

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

In the Matter of: *

ORACLE ELEVATOR HOLDCO, INC. *

Employer, *

and * Case 25-RC-248645

INTERNATIONAL UNION OF *
ELEVATOR CONSTRUCTORS, *
AFL-CIO *

Petitioner. *

* * * * *

**REQUEST FOR REVIEW FROM THE
DECISION AND CERTIFICATION OF
REPRESENTATIVE AND FOR A
STAY PENDING RESOLUTION**

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TABLE OF CONTENTS

Table of Authorities iii

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY AND BACKGROUND.....2

THE STANDARD FOR GRANTING A REQUEST FOR REVIEW3

THE REGIONAL DIRECTOR’S DECISION FAILS TO FOLLOW BOARD PRECEDENT
AND IS CLEARLY ERRONEOUS ON SUBSTANTIAL FACTUAL ISSUES4

A. THE REGIONAL DIRECTOR’S FINDINGS4

B. LEGAL ANALYSIS.....5

I. The Record Overwhelmingly Establishes That Jon Effinger Is Not A
Supervisor Within The Meaning Of Section 2(11) Of The Act.....5

A. Individuals Who Do Not Exercise Independent Judgment Or
Effectively Recommend Actions Under 2(11) Are Not Statutory
Supervisors.....5

B. Jon Effinger Has Not Performed Supervisory Duties Within The
Meaning Of Section 2(11) Of The Act Since At Least January 20196

C. The Regional Director Erroneously Disregarded Evidence That
Effinger Did Not Exercise Independent Judgment Regarding Or
Effectively Recommend Work Assignments.....9

D. The Regional Director Erroneously Disregarded Evidence That
Effinger Did Not Exercise Independent Judgment Regarding Employee
Evaluations And Pay Increases Or Effectively Recommend Them18

E. The Regional Director Erroneously Disregarded Evidence That
Effinger Did Not Effectively Recommend The Hire Of Employees21

F. The Regional Director Erroneously Disregarded Evidence That
Effinger Did Not Use Independent Judgment To Adjust Grievances
Related To Employee Work Hours And Pay23

G. The Regional Director Gave Improper Weight To Secondary Indicia25

II.	The Record Overwhelmingly Establishes That Jason Buchanan’s Branch Assignment Is Evansville, Indiana And That He Shares A Community Of Interest With The Stipulated Unit	26
A.	The Regional Director Erroneously Disregarded Evidence That Jason Buchanan’s Branch Assignment Is Evansville, Indiana	26
B.	The Regional Director Erroneously Did Not Consider Whether Buchanan Shares A Community Of Interest With Employees In The Stipulated Unit	30
III.	The Regional Director Erroneously Disregarded Evidence Of The Union’s Conduct At The Indianapolis Polling Location Which Is Sufficient To Set Aside The Election Based On Established Board Law Because The Union Improperly Tainted The Election Through An Intimidating Presence At The Indianapolis Branch	34
A.	The Union’s Conduct At The Indianapolis Polling Location	34
B.	Board Law Supports Sustaining Oracle’s Objection	38
	THE BOARD SHOULD STAY THE REGIONAL DIRECTOR’S DECISION & CERTIFICATION OF REPRESENTATIVE.....	42
	SUMMARY AND CONCLUSION	43

TABLE OF AUTHORITIES

Cases

Adco Electric,
307 NLRB 1113 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993)22

Am. River Transp. Co.,
347 NLRB 925 (2006)23

Angelica Healthcare Servs. Group,
315 NLRB 1320 (1995)42

Arlington Masonry Supply, Inc.,
339 NLRB 817 (2003)34

Austal USA, L.L.C.,
349 NLRB 561 (2007)16

Avante at Wilson, Inc.,
348 NLRB 1056 (2006)6

Baker DC, LLC,
2017 NLRB LEXIS 548 (Nov. 2, 2017)40, 41

Bally’s Park Place, Inc.,
265 NLRB 703 (1982)40

Bell Convalescent Hospital,
337 NLRB 191 (2001)27

Berkeley Marina Rest. Corp.,
274 NLRB 1167 (1985)25

Boston Insulated Wire & Cable Co.,
259 NLRB 118 (1982)38

Bredero Shaw,
345 NLRB 782 (2005)34

Brotherhood of Locomotive Firemen & Enginemen,
145 NLRB 1521 (1964)17

Brown & Root, Inc.,
314 NLRB 19 (1994)17, 20

<i>Caesars Tahoe,</i> 337 NLRB 1096 (2002)	26
<i>Cambridge Tool & Mfg. Co., Inc.,</i> 316 NLRB 716 (1995)	39, 41
<i>Chevron U.S.A.,</i> 309 NLRB 59 (1992)	21
<i>Children’s Farm Home,</i> 324 NLRB 61 (1997)	17
<i>Coffman v. Queen of the Valley Medical Center,</i> 2017 U.S. Dist. LEXIS 197502 (N.D. Cal. Nov. 30, 2017).....	42
<i>Cook Inlet Tug & Barge, Inc.,</i> 2015 NLRB LEXIS 506 (June 30, 2015).....	10, 22
<i>Coral Harbor,</i> 2018 NLRB LEXIS 171 (May 2, 2018).....	10
<i>Columbus Symphony Orchestra,</i> 350 NLRB 523 (2007)	34
<i>Cranesville Block Co., Inc. v. NLRB,</i> 741 Fed. Appx. 815 (D.C. Cir. 2018)	16
<i>Croft Metals, Inc.,</i> 348 NLRB 717 (2006)	16
<i>Custom Mattress Mfg.,</i> 327 NLRB 111 (1998)	21
<i>Dole Fresh Vegetables,</i> 339 NLRB 785 (2003)	9
<i>Eastern Camera & Photo Corp.,</i> 140 NLRB 569 (1963)	17
<i>Electric Hose & Rubber Co.,</i> 262 NLRB 186 (1982)	39, 41
<i>Elmhurst Extended Care Facilities,</i> 329 NLRB 535 (1999)	18

<i>Entergy Miss., Inc.,</i> 357 NLRB 2150 (2011)	10
<i>Farmers Insurance Group,</i> 143 NLRB 240 (1979)	34
<i>Franklin Home Health Agency,</i> 337 NLRB 826 (2002)	10
<i>Fred Meyer Alaska, Inc.,</i> 334 NLRB 646 (2001)	23
<i>G4S Regulated Security Solutions,</i> 2015 NLRB LEXIS 491 (June 25, 2015).....	16
<i>Gaines Electric,</i> 309 NLRB 1077 (1992)	6
<i>Golden Crest Healthcare Center,</i> 348 NLRB 727 (2006)	6, 17
<i>Highland Telephone Cooperative,</i> 192 NLRB 1057 (1971)	20
<i>ITT Lighting Fixtures,</i> 265 NLRB 1480 (1982)	5
<i>J.C. Penney Corp., Inc.,</i> 347 NLRB 127 (2006)	23
<i>Kalamazoo Paper Box Corp.,</i> 136 NLRB 134 (1962)	31, 33
<i>Kalustyans,</i> 332 NLRB 843 (2000)	8
<i>Kamehameha Sch. Bernice P. Bishop Estate,</i> 213 NLRB 52 (1974)	3
<i>Kanawha Stone Co.,</i> 334 NLRB 235 (2001)	6

<i>LakeWood Health Center,</i> 2016 NLRB LEXIS 903 (Dec. 28, 2016)	16
<i>Lear Siegler, Inc.,</i> 287 NLRB 372 (1987)	27
<i>Longwood Security Service, Inc.,</i> 364 NLRB No. 50 (2016)	40
<i>Lynwood Manor,</i> 350 NLRB 489 (2007)	16
<i>Martin Enterprises, Inc.,</i> 325 NLRB 714 (1998)	30, 34
<i>Matson Terminals, Inc. v. NLRB,</i> 728 Fed. Appx. 8 (D.C. Cir. 2018)	25
<i>Medlar Electric, Inc.,</i> 337 NLRB 796 (2002)	34
<i>Muncie Newspapers, Inc.,</i> 246 NLRB 1088 (1979)	34
<i>Nathan Katz Realty LLC v. NLRB,</i> 251 F.3d 981 (D.C. Cir. 2001)	39, 40
<i>Necedah Screw Machine Products,</i> 323 NLRB 574 (1997)	20
<i>New York Display & Die Cutting Corp.,</i> 341 NLRB 930 (2004)	34
<i>NLRB v. Bell Aerospace Co.,</i> 416 U.S. 267 (1974).....	5
<i>NLRB v. Carson Cable TV,</i> 795 F.2d 879 (9th Cir. 1986)	33
<i>NLRB v. Ideal Laundry & Dry Cleaning Co.,</i> 330 F.2d 712 (10th Cir. 1964)	33

<i>NLRB v. Joclin Mfg. Co.</i> , 314 F.2d 627 (2d Cir. 1963).....	30
<i>North General Hospital</i> , 314 NLRB 14 (1994)	23
<i>North Shore Ambulance & Oxygen Serv., Inc.</i> , 2017 NLRB LEXIS 215 (May 3, 2017).....	40
<i>Northcrest Nursing Home</i> , 313 NLRB 491 (1993)	21
<i>Northwestern Univ.</i> , 2018 NLRB LEXIS 414 (Sept. 27, 2018).....	30, 43
<i>Nymed, Inc.</i> , 320 NLRB 806 (1996)	18
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006)	5, 6, 10, 18, 24
<i>Ohio Masonic Home</i> , 295 NLRB 390 (1989)	21
<i>Passavant Health Center</i> , 284 NLRB 887 (1987)	21
<i>Peacock Productions</i> , 2016 NLRB LEXIS 645 (Aug. 26, 2016).....	16, 20, 23
<i>Pearson Education, Inc.</i> , 336 NLRB 979 (2001)	40
<i>Peerless Products Co.</i> , 114 NLRB 1586 (1956)	33
<i>Performance Measurements Co.</i> , 148 NLRB 1657 (1964)	39
<i>Phelps Community Medical Center</i> , 295 NLRB 486 (1989)	6, 18
<i>Piscataway Assocs.</i> , 220 NLRB 730 (1975)	42

<i>Plumbers Local 195,</i> 237 NLRB 1099 (1978)	22
<i>Portola Packaging, Inc.,</i> 361 NLRB 1316 (2014)	26
<i>Providence Hospital,</i> 320 NLRB 717 (1996)	5
<i>Pub. Serv. Co. of Colo. v. NLRB,</i> 405 F.3d 1071 (10th Cir. 2005)	25
<i>S.S. Joachim & Anne Residence,</i> 314 NLRB 1191 (1994)	34
<i>Sands Bethworks Gaming, LLC,</i> 361 NLRB 916 (2014)	3
<i>Sears, Roebuck & Co.,</i> 304 NLRB 193 (1991)	6
<i>Shaw, Inc.,</i> 350 NLRB 354 (2007)	17
<i>Sheet Metal Workers Int’l Ass’n, Local Union 68,</i> 298 NLRB 1000 (1990)	25
<i>Somerset Welding & Steel,</i> 291 NLRB 913 (1988)	17
<i>SR-73 & Lakeside Avenue Operations, LLC,</i> 365 NLRB No. 119 (2017)	17
<i>St. Francis Medical Center-West,</i> 323 NLRB 1046 (1997)	17
<i>Standard Dry Wall Products, Inc.,</i> 91 NLRB 544 (1950)	3
<i>Station Casinos Inc.,</i> 358 NLRB 637 (2012)	25
<i>Terrace Gardens Plaza, Inc. v. N.L.R.B.,</i> 91 F.3d 222 (D.C. Cir. 1996)	43

