

Nos. 18-1070 and 18-1103

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

CRANESVILLE BLOCK CO., 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**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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

CRANESVILLE BLOCK COMPANY, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1070, 18-1103
)	
)	
v.)	Board Case Nos.
)	3-CA-209124
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and Amici: Cranesville Block Co., Inc., was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board’s General Counsel was also a party before the Board, and the Board is the respondent/cross-petitioner before the Court. The International Brotherhood of Teamsters, Local 294 was the charging party before the Board. There are no intervenors or amici.

(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 the Board’s Decision and Order in Case No. 3-CA-209124, issued on February 13, 2018, and reported at 366 NLRB No. 18. The Board’s Order in the underlying

representation case denying review of the Regional Director's Supplemental Decision and Order issued on September 6, 2017.

(C) Related Cases: The case on review was not previously before this Court and or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

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Dated at Washington, DC
this 7th day of August 2018

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GLOSSARY

Act	The National Labor Relations Act
Board	The National Labor Relations Board
Br.	Cranesville Block Co., Inc. brief to the Court
Company	Cranesville Block Co., Inc.
Union	International Brotherhood of Teamsters, Local 294

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Cranesville Block Co., 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 February 13, 2018, and reported at 366 NLRB No. 18. (A. 300-02.)¹

The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, 158(a)(5) and (1), by refusing to bargain with the International Brotherhood of Teamsters, Local 294 (“the Union”) as the certified collective-bargaining representative of a unit of mechanics at the Company’s Amsterdam, New York facility. (A. 300-02.)

The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the Act, 29 U.S.C. 160(a), which empowers the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final, and the Court has jurisdiction over the case under Section 10(e) and (f) of the Act, 29 U.S.C. §160(e) and (f), which allows an aggrieved party to obtain review of a final Board order in this Circuit, and allows the Board to cross-apply for enforcement. The Company’s petition and the Board’s application were timely because the Act places no time limit on such filings.

Because the Board’s Order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding (Board Case No. 03-RC-190952) is also before the Court under Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964);

¹ “A” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Terrace Gardens Plaza, Inc. v. NLRB, 91 F.3d 222, 225 (D.C. Cir. 1996). The Court may review the Board's actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or part. 29 U.S.C. § 159(d). 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 ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are contained in the Statutory Addendum to this brief.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company failed to carry its burden of proving its claim that mechanic William Deming is a statutory supervisor. If so, the Board properly certified the Union and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

STATEMENT OF THE CASE

In this test-of-certification case, the Board found that the Company unlawfully refused to bargain with the Union after a majority of the Company's mechanics at its Amsterdam, New York facility voted in a Board-conducted, secret-ballot election to be represented by the Union. (A. 300-02.) The Company concedes (Br. 4, 5) that refusal, contesting instead the Board's findings in the underlying representation proceeding. In that proceeding, the Board found that the Company failed to meet its burden of proving its claim that mechanic William Deming was a supervisor, which also necessarily disposed of the Company's election objection that alleged that Deming, as a supervisor, had improperly engaged in pro-union conduct. The Board's findings of fact, and the procedural history in the representation and unfair-labor-practice proceedings, are summarized below. Additional facts are discussed in the Argument.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations and Organizational Structure

The Company manufactures ready mix concrete. It operates 10 facilities and maintains 120 trucks. Owner and Operations and Maintenance General Manager John Tesiero, IV, oversees plant operations at all of the Company's facilities and garages. Tesiero works in the Company's corporate office located in Amsterdam, New York. Fleet Manager Richard Dwyer reports to Tesiero, and oversees the

maintenance facilities. (A. 239; 16-18, 41, 47, 52-54.) Dwyer reports to the Amsterdam maintenance garage every morning. He then visits other maintenance garages during the day before returning to the Amsterdam garage at the end of the day. (A. 54.) Five mechanics, including Deming, work in the maintenance garage at the Amsterdam facility. (A. 239; 20.) Deming is the most senior mechanic, having worked at the Amsterdam facility for 17 years. (A. 161; 177.)

