

**CASE 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 Appeal for Review from the National Labor Relations Board
NLRB Case 16-CA-223678**

PETITIONER CROSS-RESPONDENT'S REPLY BRIEF

HUNTON ANDREWS KURTH LLP

**Adam J. Peters
Texas Bar No. 24046620
Amber M. Rogers
Texas Bar No. 24056224
Alan J. Marcuis
Texas Bar No. 24007601**

**Fountain Place
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2799
214-979-3000
214-880-0011 Fax**

**ATTORNEYS FOR PETITIONER
CROSS-RESPONDENT
STP NUCLEAR OPERATING COMPANY**

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
ARGUMENT.....	3
A. STP Met Its Burden of Proof that Maintenance Supervisors Are Statutory Supervisors.	3
1. Maintenance Supervisors Assign Crew Member Tasks, Times, and Locations — the Authorized Work Schedule Simply Coordinates Those Assignments Facility-Wide.....	4
2. Maintenance Supervisors Responsibly Direct Crew Members.....	10
3. Maintenance Supervisors Possess Disciplinary Authority.	12
4. Maintenance Supervisors Possess Authority for Hiring, Transfers, and Promotions.	15
5. Maintenance Supervisors Possess Authority to Effectively Impact Crew Member Compensation Rewards.	16
6. Maintenance Supervisors Adjust Crew Member Grievances.....	18
7. The Company Considers and Authorizes Maintenance Supervisors to Act as Supervisors, Which Is Consistent Within the Nuclear Power Generation Industry.	19
B. CONCLUSION	22
CERTIFICATE OF SERVICE	24
CERTIFICATE OF COMPLIANCE WITH RULE 32(a).....	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Amoco Prod. Co. v. NLRB</i> , 613 F.2d 107 (5th Cir. 1980)	3
<i>Berthold Nursing Care Ctr., Inc.</i> , 351 NLRB 27 (2007)	12
<i>Carey Salt</i> , 736 F.3d 405 (5th Cir. 2013)	3
<i>Community Education Centers, Inc.</i> , 360 NLRB 85 (2014)	14
<i>Croft Metals, Inc.</i> , 348 NLRB 717 (2006)	9
<i>Dale Service Corp.</i> , 269 NLRB 924 (1984)	4
<i>Entergy Mississippi, Inc.</i> , 810 F.3d 287 (5th Cir. 2015)	1, 4, 10
<i>Fred Meyer Alaska, Inc.</i> , 334 NLRB 646 (2001)	15
<i>Ken-Crest Services</i> , 335 NLRB 777 (2001)	19
<i>Lord & Taylor v. NLRB</i> , 703 F.2d 163 (5th Cir. 1983)	3
<i>Loyalhanna Health Care Assocs.</i> , 352 NLRB 863 (2008)	10, 11
<i>Maine Yankee Atomic Power Co. v. NLRB</i> , 624 F.2d 347 (1st Cir. 1980)	21
<i>McCullough Env'tl. Servs.</i> , 5 F.3d 923 (1993)	4
<i>Monotech of Mississippi v. NLRB</i> , 876 F.2d 514 (5th Cir. 1989)	8, 16, 20

NLRB v. Dadco Fashions, Inc.,
632 F.2d 493 (5th Cir. 1980)19

NLRB v. NSTAR Electric Co.,
798 F.3d 1 (1st Cir. 2015).....21

Oakwood Healthcare, Inc.,
348 NLRB 686 (2006)7, 10, 12, 20

Palagonia Bakery Co.,
339 NLRB 515 (2003)19

RCC Fabricators, Inc.,
352 NLRB 701 (2008)7

Sheet Metal Workers Int’l Ass’n, Local Union 68,
298 NLRB 1000 (1990)18, 19

Southern Indiana Gas & Elec. Co. v. NLRB,
657 F.2d 878 (7th Cir. 1981)4

Starwood Hotels & Resorts Worldwide, Inc.,
350 NLRB 1114 (2007)12

Veolia Transp. Servs., Inc.,
363 NLRB No. 98, slip op. (2016)16

Statutes

National Labor Relations Act Section 2(11) (29 U.S.C. § 152(11))*passim*

INTRODUCTION

This Court recognizes that meeting even a single function for supervisory status under Section 2(11) of the National Labor Relations Act (NLRA) (29 U.S.C. § 152(11)) warrants the exclusion of putative supervisors from a collective bargaining unit. *Entergy Mississippi, Inc.*, 810 F.3d 287, 298 (5th Cir. 2015) (remanding solely with respect to the task of assigning employees to a place).