<i>Texas Empire Pipe Line Co.</i> , 88 NLRB 631 (1950)	33
<i>The Republican Co.</i> , 361 NLRB 93 (2014)	20
<i>Thyme Holdings, LLC v. NLRB</i> , 2018 U.S. App. LEXIS 13936 (D.C. Cir. May 22, 2018).....	16
<i>Tribune Co.</i> , 190 NLRB 398 (1971)	27
<i>Trump Taj Mahal Casino</i> , 306 NLRB 294 (1992), <i>enfd.</i> 2 F.3d 35 (3d Cir. 1993)	34
<i>UPS Ground Freight, Inc.</i> , 365 NLRB No. 113 (2017)	16, 17
<i>Venture Indus., Inc.</i> , 327 NLRB 918 (1999)	23
<i>Veolia Transp. Servs., Inc.</i> , 2016 NLRB LEXIS 344 (May 12, 2016).....	6, 21
<i>Viacom Cablevision</i> , 268 NLRB 633 (1984)	27
<i>Video Tape Enters., Inc.</i> , 214 NLRB 1037 (1974)	3
<i>Walker-Roemer Dairies, Inc.</i> , 196 NLRB 20 (1972)	3
<i>Waverly-Cedar Falls Health Care</i> , 297 NLRB 390 (1989)	22
<i>Willamette Industries, Inc.</i> , 336 NLRB 743 (2001)	18
<i>Williamson Mem'l Hosp.</i> , 284 NLRB 37 (1987)	3
<i>Young Broadcasting of Los Angeles, Inc.</i> , 331 NLRB 323 (2000)	33

Youville Health Care Center,
326 NLRB 495 (1998)6

Statutes and Regulations

29 U.S.C. § 152(3)5
29 U.S.C. § 152(11)5

PRELIMINARY STATEMENT

Oracle Elevator Holdco, Inc. (“Oracle”) requests review of the January 28, 2020 Decision on Determinative Challenged Ballots and Objection and Certification of Representative (“Decision”) of Regional Director Patricia K. Nachand. The Decision should be overturned because it is clearly erroneous on many substantial factual issues and such errors prejudicially affect the rights of Oracle and its employees. Specifically, the Regional Director erred by disregarding overwhelming and compelling evidence that: (1) senior modernization technician Jon Effinger is not a supervisor within the meaning of Section 2(11) of the National Labor Relations Act (“NLRA” or the “Act”); (2) modernization technician Jason Buchanan is an employee who shares a community of interest with the employees in the stipulated bargaining unit and is therefore eligible to vote; and (3) the International Union of Elevator Constructors (the “Union”) intimidated employees during the election by stationing themselves outside the primary entrance to the Indianapolis polling location.

As explained more fully below, Oracle senior modernization technician Jon Effinger is not a supervisor within the meaning of the Act. He does not perform or effectively recommend any of the personnel actions necessary to be deemed a supervisor under the Act or Board precedent. Modernization technician Jason Buchanan is an Evansville-based employee who for the time being is working on elevator modernization jobs in Kentucky. Buchanan’s branch assignment has always been Evansville, Indiana. The Regional Director did not engage in a community of interest analysis regarding the challenge to Buchanan, concluding that the Stipulated Election Agreement (“Stipulation”) was unambiguous. The record evidence and the Stipulation, however, demonstrate that Buchanan shares a community of interest with and is part of the stipulated unit. Finally, under Board precedent, the Regional Director erred in overruling

Oracle's objection to the Union's conduct at the Indianapolis polling location. The Union's five-plus person presence near the entrance to the polling location was sufficient in itself to interfere with the employees' freedom of choice.

PROCEDURAL HISTORY AND BACKGROUND

Oracle is an elevator service, repair and modernization company whose employees work in the field, and at customer job sites, servicing, repairing, and modernizing elevators. Oracle has two branches in Indiana: Indianapolis and Evansville. On September 20, 2019, the Union filed a petition seeking to represent certain employees at Oracle's Indianapolis and Evansville, Indiana branches. Exhibit 1 (Bd. Ex. 1(b)).¹ Pursuant to the Stipulation, the unit consisted of:

All full-time and regular part-time Service Technicians, Service Apprentices, Modernization Technicians, Senior Modernization Technicians, and Modernization Apprentices employed by the Employer at its facilities located at 5534 West Raymond Street, Indianapolis, and 2102 Kotter Ave., Suite C, Evansville, Indiana; BUT EXCLUDING all administrative and office clerical employees, professional employees, managerial employees, confidential employees, customer service associates, business development managers, guards and supervisors as defined in the Act, and all other employees.

Id. An election was held on October 16, 2019. *Id.* There were six "No" votes, and seven "Yes" votes, and two ballots challenged by the Union. *Id.* Oracle filed a timely objection to the Union's conduct at the Indianapolis polling location. *Id.* After hearings on November 15 and 18, 2019, the Regional Director issued her Decision on January 28, 2020, sustaining the challenges to Effinger and Buchanan, and overruling Oracle's objection. Exhibit 2, Decision and Certification.

Oracle now seeks review of the Decision and Certification of Representative.

¹ Excerpts of the transcript of the hearing are attached as Exhibit 3 and cited as "Tr." Exhibits from the hearing are cited as exhibits to this Request for Review with reference to their designation at the hearing. Board exhibits are identified as "Bd. Ex. __," Oracle's exhibits are identified as "ER Ex. __," and the Union's exhibits are identified as "Union Ex. __."

THE STANDARD FOR GRANTING A REQUEST FOR REVIEW

There are four bases for the Board to grant a Request for Review. Pursuant to Section 102.67 of the Board's Rules and Regulations, the Board will grant a Request for Review upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;
2. That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;
3. That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
4. That there are compelling reasons for reconsideration of an important Board rule or policy.

The Decision should be overturned because the Regional Director's decision departs from officially-reported Board precedent on Section 2(11) of the Act, the composition of an appropriate bargaining unit, the effect of the parties' intent when entering into a stipulation, and the laboratory conditions required while the polls are open. Moreover, the Decision on "substantial factual issues is clearly erroneous," and such error prejudicially affects the rights of Oracle. *See In re Video Tape Enters., Inc.*, 214 NLRB 1037 (1974) (Board granted employer's request for review brought pursuant to "clearly erroneous" standard); *In re Kamehameha Sch. Bernice P. Bishop Estate*, 213 NLRB 52 (1974) (same); *In re Walker-Roemer Dairies, Inc.*, 196 NLRB 20 (1972) (same).

The Board reviews *de novo* the Regional Director's decision. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950); *see also Sands Bethworks Gaming, LLC*, 361 NLRB 916, 916 (2014); *Williamson Mem'l Hosp.*, 284 NLRB 37, 37 (1987).

**THE REGIONAL DIRECTOR'S DECISION
FAILS TO FOLLOW BOARD PRECEDENT AND IS
CLEARLY ERRONEOUS ON SUBSTANTIAL FACTUAL ISSUES**

A. THE REGIONAL DIRECTOR'S FINDINGS

A review of the Regional Director's Decision confirms that the Regional Director's findings are clearly erroneous in numerous respects, warranting review. Significantly, the Regional Director's Decision is replete with clearly erroneous findings concerning Effinger's performance of job duties, Buchanan's status and duties as an Evansville employee, and the tendency of the Union's conduct at the Indianapolis polling location to interfere with a free and fair election. Specifically, the Regional Director erred in finding that:

- Until at least September or October 2019, Effinger used independent judgment to assign work to and transfer employees between jobsites, and order materials and parts for other modernization jobs, and that he effectively recommended work assignments. Decision at p. 3.
- Effinger participated in employee performance reviews in which he recommended the specific ratings and pay raises for modernization employees based on his knowledge of the employees' skill and performance, and General Manager Cory Ernst followed Effinger's recommendations. Decision at p. 3.
- Effinger effectively recommended the hire of employees. Decision at p. 3.
- Effinger used independent judgment to adjust grievances related to employee work hours and pay even after he was transferred to senior modernization technician. Decision at p. 3.
- Secondary indicia supported the conclusion that Effinger was a statutory supervisor. Decision at p. 3.
- Buchanan was not eligible to vote despite his receipt of a per diem at all times when working away from his Evansville, Indiana branch assignment. Decision at pp. 4-6.
- The Union's conduct at the Indianapolis polling location was not objectionable because employees were not 100% certain that it was the Union's representatives who stationed themselves outside the primary entrance used by voting employees at the Indianapolis polling location and the Union did not engage in similar conduct at the Evansville polling location. Decision at pp. 6-7.

B. LEGAL ANALYSIS

I. The Record Overwhelmingly Establishes That Jon Effinger Is Not A Supervisor Within The Meaning Of Section 2(11) Of The Act.

A. Individuals Who Do Not Exercise Independent Judgment Or Effectively Recommend Actions Under 2(11) Are Not Statutory Supervisors.

Section 2(3) excludes from the Act's definition of employee "any individual employed as a supervisor." 29 U. S. C. § 152(3). Section 2(11) defines 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). Independent judgment means "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-93 (2006). Judgment is not independent if it is dictated or controlled by detailed instructions, company policies or rules, or verbal instructions of a higher authority. *Id.* To effectively recommend "generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed." *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982).

Thus, "[i]n enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men, and set-up men,' who are protected by the Act even though they perform 'minor supervisory duties.'" *Providence Hospital*, 320 NLRB 717, 725 (1996) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)). Supervisory status is not established where the

record evidence is “in conflict or otherwise inconclusive.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Oakwood Healthcare, Inc.*, 348 NLRB at 687. Moreover, the sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Kanawha Stone Co.*, 334 NLRB 235, 237 (2001); *Gaines Electric*, 309 NLRB 1077, 1078 (1992).

The party asserting supervisory status must establish that status by a preponderance of the evidence, which requires detailed, specific evidence. *Oakwood Healthcare, Inc.*, 348 NLRB at 687; *Youville Health Care Center*, 326 NLRB 495, 496 (1998); *Veolia Transp. Servs., Inc.*, 2016 NLRB LEXIS 344, at *32 (May 12, 2016). Mere inferences or conclusory statements, without detailed, specific evidence of independent judgment, do not establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991).

