Oral Argument Not Yet Scheduled

No. 19-60152

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. 19-60071 (opening brief filed May 20; answering brief filed July 29; reply brief filed August 19), 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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National Labor Relations Act (cont'd)

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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 March 5, 2019, and reported at 367 NLRB No. 102. (ROA.1934-

37.)[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 "maintenance supervisors" at the Company's Wadsworth, Texas facility. (ROA.1935.)

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 March 12, 2019. The Board filed its cross-application for enforcement on March 26, 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 April 22, 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-220802) 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 various "maintenance supervisor" classifications 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 "maintenance 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 maintenance 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 maintenance 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 at a facility in Wadsworth, Texas, where it operates two nuclear reactors. (ROA.1672; ROA.557, 744, 977.) It maintains an extensive physical plant and equipment at that location using an in-house maintenance division led by Division Manager Rudy Stastny. (ROA.1672-73; ROA.323-24.) Six specialized maintenance groups are under Stastny's jurisdiction: mechanical maintenance, electrical maintenance, facilities maintenance, integrated maintenance, instrument and control, and the metrology and radiology laboratory. (ROA.1672-73; ROA.323-24, 1364-70.)

Each maintenance group is headed by a manager who reports to Stastny.[2] (ROA.1673-74; ROA.323-24, 1364-70.) Below the group managers are workers with specialized skills that depend on the nature of the group's work, as well as similarly skilled maintenance supervisors who track aspects of the group's work and perform other largely administrative tasks.[3] (ROA.1673-74; ROA.233, 858-

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[2] It is undisputed that Divisional Manager Stastny and the various group managers are statutory supervisors. (ROA.1674; ROA.323-24.)

[3] The mechanics, electricians, material handlers, and technicians who work with the maintenance supervisors in the above groups are represented by the Union in a bargaining unit of about 507 employees with various job classifications. (ROA.1672; ROA.977.) Based on the representation proceeding in this case, the

59, 861-62, 1364-70.) For example, maintenance supervisors certify employee work hours for timekeeping purposes, and they routinely receive and approve leave requests in the first instance.[4] (ROA.1675; ROA.162-64, 167-69, 171-74, 269-70, 280-81, 290, 575, 600-01, 605-06, 644-45, 727-28, 896-97.) In consideration of their largely administrative duties, maintenance supervisors have individual offices where they spend a large proportion of their time, unlike most other maintenance employees, who use shared workspaces. (ROA.1673-74; ROA.53, 87-88, 121-23, 233-34, 558-60, 693, 858-65.)

B. Assignment and Direction

The Company employs dedicated planners—including long-range planners, work control specialists, work week managers, and schedulers—who work with company managers to distribute employees over crews and shifts, and to determine the overall tasks that must be performed across all divisions at the facility during a defined period. (ROA.1673, 1675-76; ROA.146-49, 156-58, 632-34, 738-41, 777-79.) The planners memorialize their determinations in a comprehensive

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bargaining unit now also includes the maintenance supervisors. (ROA.1693, 1700-04.) *See* pp. 14-16 below.

[4] The Company's timekeeping software allows managers to detect overlapping leave requests that may cause coverage concerns on a given shift. (ROA.162, 171-74, 575, 727-28.) When such concerns arise, the Company honors leave requests based on the seniority of the requesting employee and directs the maintenance supervisor involved to return requests that cannot be honored. (ROA.171-74.)

Authorized Work Schedule, which they develop and refine over a 14-week period. (ROA. 1673, 1675; ROA.119-20, 125.) Around the seventh week before implementation, the planners share the Authorized Work Schedule with employees, including maintenance supervisors, so that they can begin preparing for the work that must be done and provide any feedback on the Authorized Work Schedule's descriptions of required tasks. (ROA.1673; ROA.123-25, 176-78, 246-47, 447-48, 566-67, 570-71, 636-37, 651, 738-41.)

The maintenance division follows the Authorized Work Schedule for non-routine maintenance work. (ROA.1675-76; ROA.119-20, 447-48, 678, 691, 792-94.) For routine tasks, it uses computer software that collects information about the status of the Company's numerous pieces of equipment and automatically schedules each piece of equipment for routine maintenance at appropriate intervals. (ROA.1673, 1675-76; ROA.22-24, 93-96, 312, 793-94.) Accordingly, where employees are involved in routine maintenance tasks—which is common in the mechanical maintenance group and the metrology and radiology laboratory—they follow the schedule of activity dictated by the Company's software. (ROA.1673, 1675-76; ROA.93-96, 103-04, 312.)

Maintenance supervisors assist in implementing the Company's established assignment plans. (ROA.1673-76; ROA.119-23.) Thus, they match individual employees with specific tasks required by the Authorized Work Schedule, by

considering what individual employees are certified to do. (ROA.1675-76; ROA.125, 193, 236-40, 675-76.) Where a particular task calls for two employees, maintenance supervisors may pair them based on their complementary experience. (ROA.1676; ROA.449, 467-68, 571-72.) Similarly, maintenance supervisors collaborate amongst themselves and share staff as needed to ensure that all the work called for by the Authorized Work Schedule can be completed. (ROA.218; ROA.601, 787-89, 817.) And they arrange for small amounts of overtime, on the order of one or two hours at the end of a shift, on those rare occasions when overtime is needed to complete a task underway. (ROA.1675-76; ROA.97-102, 175-76, 187-92, 281, 289-93, 599-600, 749-50, 756-57.) In such instances, maintenance supervisors follow the overtime procedures in the collective-bargaining agreement, and they do not have the power to compel any employee to work overtime. (ROA.1675-76, 1686; ROA.758.)

In addition, maintenance supervisors occasionally go into the field and observe employees as they perform required tasks.[5] (ROA.1673-74; ROA.235-36, 448-49, 680.) On such occasions, maintenance supervisors may "coach" employees on how to perform tasks correctly and in accordance with established

[5] For example, the mechanical, electrical, and integrated maintenance supervisors do this about 20 or 25 percent of the time. (ROA.1673-74; ROA.235-36, 560, 691, 858-59.)

safety guidelines. (ROA.1673-76; ROA.127-28, 466-67, 561-62.) But maintenance supervisors do not give overall performance appraisals to employees. (ROA.1676-77; ROA.59-60, 192.) Nor does the Company hold maintenance supervisors responsible for the employees' execution of their tasks or their overall job performance. (ROA.1676-77; ROA.115, 183, 291-92, 538-39.)

