

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL HISTORY AND BACKGROUND..... 2

A. The Stipulated Election Agreement and Election 2

B. Proceedings Before the Hearing Officer and His Report and Recommendations 3

C. The Regional Director’s Decision 6

III. LEGAL STANDARD FOR REQUEST FOR BOARD REVIEW 9

IV. LEGAL ANALYSIS 10

A. The Record Demonstrates that Effinger Is a Supervisor Within the Meaning of Section 2(11) of the Act. 10

1. The Record Evidence Demonstrates that Effinger Made Employee Work Assignments and Effectively Assigned Work, Exercising Independent Judgment While Doing So. 11

2. The Regional Director Considered All Evidence Regarding Effinger’s Role in the Employee Evaluation Process and Appropriately Determined It Established His Status as a Section 2(11) Supervisor..... 22

3. The Regional Director Considered All Evidence Relating to Effinger’s Effective Recommendations of Employees for Hire by Oracle and Appropriately Concluded That Effinger Made Such Recommendations..... 25

4. The Regional Director Properly Concluded Effinger Exercises Independent Judgment in Adjusting Grievances Regarding Work Hours and Pay..... 28

5. The Regional Director Gave the Appropriate Weight to the Numerous Secondary Indicia of Effinger’s Supervisory Authority Contained in the Record..... 30

6. The Evidence Described Above Established Effinger Remained a Section 2(11) Supervisor Through the Date of the Election. The Employer’s Contention That He Was No Longer an RMM and/or

| | | |
|------------|---|-----------|
| | Engaged in Field Work Beyond January 2019 Does Not Undercut This Finding..... | 31 |
| B. | The Record Demonstrates That Jason Buchanan is a not an Indiana Employee and Is Expressly Excluded from the Stipulated Unit... 33 | |
| 1. | The Regional Director Expressly Considered All Evidence Proffered Regarding Jason Buchanan’s Employment and It Indisputably Establishes That He Is Employee in Kentucky..... | 33 |
| 2. | The Regional Director Applied the Proper Legal Standard..... | 35 |
| C. | The Regional Director Considered All of the Virtually Undisputed Evidence Regarding the Union’s Conduct at a Single Polling Location on the Day of the Election and Correctly Concluded That Longstanding Board Precedent Required the Employer’s Objection Be Overruled..... | 36 |
| 1. | The Facts Underlying the Employer’s Objection Are Virtually Undisputed And Do Not Constitute Objectionable Conduct..... | 37 |
| 2. | Long-Settled Board Precedent Compels a Finding That the Union Did Not Engage in Objectionable Conduct. | 39 |
| V. | THE EMPLOYER’S REQUEST FOR EXTRAORDINARY RELIEF MUST BE DENIED IN FULL..... | 44 |
| VI. | CONCLUSION | 45 |

TABLE OF AUTHORITIES

Federal Cases

| | |
|--|--------|
| <i>All-Seasons Climate Control, Inc. v. NLRB</i> , 232 Fed. Appx. 636 (D.C. Cir. 2007)..... | 41, 43 |
| <i>Covenant Care of Ohio v. NLRB</i> , 180 Fed. Appx 576 (6 th Cir. 2006)..... | 40, 43 |
| <i>E.N. Bisso & Son, Inc. v. NLRB</i> , 84 F.3d 1443, 1444 (D.C. Cir. 1996) | 18 |
| <i>Nathan Katz Realty LLC v. NLRB</i> , 251 F.2d 981 (D.C. Cir. 2001) | 41 |
| <i>NLRB v. Attleboro Assocs., Ltd.</i> , 176 F.3d 154 (3d Cir. 1999)..... | 29 |
| <i>NLRB v. Enterprise Leasing Co. Southeast, LLC</i> , 722 F.3d 609 (4 th Cir. 2013)..... | 44 |
| <i>NY Rehabilitation Care Mgmt. v. NLRB</i> , 506 F.3d 1070 (D.C. Cir. 2006) | 41 |

Regulations

| | |
|--------------------------|-----------|
| 29 C.F.R. § 102.67 | 9, 10, 45 |
|--------------------------|-----------|

Board and Regional Director Decisions

| | |
|--|--------|
| <i>Aaron Medical Transportation, Inc.</i> , 22-RC-070888, 2013 WL 3090117 (2013) | 41, 43 |
| <i>Adco Electric Inc.</i> , 307 NLRB 1113 (1992) | 27 |
| <i>Angelica Healthcare Services Group, Inc.</i> , 315 NLRB 1320 (1995) | 46 |
| <i>Arlington Masonry Supply, Inc.</i> , 339 NLRB 817 (2003)..... | 22 |
| <i>Atlanta Newspapers</i> , 306 NLRB 751 (1992)..... | 29 |
| <i>Aurora & E. Denver Trash Disposal</i> , 218 NLRB 1 (1975)..... | 22 |
| <i>Baker DC, LLC</i> , 05-RC-135621, 2017 WL 5067470 (2017) | 41, 42 |
| <i>Beverly Enterprises</i> , 313 NLRB 491 (1993)..... | 23 |
| <i>Boston Insulated Wire and Cable Co.</i> , 259 NLRB 1118 (1982) | 39, 40 |
| <i>Bredero Shaw</i> , 345 NLRB 782 (2005) | 19 |
| <i>Brown & Root, Inc.</i> , 314 NLRB 19 (1994)..... | 21 |
| <i>Cambridge Tool & Mfg. Co.</i> , 316 NLRB 716 (1995)..... | 45 |
| <i>Custom Mattress Manufacturing, Inc.</i> , 327 NLRB 111 (1998)..... | 25 |
| <i>Dean & Deluca New York, Inc.</i> , 338 NLRB 1046 (2003) | 11 |
| <i>Didlake, Inc.</i> , 367 NLRB No. 125 (slip. op. May 10, 2019) | 18 |
| <i>Domsey Trading Corp.</i> , 351 NLRB 824 (2007) | 18 |
| <i>Donaldson Bros. Ready Mix, Inc.</i> , 341 NLRB 958 (2004)..... | 28 |
| <i>Double J. Services</i> , 347 NLRB No. 58 (2006) | 37 |
| <i>Electric Hose</i> , 262 NLRB 186, 216 (1982) | 42 |
| <i>Entergy Mississippi, Inc.</i> , 367 NLRB No. 109 (Mar. 21, 2019)..... | 22 |
| <i>Golden Crest Healthcare Center</i> , 348 NLRB 727 (2006)..... | 21 |
| <i>Ideal Elevator Corp.</i> , 295 NLRB 347 (1989)..... | 22 |
| <i>In re Highland Tel. Coop., Inc.</i> , 192 NLRB 1057 (1971)..... | 24 |
| <i>In re Int'l Door, Inc.</i> , 303 NLRB 582 (1991) | 3 |
| <i>In re Marukyo U.S.A., Inc.</i> , 268 NLRB 1102 (1984)..... | 32 |
| <i>In re Roy N. Lotspeich Publishing Co.</i> , 204 NLRB 517 (1973) | 35 |
| <i>J.P. Mascaro & Sons</i> , 345 NLRB No. 42 (2005) | 40, 42 |
| <i>Kapstone Paper & Packaging Corp.</i> , 366 NLRB No. 63 (2018)..... | 19 |
| <i>Lebanon Apparel Corp.</i> , 243 NLRB 1024 (1979) | 18 |
| <i>Longwood Security Services</i> , 364 NLRB No. 50 (July 19, 2016) | 42, 44 |
| <i>Madison Square Garden Ct, LLC</i> , 350 NLRB 117 (2007)..... | 20 |
| <i>Marshall Engineered Prods. Co.</i> , 351 NLRB 767 (2007)..... | 18 |
| <i>Martin Enterprises, Inc.</i> , 325 NLRB 714 (1998)..... | 36 |

| | |
|--|--------|
| <i>Modesto Radiology Imaging, Inc.</i> , 361 NLRB 888 (2014)..... | 11 |
| <i>NLRB v. Jocolin Mfg. Co.</i> , 314 F.2d 627 (2d Cir. 1963)..... | 36 |
| <i>North Shore Ambulance & Oxygen Serv., Inc.</i> , 2017 WL 1737910 (2017) | 44 |
| <i>Nymed, Inc.</i> , 320 NLRB 806 (1996)..... | 25 |
| <i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006)..... | 11 |
| <i>Oakwood Healthcare, Inc.</i> , 348 NLRB at 691..... | 21 |
| <i>Oakwood Healthcare, Inc.</i> , 348 NLRB at 694..... | 33 |
| <i>Ohio Masonic Home</i> , 295 NLRB 390 (1989)..... | 23 |
| <i>Operating Eng’rs (Stone & Webster Eng’g Corp.)</i> , 283 NLRB 734 (1987) | 26 |
| <i>Ozburn-Hessey Logistics, LLC</i> , 366 NLRB No. 177 (Aug. 27, 2018) | 3 |
| <i>Performance Measurements</i> , 148 NLRB 1657 (1964)..... | 42 |
| <i>Piscataway Assocs.</i> , 220 NLRB 730 (1975)..... | 45 |
| <i>Progressive Transportation Services, Inc.</i> , 340 NLRB 1044 (2003) | 29 |
| <i>Safeway, Inc.</i> , 338 NLRB 525 (2002)..... | 37 |
| <i>Shaw, Inc.</i> , 350 NLRB 354 (2007) | 21 |
| <i>SNE Enterprises, Inc.</i> , 348 NLRB 1041 (2006)..... | 20 |
| <i>St. Barnabas Hosp.</i> , 355 NLRB 233 (2010) | 10 |
| <i>St. Francis Medical Center-West</i> , 323 NLRB 1046 (1997)..... | 21 |
| <i>Standard Dry Wall Products, Inc.</i> , 91 NLRB 544 (1950) | 18 |
| <i>Station GVR Acquisition</i> , Case No. 28-RC-208266, 2018 BL 254293 (July 18, 2018) | 10 |
| <i>The Arc of South Norfolk</i> , 368 NLRB No. 32 (2019) | 22 |
| <i>U-Haul Co. of Nevada, Inc.</i> , 341 NLRB No. 26 (2004)..... | 41, 43 |
| <i>Venture Industries</i> , 327 NLRB 918 (1999)..... | 28 |
| <i>Waverly-Cedar Falls Health Care, Inc.</i> , 297 NLRB 390 (1989) | 27 |
| <i>Willamette Industries, Inc.</i> , 336 NLRB 743 (2001)..... | 25 |

I. INTRODUCTION

The International Union of Elevator Constructors, AFL-CIO, (“Union” or “IUEC”) submits this Statement in Opposition to the Request for Review of the Regional Director’s Decision and Certification of Representative filed by Oracle Elevator Holdco, Inc. (“Employer” or “Oracle”) on February 11, 2020. In its Request, Oracle claims that the Regional Director’s 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.” (Employer’s Request for Review at p. 1.) The Employer’s assertion is entirely without merit. The Regional Director’s Decision to adopt the Hearing Officer’s Report and Recommendations, sustain the challenges to two ballots cast in the election, and overrule the Employer’s objection was amply supported by the consistent, corroborated testimony of both Union and Employer witnesses as well as the documentary evidence submitted. Oracle has not demonstrated—nor can it—that any of the Board’s limited grounds for Review exist in this case. Rather, Oracle’s Request is nothing more than a thinly-veiled attempt to challenge the sound credibility determinations of the Region. Likewise, there is no basis for Oracle’s claims that the Regional Director’s decision departs from Board precedent. Its Request should be denied in full.