The evidence detailed below shows that Effinger is not a statutory supervisor. He does not use independent judgment with respect to and does not effectively recommend any of the Section 2(11) actions.

B. Jon Effinger Has Not Performed Supervisory Duties Within The Meaning Of Section 2(11) Of The Act Since At Least January 2019.

Jon Effinger testified that he is a senior modernization technician and, as of November 2019, had been in that role for 10-11 months. Tr. 354. Effinger also referred to himself as a lead technician or modernization technician. Tr. 354. Prior to becoming senior modernization technician, Effinger was briefly the regional modernization manager (“RMM”), a supervisory position, from October 2018 to approximately January 2019, and was a salaried employee in that

role. Tr. 354-355, 359, 367, 459, 467-473, 478. The RMM duties included reviewing bids with the sales team and Oracle's Indiana general manager Cory Ernst, completing job surveys, ordering materials, creating job schedules with required hours per task, monitoring job completeness, participating in monthly Work-In-Progress (WIP) calls (reporting hours on and status of modernization jobs), addressing manpower needs, working with tools, and performing additional job tasks. Tr. 356-357, 459; Exhibit 4 (ER Ex. 5).²

Oracle moved Effinger from the RMM role to the senior modernization technician role in January 2019 because the Company had sold multiple demanding jobs “that [Effinger] was gonna need to work, so [Oracle's] backlog filled up to the point that we couldn't afford to not have [Effinger] working 40 hours a week on a mod[ernization] job.” Tr. 469-473, 478. Ernst explained that the Company “decided it was best for [Jon Effinger] to continue to be a mod[ernization] tech and turn the wrenches on jobs to help us with our backlog that we had.” Tr. 469-473, 478. Effinger's testimony was consistent with Ernst's. Effinger explained that his role changed because “[t]he [RMM] position wasn't needed. They thought we were going to have more of a role for that, . . . and that's [(referring to performing technician work in the field)] where they knew I was best suited to be.” Tr. 358-359, 472. Effinger further testified that he, “was told that I was being put back to a Technician. I wasn't told an exact title of what it would be called.” Tr. 359-360. With the change to Effinger's role, his wages were reassigned from the Midwest Region to the Evansville branch. Tr. 471, 545-546. Effinger was also returned to hourly pay with the same vacation, days off, and insurance as other technicians. Tr. 358-359,

² The Regional Director identifies some job duties Effinger performed as RMM, though the duties he performed in that role do not impact whether he is a statutory supervisor, because what matters is the duties he performed after January 2019. *See* Decision at p. 2. The Regional Director apparently understands that, as she focuses her Decision on things Effinger is alleged to have done since he became senior modernization technician. Decision at pp. 3-4.

363, 473. Effinger is the only senior modernization technician, meaning that if his vote is not counted, the inclusion of the classification in the Stipulation would be superfluous. *See* Tr. 360-361, 464-465, 517-518. Indeed, Board precedent is that parties do not intend to identify a bargaining unit containing employee classifications that do not exist. *Kalustyans*, 332 NLRB 843, 844 (2000).

Oracle acknowledges that some documents refer to Effinger as the RMM after January 2019. Effinger's testimony, however, was clear that he is no longer RMM, and has not performed supervisory duties since becoming senior modernization technician. Tr. 354, 358-363, 379-381, 390-397, 452-456. Effinger testified that he no longer performs the duties of the RMM, including reviewing bids, scheduling and monitoring job percent completeness and hours, participating in WIP calls, preparing WIP and labor hour reports, and managing manpower needs (arguably his only 2(11) duties as RMM). Tr. 357-358, 426-427, 452-456, 472. With respect to why some emails and other documents continued to list his title as RMM, Effinger testified that he simply did not update his title because that was not a priority for him. Tr. 358-363, 368, 379-381, 457. Oracle did not realize that Effinger's title was not updated in its internal directory until after the Union filed the petition in this matter and, therefore, between September and October 2019, the Company updated Effinger's title in its directory to identify Effinger as senior modernization technician. Exhibit 5 (Union Ex. 9); Tr. 128-129. This clerical change (a damned if you do, damned if you don't change) in no way undermines the weight of evidence in this case that Effinger's role changed months prior to the petition in this matter to senior modernization technician, and that he has not performed supervisory functions since January 2019. *See, e.g.*, Tr. 358-362, 390-397, 460. What matters is Effinger's actual job duties after January 2019 -- the nine months before the Petition in this case was filed.

Effinger's timesheets for 2019 confirm that since January 30, 2019, all his time has been spent as a field employee performing modernization work at various job sites -- not supervisory work.³ Exhibit 6 (ER Ex. 8). In his capacity as a senior modernization technician, Effinger changes elevator machines, controllers, wiring, and door entrances; services elevators; assesses and completes jobs; works with and teaches apprentices; coordinates with customers; and helps other technicians get materials. Tr. 354-355, 360-363; Exhibit 7 (ER Ex. 2). As a field employee Effinger uses the same hand and power tools, hoisting and rigging equipment and other machinery used by other technicians. Tr. 357-361, 372, 443-444. He also wears the same uniform as other technicians and typically works four ten-hour days, like other modernization technicians. Tr. 372, 417, 478-479.

Most critically, Effinger has performed no supervisory functions or made supervisory recommendations within the meaning of the Act since January 2019. See Tr. 355-364, 473. It is an individual's duties -- not job title -- that determines status. *Dole Fresh Vegetables*, 339 NLRB 785, 785 (2003). Therefore, it is necessary to examine the evidence the Regional Director disregarded concerning Effinger's lack of independent judgment and effective recommendations following January 2019.

C. The Regional Director Erroneously Disregarded Evidence That Effinger Did Not Exercise Independent Judgment Regarding Or Effectively Recommend Work Assignments.

The Regional Director found that:

[U]p until at least September or October 2019, Effinger used independent judgement [sic] to assign work to employees, transfer employees between jobsites, and order materials and parts for modernization jobs on which he was not working. Throughout 2019, Effinger also effectively recommended work

³ The one exception occurred on August 12, 2019, when Effinger listed supervisor time because he was told to note the time as "supervisor" time so that the time would be accounted for. Tr. 408-409. Effinger explained that he needed to allocate time he spent on a job in Kentucky. *Id.*

assignments to Ernst based on his own knowledge of employees' skill and experience and the needs of the various modernization jobs, and Ernst followed Effinger's recommendations.

Decision at p. 3. The Regional Director ignored the clear weight of evidence showing that Effinger did not assign or effectively recommend assignment of other employees using independent judgment.

Under Section 2(11) of the Act, "assign" refers "to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Health Care, Inc.*, 348 NLRB at 689. Critically, independent judgment is found in assignment when the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Id.* at 693.

Employees who merely adjust assignments to accommodate scheduling are not supervisors. *See Entergy Miss., Inc.*, 357 NLRB 2150, 2153-2157 (2011); *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) ("The assignment of tasks . . . based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition [of a supervisor]"); *see also Coral Harbor*, 2018 NLRB LEXIS 171, at *84-88 (May 2, 2018) (no supervisor status where assignments were routine). Moreover, "basing an assignment on whether an individual is capable of performing the job does not involve independent judgment." *Cook Inlet Tug & Barge, Inc.*, 2015 NLRB LEXIS 506, at *8 (June 30, 2015). Non-supervisors can express opinions of other non-supervisor's skills and abilities without becoming supervisors themselves, even if their supervisors agree with the assessment or consider the assessment.

Ernst and Effinger testified that, since January 2019, Effinger has not decided where other employees will work or assigned other employees to specific job sites, agreeing that he does not have the authority to assign work to other employees. Tr. 364-366, 376, 383, 494-495. When asked if he had decided where other employees would work since January 2019, or had the authority to do so, Effinger's answer was precise: "No, sir." Tr. 364-365. Effinger has passed along instructions from Ernst and provided input to Ernst about how to "streamline the process." Tr. 364-365. In one example he provided, Effinger explained that:

There was a job in Louisville that they had to replace some 2-to-1 cable, and I recommended -- they were having trouble with it, and they needed a hand. I recommended that one of our apprentices -- I didn't have time to go down through my scheduling, but I recommended that Jeremiah had a lot of knowledge and experience after changing multiple 2-to-1 working with me, that he could help them get the job done.

Tr. 377. Effinger has also asked Ernst to pair him with a more experienced apprentice and provided Ernst with his opinion on jobs, but the decision where employees work is left to Ernst or another manager. Tr. 366, 375-377. The feedback Effinger provides is common and should not be colored by his superior skills and experience. Ernst testified that he solicits input from experienced field employees, such as service technician David Findley, to assess how long a job might take or what it will entail. Tr. 466-467. The Union did not challenge Findley's eligibility to vote even though Ernst asks for his input regarding service jobs. Tr. 468.

The undisputed testimony was that Ernst, not Effinger, determines where the modernization technicians will work based on backlog, schedules, customer preference and needs, and mechanic strengths and weaknesses. Tr. 386-389, 466, 483-485. Service Apprentice Josh White testified that Ernst reassigned him from modernization to service and that Ernst decided where technicians would work. Tr. 264-266.

Despite Effinger's and Ernst's clear testimony based on personal knowledge, the Regional Director chose to rely instead solely upon the testimony of the Union's witnesses who almost universally do not have personal knowledge of Effinger's authority and duties. A few of the more egregious examples are:

- Former Oracle Field Operations Manager Larry Brys ("L. Brys"), testified that he understood Effinger's role to be RMM. Tr. 48-60. L. Brys only saw Effinger about twice a week and did not work with Effinger in the field. Tr. 59-60, 80-81. L. Brys, therefore, was not personally aware of what Effinger did on a daily basis. Moreover, L. Brys testified that Ernst was the final authority regarding modernization-related matters, and was not aware of what Effinger and Ernst discussed regarding modernization personnel. Tr. 75-78.
- Former Oracle Modernization Apprentice Jeremiah Brys ("J. Brys"), testified that he overheard conversations Effinger had with other Oracle employees, but acknowledged that he could not hear the full conversations because he was not on the calls. Tr. 135-137. J. Brys acknowledged that he did not know what Effinger discussed during conversations he was not a part of and he did not know whether Effinger was merely following instructions. Tr. 99, 135-137.
- Service Apprentice Josh White and J. Brys testified that they did not know what Ernst and Effinger discussed or even whether Effinger was following Ernst's instructions when Effinger communicated things such as job assignments. Tr. 135-137, 271-273.
- White testified that he received instructions from Effinger, but that he did not know whether Effinger was following instructions, did not know how the hours of work were decided, and offered no examples. Tr. 239-240, 242-244.

Plainly, none of the Union's witnesses had first-hand knowledge of whether Effinger was making decisions himself or simply communicating messages -- as senior modernization technician -- on behalf of General Manager Ernst. Tr. 136-137, 143-146, 148-151, 156.