Here, the record repeatedly contains examples of supervisory functions and authority STP Maintenance Supervisors possess and perform. This Court might, however, acknowledge the Section 2(11) supervisory status of Maintenance Supervisors by looking at just one of those many functions — the very same, singular factor at issue in *Entergy Mississippi* (810 F.3d at 298): the authority of Maintenance Supervisors to assign employees to a place.

In doing so, this Court will find the record does not substantiate the NLRB’s astonishingly simplistic view about the work involved in maintaining a nuclear power plant. And while it is true that an Authorized Work Schedule (or “AWS”) outlines the multitude of necessary weekly testing, surveillance, and maintenance tasks to be performed throughout the facility, the AWS is not a self-contained mandate, dictated from afar by a few select planning personnel members. Instead, the AWS is a work-in-progress planning tool Maintenance Supervisors themselves actively and collaboratively develop, and from which Maintenance Supervisors

assign work. The NLRB flatly misstates the record on this crucial point in several ways.

Maintenance Supervisors make decisions about which specific crew members on their own team will perform the ultimate tasks. Even more specifically, virtually all of the testifying witnesses discussed the common practice of Maintenance Supervisors borrowing and exchanging crew members with other crews to accomplish their work. This practice is not only a stark demonstration of the exact function of assigning employees particular locations, these assignments are made with a clear exercise of independent judgment — one Maintenance Supervisor even testified he likes cross-training members from different crews to broaden their experience level (ROA.617) while another testified he prefers to borrow specific other crew members in particular “[j]ust because of their work ethic” (ROA.513). These assignments are obviously made with the Maintenance Supervisor’s independent judgment.

Maintenance Supervisors also do much more than issue assignments, of course. In their long-recognized supervisory role in this heavily regulated industry, Maintenance Supervisors act like supervisors in many respects. Only by ignoring substantial portions of the record, however, and insisting on deference to its own earliest conclusion can the NLRB dispute that Region 16 erred in its rejection of the

supervisory status of Maintenance Supervisors. As the following shows, the NLRB's determination must be overturned.

ARGUMENT

A. STP Met Its Burden of Proof that Maintenance Supervisors Are Statutory Supervisors.

This Court gives significant deference to the Board's fact findings, but it also refuses to do so when the Board repeatedly chooses not to credit significant portions of the record. "Our deference . . . has limits." *Carey Salt*, 736 F.3d 405, 410 (5th Cir. 2013). "[A] decision by the Board that 'ignores a portion of the record' cannot survive review under the 'substantial evidence' standard." *Id.* (quoting *Lord & Taylor v. NLRB*, 703 F.2d 163, 169 (5th Cir. 1983)); see *Amoco Prod. Co. v. NLRB*, 613 F.2d 107, 111-12 (5th Cir. 1980) (remanding when the Board fails to adequately explain its factual basis for the opinion).

Here, a fair reading of the record shows Maintenance Supervisors to be supervisors in numerous respects, and fitting within the guidelines of Section 2(11) of the Act. Maintenance Supervisors regularly assign tasks, times, and locations to their crew members. Maintenance Supervisors responsibly direct employees on their shifts based on their own judgment as to priority, skill, and workload. Maintenance Supervisors have authority to discipline employees, hire, transfer, and promote employees, reward them for good job performance, and adjust their grievances.

These individuals also possess a host of common “secondary indicia” factors to make them fit the NLRA’s established definition of supervisors.

1. Maintenance Supervisors Assign Crew Member Tasks, Times, and Locations — the Authorized Work Schedule Simply Coordinates Those Assignments Facility-Wide.

The supervisory function of “assigning” 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.” *Entergy Mississippi*, 810 F.3d at 296. The “independent judgment” of assignments has a relatively low threshold — even the choice to assign a direct report to handle one particular project out of a choice of two or more may be sufficient for the exercise of independent judgment. *Id.*

This Court has also found that supervisors in fact possess authority to assign employees to specific tasks when “an operations manual outlines the tasks to be performed at specific times, and work varies little day to day.” *McCullough Envtl. Servs.*, 5 F.3d 923, 941 (1993) (quoting *Dale Service Corp.*, 269 NLRB 924, 924 n. 7 (1984)). Other courts have also rejected the idea that existing procedures should negate the supervisory role of leadership personnel, stating it is “axiomatic that all employees, including top management, work within the framework of Company policy and practices.” *Southern Indiana Gas & Elec. Co. v. NLRB*, 657 F.2d 878, 878 at n. 9 (7th Cir. 1981).

