

No. 19-60071

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

STP NUCLEAR OPERATING COMPANY

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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STATEMENT REGARDING ORAL ARGUMENT

This case involves the Board's application of settled law to straightforward facts. Accordingly, the Board believes that the case may be decided on the briefs. However, if the Court believes that oral argument would be of assistance, the Board respectfully requests to participate and submits that 10 minutes per side would be sufficient.

The Board further notes that both this case and another pending case, *STP Nuclear Operating Company v. NLRB*, No. 19-60152 (opening brief filed July 1; answering brief due August 30), involve refusal-to-bargain and supervisory-status issues at the same worksite, although each case involves distinct employee classifications and factual questions. If the Court believes that oral argument is appropriate in both cases, it would conserve the Court's resources to schedule them for argument on the same day, before the same panel.

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of STP Nuclear Operating Company (“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 January 16, 2019, and reported at 367 NLRB No. 73. (ROA.858-

61.)¹ The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”), by refusing to recognize and bargain with the International Brotherhood of Electrical Workers, Local Union 66 (“the Union”) as the certified collective-bargaining representative of employees who serve as “unit supervisors” at the Company’s Wadsworth, Texas facility. (ROA.859.)

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 with respect to all parties. The Court has jurisdiction to review the Order under Section 10(e) and (f) of the Act (29 U.S.C. §160(e) and (f)), because the unfair labor practice occurred in Wadsworth, Texas.

The Company filed its petition for review on January 28, 2019. The Board filed its cross-application for enforcement on March 12, 2019. Both filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

¹ “ROA” refers to the administrative record filed with the Court on March 11 and April 1, 2019. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

Because the Board's Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 16-RC-214839) is before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 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 Court's ruling. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company failed to meet its burden of proving that employees in its "unit supervisor" classification are statutory supervisors excluded from the Act's coverage. If substantial evidence supports that finding, then the Board properly certified the Union as their representative, and the Company violated the Act by refusing to recognize and bargain with the Union.

STATEMENT OF THE CASE

This case involves the Company's refusal to recognize and bargain with the Union as the collective-bargaining representative of the "unit supervisors" at the Company's Wadsworth facility, despite their selection of the Union as their representative by a majority vote in a Board-conducted representation election and the Board's subsequent certification of the Union as their collective-bargaining representative. The Company bases its refusal on the ill-supported claim, which it advanced in the underlying representation proceeding, that the unit supervisors are statutory supervisors excluded from collective bargaining under Section 2(11) of the Act (29 U.S.C. § 152(11)). The Board reasonably rejected that claim, following a hearing on the matter, because the Company failed to carry its burden of proving that the unit supervisors possess any form of Section 2(11) supervisory authority. Now, the Company largely repeats the failed arguments it made before the Board and falls far short of establishing, as it must on review, that the record compels reversal of the Board's findings. Those findings, as well as the procedural history of the representation and unfair-labor-practice cases, are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations and Organizational Structure

The Company generates electricity for the Texas grid using two nuclear reactors in Wadsworth, Texas. (ROA.754; ROA.23-24, 26-27.) At the Wadsworth facility, the Company refers to its reactors as "Unit 1" and "Unit 2" and staffs each with five crews every week. (ROA.26-27, 44-46, 53.) The crews work 12-hour shifts and collectively ensure that the units are continuously running except during planned outages. (ROA.44-46, 54-55, 229.)

Each crew is headed by a shift manager, who sits in a glass-enclosed office in the unit control room.² (ROA.754; ROA.44-45, 63, 66, 268, 283.) From his position, the shift manager oversees the members of his crew: two or three unit supervisors, at least one of whom sits at a desk on an elevated platform overlooking the unit controls; two or three reactor operators who are stationed at the controls; and six or seven plant operators who are not physically in the control room, but are in constant contact with the control room as they manipulate unit-

² The shift manager is an admitted statutory supervisor. (ROA.754; ROA.49.)

related equipment in the surrounding plant areas.³ (ROA.754; ROA.45-46, 53, 64-72, 268.)

The crews operate in a highly regimented context. (ROA,754; ROA.30-34.) As a result of the intensive government oversight that applies in the nuclear-generation area, the Company has established its own manuals and written guidance to govern nearly every conceivable scenario that the crews may face in running their units. (ROA754; ROA.30-34, 69, 270-73.) The Company also invests heavily in training each crew member to internalize the methods that apply to his tasks, whether in the control room or surrounding plant areas. (ROA 755; ROA.30, 38-39, 53-55, 58-60, 273-75.) In addition, the Company employs a human performance coach to monitor crew activities on an ongoing basis and ensure that individual crew members perform tasks correctly. (ROA.46-47.) And the Company has implemented a rigorous process of documentation and review that crews must follow when human errors occur. (ROA.755-56; ROA.147-48, 173-74, 245-53, 295-301.)

³ The reactor operators and plant operators are represented by the Union in a bargaining unit of about 475 employees with various job classifications. (ROA.754; ROA.39, 76.) Based on the representation proceeding in this case, the bargaining unit now also includes the unit supervisors. (ROA.754, 767.) *See* pp. 13-15 below.

To further guard against errors and ensure compliance with federal regulations, the Company employs a dedicated group of planners who map out, weeks in advance, every activity that will be performed at the facility on an hour-by-hour basis. (ROA.755; ROA.29, 197-200, 231-32, 287.) The planners determine, in collaboration with higher-level operations managers, who will serve on each crew and what each crew will do during their shift. (ROA.755; ROA.287-88.) The planners produce an Authorized Work Schedule capturing all assignments. (ROA.755; ROA.197-200, 231-32, 287.) The Authorized Work Schedule goes to the shift managers for review and approval before it is published more broadly to the crews. (ROA.754; ROA.200, 285.)

B. Unit Supervisors Implement the Authorized Work Schedule and Deviate From It Only when Permitted by Company Procedural Manuals

Each unit supervisor on an eleven-to-fourteen-person crew works with a subset of the crew's operators (either reactor operators or plant operators) and supports their activities during the shift. (ROA.754; ROA.64.) Thus, the unit supervisor reviews the lengthy Authorized Work Schedule for his small group, extracts the directives and tasks that apply to them, and allocates tasks among the operators in his group, sometimes taking into account individual experience levels. (ROA.755; ROA.235-37.) As the shift progresses, the unit supervisor monitors his group to ensure that the operators are able to do what they are supposed to do

under the Authorized Work Schedule. (ROA.755; ROA.145-46, 236.) If an individual operator seems overwhelmed, the unit supervisor may re-distribute tasks among the group members to equalize workloads. (ROA.261-62.)

