reward, assign, responsibly direct, discipline and adjust grievances. In performing these responsibilities, the Supervisors rotate through four positions – Barge Planners, Barge Supervisors, Yard Supervisors and Timekeeper/Dispatchers.

When a Supervisor is a Barge Supervisor or a Yard Supervisor, they have the authority to **reward** employees by tacking on time to their timecards or by allowing them to leave work while continuing to be paid. Matson presented substantial evidence of instances where Supervisors exercised their independent judgment in deciding to reward employees. The GC attempts to counter the evidence by applying a nonexistent standard (that the practice must be based on pre-determined written, criteria authorized by management) and by claiming the Supervisor’s authority to pay employees for time they did not work is not actually a reward. The GC’s arguments fail in the face of the established law in this Circuit,

which does not require written, pre-determined or authorized criteria, or adherence to an out-of-circuit definition of “reward” relied upon by the GC.

When a Supervisor is a Barge Planner, they have the authority to **assign** when he creates the assignment for the entire operation, which is then executed by the Barge Supervisor and Yard Supervisor. The GC claims the Barge Planner does not “assign” because he does not directly assign jobs to laborers. However, this notion was specifically rejected by the Board, which has held it does not have to be employees but rather tasks that are assigned.

When a Supervisor is a Barge Planner, Barge Supervisor, or a Yard Supervisor, they **responsibly direct** employees. The GC does not dispute that the Barge Supervisors and Yard Supervisors direct employees, but protests that the direction is without the exercise of independent judgment or accountability. However, the substantial evidence shows that Supervisors exercise independent judgment when directing employees. For example, as a Barge Supervisor, a Supervisor decides how to direct a crane operator to remove cargo, and he is accountable because he issues corrective action and can be disciplined for the mistakes of the longshoremen/laborers.

As a Barge Planner, and contrary to the GC’s claim that the Supervisor does not direct because there are no “men under him,” the Supervisor does in fact have Barge Supervisors and Yard Supervisors “under him” to execute

the plan he created. In arguing that Barge Planners do not exercise independent discretion in creating the plan, the GC relies on another *Matson* case out of its larger California operation, although there is no evidence that the planner's job in California is identical to the Barge Planner's job in the much smaller operation on the Big Island. In fact, the substantial evidence shows the Barge Planner on the Big Island has more significant responsibilities than the planner in California.

Supervisors also have the authority to **discipline** employees. The GC disputes whether the discipline issued by Supervisors qualifies as discipline and whether they exercise independent judgment in issuing discipline. The GC's arguments have no merit because the substantial evidence shows that the two written warnings presented during the representation hearing were, in fact, discipline. Further the substantial evidence shows that the Supervisors had discretion on whether to issue the discipline and could do so without notifying the Terminal Manager or seeking his permission.

Supervisors have the authority to **adjust grievances** based on the substantial evidence that Supervisors in fact adjust timesheets when the longshoremen dispute them. In any event, as set forth in the collective bargaining agreement with the longshoremen's union, the International Longshore and Warehouse Union ("ILWU"), a first step grievance must be presented to the "on-

the-job supervisor,” who indisputably is a Petitioned-For Employee and who provides his binding “answer” to the grievance.

Finally, the GC claims that this Court is not permitted to consider the real world implications of the Board’s decision – specifically, that if the Petitioned-For Employees are not statutory supervisors, then the ratio between supervisors and employees will be implausibly high. Contrary to the GC’s claim, while Matson may not have used the words “ratio” in its earlier submissions, Matson substantively made this point when it argued that, if the Petitioned-For Employees are not statutory supervisors, then there is no supervisor to oversee the operations when the Terminal Manager is not present (during night and weekend operations). Moreover, the Board was required to, but did not, substantively address the dissent’s argument with respect to this issue in its Order dated October 7, 2016 (**“Board Order”**).

Thus, the GC’s Brief did not advance the Board’s position, and based on the substantial evidence that was improperly discounted, misconstrued or ignored by the Board in making its arbitrary and capricious decision, Matson’s Petition for Review should be granted and the Board’s Cross-Application for Enforcement should be denied.

III. ARGUMENT

A. The Petitioned-For Employees Exercise Independent Judgment When They Reward

The GC incorrectly asserts in the Board Brief that Supervisors do not exercise independent judgment when they reward the longshoremen by tacking on time or allowing them to leave early or in the middle of their shift. GC Brief at 23-30. The substantial evidence, ignored by the Board, shows otherwise.

