

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

JAKE'S 58 CASINO HOTEL,)
)
Employer,)
)
-and-)
)
INTERNATIONAL UNION OF)
OPERATING ENGINEERS)
LOCAL 30,)
)
Petitioner.)
)

Case No. 29-RC-240966

**PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST
FOR REVIEW OF DECISION AND DIRECTION OF ELECTION**

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TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT	2
1. Hiring	4
2. Discipline	5
3. Assigning and Directing Work	6
4. Overtime and Time Off	7
5. Secondary Indicia	8
CONCLUSION	9

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Entergy Mississippi, Inc.</u> , 357 NLRB 2150 (2011)	8
<u>Golden Crest Healthcare</u> , 348 NLRB 727 (2006).....	8
<u>Heritage Hall, EPI Corp.</u> , 333 NLRB 458 (2001).....	8
<u>ITT Lightning Fixtures</u> , 265 NLRB 1480 (1982)	4
<u>NLRB v. Kentucky River Community Care, Inc.</u> , 532 U.S. 706 (2001)	3, 4
<u>Oakwood Healthcare, Inc.</u> , 348 NLRB 686 (2006)	<i>passim</i>
<u>Pacific Beach Corp.</u> , 344 NLRB No. 140 (2005)	8
<u>Peacock Productions of NBC Universal Media</u> , 364 NLRB No. 104, slip op. (2016).....	4, 5
<u>Republican Co.</u> , 361 NLRB No. 15, slip op. (2014).....	4
<u>Shaw, Inc.</u> , 350 NLRB 354 (2007)	6
<u>Springfield Terrace Ltd.</u> , 355 NLRB 937 (2010).....	6, 8
<u>Veolia Transportation Services</u> , 363 NLRB No. 98, slip op. (2016)	5
<u>Statutes</u>	
29 U.S.C. § 152(11)	2

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Petitioner International Union of Operating Engineers Local 30, AFL-CIO (“Local 30”) by its attorneys, Brady McGuire & Steinberg, P.C., respectfully submits this position statement in opposition to the request of Employer Jake’s 58 Casino Hotel (the “Employer”) for review of the Regional Director’s Decision and Direction of Election in this matter.

On May 7, 2019, Local 30 filed a petition under Section 9(c) of the National Labor Relations Act (the “Act”) seeking to represent a unit of employees including all full-time and regular part-time maintenance supervisors employed by the Employer at its hotel and casino located in Islandia, New York. In response, the Employer asserted that the petitioned-for unit was inappropriate because it was comprised of employees holding the title of “maintenance supervisors” and that these employees were supervisors within the meaning of Section 2(11) of the Act. On May 16, 2019, a hearing was held at Region 29 and on May 23, 2019, post-hearing

briefs were filed by the parties. On June 20, 2019, the Regional Director issued a Decision and Direction of Election (the “DDE”) finding that employees holding the title of “maintenance supervisors” were not supervisors within the meaning of the Act and directed an election for July 2, 2019. The election was held on July 2, 2019 with all four (4) of the unit members voting in favor of Local 30 representation. On July 11, 2019, the Regional Director issued a Certification of Representative.

In lieu of restating the facts, the Board’s attention is respectfully directed to the Regional Director’s Statement of Facts as outlined in the DDE. See DDE at 1-6.

ARGUMENT

At the outset, the Employer’s Request for Review is patently insufficient as its counsel has failed to set forth a basis for review of the DDE. Instead, counsel merely correctly identifies the four (4) instances under which review may be granted and then makes vague complaints about the “the newly expedited election procedures.” See Employer’s Request for Review at 1. Plainly, this is an inappropriate method and forum for litigating the established rules of the Board. Merely stating the legal standard upon which a review may be conducted and alleging in a conclusory manner that the findings are erroneous is an insufficient basis for granting review.

Notwithstanding this deficiency, it is well settled that the definition of “supervisor” as found in the Act requires that an “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 responsibility to direct them, or to adjust their grievances, or effectively to recommend such action,” must in connection with these acts not exercise “merely routine or clerical” authority but “*the use of independent judgment.*” 29 U.S.C. § 152(11) (Emphasis

added). While the Employer goes to great lengths to criticize the decision reached by the Regional Director, the Employer fails to show how it satisfied its legal burden of proof showing with credible evidence the supervisory status of the employees in question. As set forth below, noticeably absent from the Employer's argument is any explanation for its repeated and continued mischaracterization of the job duties of the maintenance supervisors or any acknowledgement of the troubling veracity issues created when the Employer's own witness, Director of Hotel Operations & Security Kathleen Parks, disregarded its written employee handbook by attributing tasks performed by the maintenance supervisors as temporary accommodations, although formally assigned to and customarily performed by the maintenance manager. The willful failure of the Employer's witness to attribute any of these tasks to the temporary absence of the maintenance manager only undermines its otherwise conclusory claims that the unit employees are Section 2(11) supervisors.

