

**CASE NO. 19-60071  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**STP Nuclear Operating Company  
Petitioner Cross-Respondent,**

**v.**

**National Labor Relations Board  
Respondent Cross-Petitioner.**

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**On Appeal for Review from the National Labor Relations Board  
NLRB Case 16-CA-222349**

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**PETITIONER CROSS-RESPONDENT'S REPLY BRIEF**

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## INTRODUCTION

This Court should follow guidance from the First Circuit Court of Appeals on the supervisory status of the Unit Supervisors. In *Maine Yankee Atomic Power Co. v. NLRB*, the First Circuit encountered the same, unique industry of nuclear power generation, and the same category of employees who oversee control room operations, known in that case as “shift operating supervisors” or “SOS’s.” 624 F.2d 347, 347-48 (1st Cir. 1980).

The sole issue before the First Circuit was whether those employees, as proposed additions to an underlying bargaining unit, were “supervisors” within the meaning of section 2(11) of the Act. *Id.*; 29 U.S.C. § 152(11). Given the highly regulated nature of nuclear power generation, the licensing, staffing, and job responsibilities of SOS’s at Maine Yankee Atomic Power Company and the Unit Supervisors at STP are all virtually identical. Following a thorough review of the authority and responsibilities of SOS’s, the First Circuit concluded “we do not see how the [National Labor Relations] Board’s negative finding on the issue of the SOS’s supervisory authority can possibly be sustained.” *Id.* at 366.

Here, Unit Supervisors also meet the statutory “supervisor” standard for exclusion from collective bargaining eligibility. Not only are they titled, paid, treated, and perceived as supervisors (with numerous other “secondary indicia” of supervisory status), Unit Supervisors undeniably possess and demonstrate authority

to assign work, and responsibly direct, discipline, and reward the employees they supervise. As such, and given the weight of their responsibility within the control rooms of STP's two nuclear fission reactors, the Company maintains that Unit Supervisors should be exclusively identified with the interests of their employer, rather than a union's collective bargaining unit. Accordingly, the Board's contrary upholding of Region 16's decision should be reversed.

### **ARGUMENT**

#### **A. This Court Should Follow the First Circuit's Guidance from *Maine Yankee* Finding Supervisor Status for Employees of the Same Position.**

This Court has reviewed Section 2(11) supervisor questions by relying on cases that involve the particular industry involved. *See, e.g., NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923, 940 (5th Cir. 1993) (citing *Dale Service Corp.* (269 N.L.R.B. 924 (1984)) as the controlling case that lead operators in the heavily regulated wastewater industry should be considered statutory supervisors). In this case, *Maine Yankee* provides directly relevant guidance on the nuclear power industry and the specific role of supervisors within a reactor control room.

#### **1. *Maine Yankee* Concerns An Identical Category of Nuclear Power Plant Supervisors.**

In *Maine Yankee*, the First Circuit encountered a nearly identical scenario to this appeal. 624 F.2d at 347-48. Like the Unit Supervisors here, the SOS's of *Maine Yankee* managed a reactor control room featuring equipment for monitoring

temperature, pressure, and flow rates, and manipulating the complex reactor, cooling, electrical, and turbine systems constituting the machinery of a nuclear fission power plant. *Id.* at 349-50. Just as the control room in *Maine Yankee* was described as “the plant nerve or safe-guard control center” (624 F.2d at 350), the control room for each reactor at STP features a primary station for operating the nuclear reactor’s equipment and a secondary station for controlling the turbine generator and auxiliary equipment. ROA.66-67. As one witness testified, “I guess the thing for you to understand is there are hundreds, if not thousands of switches and lights and alarm panels and dials and computers that the Reactor Operators use to operate and monitor.” ROA.72.