B. The Procedures for Maintenance Work at the Amsterdam Garage

Each evening, drivers at the Amsterdam facility complete Driver Inspection Reports that set forth needed truck maintenance. Fleet Manager Dwyer reviews the inspection reports and other maintenance tasks with Owner Tesiero. Deming does not participate in these discussions. (A. 241; 54, 57, 76, 163-64.) At the start of each workday, at approximately 6:00 a.m., Dwyer meets with Deming to review the inspection reports. Dwyer informs Deming of the needed repairs and sets priorities for those repairs. (A. 241; 32, 55-56, 66-67, 74-77, 140-41, 164-65.) During their morning meeting, Dwyer also discusses regularly scheduled maintenance with Deming, such as oil changes. (A. 92.)

After the morning meeting when he has received the tasks for the day, Deming assigns the repair and maintenance work to the other mechanics based on their experience and specific knowledge. He assigns simple mechanical tasks to two new mechanics who have no prior mechanical experience with heavy

equipment. He assigns electronic repair work to Justin Stewart, who is known for his knowledge of electronics. Deming himself performs maintenance work on motors, which requires the most experience. (A. 241; 67, 76-81, 91-92, 135, 165, 217-18, 224-25.) Because Deming is the most experienced mechanic, the other mechanics ask him questions regarding the performance of tasks. (A. 60-61, 103-05, 135-36, 173.) Deming also provides the other mechanics with instructions if he sees they are not performing a task properly, and will remind them to keep their work areas clean. (A. 255; 110, 170.)

During the day, the Amsterdam facility may receive calls from drivers (“road calls”) whose trucks have a flat tire or a mechanical issue. Both Dwyer and Deming are involved in dispatching mechanics on these occasions. Deming notifies Dwyer of every road call unless it is something simple, such as a flat tire. (A. 241; 109-10, 174-76, 218-19.) Little training is generally needed to perform a road call. (A. 241; 45.) Rather the decision on which mechanic to assign is a matter of who is willing and able. Sometimes the repair requires two people. (A. 45, 96-97, 174-75.)

II. PROCEDURAL HISTORY

A. The Representation Proceeding

1. Petition and election

In January 2017, the Union filed an election petition to represent the mechanics at the Company's Amsterdam, New York facility. (A. 237; 299.) On February 8, pursuant to the parties' Stipulated Election Agreement, the Board conducted a secret-ballot election. As a result, the tally of ballots showed two ballots were cast for the Union, 1 ballot was cast against, and 1 ballot, the ballot cast by Deming, was challenged. That one challenged ballot was a number sufficient to affect the outcome of the election so it was held unopened until the Board could resolve the challenge. (A. 237.) After the election, the Company filed election objections alleging that Deming was a statutory supervisor, and that, as such, he had engaged in objectionable pro-union conduct prior to the election. (A. 237; 5-6.)

2. The hearing officer's report and the Regional Director's decision on review

A Board hearing officer held a hearing on the Company's objections and Deming's challenged ballot. (A. 237.) Thereafter, the hearing officer issued a report concluding that because the Company had "failed to show by a preponderance of the evidence that Deming's ballot should be excluded on supervisory grounds, I recommend that the Objections be overruled in their

entirety, and that Deming’s ballot be opened and counted, and that a revised tally of ballots [be] issued.” (A. 241.)

The Company filed timely exceptions to the hearing officer’s report, arguing that Deming exercises supervisory authority on three statutory bases: (1) that he assigns work to the other mechanics, (2) responsibly directs their work, and (3) disciplines them or effectively recommends their discipline. Thereafter, the Board’s Regional Director issued a Supplemental Decision and Order. (A. 259-60.) Specifically, the Regional Director “adopt[ed] the hearing officer’s findings with regard to Deming’s supervisory status, and conclude[d] that the [Company] has not carried its burden to show that Deming is a supervisor within the meaning of Section 2(11) of the Act.” (A. 256.) Having found that Deming was not a supervisor, the Regional Director overruled the Company’s election objections in their entirety “on that basis.” (A. 256.) However, the Regional Director further found that, “[i]n the event my finding concerning Deming’s supervisory status is reversed, I also find . . . that none of the conduct the [Company] ascribes to Deming would warrant[] setting aside the election.” (A. 256.)