Here, the NLRB goes to great lengths to oversimplify the creation process and functionality of the AWS at STP, as though this facility-wide coordination device was like a complete and self-contained managerial directive from its inception.¹ But the AWS does not displace STP's leadership of the crews who perform the work. Instead, the record shows Maintenance Supervisors ultimately decide what the AWS contains.

For example, on virtually every project for which their crew is ultimately responsible to implement, Maintenance Supervisors get the opportunity to express prior approval. As one witness stated:

[Maintenance Supervisors] own their schedule. In fact, that's part of their performance evaluation is schedule performance. . . . [A]nd that does not always happen real well. I mean there's things that pop onto people's schedule and you'll see . . . they'll write condition reports saying, ["H]ey. This got put on my schedule without me approving it."

¹ Although the NLRB cites the record, nothing within those cites (or anywhere else in the record) actually substantiates the Board's foremost claim about the AWS: that "dedicated planners . . . work with company managers to distribute employees over crews and shifts . . ." NLRB Br. 6, 26-27. Planners are involved in scheduling, of course, but the record never indicates (1) the active involvement of "managers" in the development of the AWS, nor (2) the notion that the AWS distributes or even identifies specific employees for specific projects. Quite the opposite is true. Maintenance Supervisors each run their own respective crew and assign the work their crew needs to perform. See e.g., ROA.449. The Board apparently asks this Court to rely on a completely unexplained, unsubstantiated notion that "the record amply shows that *other* individuals perform these [assignment] activities." NLRB Br. 26 (emphasis added).

ROA.652. Maintenance Supervisors do not simply “assist in implementing the Company’s established assignment plans” (NLRB Br. 7), they approve or disapprove of each project for their crew. *See* ROA.75, 636-37, 654-55, 794-96, 821.

Another witness tried to clarify the terminology about what “authorization” is involved in this rolling 14-week project schedule, pointing out that what ultimately serves as the “AWS” as of its implementation week is significantly the product of Maintenance Supervisor input:

There’s really two schedules we’ve been talking about the last two days. You got the projected — or the PWS and the AWS. So, the projected work schedule and then you got the authorized work schedule, which gets assigned at two weeks prior to implementation, and that’s the one we’ve been talking about is [the] authorized work schedule.

ROA.566. Maintenance Supervisors approve and affirm what tasks their respective crews handle, and they are effectively the ones who “authorize” the AWS — as opposed to initial Planners or Work Window Coordinators.

Maintenance Supervisors also decide specifically who will perform AWS work among the members of the crew. *See, e.g.*, ROA.119, 235, 449. As one witness testified:

[The Maintenance Supervisor] knows his crew. He knows who can do what in most cases, and he confers with the work window coordinator, but a lot of times it will go like, [“H]ey, I need to do this job because I really don’t have the skill for this other one.”

ROA.569-70. Contrary to the Board’s assertion that Maintenance Supervisors’ decisions are merely clerical matters of confirming crew member certifications (NLRB Br. 30), the record shows those assignments are not simply checking a box for certification, but instead the assignments are managerial in nature, made with an eye to benefit the Company’s future. For example, a witness testified as follows:

[T]hat supervisor, he looks at the work, and he should be thinking — the whole time he should be thinking okay. Okay. I can’t just put my best guys on the hardest work ‘cause we need to grow all of our people. You’ve heard we have a lot of retirements comin’. So, part of his thought should be knowledge share, so you put the more experienced guy with the less experienced guy. The supervisor determines who should be doin’ that work.

ROA.571,² *see also* ROA.119, 235. Another witness, who testified for the Union, said, “I have to know who has the experience to be most successful at the job. I make that determination.” ROA.676 (emph. added). Assignments that require consideration of the nature of tasks and the capabilities of an employee necessarily require an exercise of independent judgment. *RCC Fabricators, Inc.*, 352 NLRB 701, 736 (2008) (citing *Oakwood Healthcare, Inc.* (348 NLRB 686 (2006)) and finding independent judgment when the supervisor weighs “factors involved in

² The Board seems to characterize the independent judgment shown in testimony like this as nothing “beyond routine observations about employee skills.” NLRB Br. 30. Even the Board would have to concede, however, that succession planning for the employer’s future success is a managerial way of thinking, as opposed to merely a “routine observation” to get through the workday. *See also In re Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006) (highlighting the importance of supervisory employees who maintain interests aligned with that of management).

making these assignment decisions, including the employees' abilities to operate equipment such as cranes, read blueprints, and perform dangerous tasks safely").