Maintenance supervisors do not deviate from the Authorized Work Schedule unless necessary based on the requirements of the "customers" they serve in other company divisions, such as the operations division. (ROA.1675-76; ROA.30, 194-95, 468-69.) Likewise, in work groups where company software drives routine maintenance, the maintenance supervisors only intervene and ask employees to perform other tasks if they receive a specific request from a customer, or if they perceive that an accelerated schedule is necessary to complete all scheduled work before an outage period. (ROA.1676; ROA.74-75, 96-97.)

C. Discipline

The Company makes "contact log" forms available to a variety of personnel—including managers, maintenance supervisors, and "lead" employees in the bargaining unit—who nominally have others reporting to them. (ROA.1677-78; ROA.1362, 1382.) The form provides space for notations about "positive contact" with an employee, non-disciplinary "counseling," or various forms of discipline as defined by the Company's Constructive Discipline Policy.

(ROA.1677-78; ROA.45-46, 69, 258-61, 714, 1362, 1382-95.) The Company provides the same training to lead employees and maintenance supervisors on the guidelines that apply to disciplinary action. (ROA.1678; ROA.67-68.)

In practice, despite language in the Constructive Discipline Policy suggesting that maintenance supervisors, along with lead employees, may give the lowest level of discipline without management review, they do not unilaterally fill out contact-log forms indicating discipline. (ROA.1677-78; ROA.69-70, 164-67, 266-67, 274-75, 577-79, 719-24, 834-40, 1389.) Instead, maintenance supervisors typically use the forms only to note positive contact with an employee or non-disciplinary counseling. (ROA.1678; ROA.45-46, 69, 164-67, 258-61, 273, 708-09, 830-31.)

D. Hiring, Transfer, and Promotion

The Company uses a standardized panel process to interview candidates for vacancies, regardless of whether they already work for the Company. (ROA.1679-80; ROA.708, 781.) A panel usually consists of three to four company representatives, including a human resources official, a bargaining-unit employee, and a "supervisor" or manager, or both, from the group or department where the vacancy arose. (ROA.1679-80; ROA.76-82, 248-53, 272, 388-91, 535, 539-40, 592.)

In the candidate interviews, the panel asks a series of questions that are printed on a company-provided form. (ROA.1680; ROA.76-82, 388-91, 694-95, 699.) The panelists individually provide a numerical rating or score for the candidate's answer to each question. (ROA.1680; ROA.76-82, 248-53, 272, 388-91, 589, 694-95.) The panelists later discuss their individual scoring decisions and reach a consensus score for each question. (ROA.1680; ROA.44-45, 248-53, 272, 388-91, 591, 694-95, 697.) At the end of the process, the panel tallies each candidate's consensus scores and identifies the highest-scoring candidate for the manager in charge of hiring for the vacancy, who may have participated in the interview process as a member of the panel. (ROA.1680; ROA.248-53, 272, 388-91.) The hiring manager may accept the panel's assessment and hire the highest-scoring candidate, or he may reject that candidate in favor of another applicant who he considers a better fit for the position. (ROA.1680; ROA.462-64, 533-35, 542-43.)

E. Reward

Maintenance supervisors have no influence over employee bonuses, referred to as "incentive compensation" under the collective-bargaining agreement covering the maintenance employees. (ROA.1679; ROA.1144-46.) Such bonuses are awarded based on objective performance metrics set forth in the collective-

bargaining agreement, rather than any subjective input from maintenance supervisors. (ROA.1679; ROA.59, 1145-46.)

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.1679; ROA.47-48, 377.) Recipients can then accumulate and redeem points for retail gift cards or merchandise at a company store. (ROA.1679; ROA.375-76.) Each point is worth a penny ($0.01). (ROA.1679.) Accordingly, an employee must accumulate thousands of points before they can translate into a non-negligible reward. (ROA.1679; ROA.375-76.)

Maintenance supervisors have a larger overall bank of points to distribute than other employees because the Company allocates them "Peer Points" and "Boss Points" of the same value. (ROA.1679; ROA.105, 139-40, 373-75.) Maintenance supervisors get $10 worth of Boss Points (or 1,000 points) on a quarterly or monthly basis for each person nominally reporting to them. (ROA.1679; ROA.378.) Meanwhile, all employees are allocated $5 worth of Peer Points (or 500 points) outright on a monthly basis. (ROA.1679; ROA.381.)

Like all employees, maintenance supervisors are free to distribute the accumulated points in their bank as they see fit, with the caveat that the maximum allowable award to a single individual is $50 in points. (ROA.48, 140, 254-56, 374, 377.) A maintenance supervisor, thus, can give all his allocated Boss Points

(up to $50) to one person, and it need not be someone who reports to him. (ROA.1679; ROA.48, 140, 254-56, 377, 460-62, 900.) Although there are mechanisms for a maintenance supervisor to request additional points—to make an award in excess of his allocated point balance, or in excess of the $50 maximum—no maintenance supervisor has sought to make such extraordinary points-awards. (ROA.1679; ROA.373-77.)

F. Adjusting Grievances

If maintenance employees believe that the Company has violated provisions of the collective-bargaining agreement governing their wages, hours, and working conditions, they can prepare a grievance through their union representative or "shop steward." (ROA.1680; ROA.52, 884-86.) The shop steward may then present the grievance to a maintenance supervisor. (ROA.1680; ROA.52, 884-86.) Because grievances necessarily involve issues of contract interpretation or application, maintenance supervisors do not address the merits of grievances on their own or take steps to resolve them without first discussing the matter with a manager and officials in the human resources department. (ROA.1680-81; ROA.432, 471.) If a written response to a grievance is called for, human resources officials provide the necessary language. (ROA.1680-81; ROA.471-92.)

II. PROCEDURAL HISTORY

A. The Representation Proceeding

In May 2018, the Union filed a petition for an *Armour-Globe* election, to allow the maintenance supervisors to determine whether they should be added to an existing bargaining unit of company employees that includes technicians, mechanics, and electricians in the Company's maintenance division.[6] (ROA.1672; ROA.952-53, 977.) *See Armour & Co.*, 40 NLRB 1333 (1942); *Globe Mach. & Stamping Co.*, 3 NLRB 294 (1937). The Company opposed the petition, asserting that the maintenance supervisors are statutory supervisors excluded from the Act's protections, and that they lack a community of interest with employees already in the unit. (ROA.1671; ROA.979, 985-86.)

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 maintenance supervisors are

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[6] After the Union filed its petition herein, and pursuant to a separate petition and representation election in Board Case No.16-RC-214839, the Board added the Company's "unit supervisors" and "senior reactor operator instructors" to the existing bargaining unit, which brought the total number of employees in that unit to approximately 507. (ROA.1672.) The addition of the "unit supervisors" to the existing bargaining unit is the subject of a separate case pending in this Court. *See STP Nuclear Operating Co. v. NLRB*, No. 19-60071 ("*STP I*") (opening brief filed May 22, 2019; answering brief filed July 29, 2019; reply brief filed August 19, 2019.) As in the present case, the Company argues in *STP I* that the disputed employees are statutory supervisors.