The unit supervisor also applies his experience and training as a senior reactor operator to monitor and interpret surrounding unit and facility conditions, and he may change the timing or sequence of tasks set for his group in the Authorized Work Schedule—but only in limited circumstances.⁴ (ROA.755; ROA.146-47, 198, 281-82, 286-88.) The Company’s procedural manuals constrain unit supervisors and others to follow the Authorized Work Schedule unless four specifically identified conditions are met. (ROA.755; ROA.315, 326-28.) Where those conditions are met, the unit supervisor may undertake “alternate performance”—for example, changing a step required by the Authorized Work Schedule or omitting a step. (ROA.755; ROA.327.) But as with the decision to deviate from the Authorized Work Schedule in the first place, decisions as to what

⁴ Based on his assessment of unit conditions, the unit supervisor can also respond to routine questions from non-crew-members—for example maintenance personnel—as to whether they can proceed with work that will affect the unit. (ROA.69-70, 262-63, 323-24.) Although the unit supervisor is not empowered to cancel such work entirely, particularly if required by the Authorized Work Schedule, he can postpone it to a later time or the following day. (ROA.146-47, 323-24, 262-63, 287-88.)

kinds of deviations are permissible are governed by the Company's manuals on Plant General Procedure and General Philosophy. (ROA.755; ROA.270-72.)

Similarly, if an operator or unit supervisor believes that an operation not contemplated by the Authorized Work Schedule is in fact needed—such as an additional manipulation of equipment—the unit supervisor must consult the Company's manuals for guidance as to whether and how to implement such additional operations. (ROA.755; ROA.238-42.) And in emergency situations, the unit supervisor must likewise consult and implement the Company's detailed written procedures governing emergencies. (ROA.755; ROA.291-93.)

In general, for nearly every “off-normal” condition that could arise, the Company has a step-by-step written procedure that must be followed. (ROA.755, 763; ROA.305.) Accordingly, when faced with an “off-normal” condition, the unit supervisor simply consults the Company's written guidance and reads the appropriate written steps to the operators involved. (ROA.763; ROA.305.) The shift manager, who is nearly always present in the control room, also provides direction in such situations, to ensure that the crew follows established procedure in all matters.⁵ (ROA.755; ROA.305.)

⁵ The shift manager cannot leave the control room for more than about 10 minutes at a time, except during emergencies when he has designated responsibilities outside the control room. (ROA.63-64, 219, 276, 283, 321-23.)

C. Unit Supervisors Perform Ministerial Tasks for the Crew

In addition to implementing the Authorized Work Schedule and company procedures at the front line alongside the operators, the unit supervisors perform a variety of administrative tasks for the crew. For example, when the crew resorts to off-normal procedures, the unit supervisor most directly involved prepares a condition report documenting the shift and describing the specific procedures applied. (ROA.756; ROA.161-62, 208-09.)

Similarly, when an operator makes a mistake in manipulating unit controls or other equipment, the unit supervisor who works with that operator must initiate a process of investigating and reporting on the mistake. (ROA.755-56; ROA.147-48, 173-74, 245-53, 295-301.) The Company's written procedures specifically require that the unit supervisor open a designated computer program and respond to a series of questions about the incident. (ROA.755-56; ROA.295-98.) The program generates a "Lessons Learned" document based on the unit supervisor's responses. (ROA.755-56; ROA.297.) That document then goes to higher-level officials, who may request that the unit supervisor make changes. (ROA.755-56; ROA.297.) After the process of review and revision is completed, the Lessons

Learned are published to everyone in the operations department.⁶ (ROA.755-56; ROA.297.)

Unit supervisors likewise answer stock yes-or-no questions related to the operators' performance on an annual basis. (ROA.757; ROA.155-56, 160-61, 291-92.) Under the collective-bargaining agreement covering the operators, those employees are entitled to incentive pay if they have a defined, acceptable number of (1) absences from work, (2) safety or OSHA occurrences, (3) human performance errors, and (4) disciplinary incidents. (ROA.757; ROA.690-91.) The unit supervisors complete a form verifying (by "yes" or "no" response) whether a named operator has an acceptable number of incidents in those categories. (ROA.155-56, 160-61.) After the unit supervisor fills in the appropriate "yes" or "no" answer based the objective data available to him, the form goes to the shift manager for review and signature. (ROA.160-63, 206-07, 291-92.)

D. Unit Supervisors Do Not Have Any Meaningful Role in Disciplining Other Crew Members

Unit supervisors can make notes on an employee "contact log" form housed in the shift manager's office. (ROA.756; Tr. 163-64.) The form allows the shift

⁶ The Company's written procedures mandate additional actions, apart from investigation and documentation. (ROA.174, 215-16, 245-46, 295-302.) After the mandatory actions are completed, a unit supervisor may raise with the shift manager the possibility of discipline for the employee who committed the error. (ROA.255.)

manager or a unit supervisor to note “positive contact” with an operator, non-disciplinary “counseling,” or various forms of discipline as defined by the Company’s Constructive Discipline Policy. (ROA.756-57; ROA.547.)

In practice, despite language in the Constructive Discipline Policy suggesting that unit supervisors may give the lowest level of discipline without management review, unit supervisors do not unilaterally fill out contact-log forms indicating discipline. (ROA.756-57; ROA.128-32, 293, 317.) Instead, they typically use the forms only to note positive contact with an operator. (ROA.757; ROA.118, 144-45.)

Unit supervisors can recommend discipline, but all such recommendations are subject to review by the shift manager, higher-level officials in the operations department, and the human resources department. (ROA.756; ROA.128-32, 301-03.) Unit supervisors do not participate in the process of determining what discipline should issue, beyond giving a recommendation to the shift manager or collaborating on one with him. (ROA.756; ROA.211-12, 220-21, 292-93, 301-02.) Unit supervisors’ recommendations are sometimes accepted and followed, but sometimes disregarded. (ROA.254-61, ROA.301-03).

E. Unit Supervisors and Other Employees Participate in a Reward-Points Program

The Company gives every employee a bank of electronic points—called “Peer Points”—that they can award to other employees through a computer

program. (ROA.757, 765; ROA.178.) Recipients can then accumulate and redeem points for retail gift cards or merchandise at a company store. (ROA.757, 765; ROA.177.) Each point is worth slightly less than \$0.0077. (ROA.757, 765; ROA.179.) Accordingly, an employee must accumulate thousands of points before they can translate into any non-negligible reward. (ROA.757, 765; ROA.179.)