Oracle additionally asks the Board to stay the Regional Director’s certification of the IUEC as the employees’ representative pending the Board’s resolution of its Request. Because Oracle has failed to shoulder the very high burden it must to be awarded any such extraordinary relief the Board should deny this request as well.

II. PROCEDURAL HISTORY AND BACKGROUND¹

A. The Stipulated Election Agreement and Election

On September 19, 2019, the IUEC filed a representation petition seeking to represent all full time and regular part time Elevator Constructor Mechanics, Apprentices and Helpers at the Company's Indianapolis and Evansville, Indiana locations. On October 1, 2019, the Regional Director approved a stipulated election agreement. The unit and eligible voters in the stipulated election agreement states:

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 as 5534 West Raymond Street, Indianapolis, and 2101 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.

The election took place on October 16, 2019. There were two polling locations and sessions: one in Evansville, Indiana, from 7:30 am until 8:30 am, and another in Indianapolis, Indiana, from 2:00 pm until 3:30 pm. The Union's observer challenged the ballots of two individuals who showed up to vote. First, the Union challenged Jason Buchanan, on the grounds that he is not employed at either of the facilities covered by the parties' stipulation. Second, the Union challenged John Effinger, on the grounds that (1) he is a statutory supervisor under Section 2(11) of the Act, and (2) his job title is actually Regional Modernizations Operations Manager, a

¹ It is the Union's understanding that the Region has transmitted to the Board the full record developed in this case, including the parties' briefs (both post-hearing and after the Hearing Officer's Report and Recommendations), transcripts, exhibits and the Hearing Officer's Report and Recommendations. In order to avoid unnecessarily cluttering the record on Review, the Union has not re-stated or re-attached the entirety of that information here. However, to the extent the Union is mistaken, the Union requests the opportunity to provide that information to the Board and/or brief a summary of the evidence in full before the Board rules on Oracle's Request for Review.

job classification that is not included in the unit stipulation. The tally of ballots was seven (7) in favor of the Union and six (6) opposed. After the election, Oracle filed one objection claiming that the presence of several Union representatives in the vicinity of the Indianapolis facility during the second polling session was “intimidating” to voters and “prevent[ed] a fair election.” Both the Employer and the Union filed evidence and argument with the Region regarding the challenges and objection. After conducting an investigation, the Regional Director set a hearing on the two challenged ballots and the objection.

B. Proceedings Before the Hearing Officer and His Report and Recommendations

The hearing took place on November 15 and 18, 2019 before Hearing Officer Raifael Williams. The parties presented extensive witness testimony² and documentary evidence regarding their respective positions on the challenges and objection. The IUEC provided the testimony of seven witnesses – four Oracle employees employed by the Employer through the date of the election, as well as two employees who left earlier in the year and one third party witness:

² A number of the Union’s witnesses had no personal or professional interest in the outcome. Prior to the hearing, Larry Brys, Jeremiah Brys, and Fehrenbacher had voluntarily left their employment with Oracle.² (Brys, L. 35; Brys, J. 92; Fehrenbacher 164.) See *In re Int’l Door, Inc.*, 303 NLRB 582, 582 n.1, 588-89 (1991) (adopting ALJ’s decision crediting former employees of the employer because there was a “lack of apparent bias” in their testimony and that their “mutually corroborated testimony” was “compelling and convincing”). Griffin was employed by a different branch of Oracle in Kentucky not involved in this representation proceeding. (Griffin 206.) Hendrickson has been employed by an employer with no relationship to Oracle since 2005. (Hendrickson 197.) By contrast, all of the Employer’s witnesses were individuals whom have an interest in the outcome of the proceeding, including two supervisors. See *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 31 (Aug. 27, 2018) (noting that employer’s witnesses had “some interest in the outcome” of the proceeding because they were “supervisors” and “rather high-ranking managers”). Thus, both the Hearing Officer and the Regional Director had additional reason to credit the testimony of the Union witnesses over the Employer’s witnesses on a number of occasions, as a witness’s self-interest in the outcome of a proceeding is a factor to be considered in making credibility determinations. *Sam’s Club v. NLRB*, 141 F.3d 653, 659 (6th Cir. 1998).

(1) Larry Brys, Operations Manager for Oracle's Indiana offices until his departure in late June 2019; (2) Jeremiah Brys, Modernization Technician at Oracle's Indiana offices from April 2017 until after the election, in late October 2019; (3) Kelly Fehrenbacher, Customer Service Associate for Oracle's Evansville, Indiana office until her departure in March 2019; (4) Benjamin Fromme, Modernization Apprentice at Oracle's Indiana offices; (5) Rich Hendrickson, Construction & Modernization Superintendent at Murphy Elevator; (6) Andrew Griffin, Repair Technician at Oracle's Kentucky offices; and (7) Joshua White, Service Technician at Oracle's Indiana offices. The Union presented thirty exhibits, including internal Company documents referencing or completed by Effinger, and documents relating to the hire and branch assignment of Buchanan. The Employer provided the testimony of four witnesses from Oracle: (1) Joel Stafford, Repair Technician at Oracle's Indiana offices; (2) Jason Buchanan, (3) Jon Effinger, and (4) Cory Ernst, Branch Manager for Oracle's Indiana offices. The Employer presented twelve exhibits, five of which were photographs taken at the Employer's Indianapolis facility taken the day of the election, a copy of the stipulated election agreement, a signed statement by Jason Buchanan submitted to the NLRB, or emails between the attorneys in the case. After the close of the hearing, the parties were permitted to file post-hearing briefs summarizing both the evidence presented and their arguments regarding the challenges and objection.

After the hearing and having considered the record in full, the Hearing Officer issued a report on December 23, 2019 ("Hearing Officer's Report"). The Hearing Officer recommended that the Petitioner's challenges to the ballots of Effinger and Buchanan be sustained and that the Employer's objection be overruled. (Hearing Officer's Report at 13.) With regard to Effinger, the Hearing Officer noted that the critical issue was not whether Effinger had ever been a supervisor: the parties agreed that that he served as a 2(11) supervisor as Regional Modernization Manager

(“RMM”) in late 2018 and possibly early 2019. Rather, the question was whether Effinger continued to exercise supervisory authority under the Act until the fall of 2019.

The Hearing Officer concluded that the evidence demonstrated Effinger is a statutory supervisor under Section 2(11) of the Act, as he continued, throughout 2019, to have the authority to engage and to actually engage in several supervisory functions: assigning work, recommending employee hire, adjusting grievances, and performing evaluations tied directly to compensation increases, using independent judgment in doing so. The Hearing Officer also found that Effinger possesses a number of secondary indicia of supervisory status. (Hearing Officer’s Report at pp. 5-9.) In so finding, the Hearing Officer relied upon the testimony of both the Union’s and Oracle’s witnesses, including specific examples of Effinger engaging in supervisory functions. The Hearing Officer expressly credited the testimony which was consistent with and corroborated by the documentary evidence. (*Id.* at pp. 5-9.)

With regard to Buchanan, the Hearing Officer found that Buchanan was not an employee in the unit covered by the parties’ Stipulated Election Agreement, as the “evidence demonstrate[d] that Buchanan has had effectively no connection with either the Evansville or Indianapolis facilities from the time that the Employer rehired him, in November 2018, through the date of the election over eleven months later.” (*Id.* at p. 10.) In so finding, the Hearing Officer credited the testimony of a former Oracle customer service employee, a number of Employer-provided documents, and consistent testimony from both Union and Oracle witnesses – all demonstrating overwhelmingly that Buchanan was employed at Oracle’s Louisville, KY location (and not any of the locations covered by the Election Agreement). (*Id.*)

As for the objection, the Hearing Officer concluded that there was “insufficient evidence demonstrating that the representatives of the Petitioner engaged in objectionable conduct during

the election.” (*Id.* at p. 13.) This was because the undisputed testimony and evidence demonstrated *inter alia* that: (1) the Petitioner’s representatives were present at only one of two polling sessions; (2) during that one session, they were present in the general vicinity of only one of the two entrances that voters could use to enter the facility; (3) they remained off Oracle’s property, and at least 100 feet away from that one entrance to the facility (the rear entrance); and (4) they had no interactions with any employees before they voted, and only one or two brief conversations with employees which took place after the employee exited the facility where the vote took place. (*Id.*) The Hearing Officer recommended that the appropriate certification of the results issue. (*Id.*)

On January 6, 2020, the Employer filed fifty-five (55) exceptions to the Hearing Officer’s report and recommendations. Many included exceptions to factual findings made by the Hearing Officer which had no bearing upon his ultimate factual and legal conclusions. Others were exceptions to factual findings that were relevant to the Hearing Officer’s conclusions, but which were, in fact, amply supported by substantial and credible record evidence. The remainder were exceptions to factual and legal conclusions made by the Hearing Officer which were supported by substantial and credible record evidence and entirely consistent with long-settled Board precedent. The Union timely filed a response to the Employer’s exceptions.

C. The Regional Director’s Decision

On January 28, 2020 after careful review of the record, Regional Director Patricia K. Nachand issued a Decision (“Regional Director’s Decision” or “Decision”) sustaining the challenges to Effinger’s and Buchanan’s ballots and overruling the Employer’s objection. The Regional Director certified the Union as the exclusive collective-bargaining representative of the appropriate bargaining unit of the Employer’s employees.