Oracle does not dispute that Effinger communicated to modernization technician Jason Zornes and modernization apprentice J. Brys about the jobs they would be working. Exhibit 8 (Union Exs. 3-6). The testimonial evidence by the two people who would know -- Ernst and Effinger -- was that Effinger was merely following Ernst's instructions (Tr. 364-366, 376, 383, 494-495), a fact that neither White nor J. Brys could dispute as both individuals testified that

they do not know who made the decisions regarding where they would be working or whether Effinger was merely following Ernst's instructions. Tr. 136-137, Tr. 239-240, 242-244.

The Union and the Regional Director relied on three examples in which Effinger communicated work assignments to Zornes and J. Brys: occurring on February 3, 2019; July 13, 2019; and August 28, 2019. In each case, Ernst and Effinger testified that Effinger was merely communicating Ernst's instructions.

On February 3, 2019, Effinger told Zornes and J. Brys that they would be working a job in Louisville. Exhibit 8 (Union Ex. 3). Effinger explained that he was a messenger:

A It looks like to Jason Zornes and Jeremiah Brys, both.

Q Why did you send -- what's going on here?

A It looks like they were going to [ResCare in Louisville] to help Jason and -- Jason Buchanan and his Apprentices with whatever they were doing down there at that time.

Q Did you decide to send Jason Zornes and Jeremiah Brys to ResCare?

A No, it wasn't my decision.

Q Whose decision was it?

A It would either be Cory or Roger, or a joint effort between the two of them.

Q Why did you communicate this message?

A I communicate a lot of things to Jason Zornes for Cory or -- and Jeremiah.

Q Were you told to send -- strike that. Were you told to tell Jason Zornes and Jeremiah Brys that they'd be going to ResCare?

A Yes, sir.

Q Who told you to do that?

A Once again it would either have been Cory or Roger. I'm assuming they would have had a conversation. Cory would have to approve his guys leaving his jobs to go help another Manager's jobs.

Tr. 378-379. Ernst consistently testified that he made his own assessment of whether Zornes and J. Brys should handle the assignment, and that he instructed Effinger to tell the employees where they would be working. Tr. 485-488. For his part, J. Brys testified that he did not know whether Ernst was involved in the decision. Tr. 148-149.

In July 2019, Effinger told Zornes and J. Brys to work the Anderson Library job and then proceed to Wilson Street, because Ernst told him to communicate that message. Tr. 384-386, 488-489; Exhibit 8 (Union Ex. 5). J. Brys does not know what role Ernst played. Tr. 149-150. When J. Brys was moved from the Anderson Library job, Effinger explained it was because there was a rush job and Ernst made the decision, possibly because Effinger told Ernst that he and J. Brys work well together. Tr. 384-386. Ernst testified that he instructed Effinger to tell Zornes and J. Brys where they would be working. Tr. 485-488.

On August 28, 2019, Effinger told Zornes and J. Brys that they would be working the Mollenkopf job and then the Wilson Street job. Exhibit 8 (Union Ex. 4). Effinger testified Ernst made this assignment decision, but that he provided input on how long the Mollenkopf job would take and that Zornes and J. Brys were available. Tr. 379-380. When asked if he suggested to Ernst to send Zornes and J. Brys to the job, Effinger explained:

I just -- it's my opinion on it, but it's his [(Ernst's)] decision. Because he [(Ernst)] asked me what's left at Mollenkopf. He [(Ernst)] would ask me how Wilson Street is going because I was running the Wilson Street job. That was one of my duties, so he would ask, for one, if I had work there that they could do for a couple hours. And then he [(Ernst)] would make his decision based on that.

Tr. 379-380. Again, Ernst's testimony was consistent:

Q Are you aware that on August 28th, 2019 Mr. Effinger sent Mr. Zornes and Mr. Brys to work at Mollenkopf and then Wilson Street?

A Yes.

Q Were you involved in that decision?

A Yes, I was.

Q Did you tell Mr. Effinger to send Mr. Zornes and Mr. Brys to these two jobs?

A Yes, I did.

Q Why?

A Because we had to -- Mollenkopf was a job that was with Purdue University that we were trying to get wrapped up, and I think initially the guys were supposed to go to Wilson Street to start, but I told Jon that we need to get that Purdue job wrapped up before we started on Wilson Street to try to get less jobs that were on our plate. And so that's when I communicated to Jon we needed to wrap up Mollenkopf first and then go on to start Wilson Street.

Tr. 486-487. Again, J. Brys did not know what role Ernst played. Tr. 149-150.

As the testimony shows, Ernst was aware of each of these situations -- he made the decision for Zornes and J. Brys to work those jobs because he wanted those projects completed and instructed Effinger to communicate the message. Tr. 485-488; *see also* Tr. 378-380, 385-386.⁴ The other example the Union provided was from December 28, 2018, when Effinger asked Zornes and J. Brys "how many hours each of ypu [sic] put on the job last week 12/17 -

⁴ Although not noted or discussed by the Regional Director, additional evidence shows that Effinger does not approve overtime, leave, or expenses, or have authority to do so. Tr. 267, 390-391, 394-396, 481, 491-492. Effinger's expenses are reviewed by others. *See* Tr. 369; Exhibit 9 (ER Ex. 6). Effinger signed a Personal Protective Agreement for an apprentice in September 2019, because Ernst was not in the office and he wanted to make sure the employee received his safety equipment. Tr. 403-404, 516-517.

12/21.” Exhibit 8 (Union Ex. 6). This message was sent while Effinger was RMM and, therefore, is not relevant to his status as senior modernization technician. Tr. 381-382. Ernst’s and Effinger’s uncontradicted testimony shows that Ernst made the decisions and that Effinger’s input was merely routine, schedule-based feedback, that does not elevate him into a statutory supervisor. Ernst’s role as the individual deciding work assignments is further supported by J. Brys’ testimony that when he needed time off on October 16, 2019, he went to Ernst for approval, not Effinger. Tr. 156-157.

Here, the Regional Director disregarded evidence that Effinger did not assign work using any sort of independent judgment. Oracle provided credible evidence that Effinger did not exercise independent judgment with respect to any of the specific examples the Union offered, and the conclusory statements regarding other unspecified assignments cannot support a finding of supervisory status. *See Lynwood Manor*, 350 NLRB 489, 490 (2007) (citing *Austal USA, L.L.C.*, 349 NLRB 561, 561 n.6 (2007)); *see also LakeWood Health Center*, 2016 NLRB LEXIS 903, at *1 n.1 (Dec. 28, 2016); *Peacock Productions*, 2016 NLRB LEXIS 645, at *10-11 (Aug. 26, 2016); *G4S Regulated Security Solutions*, 2015 NLRB LEXIS 491, at *4 (June 25, 2015).

The lack of evidence that Effinger exercises independent judgment regarding assigning work is fatal to a finding that he is a statutory supervisor. *See Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (no supervisory status where there was no evidence “regarding the factors weighed or balanced by the [alleged supervisors] in making production decisions and directing employees”); *see also Thyme Holdings, LLC v. NLRB*, 2018 U.S. App. LEXIS 13936, at *7-9 (D.C. Cir. May 22, 2018) (assignment requires independent judgment); *Cranesville Block Co., Inc. v. NLRB*, 741 Fed. Appx. 815, 816 (D.C. Cir. 2018) (no independent judgment when assigning work where decision based solely on the “known skill or experience” of the mechanics); *UPS Ground*

Freight, Inc., 365 NLRB No. 113 (2017) (same); *SR-73 & Lakeside Avenue Operations, LLC*, 365 NLRB No. 119 (2017) (no independent judgment where evidence was conclusory or lacking in specificity, and the one specific example involved one obvious and self-evident choice).

Likewise, the hearing evidence showed that Effinger did not “effectively recommend” the assignment of work, because Ernst testified that he conducted his own assessment before making the decision. *See Children’s Farm Home*, 324 NLRB 61, 61 (1997) (“effectively recommend” means “the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed”).

Contrary to the Regional Director’s finding, the overwhelming evidence shows that Effinger is an experienced technician who provides factual input from what he observes in the field. His status as a more experienced employee does not make him a statutory supervisor. *Shaw, Inc.*, 350 NLRB 354, 354-57 (2007) (limited role in assignment of routine tasks does not establish independent judgment); *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006) (independent judgment not found where higher official authorized putative supervisory charge nurses to “mandate” employees to come to work); *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997) (no supervisory status where putative supervisory is a “lead person, an experienced employee who directs the work of other employees engaged in routine work”); *Brown & Root, Inc.*, 314 NLRB 19 (1994) (same); *Somerset Welding & Steel*, 291 NLRB 913, 914 (1988) (leadmen not statutory supervisor).⁵

⁵ To the extent the Regional Director concluded that Effinger’s ability to order materials and parts is evidence of supervisory status, such a conclusion has no application here. *See Eastern Camera & Photo Corp.*, 140 NLRB 569, 573 (1963) (discussing broad versus limited authority to pledge employer’s credit); *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521, 1535 (1964) (supply clerk purchased \$60,000 - \$100,000 in supplies annually and “rarely” consulted superiors). Ernst explained that Effinger can make only small purchases, his credit card limit is \$2,000/month, and purchase orders require approval. Tr. 483-485; Tr. 383-384.

For these reasons, it was improper for the Regional Director to conclude that Effinger assigned work within the meaning of Section 2(11) based on the record evidence, which did not satisfy Board standards. *Oakwood Healthcare, Inc.*, 348 NLRB at 687-689, 694 (citation omitted) (lack of evidence is construed against the party asserting supervisory status).

D. The Regional Director Erroneously Disregarded Evidence That Effinger Did Not Exercise Independent Judgment Regarding Employee Evaluations And Pay Increases Or Effectively Recommend Them.

The Regional Director found that:

Effinger participated in employee performance reviews, which were tied directly to employee pay increases. The record showed that Effinger recommended the specific ratings and pay raises for modernization employees based on his knowledge of the employees' skill and performance, and again Ernst followed Effinger's recommendations. Effinger signed employee performance reviews on the line designated for the "supervisor."

Decision at p. 3. The Regional Director is correct that Effinger participated in performance evaluations for two employees and signed one evaluation as senior modernization technician. However, the record *does not* show that Effinger recommended specific ratings and pay raises. The record evidence shows, in the evaluations he attended, Effinger provided factual information to Ernst, and Ernst decided the evaluations to give and whether employees would receive pay increases with approval from Ernst's superiors.

The authority to evaluate is not one of the indicia of supervisory status set out in Section 2(11). See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Nevertheless, the Board analyzes the evaluation of employees to determine whether it is an "effective recommendation" of promotion, wage increase, or discipline. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Participation in an evaluation alone does not support a finding of supervisory status. *Williamette Industries, Inc.*, 336 NLRB 743, 743-744 (2001) (citation omitted); *Nymed, Inc.*, 320 NLRB 806, 813 (1996).