Citing to Oakwood Healthcare, Inc., 348 NLRB 686, 693 (2006), the Regional Director properly found that the Employer failed to prove supervisory status under Section 2(11), as it "must demonstrate that the individual has the authority to take the enumerated actions, and that the individual employs 'independent judgment,' which is 'free from the control of others' in the exercise of that authority." See NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001) (putative supervisors' "exercise of such authority [cannot be of] a merely routine or clerical nature, but requires the use of independent judgment," and authority must be "held in the interest of the employer"). Throughout the Regional Director's decision, she distinguished "true supervisors vested with 'genuine management prerogatives,' from employees such as 'straw

bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" Oakwood, 348 NLRB at 688.

In addition, the Regional Director on numerous occasions identified the deficiencies in the Employer's proof which failed to carry its burden of showing that the maintenance supervisors were "supervisors" as defined under Section 2(11) of the Act. See Kentucky River, 532 U.S. at 711 (party asserting supervisory status has legal burden of proving such status). Particularly, this burden required that the Employer demonstrate that the maintenance supervisors had the authority to take the enumerated actions and employ "independent judgment" which was "free from the control of others." See DDE at 6-7 (quoting Oakwood, 348 NLRB at 693). In order to be free from the control of others, the Regional Director explained that the actions of the maintenance supervisors would have to have been "taken with no independent investigation of superiors." See DDE at 7 (quoting ITT Lightning Fixtures, 265 NLRB 1480, 1481 (1982)). As explained hereafter, the evidence at the hearing showed that the maintenance supervisors did not exercise "independent judgment" as required for supervisory status under Section 2(11).

1. Hiring

A supervisor exercises the power to effectively recommend the hiring of a new employee if "the supervisor's recommendations are followed with no independent investigation by superiors." Peacock Productions of NBC Universal Media, 364 NLRB No. 104, slip op. at 4 (2016); Republican Co., 361 NLRB No. 15, slip op. at 5 (2014). On this issue, counsel for the Employer continues to repeat the fundamentally disingenuous and discredited representation of its witness by attributing the temporary responsibilities of the maintenance supervisors, necessitated by the Employer's failure to fill the maintenance manager position, to the job duties

of the maintenance supervisors. As it pertains to the issues of hiring, the Employer was only able to show that on a few occasions maintenance supervisors conducted interviews and that the interviews were conducted *because the position of maintenance manager was unfilled*. See DDE at 7. Further, ultimately, no candidate was hired until after he or she was interviewed by Director Parks. See *id.* In fact, Director Parks testified that she makes the ultimate decision regarding hiring. See *id.* at 3. As in Peacock Productions, any hire, even after an interview by a maintenance supervisor, still requires independent investigation and interview by a superior, namely, Director Parks. 364 NLRB No. 104 at 6. Accordingly, the Regional Director correctly found that the Employer did not establish that the maintenance supervisors exercise supervisory authority by making effective recommendations to hire under Section 2(11). See DDE at 7.

2. Discipline

The Regional Director found that maintenance supervisors do not terminate, suspend or issue written discipline to employees. See DDE at 7. The Employer contends that because the maintenance supervisors have verbally reprimanded employees, this establishes supervisory authority under Section 2(11). In determining whether issuing verbal reprimands constitutes the authority to discipline employees, the evidence must support the contention that the maintenance supervisors may “act, or effectively recommend action, free of the control of others.” Oakwood, 348 NLRB at 692-93. Citing to Veolia Transportation Services, 363 NLRB No. 98, slip op. at 7 (2016), the Regional Director stated that “supervisory authority to discipline ‘must lead to personnel action without independent investigation by upper management.’” For a verbal warning to qualify as disciplinary within the meaning of Section 2(11), the Board in Veolia Transportation explained that it must “automatically or routinely lead[] to job-affecting

discipline by operation of a defined progressive disciplinary system.” Id. In this case, there was no evidence showing that maintenance supervisors make recommendations regarding discipline and the verbal warnings that were made did not lead to “job affecting discipline.” Id. Once again, the record is devoid of any evidence that beyond verbal warnings, that the maintenance supervisors exercised independent judgment in recommending discipline or having the authority to effectively recommend discipline. See Shaw, Inc., 350 NLRB 354, 356 (2007). The Employer’s unsupported claim at page 6 of its Request for Review -- that an employee waking up another sleeping employee and telling him to “do his job” constitutes an act of disciplinary authority -- threatens to render the entire concept and definition of authority meaningless.