With regard to Effinger, the Regional Director agreed with the Hearing Officer that the substantial and credible record evidence demonstrated his continuing status as a Section 2(11) supervisor. She stated: “The Employer argued that Effinger did not have or exercise any supervisory after December 2018 or January 2019, asserting that point forward, Effinger only worked with tools in the field and simply delivered instructions to other employees on behalf of General Manager Ernst.... I disagree.” (Decision at pp. 2-3.) In so doing, she relied on the testimony of the Petitioner’s disinterested witnesses, substantiated by significant documentary evidence that Effinger used independent judgment to assign employees’ work, transfer them between jobsites, and order materials well beyond December 2018 or January 2019 and until at least September and October of 2019. (*Id.* at 3.) The Regional Director also found that the evidence presented – including testimony and documents provided by the Employer – showed that during the same time frame Effinger participated in employee evaluations (which are directly tied to employee pay raises at Oracle), recommended specific ratings and pay raises based on his personal knowledge to Ernst, and Ernst followed those recommendations. (*Id.*) The Regional Director also concluded that the evidence showed Effinger also “recommended the hire of employees and used independent judgment to adjust grievances related to employee work hours and pay” after January 2019. (*Id.*) The Regional Director specifically concluded that: “the Employer failed to present clear and specific evidence contradicting the testimony and corroborating documentary evidence of instances in which Effinger used independent judgment to perform supervisory functions and effectively recommend such functions” throughout 2019. (*Id.*)³ To the contrary, she found “although Ernst and Effinger testified that Effinger was transferred to

³ Though she explained that secondary indicia were not dispositive, the Regional Director also cited to a number of secondary indicia of Effinger’s supervisory status appearing throughout the record. (*Id.* 3.)

Senior Modernization Technician around December 2018 or January 2019, there is no documentary evidence to corroborate such a transfer. Throughout 2019, Effinger's email signatures identified him as the Mod Manager, Effinger continued to sign in to meetings as "Mod Manager," and until at least September 2019, the company directory continued to show Effinger as Mod Manager." (*Id.* 3-4.)

With regard to Jason Buchanan, the Regional Director found no merit to the Employer's contention that Buchanan's work location was in Indiana and he was therefore eligible to vote in the election, as there was "no evidence that the work he performed at the Evansville facility was more than sporadic." (*Id.* at 6.) Rather, "the undisputed evidence showed that all of Buchanan's regular work hours were worked from the Employer's Louisville, Kentucky facility and since around November 12, 2018 Buchanan worked only 52 hours from the Employer's Evansville facility." (*Id.* at 5 (emphasis added).) The Regional Director cited numerous pieces of testimony and documentary evidence supporting a finding that Buchanan was employed in Louisville. (*Id.*) All but one of Buchanan's three offer letters admitted referred to Buchanan as a Kentucky employee, and the remaining one simply had the typed word "Louisville" crossed out with a handwritten notation of "Evansville" written above it. (*Id.*) Buchanan was listed in the Employer's directory as a Kentucky employee. (*Id.*) Moreover, his direct supervisors worked in Kentucky, and he had no personnel file, mailbox, or uniforms laundered in Evansville or Indianapolis. (*Id.*) The Regional Director considered the single piece of evidence relied upon by the Employer – that Buchanan receives a per diem when he worked outside of Evansville – and found it was not determinative, particularly because the record showed that he received a per diem on days when he did not record any work hours from any branch location. (*Id.*)

Finally, the Regional Director agreed with the Hearing Officer and concluded that the Employer's objection was meritless and must be overruled. She pointed out that agents of the Union were only present at one of two polling places, and only in the vicinity of one of two entrances to that polling place. Even with respect to that one entrance, the Regional Director noted that the Union agents were "not situated in the area at or near the polls." (*Id.* at 7.) It was also undisputed that the Petitioner engaged in no electioneering and that no "no-electioneering zone" was designated by the Board Agent. (*Id.*) The Regional Director also noted that the testimony of employee witnesses presented by both sides showed that no employees had contact with the representatives or even knew who they were until after voting. (*Id.*) The Regional Director concluded "the Petitioner's presence could not have interfered with free choice if employees did not know it was Petitioner stationed behind the Employer's facility until *after* they voted." (*Id.*)(emphasis in original.)

Following the Regional Director's decision, Oracle filed its Request for Review.⁴

III. LEGAL STANDARD FOR REQUEST FOR BOARD REVIEW

Few burdens are greater in the practice before the National Labor Relations Board than the burden imposed upon parties seeking the Board's review of a Regional Director's decision under Section 102.67 of the Rules and Regulations. "The Board will grant a request for review only where *compelling reasons* exist therefore." 29 C.F.R. § 102.67(d) (emphasis added). Not any compelling reason will suffice; instead, a party must show 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.

⁴ Along with its forty-three page Brief in support of its Request for Review, the Employer attached a 393-page document containing "Exhibits," in apparent contravention of the requirement that requests for review shall not exceed fifty pages absent the Board's permission. 29 C.F.R. § 102.67(i)(1).

(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.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. §§ 102.67(d)(1)-(4). The Board has described the requirements of Section 102.67 as “stringent.” *St. Barnabas Hosp.*, 355 NLRB 233, 233 (2010)). *See generally Station GVR Acquisition*, Case No. 28-RC-208266, 2018 BL 254293 (July 18, 2018). Oracle alleges that its request for review is based on grounds (1) and (2). (Request for Review at 3.) For the reasons explained below, Oracle’s claims are without merit and its Request for Review should be denied in its entirety.

IV. LEGAL ANALYSIS

A. The Record Demonstrates that Effinger Is a Supervisor Within the Meaning of Section 2(11) of the Act.

The record developed by the Region over the course of these proceedings establishes that Effinger was ineligible to vote based on his status as a Section 2(11) supervisor. Indeed, the Regional Director’s conclusion in this regard was the only logical conclusion in light of the substantial and credible record evidence.

It is well-established that individuals are supervisors and thus not permitted to vote in a Board representation election “if (1) they hold the authority to engage in any one of the supervisory functions listed in Section 2(11) of the Act; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.” *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 888 (2014) (emphasis added). Thus, if an individual exercises independent judgment with regard to any single

function of the twelve described in Section 2(11) of the Act, he is a supervisor and must be excluded from any potential bargaining unit. *Oakwood Healthcare, Inc.*, 348 NLRB at 694. The supervisory functions listed in Section 2(11) include the authority to hire, transfer, suspend, promote, discharge, assign, reward, discipline, responsibly direct employees and adjust employee grievances, or to effectively recommend such actions. 29 U.S.C. § 152(11). The "burden of proving supervisory status rests on the party asserting that such status exists"; supervisory status must be established by a preponderance of the evidence. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

As will be explained in more detail in the sections to follow, the Regional Director concluded that Effinger is a supervisor under the Act based on all of the record evidence, which included a number of specific examples of Effinger's exercise of several of the supervisory functions identified in Section 2(11) while exercising independent judgment. The documentary evidence and testimony also confirmed that these specific examples were representative of Effinger's regular and continued exercise of this authority. Consequently, the Union more than satisfied its burden in establishing that Effinger is a Section 2(11) supervisor and the Regional Director correctly concluded the challenge to his ballot should be sustained on this basis.

1. The Record Evidence Demonstrates that Effinger Made Employee Work Assignments and Effectively Assigned Work, Exercising Independent Judgment While Doing So.

The Regional Director correctly concluded that the record contained "testimonial and substantiating documentary evidence which showed that up until at least September or October 2019, Effinger used independent judgment to assign work to employees, transfer employees between jobsites and order materials and parts for modernization jobs on which he was not working." (Regional Director's Decision at p. 3.)

Oracle claims in its Request that “none of the Union’s witnesses” presented at the hearing “had first-hand knowledge of whether Effinger was making decisions himself or simply communicating messages...on behalf of General Manager Ernst.” (Employer’s Request for Review at 12.) The Employer additionally asserts that 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.” (*Id.* at 11.)

The Employer’s contentions are contradicted by the witnesses’ testimony and record evidence. Former Oracle Operations Manager Larry Brys testified that between fall 2018 and the end of June 2019 (when Larry voluntarily left Oracle), he saw and worked with Effinger face-to-face at least twice a week at Oracle’s Indianapolis offices. (Brys, L. 60, 66-67.)⁵ Throughout that time, he observed Effinger independently assign Mod Technicians and Apprentices, without input from anyone else, to work at different jobsites, performing different modernization projects based on scheduling considerations, efficient use of manpower, and availability of parts and material, much of which Effinger was responsible for ordering. (Brys, L., 52-54.) He also testified that he and Effinger would make arrangements to “borrow” technicians between departments for a day or two. (Brys, L. 60.) Larry testified that he and Effinger made these arrangements on their own, without seeking approval from Ernst. (*Id.*, 76-78.)

Modernization Department employee Jeremiah Brys corroborated Larry Brys’s testimony, and also testified regarding specific examples in which Effinger assigned and directed the work of Mod Technicians and Apprentices in real-time, without first consulting Ernst. Jeremiah, who

⁵ Citations to the transcript from the hearing shall be by name of witness, followed by page number. Citations to exhibits submitted at the hearing shall be as follows: BX for Board Exhibits, EX for Employer Oracle Exhibits, PX for Petitioner IUEC Exhibits.

worked alongside Effinger on a daily basis, side by side in the field as a Mod Apprentice between April 2017 and late October 2019, testified that Effinger routinely assigned work to him and other employees in the modernization department, including Rocky Jividen, Jason Zornes and Josh White.⁶ (Brys, J. 92, 96-99, 101, 104, 117-118, 157.) Effinger would tell the modernization employees in person, call, text or email them to assign them to different Mod jobs, on both a long term basis (several weeks or months) and a more temporary basis (a few days). (*Id.* 207.) Jeremiah provided four specific examples—three in writing—of these assignments, all of which took place after Effinger had supposedly been removed from the RMM position. For example, in February 2019 he sent the following emails to Zornes and Jeremiah:

You all are going to work in Louisville Mon-Wed at ResCare. Can report to Louisville office at 730? Be working with Buchanan and a few guys. Sorry late notice. I've been slammed and meant to email Friday.

Possibly back at Shindigz Thurs if Smartrise order comes in.