In *Maine Yankee*, one “plant shift superintendent” oversees the SOS’s on each crew, with crews consisting of “control room operators” within the control room, and “auxiliary operators” throughout the plant. 624 F.2d at 351. Likewise at STP, one Shift Manager oversees two to three Unit Supervisors on each crew. ROA.46-47. Each Unit Supervisor supervises activities of either the Reactor Operators within the control room, or the Plant Operators throughout the plant. ROA.46-47; ROA.68-71.

Just as the SOS’s in *Maine Yankee* are required to possess a Senior Operator’s license from the Nuclear Regulatory Commission, STP’s Unit Supervisors possess the same license, authorizing them to “direct the licensed

activities of licensed operators” (i.e., their crew). *See* 624 F.2d at 355; ROA.31; ROA.430 (citing 10 CFR § 55.4).

The procedural history of *Maine Yankee* is also identical. Following a union’s petition to expand its membership, the regional office of the National Labor Relations Board held hearings, rejected Maine Yankee’s contention on the supervisory nature of SOS’s, and directed an election in which a majority of the voters approved the union. 624 F.2d at 348. The company then sought judicial review of the same unfair labor practice violations alleged here, with the sole issue being statutory supervisor status under section 2(11) of the Act. *Id.*

**2. The First Circuit Rejected the National Labor Relations Board’s Same Over-Reliance on the Existence of Schedules and Written Procedures.**

Because of the highly regulated nature of the industry, the present appeal is similar to *Maine Yankee* with respect to ubiquity of written procedures and upper management’s involvement in operational scheduling. ROA.24-28. The Board here reiterates a similar argument presented to the court in *Maine Yankee*: that Unit Supervisors largely organize their day around an Authorized Work Schedule (AWS), “and deviate from it only when permitted by Company procedural manuals.” NLRB Br. 7.

The First Circuit in *Maine Yankee* chose not to discredit the supervisory nature of SOS personnel based on the codified nature of operational practices in a

nuclear power plant. It concluded the Board overemphasized the written procedure, stating

“We fail to see how selecting the correct operating procedures, whether written or not, governing such a vast array of instruments and equipment in all possible permutations of emergency and more routine situations, directing the other employees in the performance of the procedures so selected, and coordinating all their efforts in a unified scheme of operation, can be said not to depend upon an exercise of independent judgment. That judgment is hopefully informed by strict training and written procedures, but it is judgment nonetheless; it is not simply the conditioned reflex of an automaton.”

624 F.2d at 363; *see also McCullough Env'tl. Servs.*, 5 F.3d at 940 (citing *Maine Yankee* in determining that wastewater lead operators were supervisors because they chose which employee would perform specific tasks, even though checklists and instructions largely outline day-to-day tasks).

The First Circuit also took issue with the underlying decisions of the Acting Regional Director and Board for excessively emphasizing the “routine and repetitive” nature of normal operational tests and repairs. 624 F.2d at 356. Such operations were largely scheduled in advance by upper management, and “closely governed by NRC regulations or the Company’s own written procedures.” *Id.* The court objected that the Board (1) failed to “reference the serious consequences that can flow from even simple errors made in connection with the operation of a nuclear electrical generating plant,” (2) disregarded the complex nature of tasks

performed by the crew, and directed by the SOS's who were also "keeping an eye out for mistakes and responding to sudden malfunctions," and (3) neglected to reasonably weigh the urgent role of SOS's in the event of emergencies, even regardless of a procedural directive to immediately report such abnormalities to higher plant management. *Id.* at 356-59. The court stated, in summary, "[w]e regret to say that we believe the Board both oversimplified and underestimated the responsibilities inherent in this position." *Id.* at 359.