3. Assigning and Directing Work

The Board has defined the term “assign” as “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” Oakwood, 348 NLRB at 689. “Assign” does not refer to an “ad hoc instruction that the employee perform a discrete task,” nor does it include assignments made “solely on the basis of equalizing workloads.” Id. at 689, 693. Instead, as stated by the Regional Director, “in order to show that an alleged supervisor makes assignments and uses independent judgment in doing so, the individual must make a decision that is free from the control of others and also involves forming an opinion by discerning and comparing data.” See DDE at 8; see also Springfield Terrace Ltd., 355 NLRB 937 (2010). As stated by the Board in Shaw, “rotating essentially unskilled and routine duties among available crewmembers in this fashion does not involve the use of independent judgment and is not, therefore, indicative of supervisory authority.” 350 NLRB 354 at 356.

The key component of finding supervisory authority over directing work requires that “the person directing and performing the oversight of the employee must be 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.” Oakwood, 348 NLRB at 691-92. At no time did the Employer establish that the maintenance supervisors were accountable for directing employees in their job functions. As found by the Board in Oakwood:

Significantly, the concept of accountability creates a clear distinction between those employees whose interests, in directing other employees’ tasks, align with management from those whose interest, in directing other employees, *is simply the completion of a certain task*. In the case of the former, the dynamics of hierarchical authority will arise, under which the directing employee will have, if and to the extent necessary, an adversarial relationship with those he is directing. The directing employee will rightly understand that his interests, in seeing that a task is properly performed, are to some extent distinct from the interests of those under his direction. That is, in directing others, he will be carrying out the interests of management disregarding, if necessary, employees’ contrary interests. Excluding from coverage of the Act such individuals whose fundamental alignment is with management is at the heart of Section 2(11).

Id. at 692 (Emphasis in original).

Here, the decision properly refers to the Employer’s own testimony and the absence of any evidence which would show how the work is assigned or directed, or showing that the maintenance supervisors are accountable for the work performed in connection with an assignment.

4. Overtime and Time Off

The Employer’s argument concerning maintenance supervisors assigning overtime fails to acknowledge that in order for the putative supervisor to have assignment authority under Section 2(11), the evidence must show that he or she can require employees to work overtime or

come in when off-duty. See DDE at 8; Entergy Mississippi, Inc., 357 NLRB 2150, 2156-57 (2011); Golden Crest Healthcare, 348 NLRB 727, 729 (2006); Heritage Hall, EPI Corp., 333 NLRB 458, 459 (2001). The evidence at the hearing, however, showed that the maintenance supervisors did not set schedules or assign employees to departments. See DDE at 8.

With regard to “approving” time off, the Regional Director found that while maintenance supervisors could sign requests for time off, their authority in this regard was unclear; the Employer’s handbook did not specify a role for the maintenance supervisors to grant time off but instead assigned that task to the “department general manager”; and Director Parks testified that she would review an employee’s request for time off with a maintenance supervisor in order to determine if there was enough coverage at the casino in the absence of the employee. Id. However, the Regional Director, in following the holding in Springfield Terrace, 355 NLRB 937, 943 (2010) found that determining an employee’s availability to work is not a criteria establishing the existence of independent judgment for Section 2(11) supervisory status.

5. Secondary Indicia

The Regional Director also properly found that no secondary indicia supported the Employer’s contention that the maintenance supervisors are supervisors under the Act in light of the fact that none of the statutorily described functions under Section 2(11) support the Employer’s argument. In Pacific Beach Corp., 344 NLRB No. 140, 149 (2005), the Board held that “secondary indicia should not be considered in the absence of at least one characteristic of supervisory status enumerated in Section 2(11).” Notwithstanding the Employer’s failure to carry its burden with regard to the primary statutorily described supervisor functions, the

Regional Director still addressed the secondary indicia submitted by the Employer and found that:

Rates of Pay

The maintenance associates earn approximately \$18.20 per hour. The maintenance supervisors earn approximately \$20 to \$22 per hour. (Footnote omitted.) Supervisor Kline earns approximately \$20.20 per hour. The supervisors and associates punch the same time clock. The maintenance manager is a salaried position.

Training

Supervisors and associates receive much of the same training. In 2017, maintenance supervisor Kline attended a “teambuilding” training with supervisors from other departments. Er. Ex. 2. Kline was the only member of the maintenance department to attend the training.

The supervisors have an office which is used by the supervisors and associates. The maintenance supervisors do not attend supervisory meetings.

See DDE at 6.

CONCLUSION

The Regional Director properly found that the Employer failed to satisfy its burden of proving that the maintenance supervisors satisfied any of the criteria in order to establish them as Section 2(11) supervisors. Instead, the evidence showed time and time again that the maintenance supervisors did not exercise the level of independent judgment required under the Act. Further, nearly every decision or recommendation they were able to make was still subject to approval by Director Parks. Finally, the record is clear that the position of maintenance manager remained unfilled and this is the Section 2(11) supervisor to whom the maintenance supervisors and maintenance associates would report to. For these reasons and those outlined

herein, it is respectfully submitted that the Employer's Request for Review should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petitioner's Opposition to the Employer's Request for Review of Decision and Direction of Election was served via electronic filing through the Board's website on the Board and via email on this 1st day of August, 2019 to the following:

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