Jon Effinger
Regional Modernization Operations Manager

(PX 3.) Jeremiah testified that Effinger sent him from Indiana to Kentucky to help replace 2-1 cable on that specific kind of elevator, because Effinger knew that he had experience with that kind of work and knew his skills and experience would be helpful in finishing the job. (Brys, J. 108-09.) Notably, Effinger admitted that he effectively recommended this assignment to Ernst (and/or Roger Smith, the Kentucky branch manager). Effinger admitted that: (1) he knew that the

⁶ In its Request, Oracle relies on White's testimony that Cory Ernst made the decision to transfer White from his position as a Mod Apprentice to a Service Mechanic on a permanent or semi-permanent basis to support its claim that the "undisputed testimony was that Ernst, [and] not Effinger, determines where the modernization technicians will work[.]" (Request for Review at 11.) However, the fact that Branch Manager Ernst may have made the decision to transfer an employee from the Modernization Department to another department does not contradict the strong record evidence that Effinger assigned and directed the day-to-day work of the Mod Technicians and Apprentices while they were in the Mod Department.

modernization technicians in Louisville were performing this specific job; (2) he knew they were having trouble with it; (3) he recommended taking specific personnel away from their current job—Shindigz, in Fort Wayne—to travel out of state and work on the job; and (4) his recommendation was followed. (Effinger 376-77; *see also* Brys, J. 113.)

Likewise, on August 28, 2019, he emailed Zornes and Jeremiah:

Plan for tomorrow is first to go to Mollenkopf and finish that job. After that is finished go to Wilson Street to finish out the day. Fri at Wilson Street as well.

Jon Effinger
Regional Modernization Manager

Jon Effinger
Regional Modernization Operations Manager
812 707 1663

(PX 4.) The Mollenkopf job was in West Lafayette, over an hour from Indianapolis, where the Wilson Street garage is located. (Brys, J., 113.) Once again, Effinger admitted he effectively recommended the assignment to Ernst. Effinger testified although he wasn't personally working on Mollenkopf, he knew how much work was left on the job and he gave Ernst his "opinion,"—which Ernst followed—that Zornes and Jeremiah be assigned to finish it up and then proceed to a different job, over an hour away, later that same day and for the rest of the week. (Effinger 380; Brys 113.) *See also* PX 4 (text message from Effinger to Jeremiah in **July 2019** assigning Jeremiah to one modernization job for that week, and a separate job when he returns from vacation); Brys, J., Testimony at 108 (describing in detail a specific work assignment from Effinger removing him from one modernization job and reassigning him to another in **September 2019**).

Additional documents and testimony introduced by the Union go even further to demonstrate Effinger's status as a Section 2(11) Supervisor. Not only do they corroborate the

consistent testimony of the witnesses, they also show that Effinger used independent judgment in making his assignments. In addition to the texts and emails showing Effinger actually assigning work, the record also contains witness testimony and documentary evidence showing that Effinger continued to perform several job duties and responsibilities of the RMM right up until the election. Specifically, throughout 2019, Effinger continued to request and receive from Mod employees weekly punch lists of tasks remaining on their projects, hours projections showing their expected upcoming labor costs, and requests to order parts⁷ for their various jobs. (Brys, J., 98-99; 141; White 239; 244; PX 23. Brys, J. 102-04; see also PX 22, PX 23. Effinger 356, 358, 361, 388, Ernst 484-85.) The performance of these continued functions and types of oversight establishes that Effinger uses independent judgment to assign modernization work in Indiana—and sometimes beyond—as he is keeping track of the progress of the jobs, the availability of parts and materials, the needs of the customers and the Company, and the skills and availability of the manpower.

Unable to show that Effinger did not assign work, Oracle admits that Effinger often told people where they would be working, but asserts that Effinger was just the “messenger” and never assigned anyone anywhere unless he was first instructed to do so by Ernst or another Branch Manager. Oracle claims that the “Regional Director ignored the clear weight of the evidence showing that Effinger did not assign or effectively recommend assignment of other employees using independent judgment.” (Employer’s Request for Review at p. 10.)

⁷ In a footnote on page 17 of its Request, the Employer claims that “Effinger can make only small purchases, [as] his credit card limit is \$2,000/month and purchase orders require approval.” (Employer’s Request for Review at p. 17, n.5.) However, the evidence established that Effinger uses company accounts and purchase orders, in addition to his corporate credit card, to make purchases on Oracle’s behalf. (Effinger 362. *See also* Brys, J. 100-102; 162-3; Brys, L. 52-53; White, 240, 245-46.). While Ernst apparently can “veto” purchases made by Effinger, Oracle presented no examples of him ever doing so. (*Id.*)

This argument fails. The Regional Director considered all of the testimonial and documentary evidence submitted by the parties to the Region, and correctly found that the credible and corroborated evidence established that Effinger “used independent judgment to assign work to employees [and] transfer employees between jobsites.... Throughout 2019, Effinger also effectively recommended work 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.)

As set forth above, multiple witnesses testified that they routinely observed Effinger assigning work. A number of specific examples of Effinger doing so, including several in writing, were also provided to the Region and discussed above. The evidence is clear that Effinger himself assigns the work. Multiple witnesses testified that he does so on his own. (Brys, L, 50-51; Brys, J. 105-116; 158-60; White 271-2.) None of the emails or text messages which show Effinger assigning work come from Ernst, are sent to Ernst, cc Ernst, or even mention Ernst. (PX 3, 4, 5.) And, despite the Union’s specific subpoena request for documents showing how work is assigned to Mod Technicians and Apprentices, Oracle provided no documents or other evidence suggesting that Ernst makes work assignments, or that Effinger consults with Ernst before Effinger assigns the work. (Ernst 564.) As the Regional Director correctly notes, “despite its exceptions and supporting arguments, the record shows that the Employer failed to present clear and specific evidence contradicting the testimony and corroborating documentary evidence of instances in which Effinger used independent judgment to perform supervisory functions and effectively recommend such functions.” (Decision at 3.)

Oracle attempts to discredit the Union’s witnesses’ testimony in this regard by emphasizing that the employees were not present for each and every conversation held between Ernst and

Effinger; thus, they could not speak directly to the content of each conversation. (Employer' Request for Review at 12.) The Employer argues that the corroborated testimony of the Union witnesses should be discredited in favor of Ernst's and Effinger's statements that, while Effinger may have ultimately communicated work assignments and directions, the substance of those communications came from decisions articulated to him by Ernst during constant "behind-the-scenes" conversations to which the Union's witnesses were not privy. (*Id.* at 11-12.)

Essentially, the Employer argues that the Regional Director erred in crediting the consistent testimony of multiple witnesses cited above (which was corroborated by documentary evidence) over its own witnesses' bare assertions that Effinger did not make any decisions on his own regarding assignments and that all such decisions came from Ernst. (Employer's Request for Review at pp. 9-16.) In other words, the Employer seeks to overturn the Regional Director (and the Hearing Officer's) determinations regarding the credibility of the testimony of certain witnesses over others, even where the testimony credited was corroborated by the documentary evidence. Such an argument fails in a number of respects and is wholly insufficient to warrant Board Review.

As an initial matter, it is well-established that Regional determinations as to witness credibility should not be disturbed "unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect." *See e.g., Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951); *Didlake, Inc.*, 367 NLRB No. 125, at 2 (slip. op. May 10, 2019). *See also E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444 (D.C. Cir. 1996) (explaining that a hearing officer is "uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict," and so his "credibility determinations may not be overturned

absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible”).

In any event, it was entirely appropriate for the Regional Director to credit testimony that was consistent and corroborated by documentary evidence. In fact, Board precedent provides that a failure to consider documentary evidence when making credibility determinations can constitute reversible error. *See, e.g., Marshall Engineered Prods. Co.*, 351 NLRB 767, 768-70 (2007) (where the Board held that it was reversible error for the ALJ to credit the testimony of one employee over the inconsistent testimony of other employees because the testimony of the other employees was corroborated by documentary evidence); *Domsey Trading Corp.*, 351 NLRB 824, 836-37 (2007) (error for ALJ to credit “unsupported...testimony” over information contained in documentary evidence); *YHA, Inc. v. NLRB*, 2 F.3d 168, 173-74 (6th Cir. 1993) (error for ALJ and Board to credit testimony of union official when this testimony was contradicted by other testimony that was consistent with corroborating documents). The converse is also true, namely, the Board routinely upholds credibility determinations which take into account documentary evidence. *Lebanon Apparel Corp.*, 243 NLRB 1024, 1024-26 (1979) (proper for ALJ to discredit General Counsel’s witness when witness was contradicted by employer’s documentary evidence); *Kapstone Paper & Packaging Corp.*, 366 NLRB No. 63 (2018) (upholding ALJ’s credibility determination when, presented with conflicting testimony, ALJ credited testimony of witnesses that was corroborated by documentary evidence).

Moreover, in order to satisfy the burden required to establish that an individual is a supervisor under Section 2(11) of the Act, it is not necessary to establish that the individual never communicated something otherwise decided by a higher-level supervisor. Contrary to Oracle’s suggestion, it is not necessary for non-supervisory witnesses to be present for the full content of

each and every exchange between the alleged supervisor and a higher-level supervisor in order to adduce sufficient evidence to establish supervisory status under the Act. This is particularly so where the individual's supervisory authority is established in part by specific examples of occasions on which that individual exercised such authority in real time without any opportunity to first consult with an admitted supervisor. *See, e.g., Bredero Shaw*, 345 NLRB 782, 782-84 (2005) (The Board concluded that two "lead/charge hands" were supervisors under the Act despite the Employer's contention to the contrary, as the record contained specific examples in which they had engaged in supervisory authority (i.e., sent employees home and granted a time off request) without first consulting with any higher-level supervisor). In this case, the Regional Director appropriately considered (and credited) the Union witnesses' firsthand testimony detailing a number of specific examples wherein Effinger responsibly directed and assigned the work of the Modernization employees on-the-spot, without first consulting Ernst. (Decision at 3.)

Furthermore, the testimony of Oracle's own witnesses contradicts Oracle's claims that all assignments came from Ernst without any effective recommendation by Effinger. As noted above, Effinger admitted making effective recommendations related to work assignments in his own testimony. (Effinger 380-382; 385-86) Ernst also admitted that he relies heavily on Effinger to oversee all jobs within the Mod department. He testified:

I utilize [Jon Effinger] a lot for help in the Mod department...I just lean on him heavily. I wear quite a few hats in my role assisting quite a few different people in different areas...I use Jon to kinda help bridge that gap, and help me keep Mods on track while I'm able to assist with the other branches, the other aspects of the office.