Here, the Board reiterates its argument that daily and weekly Control Room operations are principally spelled out in AWS. It is the Unit Supervisors, however, who effectuate those unassigned tasks, when they begin, and who should perform them. ROA.83. Unit Supervisors also determine whether plant conditions are suitable for the work as scheduled. *Id.* One Unit Supervisor described his interaction with the AWS and his crew as an effort to equalize workloads and minimize distractions in the Control Room. ROA.145. He noted his preference for assigning tough tasks to crew members who demonstrate a similar attention to detail, who tend to question "conditions and situations which are out of the ordinary." ROA.144. Although the AWS has desired start times for various projects, those cannot always be met due to equipment being temporarily out of service or other challenges the Unit Supervisors need to account for in managing the workload. ROA.146-47. These choices on the part of Unit Supervisors

demonstrate the same high level of responsibility the First Circuit emphasized in its rejection of the claim that such assignments are simply “routine and repetitive.” 624 F.2d at 356.

**B. The *Maine Yankee* Supervisors Were Found to Responsibly Direct Their Crew Using Independent Judgment, Just as This Court Should Find that STP Unit Supervisors Assign Work, Responsibly Direct, Discipline, and Reward Their Crew Members.**

Section 2(11) of the Act defines a “supervisor” as follows:

“[A]ny 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). The First Circuit noted that section 2(11) is to be read in the disjunctive, with the existence of any one of the statutory powers being sufficient to confer supervisory status, regardless of the frequency of its exercise. 624 F.2d at 360 (citing *NLRB v. Magnesium Casting Co.*, 427 F.2d 114, 117 (1st Cir. 1970), *aff’d*, 401 U.S. 137 (1971)).

For purposes of its own analysis, the First Circuit chose not to question whether SOS’s sufficiently possess other statutory powers besides that of responsibly directing others. 642 F.2d at 360. However, with respect to SOS’s having authority to responsibly direct their crews, the court found the evidence

“absolutely overwhelming and uncontroverted.” *Id.* In particular, it noted the risk of grievous damage to the plant and surrounding countryside, warning that “[w]e are at a loss to see how such grave responsibility can be swept aside as routine and clerical.” *Id.* at 361. In doing so, the court rejected the Board’s attempt to equate SOS work with cases that “simply reflect[] ‘a more skilled employee advising one less skilled.’” *Id.* at 362.

### **1. STP’s Unit Supervisors Assign Work.**

This Court has noted the terms “‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as used in Section 2(11) are all ambiguous.” *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 293 (5th Cir. 2015). It concluded that the term “assign” refers “to 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.” *Id.* at 296. With respect to the latter, however, both the Board and this Court have effectively warned against too broad a reading of “significant overall duties” that might be assigned by a statutory supervisor. Citing *In re Oakwood Healthcare, Inc.*, (348 N.L.R.B. 686 (2006)), the Fifth Circuit noted

“[T]he Board held that assigning an employee ‘to certain significant overall tasks (e.g., restocking shelves) would generally qualify as “assign” within [its] construction.’ 348 N.L.R.B. at 689. On the other hand, ‘choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before

coffeemakers) would not be indicative of exercising the authority to “assign.” *Id.*”

810 F.3d at 298.

If restocking shelves is the Board’s standard for the assignment of “significant overall tasks,” there can be no dispute that Unit Supervisors “assign” work of far greater significance to the Reactor Operators and Plant Operators they supervise—even apart from the question of whether they “responsibly direct” them in the safe and accurate performance of those tasks (as discussed below).

“The Unit Supervisor is the point person that provides approval of work that occurs in the power plant.” ROA.69. As one Unit Supervisor explained, “I will assign owners, Task Owners for different jobs, whether we’re bringing equipment back, whether we’re performing surveillance on equipment, and we are removing equipment from service to the Plant Operations.” ROA.142. He further testified that sometimes “the workload is too high so I’ll redistribute the work and/or deny work to either postpone it to later in the shift, later that day after lunch or even the following day.” ROA.146-47. He also explained that “every Reactor Operator has certain abilities. Some guys I can pile almost anything on them, and they can handle it successfully. Some guys can only run one task at a time. So part of that is . . . making my own decision of who gets what and when, and to know if they have had enough.” ROA.261-62. As for whether the AWS fully directs operational activity, he explained, “the schedule is written to perform. Who’s going to perform

on the crew, no.” ROA.198. Accordingly, while others are involved in developing a schedule of tasks to be performed, the Unit Supervisor is the point person who assigns the work to the appropriate crew member and allows the work to take place.