Maintenance Supervisors also decide when AWS work can feasibly be performed in view of the full scope of the project and the capacity of the crew. ROA.569. Although work window coordinators provide instruction on the timing of work in an effort to coordinate the multitude of projects facility-wide, their involvement, by necessity, only goes to "priority" among those projects. ROA.569. One witness explained this interaction with work window coordinators: "Because it's a balance of priorities. You may have three or four priorities there, one of 'em being scheduled, the other two being important to ops but not emergent that they want us to go fix — operations want us to go fix." *Id.*, *see also* ROA.144-45, 569-71.

With respect to assigning time to crew members, Maintenance Supervisors are authorized to assign certain amounts of overtime as may be needed to accomplish particular tasks, and without a manager's pre-approval (except perhaps on Fridays). *See e.g.* ROA.102. Maintenance Supervisors are also able to grant or deny requests from crew members for time off. *See* ROA.786-87; *see Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989) (finding a supervisor properly excluded from bargaining unit eligibility based on only two supervisory factors, one of which is authority to grant partial days off).

Finally, as noted at the start, Maintenance Supervisors also regularly collaborate with one another, borrowing and exchanging employees from other crews in the performance of work. These reassignments are plainly evident of independent judgment, made for such reasons as cross-training crew members to give them broader experience (ROA.617), or wanting to use particular other employees “[j]ust because of their work ethic” (ROA.513). Virtually all of the witnesses testified to the practice of Maintenance Supervisors borrowing and lending crew members from other crews. *See, e.g.*, ROA.31, 120, 218, 258, 447, 512-13, 601-02, 617, 732, 787.³ No witnesses testified that this type of location and task assignment ever requires higher managerial authority. *See, e.g.*, ROA.258, 602, 787-88. As noted above, this supervisory task alone should suffice for the Section 2(11) exclusion of Maintenance Supervisors.

³ Note that Region 16 omitted any reference to this practice whatsoever in its Decision and Direction of Election, widely discussed though this practice is on the underlying record. *See* ROA.1671-96. On appeal, the Board acknowledges this practice only dismissively, relying solely on *Croft Metals, Inc.*, 348 NLRB 717 (2006) to suggest such a practice does not rise to the level of assignment under the Act. However, *Croft Metals* is distinguishable in that the manufacturing work involved (1) was handed down daily, (2) consisted of the purported supervisor switching employees and tasks within his same crew, (3) the frequency of such reallocations was unclear on the record, and (4) the record did not indicate what factors were taken into account in reallocating tasks. *Id.* at 722. By comparison, the transfers here occur between different crews (ROA.218), as often as daily or weekly (ROA.218, 732), involving more than one transferred employee at times (ROA.601-02), prearranged among Maintenance Supervisors as far as 7 weeks in advance (ROA.120), to accommodate employee illnesses (ROA.218) or vacations (ROA.447), with the benefit of cross-training crew members (ROA.617), and often involving requests for specific other crew members at the Maintenance Supervisors’ sole discretion (ROA.512-13).

2. Maintenance Supervisors Responsibly Direct Crew Members.

The Section 2(11) authority “responsibly to direct” work consists of “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, Inc.*, 810 F.3d at 295, *citing Oakwood Healthcare, Inc.*, 348 NLRB at 692. Statutory supervisor status even applies if the supervisor only “may have suffered adverse personnel action.” *Loyalhanna Health Care Assocs.*, 352 NLRB 863, 869 (2008) (emph. added).

Here, a primary component of the work performed by Maintenance Supervisors is actively directing their crew to test, observe, and repair equipment around the facility, and to independently prioritize work to minimize risks. ROA.154, 637-41. About one fifth to one quarter of Maintenance Supervisors’ time is spent in the field observing crew members in action, and coaching and counseling them on how to handle tasks properly and safely. *See, e.g.*, ROA.181, 234. One managerial witness testified:

[Maintenance Supervisors are] out making sure [the crew are] not taking shortcuts, . . . not . . . workin’ at risk, [by] not mitigating issues that are in the work area. So [Supervisors] need to be coaching – coaching on those kind of things and correcting those at-risk behaviors while they’re out in the field watching their people work.