First, there is no legal and/or factual basis for the GC's arguments that (1) Matson needed to have the practice of rewarding laborers in writing, (2) Matson management failed to authorize the practice, and (3) rewarding is routine because it is based on pre-determined criteria. GC Brief at 24, 26.¹

As a legal matter, arguments #1 and #2 above fail because this Circuit has not required that rewarding be based upon a written policy or express management authorization. For example, in *Micro Pac. Dev., Inc. v. NLRB*, this Court found that a housekeeping supervisor exercised independent judgment in rewarding employees when he determined, without managerial input, which housekeepers received "choice assignments." 178 F.3d 1325, 1332 (D.C. Cir. 1999). There was no indication that the housekeeping supervisor's practice was

¹ There is a contradiction in the GC's argument that, on the one hand, the practice of rewarding was not authorized or written, and on the other hand, that it was based on pre-determined criteria.

written or authorized by management; in fact, his “selection process was unclear.”

Id.

As a factual matter, argument #3 fails because Leite and Bell exercise independent judgment when they determine (based on their own criteria) when to tack on time to the longshoremen’s timesheet. Matson Brief at 35-38. Leite, for example, testified he tacked on time to reward longshoremen based on a productivity standard he created, *i.e.*, when the longshoremen finished the operation within the goals he set. [App’x 212]²; Matson Brief at 19. Unlike Leite, Bell tacked on time to reward laborers for working overtime. [App’x 171-72]; Matson Brief at 19.

As a factual matter, argument #2 fails because, although the policy was unwritten, the evidence (which the Board ignores) shows that tacking on time was, and continues to be, authorized by management and is practiced by current Supervisors. [App’x 214, 239]

Second, the GC erroneously claimed that Bell and Leite’s practice of rewarding laborers by allowing them to leave work in the middle of a shift or early *with pay* was not a reward because it did not incentivize the laborers. GC Brief at 27. This argument fails because incentivizing the workers is not the legal standard: The GC cites only to one out-of-circuit case where the court opines in passing of

² References to the transcript testimony from the representation hearing before the NLRB hearings officer are referred to as “App’x.”

what “one thinks of” is “generally” a reward. GC Brief at 27; *Public Serv. Co. v NLRB*, 405 F.3d 1071, 1079 (10th Cir. 2005). Moreover, in *Micro Pac. Dev.*, this Court held that the housekeeping supervisor’s assignment of “prized overtime guarantees” was an exercise of his authority to reward without any evidence of what, if anything, the practice incentivized the housekeepers to do to obtain the overtime. 178 F.3d at 1332.

Third, the GC mistakenly claims that, when Supervisors allow employees to leave early or in the middle of the shift, they are simply adhering to § 8.01 of the ILWU’s CBA. *See* GC Brief at 28. As explained in Matson’s Opening Brief at 38-39, the GC’s argument fails because (1) the Regional Director does not have authority to interpret the language in collective bargaining agreements, (2) to the extent the Board has jurisdiction to interpret the ILWU’s CBA, its interpretation was incorrect because § 8.01 does not apply to the situation of Bell and Leite allowing laborers to “dig out” of work for a few minutes to run errands, and (3) even if § 8.01 applies, the CBA makes clear that the Supervisor determines if the laborer’s reason is “good and sufficient.” The GC’s response to these arguments is to claim Matson did not provide the factors weighed by the Supervisors in considering employees’ requests to dig out. GC Brief at 30. However, the record is clear that Bell and Leite, at the time the employees made the request to leave, had the choice of denying the request, allowing the laborer to

leave with pay, or allowing the laborer to leave without pay, all without input from management. Matson Brief at 21.

B. The Petitioned-For Employees Exercise Independent Judgment When They Assign

There is no merit to the GC's assertion that the Petitioned-For Employees do not exercise independent judgment when they assign.

First, the GC ignores the undisputed fact that the Petitioned-For Employees *rotate* through four positions – Barge Planner, Barge Supervisor, Timekeeper/Dispatcher, and Yard Supervisor. Matson Brief at 8; [App'x 217-19] In these positions, the Petitioned-For Employees plan and execute the entire operation. It is facially implausible to argue that there is no independent judgment in the Petitioned-For Employees' planning of the entire operation.