This testimony shows that Unit Supervisors not only assign tasks, but use discretion in those assignments by evaluating the nature of the work, and the Reactor or Plant Operator’s current workload and overall ability. Region 16 and the Board erred in interpreting work assignments as some overly simple, mechanized process dictated by a schedule and certification standards. The work of assigning daily tasks is indeed supervisory, and the goal of those assignments is to successfully and safely perform the work of operating a nuclear power plant.

**2. Unit Supervisors Responsibly Direct Their Crew.**

The act of “responsibly directing” others requires a supervisor to have “the authority to direct the subordinate’s work and take corrective action when necessary, and the supervisor could be held liable for the subordinate’s performance of his job.” *Entergy Mississippi*, 810 F.3d at 295 (citing *Oakwood Healthcare*, 348 N.L.R.B. at 692).

There can be no dispute Unit Supervisors have authority to direct work and that they do so. Unit Supervisors occupy an elevated platform in the Control Room. ROA.66. As the Operations Director explained, “[t]he Unit Supervisor is up

frequently over and directing and overseeing what the Reactor Operators are doing.” ROA.69. As one Unit Supervisor explained about interpreting tasks so as to direct the crew on how to perform them, “[i]t’s kinda like you have to have the information you need to make a determination of the direction you want to go. It’s not just a clear yes or no. You have to understand truly where we’re going . . . you know, to turn right or left, you know, what the indication is going to be.” ROA.152.

As for correcting the action of the crew, even a witness for the union admitted Unit Supervisors have the ability to “veto” decisions of Reactor Operators whose work they supervise. ROA.277. And, in addition to ad hoc advice given to the crew in the course of daily conversation, the record also contains numerous examples of “human performance condition reports,” through which Unit Supervisors keep track of the dates and descriptions of performance errors by crew members. ROA.441-48. These reports are a regulatory requirement of the Nuclear Regulatory Commission called the Problem Identification and Resolution Process. ROA.106.

As for accountability on the part of Unit Supervisors for the performance of their crew, the Operations Director testified he takes into consideration negative human performance condition reports for Reactor and Plant Operators over the course of the year in determining annual incentive compensation program bonuses

for Unit Supervisors (and Shift Managers). ROA.109-13; ROA.437-47. In the case of two Unit Supervisors, the Operations Director testified he directed their respective incentive compensation program bonuses be “downgraded due to crew performance, and leadership with regards to feedback.” ROA.448; ROA.111-13, 266, 404.

The record also shows that, as issues arise within the facility, or if the reactor needs to be quickly shut down in the event of an emergency, Unit Supervisors direct the actions of the Operators using their own judgment, experience, and training. ROA.194. This supervisory role is consistent with the regulations governing Senior Reactor Operators, which requires their presence in the Control Room to ensure “[a]n individual is available who can provide the oversight function of the supervisor and improve the probability of correctly detecting abnormal events early enough to mitigate potential adverse consequences.” ROA.419-23. As such, Unit Supervisors “directly supervise and communicate with the operator or operators at the controls.” *Id.*

Unit Supervisors also perform as substitutes in the roles of Shift Managers (stipulated as statutory supervisors (ROA.49)) on a regular basis and in the event of an emergency. ROA.192. In an emergency situation, a Shift Manager takes over the emergency response and “[t]he Unit Supervisor is running the crew and working through the . . . emergency operating procedures” and “owns” the control

room. ROA.193-94. The Board has long held that where an employee completely takes over the supervisory duties of another, he or she is regarded as a supervisor—not just by his or her employer, but also under the Act. *See Birmingham Fabricating Co.*, 140 N.L.R.B. 640 (1963). Accordingly, with respect to the responsible direction of work (which the *Maine Yankee* court relied upon), Unit Supervisors meet the statutory definition of supervisors.