3. The Board’s decision denying review; the Board certifies the Union

The Company requested Board review of the Regional Director’s Supplemental Decision and Order. On September 6, 2017, the Board (Members Pearce and McFerran, Chairman Miscimarra dissenting), denied the Company’s

request for review stating that it “raises no substantial issues warranting review.” (A. 275.) Specifically, the Board “agreed with the Regional Director’s conclusion that mechanic William Deming is not a supervisor under the Act because he does not assign work using independent judgment, is not held accountable for the performance of the employees he directs, and does not effectively recommend discipline.” (A. 275 n.1.) Having found Deming was not a statutory supervisor, the Board denied review without relying on the Regional Director’s analysis that if Deming were a supervisor, his conduct would not warrant overturning the election. (A. 275 n.1.)

After the Board denied review, the challenged ballot was opened and counted. The revised tally of ballots showed 3 ballots cast for the Union, and 1 ballot cast against the Union. (A. 277.) On September 19, 2017, the Board certified the Union as the exclusive bargaining representative of the mechanics. (A. 278-79.)

B. The Unfair Labor Practice Proceeding

After the Board certified the Union, the Company refused the Union’s request to bargain. (A. 300.) Based on the Union’s subsequent unfair-labor-practice charge, the Board’s General Counsel issued a complaint alleging that the Company’s refusal violated the Act. After the Company answered the complaint by reasserting arguments made in the representation case and admitting its refusal to

bargain, the General Counsel filed a Motion for Summary Judgment and the Board then issued a Notice to Show Cause why the motion should not be granted. (A. 300-01; 280-97.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On February 13, 2018, the Board (then-Chairman Kaplan, and Members Pearce and Emmanuel) issued its Decision and Order, granting the General Counsel's Motion for Summary Judgment, and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A. 300-02.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company did not allege any special circumstances that would require it to reexamine that decision. (A. 300.)

The Board's Order requires the Company to cease and desist from refusing to bargain with the Union, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, and to embody any resulting understanding in a signed agreement. The Order also requires the Company to post a remedial notice. (A. 301.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company failed to carry its burden of proving its claim that mechanic Deming is a statutory supervisor. Specifically, the Company failed to prove, as it argued, that Deming (1) assigns work to the other mechanics, (2) responsibly directs their work, and (3) disciplines them or effectively recommends their discipline. Indeed, the Company's position necessarily fails on all three bases because it does not dispute the Board's findings that Deming does not use independent judgment in assigning work, does not hold Deming accountable for the performance of others, as required for a finding of responsible direction, and does not effectively discipline because there is no evidence of the Company issuing discipline without an independent investigation or ever following a recommendation made by Deming. Accordingly, the Board is entitled to affirmance of its finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY FAILED TO CARRY ITS BURDEN OF PROVING ITS CLAIM THAT MECHANIC DEMING WAS A STATUTORY SUPERVISOR AND THEREFORE THAT THE COMPANY UNLAWFULLY REFUSED TO BARGAIN

Section 8(a)(5) of the Act prohibits an employer from refusing to bargain with the duly certified bargaining representative of an appropriate unit of its

employees. 29 U.S.C. § 158(a)(5). The Company admits that it refused to bargain in order to challenge the Board’s certification of the Union. (Br. 4, 5.) As set forth below, the Board reasonably found that the Company did not carry its burden of proving its claim that mechanic Deming was a statutory supervisor. Therefore, the Company’s reliance (Br. 19-22) on Deming’s pre-election conduct, predicated on his status as a statutory supervisor, necessarily fails. The Company’s refusal to bargain with the Union therefore violated Section 8(a)(5) and (1) of the Act.² See *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30 (1946); *Pearson Education, Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004).

A. Applicable Principles and Standard of Review

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

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

² A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Enterprise Leasing Co. of Florida*, 831 F.3d 534, 546 (D.C. Cir. 2016).