(Ernst 467-68.)

As noted above, neither Ernst nor Effinger identified any occasion on which Effinger's work assignment recommendations were not followed. Finally, Effinger and Ernst admitted that

Effinger continues to have authority to order materials for a variety of modernization projects for himself as well as other techs. (Effinger 356, 358, 361, 388, Ernst 484-85.)

Oracle's final argument that Effinger did not exercise independent judgment in making or effectively recommending work assignments is that he was merely a "more experienced" employee or "leadman" who provides the ultimate supervisor with simple factual observations and directs lower-level employees in a routine manner that does not involve judgement. This argument also fails.

The Board has routinely recognized the concept of a "first-line" supervisor: an individual who may not have the highest level of authority but who has "the most day-to-day contact with the employees and can broadly impact employees' daily working lives." *Madison Square Garden Ct, LLC*, 350 NLRB 117, 121, 121 n.14 (2007). *See also SNE Enterprises, Inc.*, 348 NLRB 1041, 1043 (2006) (recognizing the concept of a first-line supervisor and explaining that "[w]hile such a supervisor may not necessarily have the authority to hire, fire, transfer, or promote, his or her authority to assign and responsibly direct can impact broadly on subordinates' daily work lives"). Thus, simply because Ernst may be the top-level supervisor does not mean that Oracle does not employ other supervisors, such as Effinger; in fact, Oracle admitted to having other supervisors below Ernst, including Larry Brys and Gary Terry.⁸ *See, e.g., Oakwood Healthcare, Inc.*, 348 NLRB at 691 (explaining that supervisory status under the Act is not limited only to supervisors of the highest level and that a front-line supervisor who has "men under him," and decides "what job shall be undertaken next or who shall do it...is a supervisor [under the Act], provided that the direction is both "responsible" and carried out with independent judgment).

⁸ Gary Terry is the Service Supervisor in Evansville, Indiana.

Furthermore, the assignments made by Effinger were not limited to “routine” tasks with no room for the exercise of independent judgment, as in the cases on which the Employer relies. *See Shaw, Inc.*, 350 NLRB 354 (2007) (lead person not a supervisor where he assigned only routine tasks prescribed by established practices and supervisor direction, which did not allow for independent judgment); *Golden Crest Healthcare Center*, 348 NLRB 727 (2006) (charge nurses did not exercise independent judgment when they engaged in the “ministerial function” of calling employees from a rotating, seniority-based list to inform the employees they were “mandated” to come to work and fill a scheduling hole, after the charge nurses received permission from a supervisor to “mandate” employees from the list); *St. Francis Medical Center-West*, 323 NLRB 1046 (1997) (employee did not exercise independent judgment in encouraging an ill employee to stay home from work upon her call; generally, when employees called in sick, they were given the day off and/or had the right to take time off if they chose); *Brown & Root, Inc.*, 314 NLRB 19 (1994) (no independent judgment involved in assignment of employees to certain crews based on knowledge of their particular craft/qualifications and gaps in a particular craft/qualification on a crew).

By contrast, and as the Regional Director recognized, the evidence in this case showed that Effinger assigned individual Mod employees to particular projects and work; was keenly and uniquely aware of the needs of the modernization projects and assigned the Mod employees under him from job to job depending on the changing demands; and the record contains a number of specific examples detailed in witness testimony and corroborated by documentary evidence. Board law makes it clear this establishes supervisory status and is indicative of the requisite level of independent judgment. *See, e.g., Entergy Mississippi, Inc.*, 367 NLRB No. 109 (Mar. 21, 2019) (dispatchers were statutory supervisors where they assigned employees to places by prioritizing

multiple outages and deciding how many employees to send to repair outages; dispatchers considered range of factors when prioritizing outages and there were no standard operating procedures or rules for dispatchers to follow when prioritizing outages); *The Arc of South Norfolk*, 368 NLRB No. 32 (2019) (finding that program coordinators were supervisors because they had authority to assign significant overall duties based on independent judgment); *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003) ("maintenance supervisor" in employer's vehicle maintenance garage was found to be statutory supervisor who assigned work, as the individual prioritized the maintenance work that needed to be done and assigned specific jobs to mechanics, while reserving other duties for himself); *Aurora & E. Denver Trash Disposal*, 218 NLRB 1, 16 (1975) (foreman's responsibility for "making route assignments" and "being certain that the routes are serviced" were significant indications of supervisory status); *Ideal Elevator Corp.*, 295 NLRB 347, 349 (1989) (foreman was supervisor under Section 2(11) of the Act where he "assigned work to employees on a daily basis").

2. The Regional Director Considered All Evidence Regarding Effinger's Role in the Employee Evaluation Process and Appropriately Determined It Established His Status as a Section 2(11) Supervisor.

The Employer next contends – despite record evidence to the contrary – that Effinger did not play a substantive role in the employee evaluation process, which is indisputably tied directly to employee compensation at Oracle. (Request for Review at pp. 18-21.) Rather, Oracle claims, Effinger merely "provided factual information" to Ernst as part of this process.

Contrary to Oracle's claims, the Regional Director correctly determined that Effinger engages in the additional supervisory function of evaluating and rewarding employees. Although Section 2(11) does not include "evaluation" as one of the enumerated supervisory functions, the Board holds that participation in employee evaluations that directly affect the "rate of pay increase, if any, for the appraised employee" falls under the Section 2(11) supervisory function of giving a

“reward” to an employee. *See, e.g., Beverly Enterprises*, 313 NLRB 491 (1993) (explaining that the Board has “consistently found” that charge nurses were supervisors where “they performed evaluations of other employees and it was apparent that the evaluations led directly to personnel actions affecting the employees, such as merit raises”); *compare Ohio Masonic Home*, 295 NLRB 390, 393 (1989) (Board determined nurses did not have supervisory authority to evaluate where there was “no evidence in the record that establishes that employees have been affected as a result of these evaluations.”).

As the Regional Director explained, the evidence showed:

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 3.)

And, the substantial and credible record evidence, including testimony from the Employer’s witnesses, establishes just that. Jeremiah Brys testified that for all of his evaluations at Oracle, including his most recent evaluation in June 2019, Ernst has asked Effinger to provide all of the input on his performance. For example, the evaluation contains a rating system on a scale of 1-5 for ten different areas of performance. Jeremiah testified that Ernst asks Effinger to provide the appropriate number for each area, and then Ernst fills in the number Effinger provides. (Brys, J 127-8; PX 8; Brys, L. 43 (testifying that he played the same role in performance reviews as a supervisor at Oracle).) Effinger then signs the Mod Department evaluations for Oracle on the line marked “supervisor.” (Brys, J. 121-23; Ernst 499-500.) This testimony was corroborated by the documentary evidence admitted, including copies of signed evaluations. (PX 8; EX 10.)

Oracle witness Ernst corroborated this evidence. Ernst admitted at hearing that “for the Modernization side, I typically have Jon come in and sit in the reviews with me, and that was because Jon worked hand in hand with these guys.”⁹ (Ernst 489; EX 10.) Ernst does not invite any other Technicians to participate in other employees’ evaluations; only supervisors are involved. (Id. 489-490.) Ernst testified that in addition to providing the information for employees in the 1-5 rating system, Effinger also provides him with the information to fill out the remainder of the evaluation, which asks for strengths, weaknesses, and goals/suggestions to provide the Mod Department employee. (Ernst 490, 501.)

While Ernst and Effinger testified that only Ernst has the authority to request pay raises, witness testimony and emails from Oracle’s corporate office showed that employee pay raises are directly and explicitly tied to performance reviews.¹⁰ (EX 10; Brys, L. 43; Brys, J. 121-23; Ernst

⁹ Oracle claims in its Request for Review that the Regional Director improperly found supervisory status because the Union only provided one written example of Effinger participating in an evaluation in this fashion after he allegedly left his position as RMM. (Request for Review at pp. 20-21.) But as Ernst testified at hearing, it is his “typical” practice to have Effinger participate in precisely this way. (Ernst 489.) Cf. *In re Highland Tel. Coop., Inc.*, 192 NLRB 1057, 1058 (1971) (no supervisory status found where crew leaders were only “occasionally” consulted about a particular employee’s progress and only one employee was granted a raise after a crew leader recommended the same).

¹⁰ Consequently, several of the cases upon which the Employer relies in support of its argument that the Decision departed from Board precedent are readily distinguishable, as they involved situations in which evaluations did not have an impact on employee wages. (Request for Review at p. 18.) See, e.g., *Willamette Industries, Inc.*, 336 NLRB 743, 744 (2001) (where the Board concluded leads did not exercise supervisory authority in evaluating permanent employees, as: (1) their participation was essentially limited to “listing employees’ production and hours worked on particular machines”; and (2) the evaluations had no impact on employee wages or job status); *Nymed, Inc.*, 320 NLRB 806, 813 (1996) (LPNs were not supervisors based on their participation in employee evaluations, where there was no evidence the annual reviews had an impact on employee pay increases and there was evidence of specific examples where higher-level supervisors changed information and recommendations proffered by an LPN for consideration of use in employee evaluations).

500.) Moreover, while Ernst may put in the official request for a raise, and in what amount, the evidence shows that this is a *pro forma* activity: Oracle's own emails show the requests are always granted, often minutes after he sends them. (EX 10; Ernst 561-62.) Rather, the fact and amount of the raise are based upon the strength of an employee's review, which in turn is based largely, if not entirely, upon input from the "supervisor." In the Mod Department is Effinger. Indeed, both Effinger and Ernst testified that Effinger recommended a sizeable increase for Jeremiah Brys in June 2019, Ernst made the request, and it was granted. (Ernst 500; Effinger 394; ER 10.) *Cf. Custom Mattress Manufacturing, Inc.*, 327 NLRB 111, 111-112 (1998) (a case relied upon by Oracle in which a senior employee was not a supervisor under the Act, as there was no evidence to establish that her "recommendations" regarding whether an employee should or should not receive a pay increase was afforded any weight by the Employer; there was also no evidence establishing the employer solicited the employee's recommendations as to wage increases nor vested her with any authority to make such recommendations).

3. The Regional Director Considered All Evidence Relating to Effinger's Effective Recommendations of Employees for Hire by Oracle and Appropriately Concluded That Effinger Made Such Recommendations.