Second, the GC's incorrectly applies the definition of "assign" articulated by the Board in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). For example, the GC appears to argue that the Barge Planner does not assign work because, although he prepares the documents for the operation, he does not specify which longshoreman performs the job. GC Brief at 32. However, the Board in *Oakwood* specifically rejected the argument raised by the dissent that to "assign," "it must be the *employees* who are being assigned, not the tasks." *Oakwood*, 348 NLRB at 690 (emphasis in original). The *Oakwood* Board described the dissent's argument as "overly subtle and debatable grammatical distinctions." *Id.* Like the

dissent in *Oakwood*, the GC attempts to draw this Court into a debate rejected by the Board, likely because there is no question that the Barge Planner makes the assignments for the entire operation, which is then executed by the Barge Supervisor and Yard Supervisor. Matson Brief at 8-10. The GC does not dispute that the Barge Planner exercises independent judgment in assigning the discharge sequence and the load back plans (therefore the argument is waived). GC Brief at 32; *see* Matson Brief at 8-10, 42. Thus, when the Petitioned-For Employees are Barge Planners, they exercise independent judgment when they create the assignments for the operations.

C. The Petitioned-For Employees Responsibly Direct

1. The Petitioned-For Employees Exercise Independent Judgment When Directing Employees

There is no merit to the GC's argument that the Petitioned-For Employees do not exercise independent judgment in responsibly directing the longshoremen.

Barge Supervisors and Yard Supervisors: The GC asserts that, in directing the operation,³ the Barge Supervisors and Yard Supervisors do not

³ The GC does not dispute that Barge Supervisors and Yard Supervisors "direct" the longshoremen to execute the plan. GC Brief at 32-33; *see Beverly Enterprises-Minnesota, Inc., d/b/a Golden Crest Healthcare Center*, 348 NLRB 727, 730 (2006) (finding nurses had the authority to direct when they directed CNAs to perform simple tasks they deemed necessary, such as clipping a resident's

exercise independent discretion. GC Brief at 39-41. However, the evidence shows that the Barge Supervisor exercises independent discretion in determining what the longshoremen/laborers need to do to execute the plan efficiently, for example, by directing a crane operator on how to successfully extract a container based on the Barge Supervisor's assessment of the crane operator's ability. Matson Brief at 11, 44; *see Oakwood*, 348 NLRB at 695.

Barge planners: The GC incorrectly assumes that when Supervisors are Barge Planners they do not direct any laborers. GC Brief at 33, 37. However, it is undisputed that the plans created by the Barge Planner determine the work of the longshoremen and laborers; thus he clearly has "men under him" and "decides what job shall be undertaken next or who shall do it." *Oakwood*, 348 NLRB at 691. The fact that there is a layer of supervision (Barge Supervisors and Yard Supervisors) between Barge Planners and the employees further supports the supervisory status of Barge Planners. *See Beverly Enters. d/b/a Carter Hall Nursing Home v. NLRB*, 165 F.3d 290, 292 (4th Cir. 1999) (undisputed statutory supervisors had another layer of supervisors between them and statutory employees); *Granare, Inc. v. NLRB*, 137 F.3d 372, 374 (6th Cir. 1998) (same). Even assuming the Barge Planner must have "men under him," the evidence shows

toe nails and fingernails, emptying catheters, or to changing an incontinent resident).

the Barge Planner directs the Barge Supervisors and Yard Supervisors, who execute the Barge Planner's plan. Matson Brief at 10.

The GC also erroneously argues that the Barge Planner does not exercise independent discretion. GC Brief at 38. The GC relies heavily on the Board's analysis of a "vessel planner" for a Matson operation in Southern California. *Id.*, see *Matson Terminals, Inc.*, 321 NLRB 879 (1996). The GC's reliance on the California Matson case is misplaced given the lack of evidence that the positions are identical; in fact, the evidence shows that there are significant differences in the vessel planner and Barge Planner's duties. For example, while the vessel planner in the California case created the stowage plan for outbound ships, here, based on the smaller size of the operation (*compare* 321 NLRB at 881 (86 acres) *with* [App'x 287-88]⁴, the Barge Planners have more responsibility at the Big Island port, including being on-call for when an issue arises during an operation (even during nights and weekends), determining priority containers, and deciding whether to move chassis between the two Big Island ports. Matson Brief at 9, 15. The GC completely ignored these significant, additional responsibilities. Even without these additional, significant responsibilities, the evidence shows the Barge Planner exercises independent judgment in planning the operation. *See* Matson Brief at 8-10, 42-43.