29 U.S.C. § 152(11); *see Allied Aviation Serv. Co. of New Jersey v. NLRB*, 854 F.3d 55, 59 (D.C. Cir. 2017).

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel vested with “genuine management prerogatives” and workers—such as “straw bosses, leadmen, set-up men, and other minor supervisory employees”—who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). In implementing that congressional intent, the Board, as the Court has cautioned, “must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights.” *Beverly Enters.-Mass, Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999).

The Supreme Court has explained that individuals are statutory supervisors “if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’” *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001) (citation omitted); *accord 735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App’x 782, 783 (D.C. Cir. 2012). Thereafter, in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and two companion cases, *Croft Metals*,

Inc., 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), the Board refined and clarified its interpretation of the statutory phrases “assign,” “independent judgment,” and “responsibly direct,” discussed in detail below.

The party asserting supervisory status bears the burden of proving that status. *Kentucky River*, 532 U.S. at 710-12; *Allied Aviation Serv.*, 854 F.3d at 59-60, 65; *Oakwood*, 348 NLRB at 687. To meet this burden, the party must support its claim with specific examples, based on record evidence. *Avista Corp. v. NLRB*, 496 F. App’x 92, 93 (D.C. Cir. 2013) (citing *Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971)). Conclusory or generalized testimony does not suffice. *Beverly Enters.-Mass.*, 165 F.3d at 963; *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 18 (1st Cir. 2015). Nor can a party satisfy its burden with inconclusive or conflicting evidence. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 69 (D.C. Cir. 2015). Further, it is settled that “it is job function, not title that confers supervisory status.” *Allied Aviation Serv.*, 854 F.3d at 59; accord *Beverly Enters.-Mass.*, 165 F.3d at 962 (designations of theoretical or “paper power” are insufficient to prove supervisory status) (citing cases).

“Given the Board’s expertise, it enjoys a large measure of discretion” regarding supervisory status and its findings must be upheld as long as they are supported by substantial evidence. *Allied Aviation Serv.*, 854 F.3d 65. 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)). Indeed, ““the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.”” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (quoting *INS. v. Elias-Zacarus*, 502 U.S. 478, 484 (1992)).

B. The Company Failed To Prove that Mechanic Deming Is a Statutory Supervisor

Before the Court, the Company (Br. 14-18) repeats the claims it made before the Board in the underlying representation proceeding that Deming is a statutory supervisor because (1) he assigns work to the other mechanics, (2) responsibly directs their work, and (3) disciplines them or effectively recommends their discipline. As shown below, the Board’s finding that the Company failed to carry its burden of proving its claim that Deming is a statutory supervisor is amply supported by the record and consistent with law. In contrast, the Company’s brief ignores the burden placed on it to establish supervisory status, as well as the legal

requirements to establish such status, and presents a version of the facts largely unsupported by the credited evidence. Accordingly, the Company falls well short of presenting any basis for the Court to disturb the Board's reasonable conclusions.

1. Deming does not assign work to employees using independent judgment

In *Oakwood*, the Board explained that “assign” involves “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.” 348 NLRB at 689; *see also Croft Metals*, 348 NLRB at 722. As with all supervisory functions, to confer supervisory status the purported supervisor must exercise authority using independent judgment. As the Supreme Court recognized long ago, “[m]any nominally supervisory functions may be performed without the ‘exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding’ of supervisory status under the Act.” *Kentucky River*, 532 U.S. at 713 (citation omitted).

Accordingly, for a purported supervisor to make an assignment using independent judgment, he or she must act “free of the control of others and form an opinion or evaluation by discerning and comparing data,” and must exercise a degree of discretion that rises above the “routine or clerical.” *Oakwood*, 348 NLRB at 692-93; *accord 735 Putnam Pike Operations*, 474 F. App'x at 783. Thus, 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.” *Oakwood*, 348NLRB at 693; *see 735 Putnam Pike Operations*, 474 F. App’x at 783.

Likewise, as the Court has recognized, judgment is not exercised with independence if the purported supervisor “make[s] only obvious or self-evident work assignments.” *Brusco Tug & Barge, Inc. v. NLRB*, 696 F. App’x 519, 520 (D.C. Cir. 2017). In other words, “[i]f there is only one obvious and self-evident choice . . . or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.” *NSTAR Elec.*, 798 F.3d at 13 (quoting *Oakwood*, 348 NLRB at 693); *see Shaw Inc.*, 350 NLRB 354, 356 (2007) (assigning a task based on an employee’s “known skills” is “essentially self-evident” and not evidence of supervisory status); *Oakwood*, 348 NLRB at 693 (no independent judgment if one “self-evident” choice).