In addition to her findings regarding the preceding supervisory indicia, the Regional Director agreed with the Hearing Officer's conclusion that "Effinger effectively recommended the hire of employees[.]" (Decision at 3.). The record evidence and Board precedent amply supports this finding. *See, e.g., Operating Eng'rs (Stone & Webster Eng'g Corp.)*, 283 NLRB 734 (1987) (where the Board held that an individual was a supervisor despite the direct lack of authority to hire because the individual's recommendations concerning hires were "accepted without question" based on the individual's evaluation of each applicant's abilities).

The Union presented testimony from multiple witnesses that Effinger interviewed and effectively recommended several candidates for hire between September 2018 and the election. For example, former Oracle employees Kelly Fehrenbacher and Larry Brys testified that Effinger interviewed and effectively recommended Jason Buchanan for rehire as a Mod Technician at Oracle in September 2018. (Fehrenbacher 168-69; Brys, L., 47, 65.) Similarly, Larry Brys and Jeremiah Brys testified that Effinger interviewed and effectively recommended Josh Udhe for hire as a Mod Apprentice in 2019. (Brys, L., 47, 64-65, Brys, J. 127-28.) Additionally, Oracle employee Benjamin Fromme testified that Effinger and Ernst interviewed him for the position of Mod Apprentice in the summer of 2019, and that he was offered a job at the conclusion of the interview. During the interview, Effinger represented himself as the RMM. (Fromme 182.)

Thus, the Employer's claim that "[t]here is no record evidence that Effinger...effectively recommended the hiring of employees" is without merit. (Employer's Request for Review at p. 23.) Once again, the Employer relies solely on the bare assertions of its own witnesses in an attempt to "cancel out" the corroborated and credited testimony weighing in favor of the opposite conclusion. Such reliance is misplaced.

Indeed, despite the Employer's claim that Effinger only ever "referred" candidates to Oracle, the testimony of its own witnesses demonstrates his role is greater than that. Unlike any other Technician or Apprentice, Effinger has participated in interviews¹¹ of multiple candidates

¹¹ In making its argument that the Regional Director's decision is inconsistent with Board law, the Employer relies in part on readily-distinguishable cases in which the individuals-in-question were not involved in interviews and assessments of applicants conducted by a higher-level supervisor subsequent to their initial recommendations. See *Adco Electric Inc.*, 307 NLRB 1113, 1124 (1992) (discrediting the testimony of an employer's superintendent that he relied solely on the recommendation of a skilled craftsman in hiring two employees, as opposed to his subsequent interviews of those employees in which the craftsman did not participate), *enfd.* 6 F.3d 1110 (5th Cir. 1993); *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390 (1989) (LPNs did not

for field employee positions. (Ernst 494.) Ernst testified that Effinger makes recommendations as to whether the candidate “might have the foundation of skills that we would want for somebody in this trade, so I think he would work, or I think he would fit, and I think he would not fit...so he gives input, yes.” (Ernst 493; *see also* Effinger at 374.)

With one exception, all of Effinger’s hiring recommendations were followed by Oracle and the individuals were hired. (Ernst 558-59; Effinger 374; *see also* Brys, L. 43-44 (testifying that he played the same role in the hiring process when he was a supervisor at Oracle, and his hiring recommendations were usually followed as well.)) The only time Oracle did not follow a hiring recommendation by Effinger was because “[it] didn’t have the capacity...[it] just simply didn’t have the work or ability to hire another person at that point.” (Ernst 558-59.) In light of the testimony of the Union’s and Oracle’s witnesses, the Regional Director’s conclusion that Effinger effectively recommended the hire of employees is consistent with Board precedent. *See, e.g., Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 962 (2004) (“Here, the Respondent has failed to refute Weidow's possession of hiring and firing indicia by showing any instance in which Donaldson overruled his recommendations following his own cursory investigation. For these reasons, we reject our colleague's finding that the evidence on this indicia is "conclusionary" and does not establish that he exercises any independent judgment. We find to the contrary that Weidow is a statutory supervisor because he effectively recommends the hiring and firing of department employees.”). *See also Venture Industries*, 327 NLRB 918, 919 (1999) (finding an individual had supervisory authority to discipline where the employer followed his recommendations 75 percent of the time).

effectively recommend the hire of employees where the director of nursing independently interviewed the employees before making an ultimate hiring decision).

4. The Regional Director Properly Concluded Effinger Exercises Independent Judgment in Adjusting Grievances Regarding Work Hours and Pay.

The Regional Director concluded based on the clear and corroborated record evidence that Effinger “used independent judgment to adjust grievances related to employee work hours and pay even after he was [allegedly] transferred to Senior Modernization Technician.” (Regional Director’s Decision at p. 3.)

The record contained witness testimony, supported by documentary evidence, that Effinger has the authority to adjust employee grievances, including issues relating to hours and pay. Larry Brys, Jeremiah Brys, and Josh White all testified that Effinger reviewed, approved, and adjusted time and overtime for employees in the Mod department throughout 2019. (Brys, J. 105-6, 116, 142-3, 157-58; White 241-2, 247; Brys, L 61.) In addition, Jeremiah testified that from time to time his paystubs reflected an incorrect number of hours or an incorrect pay rate. (Brys, 118-19.) He would let Effinger know, and Effinger would correct his time with Oracle’s corporate payroll personnel. Jeremiah provided internal Oracle emails showing an example of Effinger resolving a dispute regarding payment of Jeremiah’s overtime in September 2019, up to and including September 20, 2019, the day the petition was filed. (PX 7.) The responsibility for resolving even “minor ‘squabbles’ or disagreements among crewmembers” and an individual’s role as “timekeeper” are duties cited as evidence of supervisory status in *Atlanta Newspapers*, 306 NLRB 751, 752 (1992). The Third Circuit similarly holds that resolution of even “small complaints” by employees indicates “the authority to adjust...grievances to meet the statutory ‘supervisory’ criterion.” *NLRB v. Attleboro Assocs., Ltd.*, 176 F.3d 154, 162-63 (3d Cir. 1999). Thus, Effinger’s repeated resolution of employee pay and hours issues upon their request is consistent with a determination he had the authority to adjust grievances under Board law.

The Employer's claim in its Request that the Regional Director relied solely on one incident involving an adjustment to Jeremiah Brys's hours to make a determination regarding Effinger's authority in this regard is simply inaccurate. (Request for Review at pp. 24-25.) To the contrary, the Regional Director relied on consistent, corroborated testimony from multiple witnesses, buttressed by consistent documentary evidence. Moreover, the Union was not required to produce a large volume of documentary evidence corresponding to each and every occasion on which Effinger undertook resolution of other employees' reported pay and hours issues. The consistent corroborated testimony of witnesses with firsthand knowledge of occasions on which Effinger engaged in these types of resolutions, along with some corroborating documents, is sufficient to satisfy the Union's burden in this regard according to Board precedent. *See, e.g., Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1044-45 (2003) (finding party met its burden in establishing individual was a Section 2(11) supervisor where record evidence included testimony regarding occasions on which the supervisor engaged in discipline corroborated by some documentary examples of written warnings and suspension notices).

This is particularly true when considered against Oracle's evidence, or lack thereof. Ernst and Effinger testified that Effinger had no authority to review, approve, or adjust time since December 2018 or January 2019, and that only Ernst could perform this task. (Effinger 374-75.) However, Oracle provided no documents showing that Ernst ever approves or adjusts employee time, and Ernst is neither copied nor mentioned in the emails provided by Jeremiah. (PX 7.) Ernst testified that Effinger only handled that particular dispute because Ernst was on vacation. (Ernst 497.) This testimony is contradicted by other portions of Ernst's testimony. Ernst testified that he was on vacation the week of September 2-6, 2019. (*Id.*) However, the dispute regarding

Jeremiah's pay did not arise until a week after Ernst returned—on September 13, 2019, and was not resolved until a week after that—on September 20, 2019. (PX 7.)

Tellingly, Oracle produced no documents showing how Technician or Apprentice time was reviewed or approved. The Employer produced detailed time tickets for Effinger showing the identity of the person who edited or “resolved” his time tickets. (EX 6.) However, although Oracle produced hundreds of pages of summary time records for the Mod Technicians and Apprentices, it did not produce records showing who resolved or edited them. Consequently, the Employer's claim that the Regional Director erred in her finding regarding Effinger's adjustment of employee grievances finds no support in the record.

5. The Regional Director Gave the Appropriate Weight to the Numerous Secondary Indicia of Effinger's Supervisory Authority Contained in the Record.

The Employer additionally claims rather summarily that the Regional Director “[g]ave [i]mproper [w]eight [t]o [s]econdary [i]ndicia.” (Request for Review at p. 25.) This contention finds no support in the record or Board law. In recounting a number of secondary indicia of supervisory authority contained in the record (which are not disputed by the Employer, *id.*) the Regional Director correctly explained that such evidence was not “dispositive” but merely “bolster[ed] the primary indicia establishing Effinger's supervisory status.” (Decision at 3.)

Although the secondary indicia are not dispositive in the absence of primary indicia, the Regional Director correctly noted that (1) multiple primary indicia of Effinger's authority exist in this case; and (2) the secondary indicia in this case strongly support of a finding that Effinger is a supervisor.

The Union produced overwhelming testimony and documents showing that both Oracle and Effinger still considered him to be an RMM well beyond January 2019. As the Regional

Director noted, “although Ernst and Effinger testified that Effinger was transferred to Senior Modernization Technician around December 2018 or January 2019, there is no documentary evidence to corroborate such a transfer.” (Decision 3.) To the contrary, throughout 2019, up to and including October 2019, Effinger continued to refer to himself as the RMM. The title was on his emails. (PX 3, 4, 28.) He signed in with it when attending safety meetings. (PX 17.) It appeared in the Company Directory. (PX 9, Brys, J. 128-29.) He signed personnel documents on the “Supervisor” line and was designated as a “supervisor” on internal employer documents such as Employee change forms and new hire paperwork. (PX 8, 16, EX 7, 10.) He maintained an email address in the format reserved for supervisors, a corporate credit card and a laptop. (Effinger 432-34; Ernst 547.) He was given a Company vehicle designated for the RMM—a Ford F250 truck—in April 2019, four months after he supposedly left the RMM position. (PX 25 and 26, Effinger 431-2.) He continued to be invited to attend management meetings and calls. (PX 22, 23.) Finally, multiple employee witnesses working with and under Effinger at Oracle testified that they understood him to be a supervisor throughout 2019.