Section 2(11) supervisors. (ROA.1671-90.) The Regional Director further found, contrary to the Company's assertions (ROA.985-86), that the maintenance supervisors share a "community of interest" with employees in the existing bargaining unit and therefore may be properly included in that unit. (ROA.1690-92.) The Regional Director based his conclusion as to community of interest on findings of fact not contested here: that the maintenance supervisors regularly interact with other bargaining-unit employees, are functionally integrated with them, work under common supervision, and share similar work hours and conditions of employment. (ROA.1690-92.)

On June 26, 2018, the Board conducted a secret-ballot election. (ROA.1935; ROA.1700.) The tally of ballots showed that, of 35 eligible voters, 20 cast ballots for union representation and 5 cast ballots against it. (ROA.1700.) Accordingly, on July 12, the Regional Director certified the Union as the exclusive collective-bargaining representative of a bargaining unit that newly included the maintenance supervisors. (ROA.1935; ROA.1703-04.)

The Company requested Board review of the Regional Director's Decision and Direction of Election, arguing that the Regional Director erred in finding that the Company failed to carry its burden of proving the supervisory status of maintenance supervisors, and in further concluding that the maintenance supervisors are properly included in the existing bargaining unit because they share

a community of interest with those in the unit. (ROA.1705-60.) On January 31, 2019, the Board (Members McFerran, Kaplan, and Emanuel) denied the Company's request, stating that it "raises no substantial issues warranting review."[7] (ROA.1933.)

B. The Unfair Labor Practice Proceeding

Following the Union's certification, the Company refused its request for recognition and bargaining. (ROA.1935; ROA.1775.) 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.1763-67.) After the Company answered the complaint by reasserting arguments made in the representation case, the General Counsel filed a Motion for Summary Judgment, which the Company opposed. (ROA.1934 & n.1; ROA.1770, 1773, 1930.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On March 5, 2019, the Board (Members McFerran, Kaplan, 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)).

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[7] 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 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.

(ROA.1934-37.) 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.1934.)

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.1935-36.) 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 maintenance supervisors, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (ROA.1936.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company failed to meet its burden of proving that its maintenance supervisors possess supervisory authority under Section 2(11) of the Act. Because the maintenance 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 maintenance supervisors "assign" within the meaning of the Act fails because the shifts, crew locations, and overall duties of employees in the maintenance division are determined by the Company's dedicated planners, not by any maintenance supervisor. Maintenance supervisors merely follow a centrally produced Authorized Work Schedule or computer program for routine maintenance activities and perform ministerial functions as needed to implement those established plans. Furthermore, even if such ministerial actions could qualify as assignments, there is no evidence that they involve the use of independent judgment. Likewise, maintenance supervisors do not "assign" in the statutory sense by arranging for but not compelling employees to work a few hours of overtime to complete a task underway, or occasionally selecting a temporary substitute from a small pool of properly certified employees.

2. The Company also failed to prove that maintenance supervisors have statutory authority to "responsibly direct" others using independent judgment. Instead, they simply follow the plan of assignments in the Authorized Work Schedule or the Company's software for routine maintenance, deviating only when prompted by personnel in other departments. Moreover, maintenance supervisors are not "responsible" in giving any directions because they lack delegated authority to take corrective action to enforce their directions, and the Company did not

establish that it holds them accountable for failures by those purportedly under their direction.

3. Nor did the Company meet its burden of proving that maintenance supervisors discipline other employees or effectively recommend their discipline using independent judgment. Although the Company's Constructive Discipline Policy purports to give them authority to unilaterally issue the lowest level of discipline (an oral reminder), the record fails to show that this is anything more than theoretical or paper authority. The Company produced evidence of only one such incident, and there the maintenance supervisor proceeded on express instructions from a manager rather than any independent assessment. Moreover, the Company failed to prove that maintenance supervisors investigate employee errors and generate disciplinary recommendations based on their findings. The disciplinary forms that the Company produced are patently insufficient, given the absence of any testimony as to how those forms were completed and ultimately issued.

4. Substantial evidence supports the Board's rejection of the Company's claim that maintenance supervisors effectively recommend hiring using independent judgment. The evidence firmly establishes that the Company conducts all hiring by a standardized panel process, and maintenance supervisors are merely one voice on a panel that generates recommendations by consensus.

Such participation in a group process that routinely includes management and human resources officials as well as admitted employees is not supervisory under settled law.

5. Likewise, the Company failed to show that maintenance supervisors reward employees using independent judgment. Instead, they merely participate along with coworkers in a program that allows recipients to work towards "rewards" by accumulating points valued at one penny. Although the Company suggests that a maintenance supervisor can theoretically make a special request to award more than $50 in points to a single employee, it produced no evidence that this has ever occurred, much less that the request would be informed by independent judgment and approved without independent review by higher-level officials.

6. Finally, the Company failed to establish that maintenance supervisors adjust employee grievances using independent judgment. Instead, the record shows only that upon receiving a grievance alleging breach of the collective-bargaining agreement, maintenance supervisors seek advice from their managers and human resources officials, and those higher-level officials determine how the grievance should be handled.

ARGUMENT

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

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 maintenance 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 maintenance 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.[8] *See Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139-43 (1971).

[8] 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).

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).[9] 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 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

[9] "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).

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 Maintenance Supervisors Are Statutory Supervisors

The Company does not contend that the maintenance supervisors have Section 2(11) authority to suspend, lay off, recall, or discharge employees. Nor does it challenge the Board's finding that the maintenance supervisors share a community of interest with employees in the existing bargaining unit. Instead, the

Company claims (Br. 17-29), as it did before the Board, that the maintenance supervisors are statutory supervisors because they allegedly give assignments to maintenance employees, responsibly direct their work, discipline them or effectively recommend their discipline, hire, transfer, and promote them, reward them, and adjust their grievances 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 precedent.

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

As the Company acknowledges (Br. 17), 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 maintenance supervisors do not possess any of these forms of authority. (ROA.755, 762-63.) Instead, the record amply shows that other individuals perform these duties.

Thus, the Company employs a host of work-planners who are not maintenance supervisors, including long-range planners, work week coordinators, and schedulers. The planners distribute employees over shifts and crews and

determine, through a 14-week advance-planning process, the work that must be performed on each crew and shift. They memorialize their determinations in an Authorized Work Schedule, and that document then governs when and where employees will perform their work, and what their overall tasks will be. The maintenance division follows the Authorized Work Schedule except for routine tasks, such as preventive maintenance, which are automatically prioritized and scheduled through a software program that tracks the status of thousands of pieces of company equipment.