Applying those settled principles here, the Board reasonably found that the Company failed to carry its burden of proof with regard to assignment of work. (A. 247, 252, 275 n.1.) As noted, the Board “agreed with the Regional Director’s conclusion that mechanic William Deming . . . does not assign work using

independent judgment.” (A. 275 n.1.) Despite the fact that the Board’s finding is based on the lack of independent judgment, the Company fails to dispute or even attempt to address the issue of independent judgment. On that basis alone, the Board’s finding is entitled to affirmance.³

In any event, the Board reasonably found that the Deming did not exercise independent judgment with regard to assignment of work, and the Company’s reliance (Br. 7-8, 16) on Deming’s role in assigning mechanics to road calls or daily tasks fell far short of establishing that Deming exercised independent judgment. Thus, the credited evidence does not establish whether it is Deming or Dwyer who makes the decision to assign road repairs (other than routine flat tires), or who makes the decision on whether to tow a truck or repair it on the scene. (A. 239.) Regardless, the Company does not dispute the Board’s finding that “road call assignments appear to be mostly uncomplicated tasks, and assignments [that]

³ The Company does not dispute that the Board reasonably rejected the Company’s reliance on conclusionary testimony, repeated in its facts (Br. 7), that is unaccompanied by specific examples. (A. 252.) For example, Owner Tesiero simply replied “yes,” when asked by company counsel whether Deming exercises independent judgment. (A. 20-21.) Similarly, Tesiero merely asserted, as the Board noted, that Deming assigns tasks based on “aptitude and ability.” (A. 252; 21.) Yet, as the Board found, Tesiero “provided no examples nor did he describe the context in which assignments were made based on aptitude and ability.” (A. 252.) As shown above, and as the Board set forth here, it has “consistently held that generalized, conclusionary testimony of this type is insufficient to establish that Deming exercises independent judgment when assigning work to other mechanics.” (A. 252.) *See also* cases cited at p. 14.

do not appear to require independent judgment.” (A. 241, 253.) Indeed, as Owner Tesiero acknowledged, “there [is] little training that is needed to perform a road call.” (A. 241; 45.) Rather, as Tesiero further acknowledged, who performs a road call is merely a matter of whether a mechanic is “willing and able.” (A. 45.) Similarly, Fleet Manager Dwyer acknowledged that Deming assigns simple tasks, such as a tire issue, to “whoever’s in the garage.” (A. 86-87.) Moreover, Dwyer also acknowledged that for more complicated tasks Deming or Dwyer may perform the task (A. 86-87), and that to the extent Deming acts on his own regarding how to handle a road call, he acts based on prior conversations with Dwyer and past practice (A. 92-93). Significantly, the Company’s brief is silent on the Board’s finding that “Deming’s role in sending other mechanics on road calls resembles the ‘ad hoc instruction that the employee perform a discrete task’ which [the Board] found insufficient to establish supervisory authority in *Oakwood*.” (A. 253.) *See Oakwood*, 348 NLRB at 689 (charge nurse ordering an LPN to give a particular patient a sedative is an “ad hoc” instruction that does not constitute an assignment).

The Board also reasonably rejected the Company’s reliance (Br. 16) on Deming’s role in authorizing work and determining who works on particular trucks. At the outset, the Company provides no basis to reverse the Board’s finding that Deming does not decide what tasks to perform. (A. 241.) Indeed, the