The Employer does not seriously dispute the existence of any of these secondary indicia. Oracles sole argument that the Regional Director afforded them inappropriate weight is that the Regional Director erred in finding Effinger engaged in any of the primary indicia described above, and so the secondary indicia cannot be considered. (Employer’s Request for Review at p. 25.). As explained throughout, the Regional Director did not err in reaching her conclusions with regard to any of the numerous primary indicia of Effinger’s status as a Section 2(11) supervisor, much less all of them. Thus, Oracle’s contention is wholly without merit.

6. The Evidence Described Above Established Effinger Remained a Section 2(11) Supervisor Through the Date of the Election. The Employer’s Contention That He Was No Longer an RMM and/or Engaged in Field Work Beyond January 2019 Does Not Undercut This Finding.

The Employer also argues that the Regional Director erred in determining Effinger was a supervisor until September and October 2019, claiming that he has not occupied the position or performed the duties of Regional Modernization Manager (“RMM”) --an admitted supervisory position not covered by the parties’ stipulated election agreement--- since December 2018 or January 2019. (Employer’s Request for Review at pp. 6-9). Even if Effinger no longer held the title of RMM after January 2019 as Oracle alleges,¹² it is the fact that Effinger possessed and exercised Section 2(11) authority that makes him a supervisor under the Act, regardless of the title given to him by Oracle. *In re Marukyo U.S.A., Inc.*, 268 NLRB 1102, 1102 (1984) (“The Board has never considered titles determinative of supervisory status.) As summarized in the preceding sections, the evidence established Effinger held and exercised a number of the relevant supervisory authorities through the date of the election.

Moreover, the mere fact that Effinger engaged in field work after January 2019 does not mean he was not a supervisor within Oracle or under Board law. *See Oakwood Healthcare, Inc.*, 348 NLRB at 694 (individuals that work part of the time as supervisors and the rest of their time in the field are supervisors under Section 2(11) if the time spent performing supervisory functions is a “regular and substantial portion” of the work time.) As the Regional Director recognized, the testimony of witnesses from both sides as well as documentary evidence established that supervisors of Oracle regularly perform work in the field. (Brys, L., 82, 89-90; Effinger 439-40; Ernst 559-60; EX 5; see also Decision at p. 2.) In fact, Effinger’s own Oracle time sheets show that he worked in the field while he admittedly held the RMM position. (EX 8 (including time sheets for Effinger from November 2018 through October 2019 performing field work).) Thus,

¹² There is a substantial amount of record evidence suggesting Effinger retained this title internally well beyond January 2019.

the evidence regarding Effinger's possession and exercise of supervisory authority beyond January 2019 requires that the challenge to his ballot be sustained, regardless of any subsequent title change or field work.

B. The Record Demonstrates That Jason Buchanan is a not an Indiana Employee and Is Expressly Excluded from the Stipulated Unit.

1. The Regional Director Expressly Considered All Evidence Proffered Regarding Jason Buchanan's Employment and It Indisputably Establishes That He Is Employee in Kentucky.

As the Hearing Officer and the Regional Director correctly found, an overwhelming amount of evidence establishes that Buchanan was not an employee of (and had "no connection with") Oracle's Indianapolis or Evansville facilities. The challenge to his ballot was therefore properly sustained. (Decision at pp. 4-6.)

The Union presented testimony from multiple witnesses and significant documentary evidence—much of which was corroborated or admitted by Oracle's own witnesses—that since he returned to Oracle in late 2018, Buchanan worked for Oracle in Kentucky.¹³ As the Regional Director discussed in her Decision, this evidence included undisputed testimony and documents that:

- Oracle's Kentucky supervisors signed all of Buchanan's new-hire paperwork when he returned to Oracle;
- Buchanan has worked **all** of his regular hours in Kentucky between November 2018 and October 2019, and has only worked a total of 52 hours, all of them overtime, in Indiana during that time;

¹³ The parties agree that Buchanan had two separate periods of employment at Oracle. He was a Mod Technician based out of Evansville from 2013 to early 2018, when he left to work for another elevator company. In late October or early November of 2018 he returned to Oracle.

- He appears in the employer’s own organizational chart and company directory as a Kentucky employee supervised by Kentucky supervisors;¹⁴
- He attends regular safety meetings in Kentucky;
- He has had no presence at the Evansville or Indianapolis facilities at all since he returned to Oracle in late 2018: he has no mailbox there, his uniforms aren’t laundered from there, and his personnel file isn’t located there;
- He has only been to an Oracle Indiana facility on two occasions since he returned to Oracle, and one of those two times was to vote in the election.

(Decision 5; see also Griffin 212, Buchanan 342-45; PX 17.)

Despite the abundant evidence to the contrary, the Employer claims in its Request for Review that “[t]he conclusion to sustain the challenge to Buchanan is incorrect and ignores substantial evidence.” (Employer’s Request for Review at p. 26.) The “substantial evidence” to which the Employer refers is essentially one fact: that Buchanan received a per diem for his work in Kentucky. The Regional Director did not ignore this point. In her Decision, the Regional Director expressly noted that Oracle provided evidence Buchanan received per diem when he worked outside of the Evansville area. (Decision at p. 5). However, she rejected the Employer’s contention that Buchanan’s receipt of per diem “proves he is an Evansville employee” given that he also received per diem on days when he did not record any work hours from any branch location. (Decision at p. 5-6.) And both the Hearing Officer and Regional Director concluded that the receipt of per diem does not, itself, establish that his job duties and responsibilities are in Indiana, when considered against the weight of the evidence establishing that he is not an Indiana employee. (Hearing Officer’s Report at p. 10.) In making this argument for the third time, the Employer is not alleging any factual or legal error, but rather attacking the Regional Director’s well-reasoned

¹⁴ During the hearing, Ernst claimed that he supervised Buchanan. Oracle provided no examples or documentary evidence to support this.

decision to rely on the weight of the credible evidence. This certainly is not a basis for Board Review.¹⁵

2. The Regional Director Applied the Proper Legal Standard.

As it did in its exceptions to the Hearing Officer's Report and Recommendations, the Employer contends the Regional Director committed a legal error by not conducting a community-of-interest analysis regarding Buchanan's employment. (Request for Review at pp. 30-34.) Oracle's position is wrong as a matter of law.

Both the Hearing Officer and the Regional Director properly considered the challenge to Buchanan's ballot by reference to the stipulated election agreement, specifically, whether the language of the parties' agreement can be read to resolve the question of whether Buchanan is in the agreed-upon unit. (Decision 4.) This analytical framework accords with longstanding Board precedent. (*Id.*) (citations omitted).

The Regional Director first noted that the unambiguous language of the stipulated election agreement limits the unit to employees employed at two of Oracle's facilities: Evansville, Indiana and Indianapolis, Indiana, and "unambiguously excludes employees employed at any other facility." (*Id.*) She then considered the evidence regarding the locus of Buchanan's employment in light of settled Board law: namely, "whether the employee performs work at the clearly defined locations" encompassed within the unit description, or "whether the employee works at the clearly defined locations only sporadically." (*Id.* at 5) (citations omitted). Finding that Buchanan

¹⁵ Oracle also complains that the Regional Director ignored Ernst and Buchanan's unsupported testimony that they "consider" and "believe" Buchanan to be an Indiana employee. The Regional Director appropriately credited objective testimony regarding Buchanan's actual employment over subjective feelings and beliefs. *In re Roy N. Lotspeich Publishing Co.*, 204 NLRB 517, 517 (1973) (explaining that the Board considers "clear, objective fact" of an employee's "actual work on the eligibility dates" to determine whether he is included within the scope of the unit).

performs virtually all of his work outside of Indiana, and that virtually none of his regular job duties or responsibilities occur in Indiana, the Regional Director concluded he was “not eligible to vote because he was not employed at one of the stipulated facilities.” (Decision at 6.)

The Regional Director considered Oracle’s claim that she must undertake a community of interest analysis and properly rejected it as irrelevant under the circumstances. The Board should do the same. In its request for review, Oracle relies on two cases standing for the unremarkable proposition that where an employee qualifies as a “dual function” employee—in other words, where an employee holds both in-unit and out-of-unit positions—a community of interest analysis may be appropriate. *Martin Enterprises, Inc.*, 325 NLRB 714 (1998); *NLRB v. Joclin Mfg. Co.*, 314 F.2d 627, 632 (2d Cir. 1963). Notably, neither case cited by Oracle involves geographical restrictions, as this case does. And more importantly, Buchanan is not a dual-function employee. Rather, he is a Mod Technician who performs all of his regular hours of work out of Oracle’s Kentucky offices and has done so at all times from November 2018, nearly a year before the election, until the date of the election itself.

Thus, the Employer’s detailed comparison of Buchanan’s own technical job duties to those of the employees in the stipulated unit – who all work in Indiana, as opposed to Kentucky – is utterly irrelevant. In any event, the evidence shows that Buchanan does not share a community of interest with the Indiana employees; he is in a different administrative grouping, a different geographical location, has different supervision, and has little to no contact, functional integration, or interchange with the Indiana employees.

C. The Regional Director Considered All of the Virtually Undisputed Evidence Regarding the Union’s Conduct at a Single Polling Location on the Day of the Election and Correctly Concluded That Longstanding Board Precedent Required the Employer’s Objection Be Overruled.

Oracle filed one objection to the election. The objection states that union representatives were present “in close proximity” to one of the entrances to the polling location in Indianapolis during the 2pm – 3:30 pm polling session, made “visual contact” with employees, and “spoke with at least two employees after they exited the Branch.” The objection further states that two union officials “walk[ed] the perimeter of the building during the same time period.” The objection states that this conduct was “intimidating” to voters and “prevent[ed] a fair election.”

The party asserting an objection has the burden of proving that that conduct complained of had the tendency to interfere with the employee’s freedom of choice. *Double J. Services*, 347 NLRB No. 58, slip op. at 1-2 (2006). The burden is a heavy one because there is a strong presumption that ballots cast under Board rules and supervision reflect the true desires of the electorate.” *Safeway, Inc.*, 338 NLRB 525 (2002). The Regional Director properly concluded that Oracle did not meet its burden in this case.

1. The Facts Underlying the Employer’s Objection Are Virtually Undisputed, And Do Not Constitute Objectionable Conduct.

The facts regarding the objection are essentially undisputed. While Oracle claims the Regional Director “disregards evidence,” it never identifies the facts she allegedly overlooked. (Request for Review 35.) As provided in the parties’ stipulated election agreement, there were two separate polling sessions on the date of the election at two separate locations of the Employer – Evansville, Indiana, where the polls were open from 7:30 – 8:30 am, and Indianapolis, Indiana, where the polls were open from 2:00 – 3:30pm.