Consistent with these established assignment mechanisms, Maintenance Scheduler Jim Bob Presswood testified that in his long previous tenure as an electrical maintenance supervisor, he simply "passed out work" from the Authorized Work Schedule. (ROA.119-20, 193.) Facilities Maintenance Supervisor Richard Horning similarly testified that his crew "work[s] to the authorized work schedule"—indeed, they "have to line up to the authorized work schedule"—because there are "probably ramifications" if they fail to follow it. (ROA.468-69, 512-13.) And Metrology and Radiology Laboratory Supervisor John Griffin testified that in his group, where the work largely involves routine maintenance of company equipment, the Company's automated equipment-tracking system "puts th[e] work out in front of them." (ROA.96.) Employees

simply "go[] to the schedule" that is "already set up electronically, . . . look[] to see what is due next[,] and do[] it." (ROA.89-90.)

In light of the Company's elaborate, centrally controlled assignment mechanisms, the Board correctly found that maintenance supervisors "do not designate or deploy employees to specific areas or provide them with the list of tasks they are to complete," nor do they "schedule the shifts or hours of others." (ROA.1685-86.) Instead, as the Board found, they play a purely ministerial role in implementing already-established assignments.

For example, maintenance supervisors delegate tasks called for by the Authorized Work Schedule to specific employees within their crew, and they can also direct crew members to perform preparatory tasks—such as fabricating a tool that will be necessary for a scheduled project. But as the Board explained, such "ad hoc instructions to perform discrete tasks do not qualify as assignment in the statutory sense." (ROA.1686.) "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 maintenance 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. *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").

Likewise, maintenance supervisors do not demonstrate authority to "assign" by occasionally changing the sequence in which employees perform required tasks, or re-prioritizing tasks in response to changed circumstances or company priorities. *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.

In any event, even if such activities could qualify as assignment, which they do not, the Board correctly found that they also fall short of the supervisory mark because they are not informed by independent judgment. (ROA.1685-86.) *See 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.*[10]

Here, in delegating tasks from the Authorized Work Schedule, maintenance supervisors follow a simple, standard procedure. They determine what individual employees on their crew are certified to do, and then they "hand the work out according[] to their certifications." (ROA.125, 236-37, 240, 284-86.) Although maintenance supervisors also may pair employees to work together on a task based on complementary skills, the Company failed to prove that in making such pairings maintenance supervisors go beyond routine observations about employee skills, or

[10] The Company claims that this Court's 2015 *Entergy* decision, quoted above, establishes "a relatively low threshold" for independent judgment because an individual may exhibit statutory independent judgment in choosing among a small number of options. (Br. 18.) But this claim fundamentally misses the point. Regardless of the number of options placed before an individual, under the Board's *Oakwood* definition of independent judgment as endorsed in *Entergy*, the putative supervisor must apply judgments of a certain quality to the options presented, by acting free of the control of others and discerning or comparing data. Although the Company resists this court-enforced definition, it is only able to do so by misunderstanding *Entergy* as noted, and by hearkening back to precedent that predates both *Oakwood* and *Entergy* and therefore reflects a now-superseded understanding of the statutory term "independent judgment." (Br. 19, citing *NLRB v. McCullough Environmental Servs.*, 5 F.3d 923, 941 (5th Cir. 1993).)

"form an opinion or evaluation by discerning or comparing data.'" *Entergy Miss.*, 810 F.3d at 296 (quoting *Oakwood*, 348 NLRB at 689).

The Company similarly failed to prove that maintenance supervisors use independent judgment in occasionally re-prioritizing tasks within employees' already-established overall duties. The record shows that maintenance supervisors only deviate from the Authorized Work Schedule, or from the automated schedule for routine maintenance, if they receive an instruction or request from personnel (known as "customers") in company units that use maintenance services, which effectively forces a re-prioritization of tasks. As Facilities Maintenance Supervisor Horning explained, if he delays performance of a task on the Authorized Work Schedule, "it's because operations tells us that there's something that's mitigating that [sic.] and we can't go forward with it." (ROA.468-69.) Along the same lines, Metrology and Radiology Laboratory Supervisor Griffin testified that employees proceed on the schedule of work suggested by the Company's software, and he will only "go ask [employees] to stop what they are doing and start something else" if he receives a faxed customer request that requires immediate attention, or if it is necessary to "work around" a customer-imposed outage. (ROA.93-97.)

As the Board further found, maintenance supervisors also do not use independent judgment in approving minor, temporary adjustments to employees' work hours as circumstances require. (ROA.1675, 1686.) For instance, although

maintenance supervisors can handle employee leave requests in the first instance, they routinely grant such requests without question. The record further indicates that they only return or deny requests on express instructions from higher-level authorities, or in collaboration with them. Similarly, although maintenance supervisors "sporadically and infrequently grant up to one to two hours of overtime," they are obliged to follow the procedures in the employees' collective-bargaining agreement in allocating even this small amount of overtime. (ROA.1686.) And insofar as maintenance supervisors make any assessment of their own, it is simply the routine, initial assessment that overtime would be helpful to complete a task underway. In any event, there is no evidence that where a maintenance supervisor has identified an employee for overtime work consistent with the collective-bargaining agreement, he can compel that employee to work the overtime. *See Entergy*, 810 F.3d at 298 (statutory authority to assign not shown where putative supervisors could allocate overtime but lacked delegated authority to compel a worker to perform the overtime work). The record, thus, directly undermines the Company's argument that maintenance supervisors meaningfully control employee work hours using independent judgment.

In an effort to claim assignment authority that the maintenance supervisors plainly do not have, the Company argues, contrary to the Board's well-supported findings (ROA.1675), that they help to create the assignments in the Authorized

Work Schedule. (Br. 18 & n.7.) But the record shows they do no such thing. Rather, they merely make sure, *after* the schedule of assignments is already generated, that the assignments are sufficiently and accurately described. As Mechanical Maintenance Supervisor Taylor put it, he occasionally suggests revisions to the Authorized Work Schedule before implementation because sometimes "the procedure is not written exactly like it is supposed to be," and he wants to ensure that the instructions are "clear and precise." (ROA.246-47.) Along the same lines, Electrical Maintenance Scheduler Presswood testified that, in his time as an electrical maintenance supervisor, he did not decide the scope of the work to be covered in the Authorized Work Schedule, but merely "help[ed] plug in the jobs that are going into" it, based on the plans already stated in the document.[11] (ROA.177-78.) On this record, it was entirely reasonable for the Board to conclude that maintenance supervisors have "no role in creating" the Authorized Work Schedule, but simply perform ministerial tasks related to its implementation. (ROA.1675.)