ROA.562. As another witness testified about crew performance, “[w]e coach them. Stop, coach, make sure they understood what they were doing wrong,” and he gave the example of correcting his own crew members who had referenced an incorrect table for non-critical motor systems when “they were actually working on a critical motor instead of that . . .” ROA.127-28.

Most Maintenance Supervisors have rarely had occasion to suffer negative consequences from their crew’s performance — the work ultimately tends to be performed free of error. *See, e.g.*, ROA.217, 242-43, 315, 538-39. Nonetheless, adverse consequences have been felt by crew leadership. For example, one Maintenance Supervisor received a written reminder, a more severe disciplinary measure than his crew received, for sending the crew out on a project, inadequately prepared to avoid taking the wrong equipment out of service, which caused a reactor alarm to go off. *See* ROA.746-49.⁴

⁴ Again, Region 16 dismissed this incident solely by misreading the (Union) witness’s indecisive testimony to speculate this notably severe incident would never be treated the same under current Company leadership. *See* STP Br. 22 n. 11; *see also* ROA.805, 1677. The fact remains, however, that STP presented a record in which a Maintenance Supervisor received harsher discipline than his crew for an error in the Supervisor’s direction of his crew. In other words, he was held accountable for “responsibly directing” his crew. Although STP Maintenance Supervisors enjoy relatively error-free job performance from their crew members, this anecdote still serves as an example of possible adverse consequences to a Maintenance Supervisor for errors occurring on his watch, and that possibility is sufficient to confer supervisory “responsible direction” authority under the Act. *See Loyalhanna*, 352 NLRB at 869 (finding even by inference that a task, if ever inadequately performed by a subordinate employee, would carry adverse consequences for the supervisor).

Another witness testified to an oral reminder a Maintenance Supervisor received when one crew member injured his back lifting a ladder. ROA.562-63. The Supervisor was held directly accountable for failing to correct an action that went wrong during his crew's performance of the task he had directed.⁵ Although relatively rare, Maintenance Supervisors have faced, and continue to face the possibility of, adverse consequences when they fail to adequately direct their crew members.

3. Maintenance Supervisors Possess Disciplinary Authority.

Purported supervisors possess authority to effectively recommend discipline when they participate in a progressive disciplinary policy at the stage of a first offense. *See Berthold Nursing Care Ctr., Inc.*, 351 NLRB 27, 28-29 (2007) (reasoning that employee counseling forms, which did not require higher managerial approval, “are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee”); *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1117-18 (2007)

⁵ Although the Board tries to distinguish this latter example as a disciplinary action against the Supervisor for his *own* action (NLRB Br. 40 n. 13), its argument falls apart. The failure of a supervisor adequately to prepare his crew to avoid mechanical errors or physical harm, or to adequately “correct any errors made” by the crew (*Oakwood Healthcare*, 348 NLRB at 695), are examples of supervisors being held responsible for inadequately directing their crew's work. By contrast, a supervisor might warrant disciplinary criticism for his *own* individual performance if his errors have little or nothing to do with the crew's performance, such as if a supervisor racks up his own unexcused absences, or fails to timely submit payroll approvals, or, as in the Board's own citation to *Oakwood Healthcare*, the supervisor is disciplined “for failing to make fair assignments.” *Id.*

(finding an effective recommendation for discipline when a supervisor’s “coach-and-counsel” sessions served as prerequisites to formal discipline imposed by upper management).

Here, it cannot be disputed Maintenance Supervisors possess authority to participate in disciplinary action in at least three respects. First, Maintenance Supervisors make regular use of Employee Contact Logs, in which they investigate and document personnel problems, avoidable work errors, or other levels of constructive discipline, and they recommend any disciplinary action to be taken, in which case they are rarely overruled.⁶ *See* ROA.348-55, 395, 1396-99.

Second, under the Constructive Discipline Policy, Maintenance Supervisors expressly possess “responsibility and authority to conduct an Oral Reminder,” which “the supervisor may review . . . with other supervisory levels or Human Resources, if desired.” ROA.1389 (emph. added).