Unit supervisors have a larger overall bank of points to distribute than operators because the Company allocates them “Peer Points” and “Boss Points” of the same value. (ROA.757, 765; ROA.178, 325.) Like all employees, unit supervisors award points to co-workers as a gesture of good-will, selecting a “reason” for the points award from a drop-down menu of options like “teamwork.” (ROA.214-17; ROA.175, 214-17.)

II. PROCEDURAL HISTORY

A. The Representation Proceeding

In February 2018, the Union filed a petition for an *Armour-Globe* election, to allow the unit supervisors and one other employee classification to determine whether they should be added to an existing bargaining unit of approximately 475 company employees that also includes the reactor operators and plant operators. (ROA.753; ROA.364-65.) *See Armour & Co.*, 40 NLRB 1333 (1942); *Globe Mach. & Stamping Co.*, 3 NLRB 294 (1937). The Company opposed the petition,

asserting that the unit supervisors are statutory supervisors excluded from the Act's protections.⁷ (ROA 753; ROA.396-99.)

Following a hearing before a Board hearing officer, the Board's Regional Director for Region 16 issued a Decision and Direction of Election finding that the Company failed to meet its burden of proving that the unit supervisors are Section 2(11) supervisors. (ROA.753-70.) The Regional Director further found that the unit supervisors share a "community of interest" with employees in the existing bargaining unit and therefore may be properly included in that unit. (ROA.766-67.) The Regional Director based his conclusion on uncontested findings of fact that unit supervisors regularly work alongside bargaining-unit employees, are functionally integrated with them, have comparable duties, responsibilities, skills, and qualifications, and share many of the same terms and conditions of employment. (ROA.766-67.)

On March 14, 2018, the Board conducted a secret-ballot election. (ROA.859; ROA.751-52.) The tally of ballots showed that, of 35 eligible voters, 18 cast ballots for union representation and 3 cast ballots against it. (ROA.777.)

⁷ Contrary to the Company's suggestion (Br. 1), it did not make a similar assertion with regard to the other classification of employees encompassed in the petition ("senior reactor operator instructors," who are the Company's training instructors). (ROA.40.) Indeed, the Company conceded in its position statement, and stipulated at the subsequent hearing, that senior reactor operator instructors are not statutory supervisors. (ROA.14-17, 396-98.)

Accordingly, on March 22, the Regional Director certified the Union as the exclusive collective-bargaining representative of a bargaining unit that newly included the unit supervisors. (ROA.859; ROA.779.)

The Company requested Board review of the Regional Director’s finding in the Decision and Direction of Election that the Company failed to prove its claim that unit supervisors are statutory supervisors. (ROA.781-807.) The Company, however, did not—and could not—seek review of the Regional Director’s separate finding (ROA.766-67) that the unit supervisors share a community of interest with employees already in the bargaining unit, having waived any such claim at an earlier stage.⁸ (ROA.781-807.) On May 17, the Board (Members Pearce and Emanuel, Member McFerran dissenting) denied the Company’s limited request, stating that it “raises no substantial issues warranting review.”⁹ (ROA.808.)

⁸ Given the Company’s failure to make any claim regarding community of interest in the statement of position that it filed in response to the Union’s representation petition, it was precluded from raising or seeking to litigate that issue thereafter. *See* 29 C.F.R. § 102.66(d) (parties are “precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position”); ROA.753 (“the sole issue raised by the [Company] in its Statement of Position and litigated during the hearing” was the supervisory status of the unit supervisors).

⁹ As the Supreme Court has noted, the Board’s denial of a request for review constitutes an affirmance of the Regional Director’s decision. *Magnesium Casting*

B. The Unfair Labor Practice Proceeding

Following the Union's certification, the Company refused its request for recognition and bargaining. (ROA.859.) 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. (ROA 858.) 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, which the Company opposed. (ROA.858.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On January 16, 2019, the Board (Chairman Ring and Members McFerran and Emanuel) 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 (29 U.S.C. § 158(a)(5) and (1)). (ROA.858-61.) 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. (ROA.858.)

Co. v. NLRB, 401 U.S. 137, 138 n.2 (1971). Accordingly, this brief refers to the Regional Director's findings as those of the Board.

The Board's Order requires the Company to cease and desist from refusing to recognize and 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). (ROA.860.) Affirmatively, the Board's Order directs the Company, on request, to recognize and bargain with the Union as the representative of a bargaining unit now including the unit supervisors, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (ROA.860.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company failed to meet its burden of proving that its unit supervisors possess supervisory authority under Section 2(11) of the Act. Because the unit supervisors are therefore statutory employees, the Board properly certified the Union as their collective-bargaining representative, and the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act.

1. The Company's claim that unit supervisors "assign" operators within the meaning of the Act fails because the operators' shifts, crew locations, and overall duties are fixed by the Company's comprehensive Authorized Work Schedule. It is undisputed, moreover, that the unit supervisors have no role in producing or approving the Authorized Work Schedule. Rather, they simply implement the

Authorized Work Schedule by distributing and sometimes re-distributing tasks from the Authorized Work Schedule among a subset of crew members with whom they work. In limited circumstances, the unit supervisors can change the sequence of tasks established by the Authorized Work Schedule. But those circumstances are strictly defined by company procedure, and any deviations must also conform to company procedure. Thus, substantial evidence supports the Board's finding that unit supervisors do not assign operators to a time, place, or significant overall duties using independent judgment, as required for supervisory status.

2. The Company likewise failed to prove its claim that unit supervisors "responsibly direct" operators in the performance of their work. Although unit supervisors give ad hoc instructions to operators to perform discrete tasks, they are not "responsible" for any directions given, as would be required for Section 2(11) authority. Specifically, the Company failed to demonstrate that unit supervisors have the delegated authority to take corrective action to enforce their directions, or that they are held accountable for operator failures to perform as directed. Indeed, the Company made no argument as to accountability in the representation proceeding before the Board, and it makes no argument on review as to authority to take corrective action. The Company, therefore, is in no position to question the Board's finding that unit supervisors do not responsibly direct others. In any event, as the Board further found, the Authorized Work Schedule and a complex of

internal procedural rules dictate nearly every direction that a unit supervisor can permissibly give to other crew members, effectively eliminating any opportunity for the exercise of independent judgment required for supervisory status.