Effinger participated in evaluations solely to report what he observed in the field so that Ernst could decide an employee's evaluation. Tr. 391-392, 502-508. Effinger testified that he sat in on two evaluations -- for modernization technician Jason Zornes and modernization apprentice Jeremiah Brys -- to answer questions about skill levels, knowledge and ability because he was present in the field with employees while General Manager Ernst was not. Tr. 391-392. Effinger did not recommend a particular evaluation for either employee, did not grant a pay increase to either employee, did not recommend a specific pay increase, and has no authority to grant pay increases. Tr. 391-393. Moreover, at the time of Zornes' evaluation, Effinger was RMM, so his involvement in that evaluation is not germane to the determination here. Exhibit 10 (ER Ex. 10); Tr. 502-508. And when Oracle granted pay increases for 10 employees on August 9, 2019, Effinger was not involved. Exhibit 10 (ER Ex. 10, p. 4-6); Tr. 502-504.

Effinger's testimony about recommendations was unequivocal:

Q Have you ever recommended an employee receive a specific wage increase?

A No, sir.

Q Have you ever recommended that an employee receive a pay increase regardless of size?

A I believe I've told Cory before that at the time, say, Jeremiah was doing great, you know, that he was a good employee. And we, you know, to keep him, he was a good employee, a good apprentice, a very upcoming person.

Tr. 393-394. There is no dispute that Effinger participated in J. Brys' evaluation in 2019. J. Brys testified that Effinger answered Ernst's questions about him, Ernst wrote on the evaluation, and he does not know whether Effinger recommended a pay increase. Tr. 122-123, 152-153. Ernst had Effinger sign the evaluation, an isolated incident, and listed Effinger as J. Brys'

supervisor to add a layer between Ernst and J. Brys. Exhibit 11 (Union Ex. 8); Exhibit 10 (ER Ex. 10); Tr. 123, 399-402, 500-501.

Ernst decided to give J. Brys a pay increase and the amount of that increase, as well as a subsequent, unrelated additional \$2.50 per hour increase. Tr. 125, 499-501. Again, Effinger did not recommend a specific pay increase. Tr. 399-402. Ernst testified that Effinger told him J. Brys was a good worker and the Company should try to keep him, but that Effinger did not suggest or decide a specific amount. Tr. 499-500. Ernst explained that he completed J. Brys' evaluation and determined what to write based on factual information from Effinger because he is not "on the job" with employees in the field. Tr. 489-490, 500-501.⁶ J. Brys testified that Ernst completed the scored ranking. Tr. 152-155.

Effinger's signature on J. Brys' evaluation does not establish supervisory authority. *See Necedah Screw Machine Products*, 323 NLRB 574, 577 (1997) (putative supervisors signed form as witnesses). And Effinger's feedback to Ernst regarding what he witnessed in the field also does not make him a supervisor, because consultation about an employee's progress and recommendations do not establish supervisory status. *Highland Telephone Cooperative*, 192 NLRB 1057, 1057-58 (1971) (consultation about an employee's progress and recommendations were isolated instances that did not establish supervisory status); *see also Peacock Productions*, 2016 NLRB LEXIS 645, at *10-11 (Aug. 26, 2016); *The Republican Co.*, 361 NLRB 93, 97-100 (2014); *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994).

⁶ The testimony of Union witnesses L. Brys did not credibly elevate Effinger's role in either the evaluations or pay increases into that of a supervisor under the Act. L. Brys testified that he saw Effinger enter one evaluation meeting, but he was not in the meeting and, therefore, he has no personal knowledge of what happened or Effinger's role. Tr. 63-64, 73-75. L. Brys' testimony about an evaluation meeting involving Effinger was based on a hypothetical. Tr. 73-74.

Effinger, moreover, does not become a statutory supervisor because his participation in personnel actions is limited to a mere reporting function, and does not come close to showing that it amounts to an effective recommendation that will affect employees' job status. *Northcrest Nursing Home*, 313 NLRB 491, 497-498 (1993); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *see also Custom Mattress Mfg.*, 327 NLRB 111, 111 (1998) (lack of evidence showing what weight, if any, recommendations for raise increases were given); *Passavant Health Center*, 284 NLRB 887, 891 (1987) (the evaluation of employees, without more, does not equate to supervisory status); *Veolia Transp. Servs., Inc.*, 2016 NLRB LEXIS 344, at *25-29 (May 26, 2016) (reporting function does not equate to supervisory finding). Ernst made the evaluation and pay increase decisions based on his own assessment, and Effinger's limited role does not satisfy the Board's standards for a finding of supervisory status. *See Chevron U.S.A.*, 309 NLRB 59, 65 (1992) (recommendations are "insufficient to satisfy the statutory standard for supervisors *unless* . . . management is prepared to implement the recommendation without an independent investigation of the relevant circumstances").

E. The Regional Director Erroneously Disregarded Evidence That Effinger Did Not Effectively Recommend The Hire Of Employees.

The Regional Director found that Effinger effectively recommended the hire of employees. Decision at p. 3. The Regional Director disregarded unequivocal evidence that Effinger does not make hiring decisions, has no authority to do so, and has not effectively recommended that certain individuals be hired. Tr. 372-373, 493-494.

The evidence shows that Effinger participated in modernization apprentice Ben Fromme's interview, but only to explain the job; Effinger did not recommend that Fromme be hired. Tr. 181-182, 374. Effinger testified that during Fromme's interview, he "told him some of the descriptions of what we'd be doing if he was in Modernization. I just told him some of the

items that are listed that we typically do.” Tr. 364. He did not provide feedback to Ernst following the interview and did not recommend that Fromme be hired. Tr. 364. Fromme testified that he does not know who made the decision to hire him. Tr. 188.

Effinger did not interview, hire, or effectively recommend the hire of Jason Buchanan. Tr. 331. Effinger testified that he did not hire Buchanan, but did refer him to Ernst. Tr. 382-383. Buchanan confirmed that Effinger did not hire or interview him. Tr. 324, 331.

Effinger explained that what he has done is refer employees to Oracle, which is how individuals get into the trade. When asked if he had ever recommended that Oracle hire somebody, Effinger answered that he has “referred people to Oracle” which is “how most everybody gets in the business.” Tr. 372-373. Union witness Ben Fromme testified that he came to Oracle via a similar referral process -- Fromme testified that he heard of an opening at Oracle through Oracle employee Josh White. Tr. 180.

The Regional Director’s decision disregards Board law that, to be effective, a hiring recommendation must be relied on without further inquiries. *See Adco Electric*, 307 NLRB 1113, 1124 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993); *see also Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989). To establish supervisory status, an individual’s influence on the hiring process must be based on actual delegated authority to participate in the hiring process and not merely on respect for the judgment of the person making the recommendation. *See Plumbers Local 195*, 237 NLRB 1099, 1102 (1978); *see also Cook Inlet Tug & Barge, Inc.*, 2015 NLRB LEXIS 506, at *88-92 (June 30, 2015). The Decision now makes the statements, “I know a guy who might be a good fit here” or “I hear that John Jones at Acme is looking to change jobs” compelling evidence of Section 2(11) hiring authority.

There is no record evidence that Effinger made hiring decisions or effectively recommended the hiring of employees. Effinger's participation in an interview and referral of potential employees to Oracle is insufficient to make him a supervisor within the meaning of the NLRA. See *Peacock Productions*, 2016 NLRB LEXIS 645, at *18-20 (Aug. 26, 2016) (no supervisory status where acknowledged supervisors also interview candidates); *Am. River Transp. Co.*, 347 NLRB 925, 943 (2006) (referrals do not satisfy standard for supervisory status); *J.C. Penney Corp., Inc.*, 347 NLRB 127, 129 (2006) (no supervisory status based on employee's "ministerial role" in the process and management had sole hiring authority); *North General Hospital*, 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"); but see, *In re Fred Meyer Alaska, Inc.*, 334 NLRB, 646, 649 (2001) (supervisor status where employee uses his own experience and assessment of a job opening to determine if a candidate is qualified); *Venture Indus., Inc.*, 327 NLRB 918, 919 (1999) (supervisor status where individuals interviewed internal applicants for promotions and recommended whether or not those applicants should receive the promotion).

F. The Regional Director Erroneously Disregarded Evidence That Effinger Did Not Use Independent Judgment To Adjust Grievances Related To Employee Work Hours And Pay.

The Regional Director found that Effinger used independent judgment to adjust grievances related to employee work hours and pay after he became senior modernization technician. Decision at p. 3. Yet that conclusion relies on a gross exaggeration of Effinger's role in a single incident where he responded to a question about J. Brys' hours. Answering a question about another employee is not an indicia of supervisory authority.

As with Effinger's role in communicating assignments and providing factual input during evaluations, his role in the one incident involving J. Brys' pay was merely as a conduit for information. The hearing evidence showed that Effinger did not adjust grievances; rather he merely reported information. Regarding workplace issues in general, if there was a problem in the field, Effinger would contact Ernst; he could not take unilateral action and had no authority to discipline employees. Tr. 365, 374-376, 402-403, 488-489.

The one specific incident identified at the hearing was a situation in September 2019 when there was an issue with J. Brys' time. On September 13, 2019, J. Brys emailed Oracle about a mistake on his pay and requested that it be corrected. Exhibit 12 (Union Ex. 7). J. Brys followed up on September 20 and Oracle employee Tori Michaels asked Effinger and another employee to "work together to figure this out." Exhibit 12 (Union Ex. 7). Effinger responded by providing the hours J. Brys worked the week of September 2-6, 2019. Exhibit 12 (Union Ex. 7). Effinger testified that he was involved "because I was the Mechanic he was working with. Overtime entry messed up his time after he sent it to him [sic]." Tr. 397-398; *see also* Tr. 497. J. Brys' hours should match Effinger's, because they worked the same job, so, "basically I could forward them, even send him just my hours. Here's what we worked on the job." Tr. 397-398; *see also* Tr. 497. Effinger did not approve the overtime hours involved in J. Brys' inquiry and did not adjust J. Brys' hours in response to his request. Tr. 397-398; *see also* Tr. 497. Effinger does not know who adjusted J. Brys' hours. Tr. 397-398; *see also* Tr. 497. Other than providing information in response to that question, Effinger does not review employee time and has not been trained to review employee time. Tr. 374-376, 480.

Effinger's role was merely routine and clerical -- it lacked "independent judgment" -- and, therefore, does not satisfy Board standards for supervisory status. *Oakwood Healthcare*,

Inc., 348 NLRB at 687; *Sheet Metal Workers Int'l Ass'n, Local Union 68*, 298 NLRB 1000, 1004 (1990) (employees possess authority to adjust grievances where the employees had initial authority to adjust grievances without the input of upper level management); *Berkeley Marina Rest. Corp.*, 274 NLRB 1167, 1174 (1985).