Company does not dispute the Board's finding that Fleet Manager Dwyer reviews the inspection reports and other maintenance tasks with Owner Tesiero and that Dwyer then informs Deming of the tasks to perform and the order of priority to follow. (A. 241.)⁴ Although the Board recognized that Deming has some role in assigning tasks to other mechanics, the Board reasonably found that such assignments are based on the mechanics' "known skills or experience and thus self-evident" (A. 253), a finding not disputed by the Company. Thus, it is self-evident that two new employees who have no prior mechanical experience with heavy equipment will be given simpler mechanical tasks. Likewise, it is self-evident that a mechanic who has knowledge of electronics performs electronic repair work. And it is also self-evidence that Deming, the most experienced mechanic, should perform maintenance work on motors, the most complicated work. As Fleet Manager Dwyer acknowledged, certain jobs "obviously" go to certain people. (A. 79.)⁵

⁴ Mechanic Green's testimony (Br. 7) is not to the contrary. Although Green testified that Deming told him what to work on, Green acknowledged that Dwyer and Deming began work before him, and that he received assignments from Deming after Dwyer had spoken to Deming about "what's going . . . on." (A. 138-41.)

⁵ The Company's reliance (Br. 16) on the assignment of "more difficult" tasks, such as "jackhammering" or dealing with dry concrete, apparently encompasses the "clean" and "dirty" tasks referenced by the Company in its facts (Br. 8, A. 30-

The Company therefore is in no position to dispute that the Board reasonably concluded that “Deming’s designation of which mechanic will perform a particular repair does not involve the exercise of independent judgment.” (A. 241); *see Brusco Tug & Barge*, 696 F. App’x at 520 (port captains’ assignment of deckhands to particular ships involves “obvious or self-evident work assignments that do not require independent judgment”); *Shaw Inc.*, 350 NLRB at 356 (foreman’s designation “of which crewmembers will perform particular functions” does not involve the exercise of independent judgment because the designation “is often based on an employee’s trade or known skills, and is, thus, essentially self-evident”); *see also VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 647 (D.C. Cir. 1999) (employees not supervisors who perform routine work requiring “common sense”).

Finally, the Company (Br. 16) proves little by simply relying on the fact that Deming may answer questions from other employees or by referring to Deming as a “supervisor.” As mechanic James Green testified, he took “direction” from Deming because he “knows more” and “knows what he’s doing.” (A. 104-05.) Likewise, another employee characterized Deming as the “go to person” not

31). As Owner Tesiero acknowledged, assigning such tasks is simply a matter of who is “willing and able.” (A. 45.) Thus, the assignment of such tasks does not require independent judgment.

because he had “authority,” but because he “knows the operation more than [other mechanics].” (A. 152.) Moreover, the record contains no evidence that the Company informed Deming that he was a supervisor or even classified him as a supervisor. More importantly, in the absence of specific evidence affirmatively establishing the Deming exercised independent judgment in assigning employees, the Company cannot meet its burden simply by declaring (Br. 16) that Deming is a supervisor. “[T]he Act, by its terms, focuses on what workers are authorized to do, not what they are called.” *NSTAR Elec.*, 798 F.3d at 11; *accord Allied Aviation*, 854 F.3d at 59 (“it is job function, not title, that confers supervisory status”). “Were [it] not so, an employer could give an employee with no supervisory duties a supervisory title and thereby deny that worker the protection that Congress intended the Act to provide.” *NSTAR Elec.*, 798 F.3d at 12. That is particularly true here given Owner Tesiero’s admission (A. 45) that Deming spends 85% to 90% of his time working with tools.

In sum, the Board reasonably concluded that the Company “has not shown that Deming’s role in assigning tasks involves discretion that rises above the routine or clerical nature, and as such has not shown that he has [Section 2(11)] supervisory authority based on this factor.” (A. 254.)

2. Deming does not responsibly direct the other mechanics

In *Oakwood*, the Board “ascribe[d] a distinct meaning[.]” to the statutory phrase “responsibly to direct.” 348 NLRB at 689. An individual has the authority “responsibly to direct” under Section 2(11) if that individual “has ‘[people] under him,’ and . . . decides ‘what job shall be undertaken next or who shall do it,’ . . . provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Id.* at 691 (citations omitted). And crucially, direction is responsible only if the person performing the oversight is 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 by the employees are not performed properly.” *Id.* at 691-92; *see 735 Putnam Pike Operations*, 474 F. App’x at 784; *Brusco Tug & Barge*, 696 F. App’x at 521.