3. Substantial evidence similarly supports the Board's finding that the Company failed to meet its burden of proving that unit supervisors discipline operators or effectively recommend their discipline, let alone that they do so using independent judgment. Although the Company's Constructive Discipline Policy purports to give unit supervisors authority to unilaterally issue the lowest level of discipline in the Company's progressive disciplinary system, the record fails to show that this is anything more than theoretical or paper authority. There is no evidence that any unit supervisor has exercised such authority, and Unit Supervisor Jeremy Tillman testified without contradiction that unit supervisors are not in fact permitted to issue any form of discipline without approval from higher-level company officials. The record likewise does not support the Company's alternative claim that unit supervisors effectively recommend discipline. The Company produced no evidence as to the frequency of such recommendations, and thus failed as a matter of law to establish that unit supervisors' recommendations are regularly followed and therefore effective. Moreover, the evidence of specific past recommendations is both sparse and inconclusive as to whether unit-supervisor recommendations have any effect.

4. Finally, the Company failed to prove that the unit supervisors reward other employees within the meaning of the Act, let alone that they use independent judgment. The operators' incentive bonuses are non-discretionary and determined by objective criteria over which the unit supervisors have no influence. And although unit supervisors can bestow reward-points of little monetary value on co-workers, all employees have this same ability, making it unremarkable and not suggestive of supervisory status.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY FAILED TO CARRY ITS BURDEN OF PROVING THAT THE COMPANY'S "UNIT SUPERVISORS" ARE STATUTORY SUPERVISORS, AND THEREFORE THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees" 29 U.S.C. § 158(a)(5). Here, the Company has admittedly (Br. 3) refused to bargain in order to seek court review of the Board's certification of the Union as the unit supervisors' bargaining representative. As explained below, the Board reasonably found in the underlying representation proceeding that the Company failed to meet its burden of proving that unit supervisors are statutory supervisors. Accordingly, the Company's refusal to recognize and bargain with the Union

violated Section 8(a)(5) and (1) of the Act.¹⁰ *See Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139-43 (1971).

A. Applicable Principles and Standard of Review

Section 2(3) of the Act excludes from the definition of employee, and therefore from the protections of the Act, “any individual employed as a supervisor.” 29 U.S.C. § 152(3); *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 718 (2001).¹¹ In turn, Section 2(11) of the Act defines a supervisor as:

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

29 U.S.C. § 152(11).

Thus, under Section 2(11), individuals are statutory supervisors only if “(1) they have the authority to engage in a listed supervisory function, (2) their exercise of such authority is not merely of a routine or clerical nature, but requires the use

¹⁰ A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act].” 29 U.S.C. § 158(a)(1). *See Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

¹¹ “Only employees have the right to unionize and bargain collectively under the Act.” *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 304 (6th Cir. 2012).

of independent judgment, and (3) their authority is held in the interest of the employer.” *Kentucky River*, 532 U.S. at 713 (internal quotation marks and citation omitted); *accord Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). In applying this analysis, the Board is mindful of the statutory goal of distinguishing truly supervisory personnel, who are vested with “genuine management prerogatives,” from 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)).

Under settled precedent, “[t]he party alleging supervisory status bears the burden of proving that it exists by a preponderance of the evidence.” *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 295 (5th Cir. 2015) (citing *Oakwood*, 348 NLRB at 694). “Because of the serious consequences of an erroneous determination of supervisory status,” moreover, the Board and the courts are “particularly cautious before concluding that a worker is a supervisor when the asserted supervisory authority has not been exercised.” *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) (internal quotation marks and citation omitted). Accordingly, the party alleging supervisory status must support its position with specific examples based on record evidence. *Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971); *see also Entergy Miss., Inc.*, 357 NLRB 2150, 2157 (2011) (absent evidence of exercise, “the

evidence still must suffice to show that [the claimed] authority actually exists”). Conclusory or generalized testimony is insufficient. *See, e.g., NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 18 (1st Cir. 2015); *Frenchtown*, 683 F.3d at 307. Likewise, inconclusive or conflicting evidence will not establish supervisory status. *N.Y. Univ. Med. Ctr.*, 324 NLRB 887, 908 (1997), *enforced in relevant part*, 156 F.3d 405 (2d Cir. 1998).

Further, and as particularly relevant here, a party’s choice to title certain employees as “supervisors” is not dispositive of the question of statutory authority. *NSTAR*, 798 F.3d at 11-12. In evaluating the evidence, the Board appropriately focuses on “what [the alleged supervisors] are authorized to do, not what they are called.” *Id.* at 11.

Ultimately, “[w]hether an employee is a supervisor is a question of fact” that is uniquely within the Board’s purview to resolve. *Entergy Miss.*, 810 F.3d at 292 (noting that “[b]ecause of the infinite and subtle gradations of authority within a company, courts normally extend particular deference to [the Board’s] determinations that a position is supervisory”) (internal quotation marks and citation omitted); *Edward St. Daycare Ctr. v. NLRB*, 189 F.3d 40, 46 (1st Cir. 1999) (supervisory-status determinations are “tinged . . . with policy implications” and therefore “within the particular expertise of the Board”). This Court upholds the Board’s determinations on questions of fact so long as they are “reasonable and

supported by substantial evidence on the record considered as a whole.” *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012) (internal quotation marks and citation omitted); *see* 29 U.S.C. § 160(e) (Board factual findings are “conclusive” where “supported by substantial evidence on the record considered as a whole”). Substantial evidence, moreover, is simply “such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.” *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

The Court, therefore, may not “displace the Board’s choice between two fairly conflicting views” of the evidence, *Universal Camera*, 340 U.S. at 477, nor may it “reweigh the evidence, try the case de novo, or substitute [its] judgment for that of the Board, even if the evidence preponderates against the [Board’s] decision.” *El Paso Elec.*, 681 F.3d at 656-57. Indeed, “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the [Board] is not supported by substantial evidence.” *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208 (5th Cir. 2014) (internal quotation marks and citation omitted). As shown below, this is by no means the rare and unusual case warranting reversal of the Board’s fact-based findings regarding lack of supervisory status.

B. The Company Failed To Meet Its Burden of Proving that Unit Supervisors Are Statutory Supervisors

The Company does not contend that the unit supervisors have Section 2(11) authority to hire, transfer, suspend, lay off, recall, promote, or discharge employees, or to adjust their grievances. Nor does it challenge the Board's finding that the unit supervisors share a community of interest with employees in the existing bargaining unit. *See* above p. 15 & n.8. Instead, the Company claims only (Br. 16-30), as it did before the Board, that the unit supervisors are statutory supervisors because they allegedly give assignments to operators, responsibly direct their work, discipline them or effectively recommend their discipline, and reward them for their work using independent judgment. As shown below, the Board's conclusion that the Company failed to carry its burden of proving these indicia of supervisory authority is amply supported by the record and consistent with law.