The Company similarly errs in claiming that maintenance supervisors, as a group, "assign" using independent judgment when they collaborate with one

[11] Presswood testified that the planners would typically give him the opportunity to review the Authorized Work Schedule in the seventh week of the 14-week planning process prior to implementation. (ROA.120, 123.)

another to temporarily move employees between crews to complete all scheduled work. (Br. 19-20.) Their action amounts to a mere switching of tasks among employees, which does not rise to the level of assignment for purposes of the Act. *Croft Metals*, 348 NLRB 717, 722 (2006). Moreover, even if such temporary task-switching could qualify as assignment, the Company failed to establish that maintenance supervisors exercise independent judgment in doing so. Instead, they merely make routine assessments of how many properly certified workers are needed to complete each crew's assigned work.

Likewise, the Company failed to establish that maintenance supervisors acquire Section 2(11) status because they can appoint another employee to fill in for them when they are absent from work. (Br. 7, 19.) Although maintenance supervisors can arrange for coverage of their own duties, the Company failed to demonstrate that they use independent judgment in making such arrangements. To the contrary, Mechanical Maintenance Supervisor Taylor admitted that he does not have unfettered discretion to select a substitute to cover his absence. (ROA.240-41.) Instead, as Taylor explained, company procedure requires that he choose between the two people on his crew who have the appropriate certification to serve in his role on a temporary basis. In choosing between those two employees, moreover, Taylor testified that he selects whichever person is available at the time of his planned absence. The record, thus, does not support the Company's

suggestion that maintenance supervisors make judgments that rise above the routine or clerical in designating a substitute, or indeed that they have any form of supervisory assignment authority.

2. Maintenance 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).[12] In addition, as with all statutory indicia, the proponent of supervisory status must show that the putative supervisor uses independent judgment in connection with

[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*.

the claimed form of supervisory authority. Substantial evidence supports the Board's finding that the Company failed to meet any aspect of its well-settled burden as to responsible direction.

At the outset, as the Board found, the record does not support the Company's claim (Br. 21) that maintenance supervisors give directions to others that are informed by independent judgment. (ROA.1686-87.) Instead, as the discussion above pp. 27-35 shows, nearly all the directions that maintenance supervisors give to other employees emanate from the Authorized Work Schedule or express instructions from the maintenance department's customers in other company units.

Moreover, when maintenance supervisors direct that specific employees perform specific tasks required under the Authorized Work Schedule, they follow "objective, pre-established criteria" in directing a properly certified employee to perform the required task. (ROA.1687.) Accordingly, as the Board explained, the maintenance supervisor "need not have any knowledge of the [employee's] particular experience or skill level with regard to the task" in order to direct that he perform it. (ROA.1687.) Along the same lines, maintenance supervisors do not bring to bear any independent judgment in directing employees to comply with established safety guidelines, or to delay routine maintenance tasks queued by the Company's equipment-tracking software, in order to attend to more pressing

customer requests. In each of those instances, maintenance supervisors simply follow and implement already articulated instructions. Contrary to the Company's barely elaborated claim, therefore, maintenance supervisors do not "independently prioritize work and assign employees to various jobs" using the statutory independent judgment necessary to bring them within the Section 2(11) definition of a supervisor. (Br. 21.)

Even if the Company had succeeded in proving that maintenance supervisors give directions to others using independent judgment, its claim that they are statutory supervisors by virtue of such directions would still fail because it did not prove that maintenance supervisors have the delegated authority to take corrective action to enforce their directions. *See NSTAR*, 798 F.3d at 22 ("using complex judgment to direct [others] does not itself suffice to make one a supervisor"). As the Company acknowledges, maintenance supervisors only have the authority to "coach[] and counsel[]" employees, which simply entails giving feedback and guidance on how to perform tasks "properly and safely." (Br. 21.) Contrary to the Company's apparent belief, the ability to give such feedback and guidance—as any experienced employee might do with a less-experienced co-worker—does not qualify a person as a supervisor under the Act. For an action to be "corrective" for Section 2(11) purposes, it must "have some force behind it or place some 'small

burden on the employee.'" *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 595 (7th Cir. 2012) (citation omitted).

Here, as the Board found, the Company produced no evidence that maintenance supervisors can place any burden on employees to force compliance with their directions. (ROA.1687.) They lack, for example, the independent authority to give a non-compliant employee a negative performance appraisal that could affect their compensation or job status. Thus, Supervisor Griffin in the Metrology and Radiology Laboratory can formulate goals for employees, but as the Board found, he cannot independently evaluate their performance. (ROA.1677.) All of his assessments must go through his manager, Vicki Patton, and Griffin admitted that he does not know what Patton does with them. (ROA.1677.) The Company, accordingly, is mistaken that the Board "ignore[d]" Griffin's testimony. (Br. 21 n.10.) The Board specifically considered his testimony and found it insufficient to prove authority to take corrective action. *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's responsible-direction claim also fails because the Company did not prove, as it must, that maintenance supervisors are held accountable for failures of the employees allegedly under their direction.

The Company produced no evidence of any established mechanism—whether evaluative, disciplinary, or otherwise—by which it holds maintenance supervisors accountable for the performance of others on their crews. (ROA.1687.) Nor did it otherwise show that it "specifically inform[ed]" maintenance supervisors that they faced the prospect of negative consequences if their crews performed poorly. *Frenchtown*, 683 F.3d at 314.

Instead, it produced one example of an over-25-year-old incident in which Electrical Maintenance Supervisor Roger Wilkinson received a written reminder after members of his crew took the wrong reactor coolant pump out of service and thereby triggered an unexpected alarm in the reactor control room. As the Board found, Wilkinson's decades-old experience of being held accountable for a crew error is of limited probative value, not only because of its remoteness in time, but because Wilkinson admitted that he is unsure whether the current leadership of the Company would take the same approach today and discipline a maintenance supervisor for an error committed by other crew members. (ROA.1687.) In addition, as the Board further found, the instance noted above is undermined by a separate incident he recalled, in which his crew committed an error and the Company *did not* hold him accountable. *See Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 92-93 (4th Cir. 2015) (employer cannot carry its burden of proof based on ambiguous or inconclusive evidence); *see also NLRB v. NSTAR Elec. Co.*, 798

F.3d 1, 15 (1st Cir. 2015) (party challenging the Board's supervisory-status determination must show that the evidence "compels a conclusion contrary to the one" reached by the Board).[13]

Given the Company's failure to meet its burden of proof at every step of the statutory test for responsible direction using independent judgment, the Board correctly found that the Company fell woefully short of establishing that maintenance supervisors possess that form of statutory authority. (ROA.1687.) *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).