The one example the Union provided at the hearing involving J. Brys' time does not show that Effinger could adjust grievances within the meaning of Section 2(11), because "corrections of mere mistakes when an employee calls attention to them" does not require independent judgment. *Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1080 (10th Cir. 2005) (citation omitted); *see also Matson Terminals, Inc. v. NLRB*, 728 Fed. Appx. 8, 11 (D.C. Cir. 2018). In fact, all of these so-called "examples" are the worst kind of motivated reasoning to exclude an employee whose vote is determinative of the outcome of the election. The Decision seems to have been drafted after the conclusion was made to find Effinger a supervisor, ignoring a preponderance of record evidence that did not support that conclusion.

G. The Regional Director Gave Improper Weight To Secondary Indicia.

The Regional Director identified secondary indicia of Effinger's supervisor status in the format of Effinger's email address, the employee directory listing Effinger's title as Mod Manager with a different supervisor, and Effinger's use of the RMM title on various documents and on social media. Decision at pp. 3-4. The Regional Director is correct that secondary indicia of supervisory status are not dispositive without evidence of at least one statutory indicator of such status. *See Station Casinos Inc.*, 358 NLRB 637, 644 (2012). Because not a single statutory indicator supports Effinger being a supervisor, the secondary indicia cannot be considered.

II. The Record Overwhelmingly Establishes That Jason Buchanan’s Branch Assignment Is Evansville, Indiana And That He Shares A Community Of Interest With The Stipulated Unit.

A. The Regional Director Erroneously Disregarded Evidence That Jason Buchanan’s Branch Assignment Is Evansville, Indiana.

The Regional Director concluded that “Buchanan had effectively no connection with the Evansville or Indianapolis facilities.” Decision at p. 4. The Regional Director based her conclusion on the following: Buchanan performed most of his work in Louisville, not Indiana; Buchanan’s supervisors included supervisory employees in Kentucky and Buchanan was listed on a Kentucky organizational chart; some of Buchanan’s offer letters refer to his place of work as Louisville; Buchanan’s uniforms were maintained through the Louisville branch; Buchanan’s personnel paperwork was signed by a Louisville management; and Buchanan’s mailbox and personnel file were kept in Louisville. Decision at pp. 5-6. The conclusion to sustain the challenge to Buchanan is incorrect and ignores substantial evidence.

When resolving determinative challenged ballots in cases involving stipulated bargaining units, the Board’s function is to ascertain and enforce the parties’ intent, provided that it is not contrary to any statutory provision or established Board policy. *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002). The Board uses a three-step approach:

First, the Board determines whether the stipulation is ambiguous. Where the objective intent of the parties to the stipulation is clearly and unambiguously expressed in the stipulation, the Board merely enforces the agreement. However, if the stipulation is ambiguous, the Board will seek to determine the parties’ intent through the normal methods of contract interpretation, including by the examination of extrinsic evidence. Finally, if the parties’ intent still cannot be discerned, then the Board determines the bargaining unit by employing the normal “community of interest” test.

Portola Packaging, Inc., 361 NLRB 1316 (2014).

The Stipulation includes in the unit “[a]ll full-time and regular part-time . . . Modernization Technicians . . . employed by the Employer at its facilities located” in

Indianapolis and Evansville. Exhibit 13 (ER Ex. 9). “[T]o determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classification.” *Bell Convalescent Hospital*, 337 NLRB 191, 191 (2001) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find a clear intent to include those classifications that match the express language. *Bell Convalescent Hospital*, 337 NLRB at 191.

It is well established that the intent of the parties is paramount in considering which employees are part of the unit. *Tribune Co.*, 190 NLRB 398, 398 (1971); *Lear Siegler, Inc.*, 287 NLRB 372, 372 (1987). The Regional Director found that Buchanan was not an Evansville employee and, therefore, was not eligible to vote by the terms of the Stipulation. In making this decision, the Regional Director understated the significance of Buchanan’s per diem when he works away from Evansville, his branch assignment.

Buchanan is paid a per diem for his work *outside* Evansville, which would only happen if Evansville were his designated branch assignment. Exhibit 15 (ER Ex. 4); Exhibit 16 (ER Ex. 3). Ernst, Buchanan, and Union witness Josh White testified that Oracle pays a per diem when employees perform work far enough away from their primary location. Tr. 268, 327, 350, 511, 528. Buchanan is paid a per diem “[e]very day that [he is] out of town.” Tr. 327. The only place Buchanan is not paid a per diem is when he works in Evansville; otherwise he is paid a per diem every day that he works outside of Evansville -- including Louisville and Lexington, Kentucky. Tr. 325-327, 335, 510-511; Exhibit 14 (Union Ex. 21, pp. 6-9). Buchanan’s time sheets also confirm Buchanan’s per diem for the work outside of Evansville. Exhibit 14 (Union Ex. 21).

Buchanan is paid a per diem when working outside of Evansville, because Evansville is his branch assignment. Tr. 352, 463, 510. Buchanan received an offer letter when he was hired by Oracle in November 2018. He testified that Louisville was listed as the location in his offer letter, but that the geographic designation was crossed out and replaced with Evansville sometime near when he was hired, though he does not know who made the revision. Exhibit 16 (ER Ex. 3); Tr. 326-327. He explained that the revision made sense “because I’m an Evansville employee.” Tr. 326-327. The Regional Director credited a different version of Buchanan’s offer letter, signed by Buchanan on October 30, 2018, over a version signed on October 26, 2018, and noting that his branch assignment is Evansville. Exhibit 20 (Union Ex. 19). The version Buchanan signed on October 30 is not signed by Oracle’s HR representative, however, the version signed on October 26 is signed by both Oracle and Buchanan. *Id.*

Buchanan acknowledged that he has worked primarily in Louisville since returning to Oracle in November 2018. Tr. 328, 332; Exhibit 14 (Union Ex. 21). Thus, Buchanan put Louisville as his place of work on social media because that is where he was going to be working. Tr. 323-324, 330. Buchanan credibly testified that he listed Louisville on social media because that is where he was going to be working, and Ernst explained that it was a nine-month modernization job. Tr. 323-324, 330, 539. Ernst and Buchanan explained why this is the case. Buchanan was “hired on to be an Evansville employee, but they needed me in Louisville for a big job [(expected to last nine months)] so that’s where I started.” Tr. 317-318, 321-322, 464, 539. Ernst acknowledged that Louisville branch management supervises Buchanan and reviews his time given that he has been working in Louisville. Tr. 480-481. He has no intention of relocating from Evansville. Tr. 346, 350. Buchanan testified that Evansville is the “location that

I am to work out of, closest to my home address” and that he considers himself an Evansville employee. Tr. 318, 323-324, 330.

Ernst corroborated Buchanan’s testimony. He explained that Buchanan’s “branch assignment was determined by where he lives.” Tr. 512. Ernst further testified that he retains supervisory authority over Buchanan: “[t]echnically I’m [Buchanan’s] Supervisor, but if he’s working for another branch he would report during the duration of that project to whatever Branch Manager or Field Operation Manager he’s working for,” which is currently Roger Smith and Ricky Welch. Tr. 513; *see also* Tr. 318-319, 512-514; Exhibit 15 (ER Ex. 4). When Buchanan’s modernization job in Louisville recently ended, Kentucky General Manager Roger Smith asked Ernst if Buchanan could continue working in Kentucky after the job he was working on was finished, and Ernst approved. Tr. 319, 513. Again, if Buchanan is not an Evansville employee, Smith would have no need to consult with a manager in another state.

Ernst also testified that he decides where Buchanan will work, that Buchanan lives in Evansville and is assigned to Evansville, but works primarily in Louisville (and now Lexington) because there is only one modernization job in Evansville since Buchanan returned to Oracle in November 2018. Tr. 463-464, *see also* Tr. 319. Buchanan testified that he performs work at job sites as directed by Ernst or other branch managers with whom Ernst has made arrangements, in particular Louisville General Manager Roger Smith. Tr. 317-318. He considers Smith and Ernst to be his supervisors. *Id.* Ernst and Smith coordinated that Buchanan would begin a modernization job in Lexington. Tr. 319-320, 513-514. Buchanan acknowledged that he has worked primarily in Louisville and that he reports to Oracle General Manager Roger Smith for work he performs in Louisville. Exhibit 15 (ER Ex. 4).

Based on the circumstances here the appropriate analysis was to proceed to community of interest considerations. *Northwestern Univ.*, 2018 NLRB LEXIS 414, at *7-8 (Sept. 27, 2018) (conducting community of interest analysis where the Stipulation was “both clear as to whom it includes and clear as to whom it excludes, but it [was] entirely unclear, even employing normal methods of contract interpretation, how to resolve the eligibility of an employee who is both clearly included and clearly excluded”).

B. The Regional Director Erroneously Did Not Consider Whether Buchanan Shares A Community Of Interest With Employees In The Stipulated Unit.

The Regional Director did not conduct a community of interest analysis. It is undisputed that Buchanan is a modernization technician, a classification expressly included in the Stipulation. What matters, therefore, is whether Buchanan shares a community of interest with the included employees. *See, e.g., NLRB v. Jocolin Mfg. Co.*, 314 F.2d 627, 632 (2d Cir. 1963) (Regional Director “needlessly” disenfranchised a dual-function employee who held a classification within the unit where it was not shown that the employee lacked a sufficient interest with the unit). In similar contexts, where an employee holds both in-unit and out-of-unit positions, the Board will consider “whether the employee[] regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that [he has] a substantial interest in working conditions in the unit.” *Martin Enterprises, Inc.*, 325 NLRB 714, 714 (1998). “[T]he Board has no bright line rule as to the amount of time required to be spent in performing unit work. Rather, the Board examines the facts in each particular case.” *Id.*

Buchanan was hired as an Evansville employee and put on a modernization job in Louisville, based on Company workload. His work in Louisville, Kentucky since returning to Oracle in November 2018, and his onboarding paperwork, assignments, and daily activities,

which have been in Kentucky over the past year, do not affect his status as an Evansville employee. Exhibit 14 (Union Ex. 21); Tr. 336-340, 349-350, 539.

To determine whether employees share sufficient interests and working conditions, the following factors are considered: (i) method of wages or compensation; (ii) hours of work; (iii) employment benefits; (iv) supervision structure; (v) relative qualifications, training, and skills; (vi) job functions and the amount of working time spent away from the place of employment; (vii) contact with other employees; (viii) integration with work functions of other employees or interchange with them; and (ix) history of bargaining. *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

Buchanan's job duties are to "[p]erform complete modernizations and repairs for hydraulic and traction elevators that include installing microprocessor controllers, door equipment, pumping units, hoist machines, wiring and connections, fixtures, hoist ropes, packings, etc." Exhibit 7 (ER Ex. 2); Tr. 317-318. These are the same duties as other modernization technicians. Tr. 317. Buchanan typically works four ten-hour days and is subject to the same work rules as other Oracle employees in Indiana, including safety requirements, and uses the same equipment and uniforms. Exhibit 15 (ER Ex 4).