Third, the Constructive Discipline Policy also includes “counseling,” described in the Constructive Discipline Program just prior to the “Specific Steps of

⁶ The Board scoffs at the notion that the Employee Contact Logs in the record (ROA.1526-54) show effectively recommended discipline. NLRB Br. 43). The collective bargaining agreement nonetheless clearly contemplates Employee Contact Log entries as part of constructive discipline. ROA.1149. For example, such entries “shall be used when the employee has been contacted by supervision about standards or expectations, [and] constructive discipline,” for which employees are then afforded “the right to review,” but such entries are not to “be used as a basis of discipline” in situations involving the need for first aid. *Id.* In other words, the Board appears far more dismissive of Employee Contact Logs as disciplinary steps than the collective bargaining agreement of the labor organization at issue in this case.

Discipline.” ROA.1388-89. The former Manager of Employee and Labor Relations also testified that “counseling” is typically foundational to more formal disciplinary actions. ROA.342-43. Counseling is also a routine practice for Maintenance Supervisors, along with investigating the circumstances of crew member problems. *See* ROA.344. Even a witness called by the Union testified that, as a Maintenance Supervisor, he is authorized to issue counseling to crew members without first having to speak with his manager. ROA.782.

Maintenance Supervisors are generally not overruled by upper management on whether and what level of discipline to assign a crew member. *See e.g.*, ROA.585-88. Maintenance Supervisors are also authorized to issue discipline independently, even though many meet with their manager or Human Resources simply to “let them know.” ROA.344-45. Human Resources and the Maintenance Supervisor’s manager generally only review a disciplinary recommendation to ensure its consistency with STP’s policies. ROA.351-52. In other words, the record shows Maintenance Supervisors are an undeniable part of the disciplinary process and they possess authority to effectively recommend discipline for their crew members, regardless of how infrequently their crew members perform in a way to invite disciplinary action.

4. Maintenance Supervisors Possess Authority for Hiring, Transfers, and Promotions.

When a purported supervisor interviews and recommends candidates for open positions, and when the employer generally follows those recommendations, that supervisor has the statutory authority to hire, transfer, or promote, or to effectively recommend such action. *Community Education Centers, Inc.*, 360 NLRB 85, 91 (2014). In making such recommendations, a supervisor's use of his or her own experience to assess a candidate's qualifications is considered an exercise of independent judgment. *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001).

Here, Maintenance Supervisors typically participate in hiring by joining a Human Resources employee and selecting one or two non-supervisory crew members to round out an interview panel. ROA.38-39, 388-89. Managers above the Maintenance Supervisor rarely participate, nor do they intervene, in the ultimate hiring decisions. ROA.32, 38, 130-32, 248-49. When they do, however, Maintenance Supervisor's scores for the candidate are afforded equal value as those of their managers. *See* ROA.32, 130-32, 248-49, 460.

One Maintenance Supervisor testified to an occasion in which he disapproved of the quality of a panel of candidates. ROA.135-39. As a consequence, his manager gave him full authority to fill the two remaining seats on a class of seven new apprentices. *Id.* Another Supervisor testified that he recently, and individually, transferred one employee and promoted another to fill a vacancy. ROA.31-32. In

that case, he notified his manager as “just basically a courtesy to keep her informed, to let her know,” but without the need for her permission. *Id.*

The Maintenance Supervisors’ hiring panels “typically reach a consensus, but there have [also] been times where the supervisor has said, ‘All right. I appreciate your input, but this is the direction I’m going.’” ROA.389. Another Supervisor testified that candidates he recommends have always been the ones ultimately hired, and, as he summarized the process: “it is ultimately my decision.” ROA.77, 38-39. Accordingly, Maintenance Supervisors satisfy Section 2(11) in yet another respect by effectively recommending the hire, transfer, and promotion of the employees who ultimately report to them.

5. Maintenance Supervisors Possess Authority to Effectively Impact Crew Member Compensation Rewards.

The Board’s standard for determining whether supervisors “reward” other employees considers, in part, whether the exercise of independent judgment about the compensation is more than sporadic. *Veolia Transp. Servs., Inc.*, 363 NLRB No. 98, slip op., at 43 (2016); *see also Monotech of Mississippi v. NLRB*, 876 F.2d at 517 (finding a supervisor to be properly excluded from the bargaining unit based solely on his ability to effectively recommend wage increases).