[13] In its brief, as before the Board (ROA.1677, 1687), the Company also attempts to establish accountability by citing an incident in which a maintenance supervisor faced discipline for *his own* error rather than that of others on his crew. (Br. 22, citing ROA.562-63 (testimony of Manager David Thornton that he disciplined a maintenance supervisor because "he violated policy" by failing to timely report and address a crew-member's injury).) Such examples are plainly insufficient to demonstrate that maintenance supervisors are held accountable for the performance failures of *others* purportedly under their direction. *See Oakwood*, 348 NLRB at 695 (putative supervisors' accountability "for their *own* performance or lack thereof, not the performance of *others*" held "insufficient to establish responsible direction") (emphasis in original).

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

Substantial evidence likewise supports the Board's finding that maintenance supervisors do not stand apart from other employees in their ability to impose or effectively recommend discipline using independent judgment. (ROA.1687-88.) The Company's Constructive Discipline Policy purports to give "supervisors," including lead employees in the bargaining unit, authority to issue an "oral reminder"—the lowest level of discipline under the policy. (ROA.1677; ROA.1389.) But as the Board found, the Company failed to prove that this authority is more than theoretical. (ROA.1687-88.) *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998) ("[t]heoretical or paper power does not a supervisor make").

Indeed, as the Company acknowledges (Br. 9), most of the maintenance supervisors who testified at the underlying hearing—including long-tenured supervisors in the maintenance department—have never issued any level of discipline under the Constructive Discipline Policy. (ROA.45-46, 69-70, 258-61, 273.) And although the Company mustered one example of a discipline issued by a maintenance supervisor, that single instance fails to advance the Company's argument that maintenance supervisors discipline other employees using independent judgment. In that outlier example, Electrical Maintenance Supervisor

Presswood verbally reminded an employee about missing a required training, but he only took this step because a manager had just issued an instruction that employees who miss trainings should be given oral reminders. (ROA.164-67.) Accordingly, taking the import of this solitary example into account, the Board correctly found that "[t]he record did not include an instance of a maintenance supervisor acting on his own, without the consultation or approval of a manager, to issue an Oral Reminder or any other formal discipline." (ROA.1678.)

As the Board further found, the record also does not support the Company's alternative claim that maintenance supervisors "effectively recommend" disciplinary action. (ROA.1688.) 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 __, 2018 WL 3040701, at *3 (D.C. Cir. 2018) (quoting *Allied Aviation Serv. Co. of New Jersey v. NLRB*, 854 F.3d 55, 59 (D.C. Cir. 2017)).

Here, any argument that maintenance supervisors effectively recommend discipline falls flat because the Company produced no evidence that maintenance supervisors "investigate [employee] errors" and independently generate disciplinary recommendations based on their findings. (ROA.1688.) The Company produced contact log sheets bearing some of the maintenance supervisors' names. But as the Board found, "there was no testimony about who drafted th[ose contact logs]," much less affirmative evidence "showing that the records were independently drafted" by maintenance supervisors to serve as recommendations of discipline, and that "discipline was issued without independent investigation by a manager or Human Resources." (ROA.1688.) Substantial evidence accordingly supports the Board's finding that the bare contact logs in evidence do not suffice to establish any aspect of the maintenance supervisors' claimed authority to effectively recommend discipline.

Nor can the Company meet its burden of proving disciplinary authority by merely pointing to the fact that maintenance supervisors can "counsel" fellow crew members. (Br. 25.) Undisputedly non-supervisory "lead" employees in the bargaining unit have the same so-called authority under the terms of the Company's Constructive Discipline Policy. Moreover, contrary to the Company's suggestion (Br. 25), the policy does not denominate counseling as a form of

discipline, and several maintenance supervisors confirmed in their testimony that counselings are not considered disciplinary.

In its brief, the Company nevertheless insists that counselings are disciplinary, relying on the testimony of a former human resources manager that "counseling is typically foundational to more formal disciplinary actions." (Br. 25, citing ROA.342-43.) But such conclusory testimony cannot suffice to establish that by "counseling" others, maintenance supervisors are involved in discipline. *See Frenchtown*, 683 F.3d at 307 (manager's testimony that "in-service" educational counselings "lead to discipline and are the first step in the disciplinary process" was insufficient to establish they are disciplinary). Under settled law, the Company had the burden to produce specific evidence of a direct correlation between the apparently non-disciplinary counselings and later job-affecting discipline. *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). The Company, however, demonstrated no particular relationship between counselings and later discipline. Accordingly, those plainly non-disciplinary actions cannot be

deemed suggestive of statutory authority to discipline, and they do not make up for the glaring lack of evidence that maintenance supervisors discipline fellow employees or effectively recommend their discipline.[14]

4. Maintenance supervisors do not effectively recommend the hire, transfer, or promotion of other employees using independent judgment

Substantial evidence also supports the Board's finding that maintenance supervisors do not effectively recommend employees for hire, transfer, or promotion. (ROA.1689-90.) As the Board explained, the Company's argument that maintenance supervisors "effectively recommend" such actions fails because no maintenance supervisor "solely recommend[s] the hire of any candidate." (ROA.1690.) Rather, maintenance supervisors participate on panels with management and human resources officials, as well as bargaining-unit employees, to interview and rate candidates in accordance with fixed criteria on a company-provided form. Consistent with established panel procedures, moreover, each panel must reach a consensus as to the best candidate (or candidates, if there are multiple vacancies). After reaching a consensus, the panel conveys *its*

[14] Likewise, the Company achieves nothing by highlighting that maintenance supervisors "receive training on disciplinary procedures and practices." (Br. 9.) As the Board found and the record shows, "one need not be classified as a supervisor to attend this training." (ROA.1678.) Thus, Metrology and Radiology Laboratory Supervisor Griffin attended the referenced training on the Company's disciplinary procedures even before he became a "supervisor." (ROA.67-68.)

recommendation—not the recommendation of any single panel member—to higher-level officials for consideration.