⁴ Matson's exhibits from the representation hearing are referred to herein as "App'x"

Finally, the GC does not and cannot dispute that the Petitioned-For Employees are constantly making adjustments during the operation. *Id.*

2. The Petitioned-For Employees Are Accountable

The GC's arguments that the Petitioned-For Employees are not accountable are similarly misplaced.

First, it is undisputed that the Petitioned-For Employees are responsible for the operation. For example, the undisputed testimony is that the "barge supervisor is responsible for everything that happens on the barge." Matson Brief at 44; [App'x 161-62]

Second, the Petitioned-For Employees are accountable for the mistakes of the longshoremen. Matson Brief at 43. It is undisputed that when a longshoreman that Supervisor Llewellyn Lee was directing caused more than \$4,000 in damage, both the longshoreman and Lee were drug tested. Matson Brief at 43. In arguing that Lee was drug tested for his "own performance," the GC misinterprets the critical and undisputed fact that Lee did not cause the damage. GC Brief at 35. Moreover, the GC questions whether a drug test is "an adverse consequence." *Id.* In feigning ignorance of whether a drug test is an "adverse consequence," the GC appears to be ignoring his own memorandum in which he took the position that drug tests have a substantial impact on the terms and conditions of an employee's working conditions, given that "[a] drug test is

designed to determine whether an employee . . . uses drugs, irrespective of whether such usage interferes with the ability to perform.” NLRB General Counsel’s Guideline Memorandum Concerning Drug or Alcohol Testing of Employees, Memorandum GC 87-5, at 6 (1987). It would be disingenuous for the GC to take the position here that giving Lee a drug test, for damage he did not cause, was not evidence of accountability.

Finally, Matson submitted factual and legal support evidencing that the Petitioned-For Employees take corrective action against the employees they supervise. *See* Matson Brief at 41; [App’x 488-91] The evidence includes written warnings issued by Supervisors to wharf clerks for disobeying a directive of a Supervisor and for violating Matson rules. *See* [App’x 488-91] Therefore the GC’s argument that Matson waived its argument is without support.

Thus, based on the above, when the Petitioned-For Employees rotate into the Barge Planner, Barge Supervisor and Yard Supervisor positions, they exercise supervisory authority by responsibly directing the employees.

D. The Petitioned-For Employees Exercise Independent Judgment When They Discipline

The GC’s argument that the Petitioned-For Employees do not exercise independent judgment when they discipline fails because it is based on the false premise that the warnings issued by the Supervisors are simply write ups/reports rather than actual discipline.

Contrary to the GC's mischaracterization of the evidence, the record shows that Supervisors issue discipline in the form of *verbal and written warnings*, which this Circuit recognizes as part of the disciplinary process. *See Palace Sports & Entm't v. NLRB*, 411 F.3d 212, 217 (D.C. Cir. 2005) (written warning was disciplinary warning which led to discharge); *Midwest Reg'l Joint Board, et al. v. NLRB*, 564 F.3d 434, 439 n. 6 (D.C. Cir. 1977) (verbal warning was part of disciplinary procedures); Matson Brief at 50-51.

Moreover, even if the discipline were "write ups," the substantial evidence is that Matson considered them a form of discipline.

First, Dexter Shimabukuro, who was the Terminal Manager when Leite disciplined wharf clerk Sherri Wilson, testified, in reference to Er Ex. 16, that Leite issued "this verbal counseling and written warning." [App'x 243] Shimabukuro further testified that he thought the verbal warning was part of the progressive disciplinary process. [App'x 243]; *see also* [App'x 199] (Leite considers verbal counseling as discipline).

Second, Shimabukuro testified that when Supervisor Norman Nakamura issued Er Ex. 19, he was disciplining wharf clerk Crystal Kekela. [App'x 244] Shimabukuro further testified that having the ILWU shop steward present at the disciplinary meeting, was consistent with § 17.05 of the ILWU CBA,

which requires “*Written warnings* . . . will be provided to the employee with a copy to the Union (BA and Unit Chair).” [App’x 244-45, 391 at § 17.05]

By splitting hairs on whether write ups are or are not discipline based on a company’s internal nomenclature, the GC is again attempting to engage this Court in “overly subtle and debatable . . . distinctions,” discouraged by the Board in *Oakwood*. See *Oakwood*, 348 NLRB at 690. However, the GC’s argument, which relies on form over substance, is immaterial given the undisputed evidence that Matson considers documents such as Er Exs. 16 and 19 [App’x 487-90] (no matter what they are called) to be part of the progressive discipline process under the ILWU CBA. See *Oak Park Nursing Care Ctr.*, 351 NLRB 27, 28 (2007).