Requiring accountability demonstrates that the purported supervisor’s interests are aligned with management such that “the directing employee will have . . . an adversarial relationship with those he is directing,” and will “disregard[.], if necessary, employees’ contrary interests.” *Oakwood*, 348 NLRB at 692. This contrasts with an employee who directs others’ work but is not held accountable for their performance: their “interests, in directing other employees, is simply the completion of a certain task.” *Id.* Accordingly, to establish accountability, the party bearing the burden of proof must establish that “the

employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary.” *Id.* The party must also demonstrate that there is a “prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.*; *see 735 Putnam Pike*, 474 F. App’x at 784; *Brusco Tug & Barge*, 696 F. App’x at 521.

Here, the Company does not dispute the Board’s finding that the Company failed to establish that it held Deming accountable for the work of others. (A. 241-42, 254, 275 n.1.) Indeed, the Company does not claim, let alone even proffer any evidence, that Deming was disciplined, given a poor performance rating, or suffered any other adverse consequence for failing to oversee mechanics who did not perform their jobs properly. Accordingly, the Company has waived any challenge to the Board’s finding that the Company does not hold Deming accountable. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (an argument not raised in the opening brief is waived).

In light of the Board’s uncontested finding regarding the absence of accountability, the Company has necessarily failed to show that the Board erred by finding that the Company failed to carry its burden of establishing that Deming responsibly directs the other mechanics. *See Allied Aviation Serv.*, 854 F.3d at 65-66 (accountability not established where evidence established that purported supervisors would be written up for their mistakes, not others); *Brusco Tug &*

Barge, 696 F. App'x at 521 (accountability not established where employer “could not identify any occasion in which a [putative supervisor] was disciplined or faced adverse consequences because of a[n employees] poor performance”); 735 *Putnam Pike Operations*, 474 F. App'x at 784 (accountability not established where “no evidence that the [putative supervisors] were held accountable if the staff failed to perform as directed”).⁶

3. Deming does not discipline mechanics, or effectively recommend their discipline

The Board reasonably found that the Company failed to show that Deming disciplines mechanics or effectively recommends their discipline. (A. 240, 254-55, 275 n.1.) Under settled law, effective recommendation of discipline requires a showing that supervisors submit actual recommendations that are regularly followed and result in personnel action ““without independent investigation or review by others.”” *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007)

⁶ The Court lacks jurisdiction to consider the Company’s new argument (Br. 17) that Deming effectively recommends overtime assignments because that contention was never raised to the Board in the underlying representation proceeding. *See Mason Terminals, Inc. v. NLRB*, 728 F. App'x 8, 11-12 (D.C. Cir. 2018); *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008); Section 10(e) of the Act, 29 U.S.C. §160(e). In any event, the Company’s claim is contrary to the record evidence. Mechanic Green did not attribute any role to Deming regarding overtime. (A. 105.) Similarly, Fleet Manager Dwyer testified that Deming relays work that needs to be completed and the names of mechanics who want to work overtime; Dwyer in consultation with Owner Tesiero then determines whether overtime is necessary. (A. 55-57, 67-68, 81-82, 88-90.)

(quoting *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). “An individual who has a mere ‘reportorial’ authority, in which it is ‘higher-ups who make the disciplinary decisions,’ is not a supervisor.” *Thyme Holdings, LLC v. NLRB*, ___ F. App’x ___ (D.C. Cir. 2018), 2018 WL 3040701, at *3 (quoting *Allied Aviation*, 854 F.3d at 59)).

Here, the Company’s sole example provided in support of its claim undisputedly reflects that no discipline issued without a full and independent investigation by Owner Tesiero. In that one instance, mechanic Austin Orcutt damaged tires because he was not performing a task properly. When Deming learned of the damage, he told Fleet Manager Dwyer that the Company should fire Orcutt, and Dwyer relayed the recommendation to Owner Tesiero. After speaking to Orcutt, Dwyer, and Deming, Teserio instead gave Orcutt only a verbal warning. (A. 240; 42-44, 59.) Thus, as the Board found, Tesiero conducted an independent investigation of the matter, and did not follow Deming’s recommendation. (A. 240, 255.) Indeed, Tesoro’s mere verbal warning to Orcutt fell far short of Deming’s suggestion that he be discharged.