Buchanan performs similar work to employees in the unit, shares working conditions with other employees in the unit, and uses the same tools and equipment. Buchanan's hours of work are consistent with the schedule used by other employees in the unit. Exhibit 15 (ER Ex. 4); Tr. 478-479. Like other employees in the unit, Buchanan performs his function in the field at jobsites, and has worked with other employees in the unit (*i.e.*, Jason Zornes, Landon Baker, Juan "Marty" Zamora, and Jon Effinger). Tr. 316-318, 324, 329-330, 341-342, 514-515. These duties include modernization work, such as changing door clips, electrical, controllers, pumping

units, cables, and anything that needs upgrading or replacement, as well as wiring and car operating panels. Tr. 316-317, 341; Exhibit 7 (ER Ex. 2). Buchanan stays in a hotel when in Louisville. Tr. 320, 326-328. Buchanan uses the same equipment as other modernization technicians, including hoisting equipment, run cables, hand tools, electric tools, and safety gear such as safety glasses, gloves, safety shoes, boots, and the Company uniform. Tr. 324-325; *see also* Exhibit 15 (ER Ex. 4).

While Buchanan reports to Smith for the work he performs in Kentucky, Indiana General Manager Ernst retains a supervisory role over him, and is consulted about Buchanan's job assignments. Tr. 318-319, 512-514. Buchanan performs the same type of job -- modernization work -- as other employees in the unit, and has worked in the field with at least three unit employees: Baker, Zamora, and Effinger. Tr. 316-318, 324, 329-330, 341-342, 514-515. He is paid on an hourly basis, typically works four ten-hour shifts, is eligible for the same benefits as other technicians in the unit, and wears the same uniform and uses the same types of tools and safety equipment as other unit members. Tr. 318, 320, 325.

Buchanan has not worked exclusively in Kentucky, as he has performed modernization work at the Weinbach Building in Evansville, Indiana and attended a benefits meeting in Indianapolis. Tr. 325-326, 335, 510-511; Exhibit 14 (Union Ex. 21, pp. 6-9). Buchanan worked side by side with Oracle Indiana employees Landon Baker and Juan "Marty" Zamora on the Weinbach job, and he has picked up material for that job from the Evansville office. Tr. 316-318, 324, 329-330, 341-344, 514-515. Ernst assigned Buchanan to the Weinbach job. Tr. 329. Jeremiah Brys also worked with Buchanan on a job in Louisville. Tr. 97-98, 109.

While Buchanan's work has been in Louisville, the clear evidence is that he is an Evansville employee who is paid an additional amount -- a \$30 per diem -- for the entire week

when performing the work in Louisville. Exhibit 16 (ER Ex. 3); Exhibit 14 (Union Ex. 21).

Thus, the Regional Director erred in sustaining the challenge to Buchanan's ballot, because the evidence shows that Buchanan shares a community of interest with included employees, which is the critical analysis -- one the Regional Director chose not to undertake. *See Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). Where a community of interest is found, the employee's votes should count. *See, e.g., Young Broadcasting of Los Angeles, Inc.*, 331 NLRB 323, 323 (2000).

Smith's onsite supervision of Buchanan does not require his exclusion. Indeed, a difference in supervision is not a per se basis for excluding employees from an appropriate unit. *Texas Empire Pipe Line Co.*, 88 NLRB 631, 632 n.2 (1950) (citation omitted). Similarly, a different situs of employment does not require exclusion. *See NLRB v. Carson Cable TV*, 795 F.2d 879, 884 (9th Cir. 1986); *Peerless Products Co.*, 114 NLRB 1586, 1588 (1956). The important consideration is the overall community of interest among the employees. Buchanan works the way he does because that is how Oracle operates. Modernization jobs come up in multiple locations. Being a highly capable modernization technician stationed in Evansville, he is called to attend to jobs elsewhere. This does not change the fact that he is an Evansville employee. Buchanan, moreover, considers himself an Oracle Evansville employee, (Tr. 318), which "is a factor . . . the Board should take into consideration in reaching its ultimate decision Indeed, it may be the single factor that would 'tip the scales.'" *NLRB v. Ideal Laundry & Dry Cleaning Co.*, 330 F.2d 712, 717 (10th Cir. 1964) (citations omitted).

The Employer has shown that Buchanan has a substantial and continuing interest in the wages, hours, and working conditions of the full-time employees in the unit. Considering the factors used in analysis of part-time employee eligibility, the Board has considered the

community of interest factors that, here, show Buchanan’s alignment with a stipulated unit. *See Farmers Insurance Group*, 143 NLRB 240, 244–245 (1979) (discussing part-time employee eligibility); *see also New York Display & Die Cutting Corp.*, 341 NLRB 930, 930 (2004) (same); *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819-820 (2003); *see also Muncie Newspapers, Inc.*, 246 NLRB 1088, 1089 (1979) (the test to determine whether one is a regular part-time employee “takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits, and other working conditions”); *Medlar Electric, Inc.*, 337 NLRB 796, 797 (2002) (dual function employees); *Bredero Shaw*, 345 NLRB 782, 786 (2005) (fact-specific analysis); *Martin Enterprises*, 325 NLRB 714, 715 (1998) (critical inquiry is whether employee “has substantial interest” in working conditions in the unit).

The fact that Buchanan’s work in Evansville has been in addition to his regular work in Louisville does not require his exclusion, because an employee’s ability to reject work when offered is not determinative of an individual’s status so as to exclude the individual from the unit. *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 n.5 (1994). Again, what matters is whether Buchanan has a “real continuing interest in the terms and conditions of employment offered by the employer.” *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), *enfd.* 2 F.3d 35 (3d Cir. 1993); *see also Columbus Symphony Orchestra*, 350 NLRB 523, 524 (2007).

III. The Regional Director Erroneously Disregarded Evidence Of The Union’s Conduct At The Indianapolis Polling Location Which Is Sufficient To Set Aside The Election Based On Established Board Law Because The Union Improperly Tainted The Election Through An Intimidating Presence At The Indianapolis Branch.

A. The Union’s Conduct At The Indianapolis Polling Location.

The Regional Director next overruled Oracle’s objection, reasoning that “[t]he evidence failed to establish that the Petitioner’s conduct reasonably tended to interfere with employees’ free

choice regarding union representation.” Decision at pp. 6-7. Her decision disregards evidence and Board precedent that the Union’s conduct here was sufficient for Oracle’s objection to be sustained.

On October 16, 2019, the day of the election, multiple Union organizers stationed themselves adjacent to the parking lot in the rear of Oracle’s Indianapolis branch while the polls were open from 2:00 p.m. to 3:30 p.m. such that they were at all times in direct view of the rear entrance to the Branch and visible by voters entering the Branch to vote. Exhibit 17 (ER Ex. 1). The Union officials arrived at the rear of the Indianapolis Branch at 2:03 p.m., when at least three Oracle employees were standing in the Oracle parking lot. Exhibit 17 (ER Ex. 1, p. 1). The Union officials exited their vehicle and stood in a large group next to their SUV. Exhibit 17 (ER Ex. 1).⁷

At 2:06 p.m., two of the Union officials began walking the perimeter of the complex. *Compare* Exhibit 17 (ER Ex. 1, p. 5-6), with Exhibit 18 (ER Ex. 12). At 2:08 p.m., an Oracle employee exited the rear of the Indianapolis Branch and the Union officials stood outside their vehicle as they had been doing. Exhibit 17 (ER Ex. 1). At 2:13 p.m., a Union official again walked in the adjacent parking lot closer to where the Oracle employees were standing. Exhibit 17 (ER EX. 1, p. 9). The Union official continued walking the perimeter of the building. *Compare* Exhibit 17 (ER Ex. 1, p. 10), with Exhibit 18 (ER Ex. 12). At 2:20 p.m., another Oracle employee arrived at the rear of the branch and parked in the Oracle parking lot approximately three spaces from where the Union officials were parked and standing in the adjacent lot. Exhibit 17 (ER Ex 1, pp. 12-13). At 2:22 p.m., a Union official walked closer to a group of Oracle employees and waved to the group of employees. Exhibit 17 (ER Ex. 1, p. 14). At 2:25 p.m., two Union officials again walked closer to a group of Oracle employees standing

⁷ The Union organizers can be seen in the top right corner of the images contained in Exhibit 17. *See* Tr. 193, 293.

in the rear lot. Exhibit 17 (ER Ex. 1, pp. 17-18). At 2:38 p.m., one of the Union officials started walking in the adjacent parking lot toward the Oracle employees. Exhibit 17 (ER Ex. 1, p. 3). At 2:42 p.m., an Oracle employee waved to the Union officials after he exited the Branch, and walked over to the Union gathering, where he remained for approximately two minutes. Exhibit 17 (ER Ex. 1, pp. 20-26). The Union vehicles left the adjacent parking lot at approximately 3:17 and 3:19 p.m. Exhibit 17 (ER Ex. 1, pp. 28-29).

Oracle employees Jon Effinger and Joel Stafford arrived at the Indianapolis Branch at approximately 3:03 p.m., and the Union officials remained close by in the adjacent parking lot. Exhibit 17 (ER Ex. 1, p. 27); Exhibit 19 (Union Ex. 18); Tr. 286-287, 291-293. Effinger and Stafford parked in the rear because that entrance is where the field employees typically park to enter the building. Tr. 195, 286-287, 291-292; Exhibit 19 (Union Ex. 18). Stafford testified that he and Effinger “noticed some different vehicles that we never see . . . with some people all standing around those vehicles.” Tr. 287. Stafford testified that, “[w]hat we noticed a little weird was that everybody that was around those vehicles were looking towards our vehicle when we pulled in and also when we were walking into the building to take vote.” Tr. 287. Stafford saw the Union officials on his way into the Branch. Tr. 293. Stafford found the presence unsettling and commented to Effinger about the cast of characters watching them. Tr. 287-289, 294. He testified that “I’ve never been watched like that before.” Tr. 287-289, 294. It was intimidating. *Id.* Stafford thought the individuals were with the Union because of the symbols on their coats and confirmed this belief when he saw a colleague, John Chaney, interacting with the Union officials, as well as because the individuals were present at the tally of votes after the election. Tr. 289-290, 306. Stafford explained that he did “not know the exact identities of the

IUEC officials, but knew the individuals were affiliated with the IUEC.” Exhibit 19 (Union Ex. 18); Tr. 288.

Effinger’s testimony was similar. Effinger testified that he saw five to seven individuals in the adjacent parking lot that he thought were Union officials. Tr. 411. Effinger reported what he saw to Ernst, because it caused him anxiety -- it was intimidating to have six guys roaming around a vehicle and staring. Tr. 411-413, 519. He testified “what is that other than intimidation.” Tr. 411-413. The parking lot the Union officials had rallied in was separated by a small grass strip of approximately four feet in width from the Oracle parking lot. Tr. 417-418. The individuals Effinger saw in the parking lot were present for the tally of votes. Tr. 413.