### **3. Unit Supervisors Are Authorized to Discipline Their Crew**

Unit Supervisors are responsible for disciplining and recommending discipline when performance issues arise with Reactor Operators in the Control Room or Plant Operators working in the plant.

STP's constructive discipline policy requires that discipline, counseling, and positive performance be documented on an Employee's Contact Log, which contains both positive and negative feedback. ROA.121-24, 143; ROA.449-61; *and see, e.g.*, ROA.462-64. Unit Supervisors note issues with a Reactor or Plant Operator's performance as entries in the Contact Log, which indicates the level of discipline issued to the employee, and which Unit Supervisors consult when recommending any subsequent discipline. ROA.121-24, 164-65; *and see, e.g.*, ROA.462-64.

The Constructive Discipline Policy also expressly grants Unit Supervisors unilaterally “the responsibility and authority to conduct an Oral Reminder,” which

“the supervisor may review . . . with other supervisory levels or Human Resources, if desired.” ROA.117-18; ROA.455 (emph. added).

When instances occur that may require further discipline, Unit Supervisors conduct an investigation into the misconduct. ROA.129, 292. The Operations Director testified that

“[T]he Unit Supervisor does the investigation. The Unit Supervisor interviews the employees . . . and says: What happened? What did you do? The employee tells him what he did. The Unit Supervisor reports that up to his Shift Manager. And the Shift Manager reports it to [the Operations Manager]. The Unit Supervisor proposes a level of discipline. We give that level of discipline to our Human Resources Department to assure that we’re being consistent across the site.”

ROA.129. Following the investigation and the Unit Supervisor’s summary of the conduct, the Unit Supervisor recommends a particular type of discipline, and forwards that to the Shift Manager and Human Resources for review. ROA.201-02, 292. While Human Resources and the Shift Manager have the ability to deviate from a Unit Supervisor’s recommendation, one Unit Supervisor testified he never anticipates his recommendation will be reversed, nor has that ever occurred in his experience. ROA.220.<sup>1</sup>

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<sup>1</sup> The Board flatly misstates the record on the efficacy of Unit Supervisor disciplinary recommendations. *See* NLRB Br. 39. In an attempt to contradict the effective disciplinary recommendation of Unit Supervisor Hamilton (cited above), the Board points out another disciplinary recommendation by Unit Supervisor Tillman (who testified on behalf of the union). The Board states: “Unit Supervisor

Here, the Regional Director even acknowledged the authority of Unit Supervisors, stating that “[u]nit supervisors may . . . recommend discipline after the review of a condition report,” ROA.764. The U.S. Supreme Court has noted that the standard is simply that the supervisor “must be authorized to perform or recommend” at least one of the twelve enumerated duties of Section 2(11). *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 673-74 (1994) (emph. added); *see also NLRB v. St. Mary’s Home*, 690 F.2d 1062, 1068 (4th Cir. 1982) (noting “it is the power and not the frequency of its use which is dispositive”). Accordingly, even though Unit Supervisors have the good fortune of not needing to discipline their crew frequently, they undisputedly possess authority to unilaterally issue certain forms of discipline, and to recommend disciplinary actions at higher levels.

**4. Unit Supervisors Play a Key Role in the Crew’s Incentive Compensation and They Directly Reward Their Crew with Boss Points.**

Unit Supervisors record entries into Contact Logs for all positive and negative performance incidents of their crew members. ROA.118-26; *see also* ROA.545-629 (sample employee Contact Logs); ROA.462-544 (Contact Log

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Tillman testified that he made a disciplinary recommendation that managers *did not* follow.” *Id.* (emphasis in original). But the record reads differently. Tillman actually testified he recommended counseling for a crew member, who soon thereafter “[f]ound another job and resigned.” ROA.301-02. Tillman even admitted “I can’t say for sure that they [in Human Resources and upper management] were going to disagree with me.” ROA.303.