Here, Maintenance Supervisors exert influence over the compensation of crew members in terms of both incentive compensation under the collective bargaining agreement and additional compensation from Boss Points. The collective bargaining

agreement contains performance measurement “metrics” for the Incentive Compensation Program (ICP) that consist of attendance, OSHA recordable incidents, human performance events, and constructive discipline. ROA.1145. Note that the latter two of these four criteria consist of disciplinary actions, counseling, and Employee Contact Logs. *Id.* Disciplinary actions and Employee Contact Log entries for crew members are maintained in employee personnel files for reference in connection with the ICP pay, and they are both initiated by Maintenance Supervisors. ROA.394-95, 1526-54. In other words, the NLRB misrepresents the record by blindly characterizing all the ICP factors as objective metrics over which Maintenance Supervisors have no actual authority. NLRB Br. 50. Half of the criteria affecting a crew member’s incentive pay depends on the independent judgment of a Maintenance Supervisor as to whether to initiate any disciplinary action, or to note an adverse occurrence in an Employee Contact Log entry. ROA.394-95, 1526-54.

The record also establishes that each of the Maintenance Supervisors rewards employees through “Boss Points.” ROA.254-55, 373-77. Employees may redeem these points for goods and services, such as gift cards, clothing, and “[w]e’ve had . . . employees buy iPads. We’ve had people buy trips.” ROA.375-77. Each witness testified they are freely able to award credit as they choose, without interference from upper management. ROA.48, 139-40, 254-55, 374, 461-62, 598, 900-01.

The NLRB simply cannot deny that Maintenance Supervisors are authorized, through use of their own independent judgment, to annually impact crew member incentive compensation pay with the addition or withholding of disciplinary notes and personnel record entries. The same is true of their ability and independent judgment to directly distribute or withhold Boss Points.

6. Maintenance Supervisors Adjust Crew Member Grievances.

Employees also exercise supervisory authority when they resolve grievances, even at a “fairly low level — before they become either particularly memorable or subject to the formalities of higher steps of the grievance procedure.” *Sheet Metal Workers Int’l Ass’n, Local Union 68*, 298 NLRB 1000, 1003 (1990). The Board has opined that “the view that no real grievance adjustment . . . could occur until a dispute reached the level of a formal meeting between an employer representative and the [employer’s] business agent simply ignores the realities of the workplace.” *Id.* at 1004.

Here, Maintenance Supervisors are undeniably “the first step of the grievance process.” ROA.398. When an employee has a grievance or dispute, the employee takes it to a union steward, who presents the grievance to the employee’s supervisor. ROA.409-10, 471, 1103, 1555-69. That process may involve greater or lesser degrees of formality because, as the former Manager of Employee and Labor Relations testified:

Most of those [grievances] never — never go to writing. The employee, the steward, and the supervisor resolve it before it ever goes to writing . . . because it’s resolved at the first step in the process. And quite frankly, that’s the way we want it to work. . . . Most grievances aren’t violations of the labor agreement, but it doesn’t mean the employee isn’t upset. We want to try to resolve those whenever we can at the lowest level possible.

ROA.410-11.

The record also reflects a Maintenance Supervisor’s involvement in an on-going grievance concerning facility safety procedures. ROA.399-401. In that case, the Maintenance Supervisor remained involved because, in his own independent judgment, he was concerned about how the grievance would resolve in coordination with the labor agreement and the needs of company policy. ROA.399-401.

Disputes that cannot be resolved are generally investigated and documented by the Maintenance Supervisor, who will include Human Resources, the Facility Manager, and other facility resources as needed. *Id.* Maintenance Supervisors accordingly occupy a crucial, initial role in the grievance process, and often resolve such matters before a grievance persists to later stages.

7. The Company Considers and Authorizes Maintenance Supervisors to Act as Supervisors, Which Is Consistent Within the Nuclear Power Generation Industry.

The Board and this Court recognize that supervisory status may also be found on the basis of “secondary indicia” of supervisory authority. *See, e.g., Palagonia Bakery Co.*, 339 NLRB 515, 534 (2003) (crediting the perception by co-workers of

a putative supervisor's supervisory authority); *Ken-Crest Services*, 335 NLRB 777, 779 (2001) (crediting the supervisor's higher wage rate); *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 496 (5th Cir. 1980) (crediting as indicative of supervisory status the relative amount of time spent directing the work of others instead of engaging in production work); *see also Monotech of Mississippi*, 876 F.2d at 517 (adopting the same secondary indicia).