1. Unit supervisors do not assign work to employees using independent judgment

As the Company acknowledges (Br. 19), assignment under the Act means “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.” *Entergy Miss.*, 810 F.3d at 296 (quoting *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006)). Substantial

evidence supports the Board’s finding that unit supervisors do not possess any of these forms of authority. (ROA.755, 762-63.) Instead, as explained below, the record shows that other individuals perform these duties.

Thus, the Company’s dedicated team of planners, in collaboration with higher-level operations managers, divide employees into shifts and crews associated with each reactor unit and determine the work each crew must perform. The planners’ determinations are captured in a comprehensive Authorized Work Schedule describing, in detail and hour-by-hour, the work to be performed by every craft and classification on every shift. The unit supervisors have no role in generating the Authorized Work Schedule, and no input into its contents.

(ROA.200, 231-32, 270, 285-89.) The shift managers are the only people at the crew level who review and approve the Authorized Work Schedule and can potentially alter its requirements in consultation with the Company’s planners.

Accordingly, the unit supervisors are relegated to simply implementing the detailed requirements of the Authorized Work Schedule. In doing so, they may delegate specific tasks on the schedule to specific crew members based on individual experience levels. But as the Board found, such “ad hoc instructions to perform discrete tasks do[] not qualify as assignment in the statutory sense.”

(ROA.762.) “A supervisor designates ‘significant overall duties to an employee’ not simply ‘instructions that an employee perform a discrete task.’” *Mars Home*

for Youth v. NLRB, 666 F.3d 850, 855 (3d Cir. 2011) (quoting *Oakwood*, 348 NLRB at 689); *accord Cook Inlet Tug & Barge*, 362 NLRB 1153, 1153 n.3 (2015) (collecting court cases). In giving instructions here, the unit supervisors simply relay to crew members the specific, individual actions they must successfully complete in order to fulfill their overall duties captured in the Authorized Work Schedule, and to comply with the detailed guidelines and standards that apply to the running of the Company’s reactors. *See NSTAR*, 798 F.3d at 17 (switching orders not indicative of supervisory status, where the putative supervisors who give such orders merely “relay a set of specific individual actions that [] employees must take to successfully complete the[ir] overall duties”).

Similarly, although a unit supervisor can change the order in which tasks on the Authorized Work Schedule are performed, the mere re-ordering of already assigned tasks does not qualify as assignment under the Act. *See Oakwood*, 348 NLRB at 689 (distinguishing between assignment of employees to a shift, which is supervisory, and “choosing the order in which the employee will perform discrete tasks” during the shift, which is not supervisory); *see also NSTAR*, 798 F.3d at 16. And even if such conduct could qualify as assignment, it also falls short of the supervisory mark because it is not informed by independent judgment. *Kentucky River*, 532 U.S. at 713 (recognizing that “[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”).

With this Court’s approval, the Board has interpreted the statutory term “independent judgment” to mean “‘act[ing], or effectively recommend[ing] action, free of the control of others and form[ing] an opinion or evaluation by discerning or comparing data.’” *Entergy Miss.*, 810 F.3d at 296 (quoting *Oakwood*, 348 NLRB at 689). Accordingly, “‘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.*

Here, contrary to the Company’s claim (Br. 20), the unit supervisors cannot “move” tasks identified in the Authorized Work Schedule at will or in their own discretion; they only have the power to do so where a specific “incident or particular condition justifies . . . doing the work out of the order that is listed on th[at] schedule.” (ROA.755.) And even in that instance, the re-ordering of tasks is “controlled by strict protocol” and therefore does not involve the use of independent judgment necessary for supervisory status. (ROA.755.)

As the Board correctly found, unit supervisors also lack other forms of assignment authority, such as the authority to grant or deny employee requests for leave from work, or to compel overtime work. (ROA.755; ROA.289-90.) *See*

Entergy Mississippi, Inc., 357 NLRB 2150, 2156 (2011) (ability to allocate overtime not supervisory unless putative supervisors can require individual employees to work the overtime); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 729 (2006) (authority to assign not shown where power to “mandate” compliance with assignments is held solely by those above the putative supervisor). Indeed, in those instances when a unit supervisor performs the ministerial task of calling employees in to cover an unexpected absence on the crew, or to meet an emergency need, he is obligated to follow detailed written procedures as to the order of call and does not exercise any discretion or independent judgment in the matter. (ROA.289-90.)

Before the Court, as before the Board, the Company does not argue that unit supervisors assign other employees to their work locations (i.e., the reactor-based crews) or work hours (i.e., shifts). (Br. 18-21.) Instead, it argues that they “give significant, not just routine, tasks” to others and, at times, redistribute or alter the timing of tasks within a shift. (Br. 19.) But the Company’s argument ignores the record evidence discussed above, which firmly establishes that the unit supervisors merely implement the planned work projects identified in the Authorized Work Schedule. *See Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 92 (4th Cir. 2015) (putative supervisors lacked authority to assign using independent judgment where they made assignment decisions within, and based on, an overall assignment

structure “imposed by management”). In carrying out this function, moreover, the unit supervisors adhere to standard procedures and detailed guidelines governing nearly every situation that could possibly arise during the course of a crew’s work. In short, the record amply supports the Board’s finding that the Company failed to meet its burden of proving its claim that unit supervisors assign significant overall duties to others or use independent judgment in applying the Authorized Work Schedule.

2. Unit supervisors do not responsibly direct employees using independent judgment

As this Court has recognized, in *Oakwood*, 348 NLRB at 692, the Board articulated “a three-part test for determining whether a putative supervisor ‘responsibly directs’ an employee.” *Entergy Miss.*, 810 F.3d at 294 (upholding *Oakwood*’s test for responsible direction as a reasonable interpretation of the Act). The proponent of supervisory status must show (1) “that the employer delegated to the putative supervisor the authority to direct the work,” (2) that the employer also delegated “the authority to take corrective action, if necessary,” and (3) “that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* (quoting *Oakwood*, 348 NLRB at 692); *see also Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 595 (7th Cir. 2012) (explaining that authority to take corrective action is an aspect of “responsible” direction because “it would be incongruous to hold someone accountable for the

conduct of others she could not control or *correct*” (emphasis in original)).