The GC also argues that preparing the discipline does not require independent judgment. GC Brief at 47. However, the evidence shows that Supervisors issue discipline without the Terminal Manager’s approval or knowledge and therefore without the Terminal Manager conducting an independent investigation. For instance, Shimabukuro did not investigate whether Wilson and Kekela actually left work under punishable circumstances or excusable circumstances (such as after informing another supervisor, because of an emergency, etc.). [App’x 245]; see also [App’x 199] (Leite testimony that Supervisors can discipline without Terminal Manager’s permission). Because the Terminal Manager is not involved in the disciplinary process, it is within the

Supervisor's discretion to decide the type of discipline, or no discipline at all.

Matson Brief at 50.

Thus, the evidence shows the Petitioned-For Employees exercise supervisory authority when they discipline employees.

E. The Petitioned-For Employees Exercise Independent Judgment When They Adjust Grievances

The GC's argument that Supervisors do not exercise independent judgment in adjusting the employees' grievances fails because it is contradicted by Matson's CBA with the ILWU.

Section 24.04 of the ILWU CBA provides for the Supervisors' unilateral authority to adjust grievances: "Any employee shall first either personally, or through a representative of the Union acting on behalf of the employee, or on its own behalf, present the alleged grievance either orally or in writing to his *on-the-job supervisor*," and the "*supervisor shall give his answer in writing*" within seven days of receipt. [App'x 321 at § 24.04] (emphasis added). The GC does not dispute that the Petitioned-For Employees are the ILWU-represented employees' on-the-job supervisors. *See* Matson Brief at 8-18.

The CBA contemplates that the Supervisor's answer might resolve the grievance, because going to the next grievance step is only a contingency and not a certainty. *See* [App'x 321 at § 24.04] ("*If the supervisor's oral or written response*

does not adjust the grievance to the complainant's satisfaction,” then complainant may take further steps) (emphasis added.)

The CBA also indicates that the Supervisor can grant the grievance by choosing not to respond – *i.e.*, that the Supervisor’s non-response within the given time limit resolves the grievance in the employee’s/ILWU’s favor. *See* [App’x 321 at § 24.04].

Thus, although the GC focuses on Supervisors when they rotate into the Timekeeper/Dispatcher position and adjust pay grievances, nowhere in § 24.04 (or the CBA generally) does it limit Supervisors from resolving other grievances. In fact, the tangible evidence shows that it is the Petitioned-For Employees’ responsibility to administer the contract and that their action or inaction can materially impact Matson’s rights under the collective bargaining agreement. *See* [App’x 128]

In this regard, it is important to reiterate that it is the ***existence, and not the exercise***, of supervisory authority that is dispositive. Matson Brief at 51-53; *NLRB v. Gray Line Tours, Inc.*, 461 F.2d 763, 764 (9th Cir. 1972); *see, e.g.*, *Barstow Community Hosp.*, 352 NLRB 1052 (2008); *Allstate Ins. Co.*, 332 NLRB No. 66 (2000) (“[T]he rule is clearly established in Board precedent that possession of authority consistent with any of the indicia of Section 2(11), not the exercise of that authority, is the evidentiary touchstone”); *Legal Aid Bureau, Inc.*, 319 NLRB

159, 161 (1995) (“the Board and courts have uniformly held that supervisory status is not dependent upon the frequency of the exercise of, but upon the existence of, such authority”) (citation omitted). Here, §§ 24.04 and 24.05 establish, without dispute, that Supervisors have the authority to unilaterally adjust grievances.

F. Secondary Indicia Must Be Considered

The GC incorrectly claims that Matson waived its argument regarding the real-world implications of the Board’s decision – specifically, that if the Petitioned-For Employees are not statutory supervisors, it would create an implausibly high supervisor to employee ratio. GC Brief at 50-53.

First, Matson did not waive its right to raise the argument, as the issue was identified in its Request for Review dated June 10, 2016. *See* [App’x 35] In its Request for Review, Matson explained that if Terminal Manager Leite were not present, there would be no other supervisor except for the Petitioned-For Employees. *Id.* at [App’x 34-35] That Matson did not specifically couch the issue in terms of the “ratio” between supervisors and employees, should not preclude it from making the argument before this Court. The GC again seeks to argue form over substance.