Here, the record is clear that Maintenance Supervisors perceive of themselves and are perceived by their crew members as supervisors. *See, e.g.*, ROA.752. The distinction of being a supervisor is present in several respects: the fact crew members do hands-on production work while Maintenance Supervisors oversee their production (*see, e.g.* ROA.605); Maintenance Supervisors receive higher salaries than their crew (*see, e.g.* ROA.464); Maintenance Supervisors attend separate training and meetings intended for management at supervisory and higher levels (*see, e.g.* ROA.159, 328-29); Maintenance Supervisors occupy offices as opposed to their crew's typically shared workspaces without individual offices (*see, e.g.* ROA.121, 510-11); and Maintenance Supervisors wear business casual attire, as compared to the t-shirts and jeans of their crew (*see, e.g.* ROA.308-09).

Moreover, Maintenance Supervisors serve as a crucial layer of managerial control within the unique industry that is nuclear power generation. Contrary to the NLRB's argument in this case, both the Board and federal courts have taken note of

particular industries involved when questions of supervisory status arise. *See, e.g., Oakwood Healthcare*, 348 NLRB at 688 (noting that “on two occasions involving the healthcare industry, the industry at issue in this case, the Supreme Court rejected the Board’s overly narrow construction of Section 2(11) as ‘inconsistent with the Act’”) (emph. added); *see also NLRB v. NSTAR Electric Co.*, 798 F.3d 1, 6 (1st Cir. 2015) (noting, with respect to Section 2(11) supervisor cases, “[a] surprising number of those precedents concern the status of electrical workers who, loosely speaking, do work similar to that done by the electrical workers at issue here.”).

Accordingly, this Court may indeed choose to do as the First Circuit Court of Appeals did in *Maine Yankee Atomic Power Co. v. NLRB* when it found the supervisor exclusion to apply, acknowledging the unusually high degree of risk and regulation inherent in the nuclear power generation industry. 624 F.2d 347 (1st Cir. 1980). As such, this Court might choose to disregard the Board’s overemphasis on a supposed “routine and repetitive” nature of normal operational tests and repairs, generally scheduled in advance and “closely governed by NRC regulations or the Company’s own written procedures.” *Id.* at 356. The First Circuit also objected to the Board’s failure to “reference the serious consequences that can flow from even simple errors made in connection with the operation of a nuclear electrical generating plant,” concluding, in summary, “[w]e regret to say that we believe the

Board both oversimplified and underestimated the responsibilities inherent in this position.” *Id.* at 356-59.

B. CONCLUSION

Contrary to Region 16’s conclusion that Maintenance Supervisors should be eligible bargaining unit members, STP proved by a preponderance of the evidence that Maintenance Supervisors in fact assign work, and responsibly direct employees in the performance of their tasks. STP has also established that Maintenance Supervisors are fully authorized to discipline and recommend discipline for other STP employees, to hire, transfer, promote, and to recommend the same for employees, to reward employees for good performance, and to adjust grievances. These supervisory duties are consistent with the jurisprudence of the Act for statutory supervisors properly excluded from the collective bargaining unit.

STP respectfully requests that the Board’s Decision and Order be reversed in its entirety.

Respectfully submitted,

HUNTON ANDREWS KURTH LLP

s/ Adam J. Peters

Adam J. Peters

Email: apeters@huntonak.com

Alan J. Marcuis

Email: amarcuis@huntonak.com

Amber M. Rogers

Email: arogers@huntonak.com

Fountain Place, Suite 3700

1445 Ross Avenue
Dallas, Texas 75202
Telephone: 214-979-3000
Facsimile: 214-880-0011

**Attorneys for Petitioner Cross-
Respondent STP Nuclear Operating
Company**

CERTIFICATE OF SERVICE

I certify that on the 20th day of September, 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:

Timothy L. Watson
Regional Director
NLRB
819 Taylor Street, Rm 8A24
Fort Worth, Texas 76102
Timothy.Watson@nlrb.gov
(by Certified Mail)

David Habenstreit
Assistant General Counsel
NLRB
1015 Half Street, SE
Washington, DC 20570
appellatecourt@nlrb.gov

Julie Broido
Supervisory Attorney
NLRB
1015 Half Street, SE
Suite 4126
Washington, DC 20570
julie.broido@nlrb.gov

Milakshmi Rajapakse
Attorney
NLRB
1015 Half Street, SE
Suite 4126
Washington, DC 20570
milakshmi.rajapakse@nlrb.gov

s/ Adam J. Peters
Adam J. Peters

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 6,324 words, excluding parts of the brief exempted by FED. R. APP. P. 32(f).

s/ Adam J. Peters
**Attorney for Petitioner Cross-
Respondent STP Nuclear Operating
Company**
September 20, 2019