Because supervisory accountability, thus, is a necessary component of responsible direction, “using complex judgment to direct [others] does not itself suffice to make one a supervisor.” *NSTAR*, 798 F.3d at 22.¹²

Applying *Oakwood*’s three-part test here, the Board correctly found that the Company failed to establish that its unit supervisors are responsible or accountable for the performance of the employees to whom they give occasional direction. Specifically, although unit supervisors sometimes delegate specific tasks to employees and generally monitor employee compliance with the Company’s various guidelines and regulations, there is no evidence that unit supervisors “have the independent authority to take any corrective action” where employees fail to follow directions or meet company standards. (ROA.763.) *See Rochelle Waste*, 673 F.3d at 595 (for corrective action to be “corrective,” it must “have some force behind it or place some ‘small burden on the employee’”) (internal citation omitted). The unit supervisor’s sole recourse in such situations is to document employee failures and bring them to the attention of higher-level officials,

¹² As the Board has explained, the requirement of accountability ensures that the purported supervisor’s interests are aligned with management. *Oakwood*, 348 NLRB at 692. An individual who is accountable for the work of others will have “an adversarial relationship with those he is directing,” and will “disregard[], if necessary, employees’ contrary interests,” making it appropriate to exclude that individual from a bargaining unit of statutory employees. *Id.*

including the shift manager, who is ultimately responsible for the crew's performance. *See Loparex LLC v. NLRB*, 591 F.3d 540, 550 (7th Cir. 2009) (authority to take corrective action not established where alleged supervisor's "only option [wa]s to submit a factual report . . . to [a] team manager for consideration").

As the Board further found, the Company also failed to establish that it holds the unit supervisor accountable for employee failures along with the shift manager. The Company presented evidence purporting to show that, in distributing incentive pay, it can take into account crew performance and a unit supervisor may be "downgraded" if his crew underperforms relative to other crews at the facility. (ROA.763.) But the Company failed to provide the basic details necessary to demonstrate *how* it achieves accountability through incentive pay. For example, the Company produced "no evidence regarding what percentage" of unit supervisors' overall compensation is incentive-based, "the extent to which unit supervisors [have been] impacted by crew performance, how often 'downgrades' occur, [and] whether unit employees are also impacted by crew performance." (ROA.764.) *See Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011) (accountability not established by evaluation form used to determine pay raises where employer presented no evidence as to how the form was applied in practice to evaluate the putative supervisors' direction of others).

Moreover, what little evidence there is about the relevant incentive compensation program suggests that negative crew performance may be counterbalanced by other factors, undercutting the prospect of negative consequences for unit supervisors through the incentive-compensation system. (ROA.112-15.) In addition, although the Company contends that it has in fact applied the system to downgrade two unit supervisors based on crew performance, only one of the allegedly downgraded supervisors testified, and his testimony shows that he was unaware of any downgrade, much less that crew performance was the decisive factor. *See Frenchtown*, 683 F.3d at 314 (accountability not established where employer failed to “specifically inform” putative supervisors of the prospect of negative consequences if those under them performed poorly). The record as a whole, thus, does not support the Company’s claim that it holds unit supervisors accountable for employee performance through incentive pay. *See Entergy Miss.*, 810 F.3d at 295-96 (where substantial evidence indicates lack of accountability, that “is sufficient to show that [the putative supervisors] do not ‘responsibly direct’” others within the meaning of the Act); *Loparex*, 591 F.3d at 551 (employer failed to show authority to take corrective action, and therefore also failed to prove authority to responsibly direct); *see also NSTAR*, 798 F.3d at 19 (employer failed to establish that putative supervisors were held accountable, through bonus system, for the performance of those allegedly under them).

Even if the Company had established that unit supervisors responsibly direct employees and are held accountable for doing so, it failed to show that they exercise independent judgment in giving direction to others. The Board found, and the record shows, “that the role of the unit supervisor is procedure driven, and there are numerous procedures for carrying out the work.” (ROA.763; ROA.270-73, 315.) Accordingly, even in those instances where the unit supervisors direct others to deviate from the order of tasks in the Authorized Work Schedule, they follow detailed instructions governing when and how to deviate. Similarly, in monitoring employees’ execution of tasks, the unit supervisors simply watch to ensure that employees comply with written guidelines and established procedures. And where employees make mistakes, written procedures again dictate exactly what the unit supervisor must do: he must immediately remove the employee from the affected work, either prepare a condition report documenting the mistake or ask the employee to do so, use a computer program to automatically generate “lessons learned,” and finalize those lessons as instructed by higher-level officials. (ROA.251-53.) Given the omnipresence of written procedures in all aspects of the unit supervisors’ work and every decision they make, the Board reasonably found that there is no appreciable discretion or independent judgment involved in their direction of other employees.

In its brief, the Company purports to challenge the Board’s finding that it did not carry its burden of proving responsible direction, but it has not argued—and therefore has waived—any claim that the unit supervisors have the expressly delegated authority to take corrective action to enforce their directions. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994). The Company instead focuses on evidence that it argues the Board overlooked, relating to the alleged prospect of accountability for unit supervisors through the incentive compensation system. However, the Company never argued this evidence to the Board on review of the Regional Director’s decision. Indeed, in requesting Board review of that decision, the Company made no argument whatsoever as to how it may hold the unit supervisors accountable for the performance of the operators. Accordingly, the Court lacks jurisdiction to consider the Company’s previously forfeited argument. *See* 29 U.S.C. § 160(e) (“No 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.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (a “Court of Appeals lacks jurisdiction to review objections that were not urged before the Board”); 29 C.F.R. § 102.67(g) (issues litigated before Regional Director but not preserved in request for Board review are forfeited).

In any event, the Board did not overlook or ignore the alleged evidence of accountability as the Company claims. Rather, as shown above, the Board considered and adopted the Regional Director's well-reasoned finding that there is no demonstrated prospect of accountability for the unit supervisors through the incentive compensation system.

Implicitly recognizing that the unit supervisors lack the requisite responsibility or accountability in their regular duties, the Company argues that they assume such supervisory qualities when they occasionally substitute for shift managers—specifically, during an absence of the shift manager from work, or during a declared emergency at the facility. (Br. 24-25.) But as the Company acknowledges (Br. 24), not all unit supervisors possess the qualifications to substitute for the shift manager in a non-emergency situation. And the Company produced no evidence to establish the overall frequency of either type of claimed substitution. In the absence of such basic evidentiary support, the Board understandably did not dignify the Company's argument that unit supervisors, or some unidentified subset of them, are statutory supervisors based on their occasional service as shift managers. In any event, as this Court has repeatedly recognized, "intermittent substitution for supervisors without any other indicia of supervisory authority does not transform [the disputed employees] into supervisors." *Adams & Assocs., Inc. v. NLRB*, 871 F.3d 358, 376 (5th Cir. 2017);

NLRB v. Lindsay Newspapers, Inc., 315 F.2d 709, 712 (5th Cir. 1963); *NLRB v. Stewart*, 207 F.2d 8, 10 (5th Cir. 1953).¹³

3. Unit supervisors do not discipline other employees, or effectively recommend their discipline using independent judgment