summaries). As one Unit Supervisor testified, “[E]very employee in Operations has a file in the Control Room that has the log or contacts or counseling sessions or oral sessions. That’s how we document it, and that’s how we track it. So if I want to go reference something I go to that and look at that.” ROA.163. Those comments and evaluations are encouraged by supervisor leadership training, but Unit Supervisors fill them out on their own initiative. ROA.167. “[I]t’s my own evaluation of Reactor Operators and Plant Operators. . . . [T]his is my own direction to fill one out.” *Id.*

The Operations Director testified that positive and negative incidents and “human performance condition reports” for crews and individual crew members directly play into the Incentive Compensation Program (ICP) under the collective bargaining agreement for Reactor or Plant Operators, which annually amounts to a potential seven percent bonus of their pay. ROA.107-13. “If you had enough events or an event that is significant enough that you get a written warning, then your ICP is impacted.” ROA.109.

Accordingly, to the extent Unit Supervisors have noted positive or negative comments or events in the Contact Logs for any given Reactor or Plant Operator, and particularly if a disciplinary action is taken (or resisted) at the Unit Supervisor’s recommendation on his review of those Contact Logs, the

independent judgment of Unit Supervisors plays a key part in how the individual may be rewarded in their annual bonus.<sup>2</sup>

Even more directly, Unit Supervisors also award crew members with “Boss Points” at their own discretion. ROA.177. These credits are part of a “Power Points” website viewable by all employees. ROA.180. As one Unit Supervisor testified, “I can award [Boss Points] based on performance, based on any evaluation with team work, good job . . . a questioning attitude, engagement, or maybe going beyond and over the top in the job, or just responding well to a certain situation.” ROA.175. Although all employees receive similar “Peer Points,” the “Boss Points” are a separate, additional bank of credits exclusively afforded to supervisory management personnel. ROA.178. Points from the program can be used to purchase clothing, food, and gift cards such as “gift cards to Cabela’s.” ROA.176-77. As the Unit Supervisor testifying for the union said about times

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<sup>2</sup> The Board argues the terms of the collective bargaining agreement (CBA) itself have helped render the supervisory authority of Unit Supervisors “merely reportorial.” NLRB Br. 42. The Board notes that the Incentive Compensation Program demands four “yes” or “no” objective answers. *Id.*; *see also* ROA.690-91. Although the CBA does contain a chart listing four 25% segments for the “Individual Goals” portion of the annual ICP bonus, the Board oversimplifies these as “straightforward questions based on existing employee records.” *Id.* However, two of those four segments are human performance condition reports and constructive discipline, each of which depends on the independent judgment of Unit Supervisors, noting positive attributes, correcting errors, and coaching and counseling individual crew members over the course of a year, during which time even a single disciplinary event by the Unit Supervisor can impact the crew member’s ICP bonus.

when his own crew members do a good job, “I lean more towards giving out the Power Points for that kind of thing than the positive contact form.” ROA.325. This latter remark demonstrates the discretion of Unit Supervisors to not only give out Boss Points on their own volition, but also to choose what Contact Log entries to document for a given crew member.

**5. Unit Supervisors Also Demonstrate Secondary Indicia of Supervisory Status.**

“[W]hether an employee is a supervisor depends on the nature of his position and how completely that position’s responsibilities identify its holder with management.” *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 344 (5th Cir. 1980).

As noted in the prior briefing, Region 16 and the Board do not dispute that Unit Supervisors are treated and perceived as supervisors by the Company and its workforce. This obviously includes the fact that the title of Unit Supervisors carries the term. This also includes numerous other indicia, such as the fact of their higher base pay, higher rate of incentive pay, the fact they receive allotments of Boss Points to distribute, the existence of their elevated platforms in the Control Room, and the 18-months of additional training (including leadership course attendance)

in order to be employed as Unit Supervisors.<sup>3</sup> ROA.70, 108, 175; ROA.765; *see also* STP Br. 6, n. 7, 16-17.