Settled precedent fully supports the Board's finding that, in these circumstances, maintenance supervisors do not have statutory authority to effectively recommend candidates for hire, transfer, or promotion. As the Board has explained, a putative supervisor does not effectively recommend where his involvement in the hiring process is "limited to participating in recommendations arrived at by the consensus of [a] panel [of interviewers] as a whole." *Children's Farm Home*, 324 NLRB 61, 64 (1997); *see also J.C. Penney Corp.*, 347 NLRB 127, 129 (2006) ("mere screening of applications or other ministerial participation" in the hiring process does not suggest supervisory authority); *North Gen. Hosp.*, 314 NLRB 14, 16 (1994) ("[m]ere participation in the hiring process, absent authority to effectively recommend hire, is insufficient to establish Section 2(11) supervisory authority"). And the case for supervisory authority is only weakened where, as here, acknowledged supervisors routinely interview candidates alongside the putative supervisors. (ROA.1689.) *See Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1387 n.9, 1388 (1998) (technicians-in-charge lacked authority to effectively recommend hiring, despite interviewing candidates and providing "opinions or recommendations" that received "significant" weight, because a higher-level official also participated in the interview and hiring process).

Contrary to the Company's claim, maintenance supervisors do not occupy a special status on the Company's hiring panels, with other panel members merely "aid[ing]" them by providing "opinions." (Br. 26.) As the Board found, all panel participants provide their input within the structured format provided by the Company's hiring form, and after all panelists have completed those forms, they are "required to come to a consensus on rating the candidate within one point of each other." (ROA.1690; ROA.132.) There is "no evidence" that a maintenance supervisor's "recommendations or conclusions about the candidates [a]re given greater weight" than those of other panelists. (ROA.1690.) Moreover, there is no evidence that a maintenance supervisor has ever displaced a panel's consensus recommendation, and substituted his own assessment of the candidate, using independent judgment. (ROA.1690.) Nor is there any evidence that a maintenance supervisor has otherwise deviated from the standard panel procedure, which requires the formulation of a recommendation by consensus. (ROA.1690.) Accordingly, there is no basis for the Company's suggestion that a maintenance supervisor's ratings somehow factor more importantly in the final panel recommendation than the ratings of other panel members.

As the Board further found, the only person who holds special sway over the process is the management official who ultimately receives the panel's recommendation. (ROA.1689.) Specifically, the record shows that a manager

with authority to hire can both participate in the panel process and later "overrule the panel's recommendations and ratings to select a candidate that the manager [finds] to be a better fit." (ROA.1689.) In these circumstances, where the maintenance supervisors merely participate in panels that are subservient to the wishes of a hiring manager, the law is clear that they do not acquire supervisory status by virtue of that participation. *See GRB Entertainment, Inc. d/b/a Aardvark Post*, 331 NLRB 320, 320-21 (2000) (editor was not a supervisor where he merely let superior know whether applicants were technically qualified and left superior to determine whether the applicant was otherwise a good fit); *Int'l Ctr. for Integrative Studies/The Door*, 297 NLRB 601, 601-02 (1990) (employee lacked authority to effectively recommend hiring where his role was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with higher-level officials, in applicant interviews).

The sparse evidence cited by the Company in its brief does not undermine the Board's findings. (Br. 26.) Thus, although the Company asserts that Electrical Maintenance Supervisor Presswood "disapproved of the quality of a [group] of candidates" and selected additional candidates to fill several vacancies, his testimony makes clear that he did not act on his own or outside the regular panel process. (Br. 26.) As Presswood testified, the relevant hiring panel—which consisted of Presswood, a human resources official, and a bargaining-unit

employee—"went through all of the interviews" and determined "based on our results" that "we didn't have enough" qualified candidates "to fill the seven spots" for which the panel was convened. (ROA.129-30, 136, 138.) Acting on the panel's consensus determination, Presswood sought and secured permission from Manager Martin Cortez to interview additional applicants beyond those initially screened for interviews. (ROA.129-30, 137.) Cortez granted permission and provided the panel with additional candidates to interview. (ROA.130-31, 139.) Thereafter, with Cortez's authorization, Presswood hired the top seven candidates from the panel process. (ROA.130-31, 139.)

Likewise, Metrology and Radiology Supervisor Griffin did not unilaterally "transfer" an employee to a new position as the Company suggests. (Br. 26.) Rather, Griffin merely transferred the duties of one departing specialist to a remaining specialist on his crew—a nominal switching of duties that does not qualify as a transfer because there was no change in the remaining specialist's pay or job status.

Nor does the record support the Company's bold claim that Griffin, on his own, promoted an applicant or effectively recommended his promotion to fill the vacancy. (Br. 26.) As Griffin testified, although he participated in interviewing and rating candidates for the vacant position, consistent with the usual panel process, the panel found no qualified candidates, so the Company re-posted the

vacancy. Thereafter, one person applied—a technician Griffin had encouraged to apply. (ROA.38, 40-41.) Griffin explained that in this "unique" situation, "since there was only one qualified candidate, we promoted him." (ROA.41.) Far from showing that Griffin promoted or effectively recommended this promotion, his testimony supports the Board's finding that "[t]here was no evidence that Griffin had the authority to hire a candidate without going through the panel procedure," and that maintenance supervisors do not "effectively recommend" specific candidates for hire but merely participate in a group process to generate a consensus recommendation. (ROA.1690.)

5. Maintenance 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 maintenance supervisors play a "significant role" in any appreciable reward given to other employees.

Maintenance supervisors have no influence over incentive pay for maintenance employees, as such pay is distributed based on objective performance metrics and a formula set forth in the employees' collective-bargaining agreement. Further, although the Company allocates $10 worth of Boss Points to each

maintenance supervisor for every employee assigned to them, and replenishes points on a monthly or quarterly basis, the Company produced no evidence as to the frequency or amount of any supervisor-to-employee awards made from those points allocations. The record establishes, moreover, that there is no necessary relationship between Boss Points allocated to a maintenance supervisor and rewards to his so-called supervisees. Indeed, Metrology and Radiology Supervisor Griffin testified that he sometimes gives his Boss Points, not to anyone reporting to him, but "across department lines" to "customer[s]" from other groups or divisions. (ROA.48.) If "anybody . . . does something good that [he] really appreciate[s]," he "give[s] them some points." (ROA.48.) Facilities Maintenance Supervisor Horning similarly testified that he mostly uses his Boss Points to show appreciation for people in *other* work groups who help him in his work. (ROA.460-62.) In these circumstances, the Board reasonably found no basis to conclude that "'Boss Points' are more than sporadically given to employees." (ROA.1689.)

Further, considering the unpredictable and standardless nature of Boss Points awards, and the fact that each point is worth only a penny, the Board aptly concluded that Boss Points "are more of a novelty than a factor in employee compensation." (ROA.1688-89.) At most, by cobbling together tens of thousands of Boss Points and Peer Points, over months or years, and potentially from multiple

sources, an employee could hope to purchase a gift card for a restaurant meal or a tangible item of similarly modest value.