Union witnesses Josh White and Ben Fromme both testified to similar observations to that of Effinger and Stafford. White testified that he saw individuals standing near the rear parking lot, but did not recognize them until after he exited the branch and waved to them. Tr. 250-251, 256, 259-261. White confirmed at the hearing that IUEC officials were present at the branch, including Steve Simpson and Bobby Capuani, and they were in direct view of the branch. Tr. 268-269. Fromme saw approximately six IUEC officials, including Steve Simpson and Bobby (last name unknown to Fromme) when he exited the branch; they were in the parking lot opposite the rear entrance standing next to their two vehicles. Tr. 186, 193-194. Fromme agreed that the Union officials were visible from where the Oracle technicians park. Tr. 195. Fromme confirmed Stafford’s testimony that the IUEC officials “were all in Union -- like they had their Union stuff on, like embroidered on their jackets.” Tr. 188. Fromme also testified that he and Oracle employee John Chaney talked to the Union officials briefly on their way out of Oracle’s parking lot. Tr. 192-193. While the Union officials may not have been on Oracle

property, they were close enough that someone on Oracle property could communicate with them from the Oracle parking lot. Tr. 192-193, 417-418.

B. Board Law Supports Sustaining Oracle’s Objection.

The Regional Director found that the Union’s conduct at the Indianapolis polling location “could not have interfered with employee free choice” because employees were not 100% certain that it was the Union’s representatives who stationed themselves outside the primary entrance used by voting employees at the Indianapolis polling location and the Union did not engage in similar conduct at the Evansville location. Decision at p. 7. The Regional Director’s finding means that absolute certainty and verbal statements are necessary for there to be sufficiently objectionable conduct. The finding also means that, to be objectionable, the conduct must occur at all polling locations. In this view, the Regional Director apparently believes that it is acceptable for Union officials to come right up to Oracle’s property line so long as they have no signs and do not yell at voters. But that misses the point. The Union officials did not have to say something to voters to engage in improper conduct. They did not need to be on Oracle property to engage in improper conduct. They did not have to be in a designated no-electioneering zone to engage in improper conduct.

The Board considers a number of factors to determine whether conduct is objectionable, including: “whether the conduct occurred within or near the polling place[;] . . . the extent and nature of the alleged electioneering[;] . . . whether it is conducted by a party to the election or by employees[; and] whether the electioneering is conducted within a designated ‘no electioneering’ area or contrary to the instructions of the Board agent.” *Boston Insulated Wire & Cable Co.*, 259 NLRB 118, 1118-1119 (1982) (citations omitted).

The Board has long held that it will set aside an election where one party engages in conduct which *could* have the reasonable effect of destroying the “laboratory conditions” necessary to ensure that employees have the opportunity to make an uninhibited choice on the question of representation. *See Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). The Regional Director’s decision on the evidence here raises a substantial question of law based on the failure to properly apply Board precedent and clearly erroneous findings regarding substantial factual issues about the Union’s conduct at the Indianapolis polling location.

The Union’s conduct is improper even if it did not actually elicit fear from employees attempting to vote -- although two Oracle employees testified that the Union’s conduct caused them apprehension. Tr. 287-289, 411-413. The Board has stated that a party’s mere *presence* may be sufficient to justify setting aside an election. *Performance Measurements Co.*, 148 NLRB 1657, 1659 (1964). The presence of multiple Union officials outside a polling location can have a coercive effect on an election and can destroy laboratory conditions where the presence conveys “to [the voting] employees the impression that they were being watched.” *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) (discussing supervisor presence); *see also Nathan Katz Realty LLC v. NLRB*, 251 F.3d 981, 991-93 (D.C. Cir. 2001). It cannot be the case that Union officials -- five to seven in number -- can stand close to the primary entrance to the polling location in a manner in which they can be seen by voters entering the polls and there be a conclusion other than to convey to voters “that they were being watched.” *Nathan Katz*, 251 F.3d at 992 (quoting *Electric Hose & Rubber Co.*, 262 NLRB 186, 186 (1982)). The Union did not have to engage in active electioneering for their conduct to communicate to voting employees that they were being watched as they entered the Indianapolis branch. Moreover, if there is no designated “no electioneering” zone, the Board will treat the area “at or near the

polls” -- such as a parking lot providing unobstructed view of the entrance to the branch -- as equivalent to a no electioneering zone for purposes of objections analysis. *Pearson Education, Inc.*, 336 NLRB 979, 979-980 (2001) (citing *Bally’s Park Place, Inc.*, 265 NLRB 703 (1982)).

In *Nathan Katz*, union officials sat in a car in the declared no-electioneering area directly outside the entrance to the site -- a location every eligible voter would have to pass in order to vote -- for the duration of the election. 251 F.3d at 991. The union officials “motioned, gestured, and honked at the employees as they passed the car.” *Id.* Here, while the Union officials did not motion, gesture, or honk, the evidence shows that eligible voters entered through the rear where the five to seven Union officials could monitor the voters entering the Branch. Honking, gesturing, or yelling was not necessary for the intimidating presence to be known.

The undisputed evidence is that employees primarily used the rear entrance to the Indianapolis branch to enter the location. The Union engaged in objectionable conduct by stationing themselves, in large numbers, outside the rear entrance in a manner in which they could view -- and employees could view them -- all employees entering the branch. *See North Shore Ambulance & Oxygen Serv., Inc.*, 2017 NLRB LEXIS 215 (May 3, 2017) (Member Miscimarra, dissenting) (quoting *Longwood Security Service, Inc.*, 364 NLRB No. 50 (2016) (Member Miscimarra, dissenting)) (“[T]he mere presence of a[ny] party’s agents in a place employees must pass in order to vote constitutes objectionable conduct sufficient to set aside an election.”). Member Miscimarra elaborated, “[t]here are few actions more coercive and impairing of free choice than a union agent positioning him or herself [in a position], closely monitoring every single voter mere seconds before he or she marks and casts a ballot.” *Id.*; *see also Baker DC, LLC*, 2017 NLRB LEXIS 548 (Nov. 2, 2017) (Member Miscimarra, dissenting) (“[A] party engages in objectionable conduct sufficient to set aside an election if one of its agents

is continually present in a place where employees have to pass in order to vote.”) (citation omitted). The Regional Director concluded that the location of the voting booth within the branch meant that the Union’s surveillance of voters entering the building was allowable. Decision at p. 7. Yet that conclusion ignores the reality of the situation here -- the Union officials observed voters entering the branch, mere seconds before they were to cast their votes. *Baker DC*, 2017 NLRB LEXIS 548, at *5 (quoting *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982)) (the rule against presence at the voting location exists “because surveillance of this character reasonably tends ‘to convey to these employees the impression that they were being watched’”). Oracle took this precedent seriously. Ernst, for example, went home while the poll in Indianapolis was open. Tr. 519. Member Miscimarra’s warning is plainly applicable here.

The unit involved in this election consists of 15 employees. Exhibit 1 (Bd. Ex. 1(b)). The Union had five to seven officials standing in a location where every voter was likely to see them, because the rear entrance was the primary entrance field employees use. The Union officials strategically stationed themselves as they did precisely so they could be seen, with visible union insignia, and they did so in numbers equal to nearly 50% of the size of the small bargaining unit at issue. They walked toward employees in the rear lot and waved to at least one employee. What other reason could there be for the Union to station themselves as they did if not to make their presence known -- to intimidate? Why be there in the first place?

If both of the challenged ballots that are to be counted are against the Union, then a switch of one vote to oppose the Union would have been decisive. Exhibit 1 (Bd. Ex. 1(b)). With the election results being so close, the Union’s conduct here may well have affected the outcome of the election and, therefore, is not *de minimis*. The Union’s conduct was not merely

being present at the Indianapolis branch -- rather, it was being present with a sufficiently large number of officials in a manner where they could monitor voters to have a coercive effect.

**THE BOARD SHOULD STAY THE REGIONAL DIRECTOR'S
DECISION & CERTIFICATION OF REPRESENTATIVE**

Section 102.67(j)(1) of the Board Rules and Regulations states:

A party requesting review may also move in writing to the Board for one or more of the following forms of relief: [] (ii) A stay of some or all of the proceedings ...

An analysis of the record evidence compels the conclusion that the Regional Director wrongfully determined that Jon Effinger and Jason Buchanan were ineligible to vote, and that Oracle's objection should be overruled. It is thus imperative that the Board stay the Certification until the Board grants Oracle's Request for Review and determines that the Regional Director's Decision and Certification was wrongly decided. Therefore, for all the foregoing reasons, further proceedings based on the petition should be stayed. *See Piscataway Assocs.*, 220 NLRB 730 (1975) (granting request for review and staying the election pending decision on review after Regional Director issued DD&E finding that six building superintendents were not supervisors within the meaning of the Act); *Angelica Healthcare Servs. Group*, 315 NLRB 1320 (1995).

Absent the granting of a stay of the duty to bargain, an employer must bargain with a union following the certification of election results, notwithstanding the employer's filing of a Request for Review. *Coffman v. Queen of the Valley Medical Center*, 2017 U.S. Dist. LEXIS 197502 (N.D. Cal. Nov. 30, 2017) (citations omitted). This requirement places both employers and unions in a procedurally awkward posture. If the employer bargains with the union, it waives its right to further challenge the certification of the election, leaving the employer who wishes to obtain further review of the Regional Director's decision with no choice but to refuse to bargain and force the union to file an unfair labor practice charge. As the D.C. Circuit stated:

If [the employer] prevails on its affirmative defense, then the certification will be held invalid and the Board's finding that it committed an unfair labor practice [by refusing to bargain] will be vacated. Alternatively, the [employer] may avoid the unfair labor practice charge altogether by agreeing unconditionally to bargain. It may negotiate with, or challenge the certification of, the Union; it may not do both at once.

Terrace Gardens Plaza, Inc .v. N.L.R.B., 91 F.3d 222, 225-26 (D.C. Cir. 1996). As a result of this conundrum, the Board should stay the duty to bargain pending the resolution of issues raised in a Request for Review. As Chairman Ring recently noted, “[i]n light of the problems that may be created by the issuance of a certification while contested election issues remain unresolved, the Chairman believes that the Board should look with favor on requests to stay certifications in these circumstances.” *Northwestern Univ.*, 2018 NLRB LEXIS 414, at *7-8, n.8.

For the foregoing reasons, Oracle respectfully requests that the Board stay these proceedings, including the imposition of its duty to bargain, pending the issuance of a decision on this Request for Review.

SUMMARY & CONCLUSION

For the reasons stated above, the Board should issue an order staying Oracle's obligation to bargain and Oracle's Request for Review should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 11, 2020, a copy of the foregoing Request for Review was electronically filed with the Board and the Regional Director through the Board's website (www.nlr.gov), with a copy served by e-mail on Jennifer R. Simon, Esq., O'Donoghue & O'Donoghue LLP, 5301 Wisconsin Avenue, N.W., 8th Floor, Washington, D.C. 20015, jsimon@odonoghuelaw.com, attorneys for the Petitioner.

/s/ J. Garrett Wozniak
J. Garrett Wozniak