Second, the Board failed to specifically address the dissent’s argument in the Board Order. Rather the Board simply made a passing remark in a footnote, writing that they “decline to revisit” the issue raised by Chairman Miscimarra. *See*

[App'x 70 at n. 1] This would not be the first time the Board reversibly failed to address the dissent's arguments. Recently, in *Hawaiian Dredging Constr. Co., Inc. v. NLRB*, this Court unequivocally stated,

An agency decision is arbitrary when it “entirely failed to consider an important aspect of the problem” or “offered an explanation for its decision that runs counter to the evidence before the agency.” The Board’s decision, therefore, must “enable [the court] to conclude that [its action] was the produce of reasoned decisionmaking,” in part because the Board “engage[d] the arguments raised before it,” ***including those of a dissenting member.***”

857 F.3d 877, 881-82 (2017) (citations omitted) (emphasis added).

Here, other than its cryptic footnote, the Board failed to explain why it declined to address Chairman Miscimarra’s arguments under the facts of the Matson case, including addressing the Regional Director’s remark that “there is no question that the work of the petitioned-for employees is to quarterback the cargo operations,” which Chairman Miscimarra found that the “statement alone could justify granting review of the Regional Director’s findings in order to determine whether evidence of supervisory authority was discounted or disregarded “merely because it could have been stronger, more detailed, or supported by more specific examples.” [App'x 71]

Thus, while the GC claims the dissent's argument is "immaterial," it is not. The Board is not permitted to ignore a dissenting argument simply by "declining" to address it.

IV. CONCLUSION

For all of the foregoing reasons and the reasons explained in Matson's Opening Brief filed on August 14, 2017, Petitioner/Cross-Respondent Matson Terminals, Inc. respectfully requests that this Court grant Matson's Petition for Review and deny the General Counsel's Cross-Application for Enforcement.

DATED: Honolulu, Hawaii, November 1, 2017.

/s/ Christopher S. Yeh

Barry W. Marr (Bar No. 55494)

Christopher S. Yeh (Bar No. 60392)

MARR JONES & WANG LLP

Pauahi Tower

1003 Bishop Street, Suite 1500

Honolulu, Hawaii 96813

Tel. No. (808) 536-4900

Fax No. (808) 536-6700

Email: cseh@marrjones.com

Counsel for Petitioner/Cross-Respondent
Matson Terminals, Inc.

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Case Number: 17-1124

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME
LIMITATIONS TYPEFACE
REQUIREMENTS, AND TYPE
STYLE REQUIREMENTS
PURSUANT TO RULE 32(A)

Board Case No. 20-CA-187970

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS TYPEFACE REQUIREMENTS, AND TYPE
STYLE REQUIREMENTS PURSUANT TO RULE 32(A)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,127 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), as counted by Microsoft Word 2010.

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DATED: Honolulu, Hawaii, November 1, 2017

/s/ Christopher S. Yeh

Barry W. Marr (Bar No. 55494)

Christopher S. Yeh (Bar No. 60392)

MARR JONES & WANG LLP

Pauahi Tower

1003 Bishop Street, Suite 1500

Honolulu, Hawaii 96813

Tel. No. (808) 536-4900

Fax No. (808) 536-6700

Email: cyeh@marrjones.com

Counsel for Petitioner/Cross-Respondent
Matson Terminals, Inc.

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CERTIFICATE OF SERVICE

Board Case No. 20-CA-187970

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2017, a true and correct copy of the foregoing document was served by using the appellate CM/ECF system on the following:

Linda Dreeben, Esq.
Julie Broido, Esq.
Micah Jost, Esq.
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

appellatecourt@nlrb.gov
julie.broido@nlrb.gov
micah.jost@nlrb.gov

Attorneys for the Respondent /Cross-Petitioner
National Labor Relations Board

DATED: Honolulu, Hawaii, November 1, 2017.

/s/ Christopher S. Yeh

Barry W. Marr (Bar No. 55494)

Christopher S. Yeh (Bar No. 60392)

MARR JONES & WANG LLP

Pauahi Tower

1003 Bishop Street, Suite 1500

Honolulu, Hawaii 96813

Tel. No. (808) 536-4900

Fax No. (808) 536-6700

Email: cyeh@marrjones.com

Counsel for Petitioner/Cross-Respondent
Matson Terminals, Inc.