In arguing that Boss Points are more valuable, and therefore "rewards" in the statutory sense, the Company extrapolates wildly from the testimony of a single witness. (Br. 27.) Former Human Resources Manager Shawn Flaherty testified that employees have purchased expensive items like ipads and "trips" through the Company's points program. (Br. 27.) But his testimony did not explain—and the Company did not otherwise show—how many Boss Points went into any large purchase made by an employee, or what proportion of any such purchase was attributable to Boss Points from a maintenance supervisor as opposed to Peer Points from fellow employees.

At bottom, the Company's briefly stated contentions regarding the effect of Boss Points (Br. 27-28) rely on far-fetched theories as to how Boss Points might—standing alone and through a chain of never-before-seen events—constitute a significant reward or aspect of employee compensation. The Company, however, produced no evidence that maintenance supervisors hoard their Boss Points to make even the modest $50 maximum allowable award to a single employee. Predictably, therefore, the Company also failed to demonstrate that any maintenance supervisor has gone to the extreme of requesting "additional Boss Point credits in the range of hundreds to thousands of dollars beyond their normal

allotment," or that any such request has ever been honored and by what process of review. (Br. 27.) Accordingly, the vague authority to which the Company refers is, at most, theoretical or paper authority to reward, which is legally insufficient to establish supervisory status under the Act. *See* above p. 41.

6. Maintenance supervisors do not adjust contractual grievances using independent judgment

The Company likewise failed to present sufficient evidence to support its claim that maintenance supervisors adjust grievances that arise under the collective-bargaining agreement between the Company and the Union. Although the record shows that a union steward may choose to discuss a grievance with a maintenance supervisor in the first instance, there is no evidence that the maintenance supervisor can resolve the grievance or reach an "adjustment" with the Union on his own. Instead, as the Board found and the record establishes, the maintenance supervisor must seek guidance from his manager and human resources before addressing the merits of the grievance in any manner. (ROA.1680-81.) Indeed, former Human Resources Manager Flaherty testified that maintenance supervisors are specifically trained to "involve their management when they get a grievance," and to also get human resources involved. (ROA.432.)

Consistent with this training, Facilities Maintenance Supervisor Horning has not independently handled "an on-going grievance concerning facility safety

procedures," as the Company fleetingly suggests. (Br. 28.) Rather, as Horning himself admitted, when he received the first in a series of grievances on that issue, he "had no idea what to do" and took the matter straight to his manager. (ROA.476, 480-81.) Following a discussion with his manager, Horning sought assistance from human resources, and ultimately a human resources official typed a written response to the grievance, which Horning merely signed. (ROA.482-84.) Thereafter, Horning "used that [response] as a template through all the rest of th[e grievances]" raising the same underlying issue, and he continued to consult human resources for review and approval of his copied responses. (ROA.486.) Accordingly, contrary to the Company's claims (Br. 28), Horning's testimony regarding his involvement in this set of grievances only tends to support the Board's conclusion that "[t]here is no evidence that [maintenance] supervisors use independent judgment in adjusting grievances." (ROA.1681.)

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. 13.) "[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).

For the same reason, the fact that some maintenance supervisors "perceive" themselves as supervising others, or that employees may "perceive" them as supervisors, does not establish that they have supervisory authority within the meaning of Section 2(11) of the Act. (Br. 13.) *See Chevron U.S.A.*, 309 NLRB 59, 70 (1992) (finding it irrelevant that the disputed employees were widely perceived as supervisors, given the absence of evidence that they possessed any of the enumerated forms of statutory authority).

Similarly, the Company cannot carry its burden by reference to the mere trappings of some undefined authority—for example, the fact that maintenance

supervisors have their own offices and are eligible for bonuses beyond those given to employees in the existing bargaining unit. (Br. 13-14, 29-30.) *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 1018, 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 maintenance supervisors attend leadership trainings and planning meetings specifically for "supervisors" and managers. (Br. 13.) *See GRB Entertainment, Inc. d/b/a Aardvark Post*, 331 NLRB 320, 321 (2000) (fact that the disputed employee attended management meetings is a secondary indicium that "cannot be dispositive" on the issue of supervisory status). Clearly, maintenance supervisors are an important part of the Company's operations, as are the various skilled workers who maintain the Company's sophisticated equipment and facilities. 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").

Further, in vaguely suggesting that an employee's importance or responsibility should weigh heavily in cases involving nuclear power plants, the Company mistakenly relies on a nearly 40-year-old First Circuit case applying pre-*Oakwood* definitions of responsible direction and independent judgment. (Br. 30.) *See Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1980). Since *Maine Yankee*, however, both the First Circuit and this Court have embraced *Oakwood*'s definition of what it means to be "responsible" for the direction of others using independent judgment. *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 293-94 (5th Cir. 2015); *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 9-11 & n.8 (1st Cir. 2015). Moreover, this Court, like its sister circuit, has specifically found that *Oakwood* displaced a prior industry-specific standard for determining supervisory status under the Act. *See Entergy*, 810 F.3d at 294-95 (*Oakwood* reasonably "change[d] the controlling law" and therefore superseded prior in-circuit law on the supervisory status of workers in the electric utility industry); *accord NSTAR*, 798

F.3d at 10-11. Accordingly, the Company errs in suggesting that some other, outdated understanding of supervisory status should apply here.[15]

In sum, as the Board reasonably found, the Company did not carry its burden of proving that the maintenance supervisors have any form of supervisory authority recognized in Section 2(11) of the Act. Because the maintenance 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

[15] For the most part, the Company acknowledges (Br. 17-28) that *Oakwood* and its progeny, which this Court approved in *Entergy*, govern this case. To the extent the Company contrarily suggests (Br. 30) that this Court should instead follow *Maine Yankee*, any such claim is barred by Section 10(e) of the Act, which provides that "[n]o 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." 29 U.S.C. § 160(e). In challenging the Regional Director's findings with regard to supervisory status before the Board, the Company conceded that *Oakwood* applied, and it made no argument for an alternative standard derived from *Maine Yankee* or any other case arising in the nuclear industry. (ROA.1735-41.) Accordingly, and in the absence of any showing of extraordinary circumstances, Section 10(e) bars any argument for an alternative nuclear-industry standard that the Board did not have an opportunity to consider in the first instance. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (Section 10(e) "bar[red]" argument not timely raised before the Board); *accord Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1396-97 (5th Cir. 1983) (legal theory not raised before the Board barred on review).

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

STP NUCLEAR OPERATING COMPANY	)	
Petitioner/Cross-Respondent	)	No. 19-60152
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case No. 16-CA-223678
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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 30th day of August 2019

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STP NUCLEAR OPERATING COMPANY Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	)	No. 19-60152 Board Case No. 16-CA-223678

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 12,713 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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