Substantial evidence likewise supports the Board’s finding that unit supervisors do not stand apart from other employees in their ability to impose or effectively recommend discipline using independent judgment. (ROA.764-65.) Like designated lead employees in the bargaining unit, unit supervisors nominally have authority to “conduct an Oral Reminder”—the lowest level of discipline in the Company’s Constructive Discipline Policy. (ROA.756.) But there is no evidence that unit supervisors can in fact impose such discipline without the involvement of higher-level officials. As the Board found, the record does not reveal any “instance of a unit supervisor acting on his own to issue an Oral Reminder or any other formal discipline.” (ROA 756.) And Unit Supervisor Jeremy Tillman specifically testified that, despite the Constructive Discipline

¹³ There is also no merit to the Company’s suggestion that unit supervisors “responsibly direct” employees outside their crews—for example, maintenance employees seeking to perform work related to the unit. (Br. 22 n.11.) The record shows that unit supervisors cannot unilaterally cancel work that other groups must perform under the Authorized Work Schedule. At most, they may collaborate with other groups to postpone work that poses a conflict with the crew’s work. (ROA.287-88.)

Policy's language suggesting that unit supervisors can act independently in giving Oral Reminders, in actuality unit supervisors are expected to consult higher-level officials before administering any discipline whatsoever. (ROA.317.) Thus, the evidence plainly does not support the Company's claim (Br. 26) that unit supervisors have authority to discipline other employees on their own.

The record also does not support the Company's alternative claim that unit supervisors "effectively recommend" disciplinary actions. (Br. 26-28.) Under settled law, in order to establish authority to effectively recommend, the proponent of supervisory status must show that the claimed 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) (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 Serv. Co. of New Jersey v. NLRB*, 854 F.3d 55, 59 (D.C. Cir. 2017)).

Here, as the Board found, the Company adduced no evidence as to the frequency of any disciplinary recommendations by unit supervisors, much less that such recommendations are "regularly" followed. Instead, the Company provided

the testimony of a single unit supervisor, Mark Hamilton, that in one instance higher-level officials followed his recommendation to issue an oral reminder to an employee. (ROA.244, 258-61.) But “one example hardly proves that the [putative supervisors] *effectively* recommend discipline.” *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 309 (6th Cir. 2012) (emphasis in original). In any event, the record provides a direct counter to the Company’s solitary example. While Hamilton testified that he made a disciplinary recommendation that managers followed (ROA.254-61), Unit Supervisor Tillman testified that he made a disciplinary recommendation that managers *did not* follow (ROA.301-03). Thus, the evidence of specific, past disciplinary recommendations is both sparse and inconclusive as to whether such recommendations have any effect. The Company cannot meet its burden of proving recommendations regularly followed by management where, as here, the record is limited to contradictory examples.

Nor can the Company meet its burden by pointing to Hamilton’s generalized testimony that he expects his recommendations will be followed without much review. (Br. 27.) As Hamilton admitted, he does not know what happens to a recommendation after he passes it on to higher-level officials, nor does he know the nature of their review. (Tr. 215-15, 238-55.) Hamilton’s expectations, thus, are unsupported by any actual knowledge of relevant facts. Given the obvious insufficiency of such evidence, the Board reasonably found that the Company

failed to carry its burden of proving that unit supervisors make disciplinary recommendations that are regularly given effect without independent investigation.

In its brief, as before the Board, the Company makes much of the unit supervisors' purported involvement in the disciplinary process, short of making disciplinary recommendations. (Br. 27-28.) But that involvement, consisting of investigation and data-collection, only serves to underscore that the unit supervisors largely perform a reportorial function, leaving higher-level officials to determine how to act on the information collected, if at all. *See Allied Aviation*, 854 F.3d at 65 (“Having a role as witnesses, or reporters of fact, within a disciplinary process is legally insufficient to establish the effective exercise of disciplinary authority.”); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 308 (6th Cir. 2012) (supervisory authority to discipline not shown where putative supervisors merely brought employee errors or misconduct to a manager’s attention and the manager “decide[d] how to proceed”).

Moreover, although unit supervisors—like all employees—can complete condition reports to memorialize incidents that occurred on the crew, those reports have no direct correlation to discipline. They are simply a necessary step in the Company’s detailed process of documenting crew errors and avoiding them in the future. *See Vencor Hosp.-L.A.*, 328 NLRB 1136, 1139 (1999) (putative supervisors’ reports documenting poor performance or misconduct not indicative

of supervisory status because they did not “automatically lead to [discipline] or otherwise affect job tenure or status”); *Ten Broeck Commons*, 320 NLRB at 812 (same); *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989) (the power to issue warnings that do not alone affect job status or tenure is not supervisory).

Further, there is no evidence that the unit supervisors use independent judgment in completing the various administrative tasks to which the Company refers—tasks that might possibly support later disciplinary decisions. Although unit supervisors must conduct an investigation about human errors, all such investigations are guided by detailed written procedures, as explained above pp. 10-11 & n.6, 34. Accordingly, even if the unit supervisors’ involvement with investigating and documenting issues constituted discipline, which it does not, the evidence would still fail to demonstrate that they exercised independent judgment in connection with those tasks.

4. Unit supervisors do not reward other employees using independent judgment

In order to establish supervisory status based on authority to reward employees within the meaning of Section 2(11) of the Act, the party claiming that such authority exists must show the putative supervisors “play a significant role in affecting” such rewards. *Shaw, Inc.*, 350 NLRB 354, 357 (2007). As the Board found, the Company failed to show that unit supervisors play a “significant role” in any appreciable reward given to other employees.

As noted above, unit supervisors can make positive comments on employee contact-log forms, but “[t]here is no evidence that the positive comments in contact logs have an effect on . . . pay or promotions of unit employees.” (ROA.757.) Nor do unit supervisors have any discretionary authority to award incentive pay as the Company erroneously suggests. (Br. 29.) Under the terms of the collective-bargaining agreement covering the Company’s reactor and plant operators, incentive pay for those employees “is nondiscretionary” and must be awarded where they have achieved certain “objective metric performances,” by avoiding excessive absenteeism, safety or OSHA occurrences, human performance errors, and disciplines. The unit supervisors merely collect the necessary objective information from employee files and answer four “yes” or “no” questions about what they found (e.g., an absence of disciplines). The Company does not explain now, nor did it explain before the Board, how answering these straightforward questions based on existing employee records is more than merely reportorial, or rises above the routine or clerical. (Br. 29.)

Similarly, the Company failed to prove its claim that unit supervisors “reward” employees within the meaning of the Act by occasionally distributing “Boss Points.” As the Board noted, the Company “failed to introduce documents that could have established the contours of this [points] system,” and the Company did not make up for this deficiency through testimonial evidence. (ROA.765.)