Accordingly, the Board reasonably concluded that the Company “has not shown that this single instance establishes that Deming has the authority to discipline or effectively recommend it.” (A. 255); *see Thyme Holdings*, 2018 WL 3040701, at *3 (employer failed to show that purported supervisors “exercise

anything beyond an essentially reportorial disciplinary authority”); *Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F.3d 298, 309 (6th Cir. 2012) (citing *Jochims*, 480 F.3d at 1170), to hold that reports that “at best . . . create[] a possibility of discipline” are “not sufficient to show supervisory authority”).

Nor does the Company’s reliance (Br. 18, A. 22-24, 110) on limited evidence that Deming verbally admonishes other mechanics if they do not perform a task correctly, or do not maintain a clean workspace, establish that Deming disciplines or effectively recommends discipline. The Company has not supplied any specifics of any such incidents. For example, there is no evidence that the Company placed any documentation in a mechanic’s personnel record, or that such comments affected a mechanics’ job status or provided the basis for any future discipline. As the Board further noted, “it is well established that merely issuing verbal reprimands is too minor a disciplinary function to show supervisory authority.” (A. 253); *see Jochims*, 480 F.3d at 1170 (recognizing that, under Board law, written warnings and reprimands do not establish disciplinary authority absent evidence that they lead to job-affecting discipline without independent investigation), citing *Ten Broek Commons*, 320 NLRB 806, 812 (1996).⁷

⁷ The Company (Br. 18) vaguely references a second discipline. Presumably, the Company is referencing a situation set forth in the fact section of its brief (Br. 11) regarding a mechanic’s absences. Although the hearing officer addressed this situation, the Company did not subsequently rely on it in the underlying

The Company does not further its position by citing (Br. 18) *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), and *Venture Industries, Inc.*, 327 NLRB 918 (1999). In those cases, unlike here, there was actual evidence of a purported supervisor making effective disciplinary recommendations. Thus, in *Mountaineer Park, Inc.*, assistant supervisors had the authority to effectively recommend discipline because they not only brought employee misconduct to the manager's attention, but could also write up recommendations concerning the appropriate level of discipline; moreover, the manager did not conduct independent investigations and routinely signed off on their recommendations. 343 NLRB at 1474-76. In *Venture Industries, Inc.*, the line and department supervisors had the authority to issue oral and written reprimands to employees which were routinely approved. 327 NLRB at 919. In sum, the Company has not shown that Deming disciplines or effectively recommends discipline under Section 2(11) of the Act.

representation proceeding before the Board. In any event, as the hearing officer reasonably found, the evidence establishes that Deming had simply informed Dwyer of his concerns regarding an employee's chronic lateness. The record contains no evidence that the employee was ever written up, or that Deming was informed that any discipline issued. (A. 240-41; 173-74.) In these circumstances, the hearing officer reasonably concluded that that the evidence regarding this situation "falls far short of establishing that Deming has the authority to discipline or effectively recommend it." (A. 240.)

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.

Respectfully submitted,

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August 2018

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

CRANESVILLE BLOCK COMPANY, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1070, 18-1103
)	
)	
v.)	Board Case Nos.
)	3-CA-209124
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 proof brief contains 6,482 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 7th day of August, 2018

STATUTORY ADDENDUM

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1. NATIONAL LABOR RELATIONS ACT

Section 152 of the Act, 29 U.S.C. § 152, provides in relevant part:

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer . . .but shall not include any individual employed as a supervisor. . . .

* * *

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

Section 7 of the Act, 29 U.S.C. § 157, provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a) of the Act, 29 U.S.C. § 158(a)), provides in relevant part:

It shall be an unfair labor practice for an employer--

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

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 9 of the Act, 29 U.S.C. § 159, provides in relevant part:

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

by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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

Section 10 of the Act, 29 U.S.C. 160, provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition . . . for the enforcement of such order . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the

United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2018, I electronically filed the foregoing 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 certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
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