Additionally, this Court has recognized that, if the supervisory status of a company's leadership were to be denied, the existence of an unreasonable ratio of employers to supervisors is another secondary indication that statutory supervisor status is appropriate. *See Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989), *citing Abilene Sheet Metal*, 619 F.2d at 344 (finding that, if the employee in question is not a supervisor, essentially no supervision would exist between ownership and the other employees when out in the field). The First Circuit in *Maine Yankee* contemplated this issue as well, noting that “[w]e think as a general proposition a determination of the proper number of supervisory personnel required to adequately carry out an employer's needs and policies is a matter for that employer, not one for the Board.” 624 F.2d at 365.<sup>4</sup>

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<sup>3</sup> As noted in prior briefing, the duration of training for Unit Supervisors was entirely missed by Region 16. STP Br. 6, n.7. The Board has ignored it once again in its current briefing.

<sup>4</sup> Also noted in our prior briefing (STP Br. 3, n. 5), two Board Members voted to reject STP's original Request for Review of Region 16's Decision and Direction of Election. ROA.808. One Board Member, however, only did so after inserting a footnote that (1) objected to part of the Regional Director's case law discussion, and (2) independently raised the issue of what might constitute a reasonable ratio of crew members to supervisors, presumptively concluding the one Shift Manager per crew should be sufficient management supervision for STP (and nuclear power plant control rooms nationwide). *Id.* The fact this latter point (which had not been addressed by Region 16) might be raised and dismissed in passing by a Board Member *sua sponte* seems to call into question what the

Indeed, this Court might recognize that the secondary indicia of Unit Supervisors' supervisory status are not negligible factors. Instead, the undisputed fact that Unit Supervisors are treated and perceived as a part of the Company's supervisory management ought to weigh appropriately as evidence that STP (and the nuclear power industry in general) reasonably believes, and always has, that the Company's undivided interests need to be represented by a Unit Supervisor category of personnel in Operations.

### **CONCLUSION**

As the *Maine Yankee* court noted, in order to be upheld on review, a determination by the Board must be supported by "substantial evidence," and the "substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." 624 F.2d at 360 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)). "It would seem that the purpose of the "whole record" test is to limit the opportunity for transmuted a preconception into judgment by picking and choosing what will support that preconception and willfully ignoring whatever weighs against it." *Maine Yankee*, 624 F.2d at 360 (citing Jaffe, *Judicial Control of Administrative Action* at 607 (1965)).

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Board's standards actually are in reviewing Section 2(11) cases. In its response brief to this Court, the Board makes no mention of the Board Member's surprising footnote.

Here, Region 16 and the Board favored a perspective of the Unit Supervisor job that basically strains credulity. Given the weight of responsibility placed on Unit Supervisor as “the point person that provides approval of work that occurs in the power plant” (ROA.69), this Court should not be persuaded by a perception of Unit Supervisors at STP (and nationwide) as though they are merely senior versions of Reactor Operators and Plant Operators, who lend advice but rarely touch the equipment themselves. Unit Supervisors demonstrate supervisory status in many respects, and regardless of the fact a majority may have voted in favor of joining a union, the role of this Court in determining their statutory status is to recognize the authority of Unit Supervisors and the legitimacy of the Company’s belief they remain a crucial, managerial level of personnel, undivided in their dedication to the Company’s interest in the safe operation of the power plant.

STP respectfully requests that the Board's Decision and Order of January 16, 2019 be reversed in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the 19th day of August, 2019, I caused the foregoing to be filed with the United States Court of Appeals for the Fifth Circuit and a copy of same to be served on the following parties of record via ECF except as otherwise noted:

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This document complies with the word limit of FED. R. APP. P. 28.1(e)(2)(A)(i) because this brief contains 5,155 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

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August 19, 2019