Indeed, the testimony of the Company’s witnesses failed to establish even the most basic details of the points program, such as the frequency with which unit supervisors receive Boss Points to give out and the total number of points made available to each unit supervisor. The scant testimony that the Company produced, moreover, only served to highlight certain facts adverse to the Company’s position: that each point is of negligible value (\$0.0077); that employees must accumulate thousands of points before they can be redeemed for anything of value; and that unit supervisors award points sporadically. (ROA.757, 765.) In light of these admissions, the Board reasonably found that Boss Points are “more of a novelty than a factor in employee compensation.” (ROA.765.)

As the Board further found, unit supervisors are not unique in their ability to award points that may be accumulated towards a later purchase of tangible goods or gift cards. The Company empowers every employee to give points to others (called “Peer Points”), and so far as the record shows, Peer Points are identical to Boss Points in their value and effect. (ROA.757, 765.) Like other employees, moreover, unit supervisors award points by simply going into a computer program, identifying a reason for the award from a drop-down menu of options such as “teamwork,” and then clicking a few buttons to electronically transfer points to a recipient. In these circumstances, even if the sporadic award of Boss Points of little monetary value could qualify as a reward—which it does not—there is no

basis for the Company’s suggestion that unit supervisors weigh different factors or otherwise exercise uniquely supervisory judgment in awarding such points to fellow employees. Accordingly, the Company has patently failed to carry its burden of proving that unit supervisors exercise statutory authority to reward others.

C. The Company Cannot Meet Its Burden of Proving Supervisory Status Through Secondary Indicia Alone

Having failed to establish that the disputed employees here possess any form of statutory supervisory authority, the Company cannot meet its burden through indirect means by relying on secondary indicia of supervisory status. *Frenchtown*, 683 F.3d at 315; *735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App’x 782, 784 (D.C. Cir. 2012). Thus, it is immaterial that the Company refers to the disputed employees as “supervisors.” (Br. 18.) “[T]he Act, by its terms, focuses on what workers are authorized to do, not what they are called.” *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 11 (1st Cir. 2015); *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*, 798 F.3d at 12; *see also Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 589 (7th Cir. 2012) (although employer called disputed employee a “Landfill Supervisor,” he lacked the authority necessary to make him a

supervisor under the Act); *Mars Home for Youth v. NLRB*, 666 F.3d 850, 852 (3d Cir. 2011) (employees called “Assistant Residential Program Managers,” who had employees nominally reporting to them, lacked Section 2(11) supervisory status).

Similarly, in the absence of a showing that the unit supervisors possess one of the forms of supervisory authority enumerated in Section 2(11), the Company cannot carry its burden by reference to the mere trappings of some undefined authority—for example, the unit supervisors’ elevated work platform and their eligibility for bonuses beyond those given to operators. (Br. 10, 18.) *See St. Francis Med. Ctr.-West*, 323 NLRB 1046, 1047 (1997) (fact that disputed employee had his own office, unlike other employees, did not establish supervisory status); *Memphis Furniture Mfg. Co.*, 232 NLRB , 1020 (1977) (fact that “crew head” was salaried and eligible for a supervisory incentive bonus unlike other workers did not render him a supervisor).

Nor does it suffice, for purposes of proving statutory authority, that the unit supervisors are highly qualified and trained employees who have special “senior reactor operator” licenses to perform their jobs. (Br. 6 & n.7, 17-18.) Clearly, the unit supervisors are an important part of the Company’s operations, as are the reactor and plant operators. But “important roles are played by many people who are not supervisors,” and importance is not the test for supervisory status under the Act. *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 148 (1st Cir. 1999); *NLRB v.*

NSTAR Elec. Co., 798 F.3d 1, 5 (1st Cir. 2015) (holding that utility company’s dispatch-center employees are not statutory supervisors, “even though [they] are highly skilled and charged with critical tasks”).

Likewise, contrary to the Company’s suggestion, unit supervisors are not supervisors within the meaning of the Act simply because the Nuclear Regulatory Commission considers them appropriately licensed “to direct the licensed activities of licensed operators.” (Br. 6, 17.) At most, such a statement reflects theoretical or paper authority, and even as such it is insufficient because the Nuclear Regulatory Commission plainly does not purport to determine who is a supervisor under the National Labor Relations Act. *See Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012) (fact that employee has state credentials making him “responsible for directing” landfill operations and “supervising” operational staff “does not answer the question of whether [the employee] is a supervisor under the NLRA”).

The Company similarly errs in relying on the Nuclear Regulatory Commission’s regulations to suggest that the ratio of statutory supervisors to statutory employees is improper under the Board’s findings. (Br. 31-32.) The referenced regulations address professional competency and require that a minimum of three licensed senior reactor operators staff every shift. The regulations do not suggest, as the Company claims, that the same number of

“management[] representatives” or statutory supervisors must be present on every shift. (Br. 32.) In any event, as the Company acknowledges, each crew has at least one statutory supervisor (the shift manager) under the Board’s findings. (Br. 31.) The Company has no legal support for its suggestion (Br. 31-32) that the resulting ratio—one statutory supervisor for every 10 to 12 employees—is so unusual or implausible as to cast doubt on the Board’s findings. *See, e.g., SR-73 & Lakeside Ave. Operations LLC*, 365 NLRB No. 119, 2017 WL 3580355, at *2 (2017) (Board’s supervisory-status findings resulted in a ratio of one supervisor to 16 employees); *Robertshaw Controls Co.*, 263 NLRB 958, 970-71 (1982) (ratio of one supervisor to 15 or 16 employees); *Hydro Conduit Corp.*, 254 NLRB 433, 436, 441 (1981) (ratio of one supervisor to more than 30 employees whose daily tasks were “delineated in a master schedule” created by the supervisor).

In sum, as the Board reasonably found, the Company did not carry its burden of proving that the unit supervisors have any form of supervisory authority recognized in Section 2(11) of the Act. Because the unit supervisors are therefore statutory employees, the Company is legally obligated to recognize and bargain with the Union as the collective-bargaining representative that they selected, and its refusal to do so violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), as the Board properly found. *See NLRB v. Am. Mfg. Co. of Tx.*,

405 F.2d 473, 474 (5th Cir. 1968) (admitted refusal to bargain unlawful where employer failed to prove that bargaining unit included statutory supervisors).

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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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	16-CA-222349
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 29th day of July 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Nos. 32(a)(7)(B), 32(a)(5) and 32(a)(6), the Board certifies that its proof brief contains 10,539 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 29th day of July 2019