Voters could enter the Indianapolis polling area from either of two entrances -- the front or the rear of the building. The parties stipulated at hearing that at no time did the Board Agent set up a no-electioneering zone or instruct the parties that they could not be present in any particular place. (Joint Stipulation, Transcript 190-91.)

The parties further stipulated that the Employer has video of both the front and the rear of the Indianapolis facility during the polling period. (Joint Stipulation, 190-91.) The parties agreed that the Employer could introduce a series of timestamped screenshots from the video in lieu of the video. The parties stipulated that if the video were to be played in its entirety, it would show little to no additional activity by the Union representatives. The parties further stipulated that the Union representatives never entered Oracle's property during the polling period. Specifically, the Union representatives did not enter the front nor back parking lots where the white Oracle vans and trucks were parked. (*Id.*) Union representatives were present for one hour and 15 minutes, and were at least 80-100 feet from the back entrance of Oracle's facility.¹⁶ (EX 1; White 250-252; Fromme 187-88; Effinger 413-14.) Two union representatives walked around the building on three or four occasions during the polling session. When they walked by the Employer's front entrance, they were about 100 feet away from the facility. (EX 1; Ernst 567.)

The polling location in Indianapolis was in a windowless warehouse at the Indianapolis location. (White 255.) The balloting area was in a corner of the warehouse about 80-100 feet from the rear entrance. (*Id.*) The objection does not allege that the balloting area could be observed from outside the warehouse, much less that the union agents observed it, and there was no evidence to that effect.

No employee had to walk past any union representative in order to vote. (Stipulation; EX 1; White 252-53.) No employee identified the Union representatives with any certainty until after they had voted. One individual testified that he did not notice the representatives until after he exited the facility. (Fromme 195.) Three employees stated that they saw people but could not identify them as Union representatives. (White 250-52; Effinger 413-14.) One or two union

¹⁶ Several witnesses testified that the distance was well farther; as much as 250 feet away. (*Id.*)

representatives exchanged a few words to a couple of employees, or waved, or shook hands after the employees voted. (White 255; EX 1.)

In light of this uncontradicted evidence, the Regional Director correctly determined that under settled Board law, there was no basis on which the conduct alleged could have reasonably tended to interfere with any of the voters' free choice.

2. Long-Settled Board Precedent Compels a Finding That the Union Did Not Engage in Objectionable Conduct.

The Regional Director properly found that the union did not engage in objectionable electioneering. *Boston Insulated Wire and Cable Co.*, 259 NLRB 1118 (1982) sets forth the factors to be considered in electioneering cases: (1) the nature and extent of electioneering, (2) whether it was conducted by a party or employees, (3) whether the conduct occurred in a designated no-electioneering zone, and (4) whether the conduct contravened any instructions of a Board Agent.

There is no evidence of improper electioneering. Although the Union representatives had brief interactions with one or two voters, there is no evidence that any conversations related to the election, and indeed the evidence conclusively reveals that the conversations took place after the employees exited the facility. They also took place at a significant distance from the rear entrance of the Indianapolis facility—at least 80-100 feet—which was in turn at least 80 feet from the polling location inside the warehouse. The Union representatives were not in a no-electioneering zone, and did not contravene the instructions of the Board Agent. There are no allegations of electioneering at the Evansville location or anywhere near the front entrance to the Indianapolis facility, where Union representatives walked around the building a couple of times, not stopping, at a distance of about 100 feet from the front entrance.

The Board and the Courts have consistently rejected electioneering objections in similar circumstances—indeed, in circumstances when the alleged electioneering was much more

substantial. *See, e.g., J.P. Mascaro & Sons*, 345 NLRB No. 42 (2005) (overruling electioneering objection when Respondent’s President stood outside facility for the entire election period, within 15-30 feet from front door, which was in turn 10 feet from the polling place, briefly conversing with some of the voters as they passed); *Boston Insulated Wire & Cable Co.*, 259 NLRB No. 149 (1982) (overruling objection when the union agents passed out campaign leaflets and spoke to employees as they entered both the main entrance to the building and entrance to closed glass paneled doors about 10 feet from the polls; no evidence they were in no- electioneering zone or contravened instructions from Board Agent); *Covenant Care of Ohio v. NLRB*, 180 Fed. Appx 576 (6th Cir. 2006) (overruling objection where union agents stationed themselves on sidewalk in front of entrance to facility and hand billed for duration of election near driveway that was only entrance to parking lot, relying on Board precedent in which electioneering took place outside building and outside any no-electioneering zone); *All-Seasons Climate Control, Inc. v. NLRB*, 232 Fed. Appx. 636 (D.C. Cir. 2007) (upholding agency decision that election was free from impermissible electioneering because “union officials did not surround the only entrance to the polling place, did not occupy a non-electioneering zone, and did not engage in conduct contrary to the instructions of the Board Agent.”); *NY Rehabilitation Care Mgmt. v. NLRB*, 506 F.3d 1070, 1077 (D.C. Cir. 2006) (upholding overruling of election objection where union representatives stationed themselves at the facility entrance on election day distributing hats, t-shirts, pins, coffee and food); *Baker DC, LLC*, 05-RC-135621, 2017 WL 5067470 (2017) (mere presence of union agents in the lobby of an office building during election where voters would have to pass in order to vote is not objectionable absent other conduct; agents were not in no-electioneering zone, did not engage in conduct contrary to Board agent, and polls were located on a separate floor of the building); *Aaron Medical Transportation, Inc.*, 22-RC-070888, 2013 WL 3090117 (2013) (“mere presence of union

agents in the parking lot and sixth floor of the employer’s premises, without more, does not constitute objectionable conduct sufficient to overturn the election...no contention that union representatives were stationed in a no-electioneering zone, made any statements or threats to voters during the critical period, or violates the orders of any Board agent.”) *U-Haul Co. of Nevada, Inc.*, 341 NLRB No. 26 (2004) (overruling objection where union official stood between 30 and 100 feet from entrance of building in company parking lot and conversed with a handful of voters), *cf. Nathan Katz Realty LLC v. NLRB*, 251 F.2d 981 (D.C. Cir. 2001) (finding that objection merited a hearing, and could not be overruled administratively, where two union officials were stationed within a no-electioneering zone for the duration of the election, 20 feet from the only entrance leading to the voting place, and were yelling and honking at voters as they passed; notably, on remand and after a hearing the agency overruled the objection. *See Longwood Security Services*, 364 NLRB No. 50, slip op. at 3 n.6 (July 19, 2016).¹⁷

Nor has Oracle identified any evidence of surveillance. The Board has found objectionable surveillance where (1) supervisors are stationed, (2) throughout the duration of the election, (3) in a location where employees “had to pass by” their supervisors or managers in order to vote. *See, e.g., Performance Measurements*, 148 NLRB 1657 (1964) (employer’s president stood by door to only entrance to polling location so it was necessary for each employee who voted to pass within

¹⁷ While acknowledging the clear factual differences between this matter and the facts of *Nathan Katz*, the Employer claims, without citing a single case to support its assertion, that “[h]onking, gesturing, or yelling was not necessary for the intimidating presence to be known.” (Request for Review at p. 40.) However, even if the Employer could point to any Board law stating that an “intimidating presence being known” by representatives standing quietly, 80-100 feet away from one of two entrances at one of two polling locations is objectionable (which it did not and cannot) and that the conduct here actually constituted an “intimidating presence,” its argument still suffers from an irreparable flaw. As the Regional Director noted, the evidence established that no employees actually knew any agents of the Petitioner were outside until after they voted. (Decision at p. 7.) Oracle’s claims of a “known” “intimidating presence” fail on the word “known.”

2 feet of him to gain access to polls); *Electric Hose*, 262 NLRB 186, 216 (1982) (one supervisor stationed inside plant within 10-15 feet to the only entrance to voting area, two others stationed in areas that employees had to pass in order to vote).

The Petitioner is aware of no case where the Board has found surveillance absent all these criteria being met. *J.P. Mascaro*, 345 NLRB No. 42 (no surveillance where company president was 15-30 feet away from the entrance to the facility and had no direct view to the only entrance to the voting area); *Baker DC, LLC*, 2017 WL 5067470 (no surveillance where union agents, although present in lobby of office building where employees had to walk through in order to vote, were on a different floor from the polling place and thus were not surrounding the only entrance to the polls); *Covenant Care*, 180 Fed. Appx. at 582-3 (no surveillance where union agents present throughout election at the only driveway entrance to the polling location because “voters were not subject to their supervisors’ scrutiny immediately before entering the polling area”); *Longwood Security Services*, 364 NLRB no. 50, slip. op. 3 (discussing the difference in significance between employer conduct and union conduct). For further cases refusing to find objectionable surveillance, *see generally Aaron Medical, All Seasons Climate Control, U-Haul Co.*

The evidence identified by Oracle in this case meets none of the criteria for objectionable surveillance, much less all three, as required by the Board. *First*, the Union representatives were not present through the duration of the election. The Union representatives in this case were in the vicinity of one of two polling sites, for approximately 1 hour and 15 minutes out of a 2.5 hour election. *Second*, no employees had to pass by the Union representatives in order to vote. The Union representatives were at least 80-100 feet from the rear entrance to the Indianapolis polling area, and *behind* the parking lot which led directly to the rear entrance to the facility. That entrance, in turn, was about 80 feet from the polling location in the far corner of a windowless warehouse

inside. Moreover, the rear entrance was not the only entrance to the polling area; there was also another entrance at the front of the facility where, as Oracle's objection and surveillance photos makes plain, no union representatives were present for more than a few minutes as they walked by on the street outside.¹⁸ Likewise, the evidence proves that no Union representatives were stationed near any of the entrances to Oracle's back or front parking lots; they were not, and no one had to drive past union representatives to get to the polls. And *third*, the alleged conduct involved union, not employer representatives. As the Board has recognized, "in view of the very different positions that unions and employers occupy with respect to employees, the Board—with court approval—has consistently applied different standards to a wide variety of employer and union conduct during an election campaign." *Longwood*, slip op. at 2-3 (collecting cases).

The dissents on which the Employer relies also have little relevance to this case, as they involve situations in which a Union official acted as an observer for an election. *North Shore Ambulance & Oxygen Serv., Inc.*, 2017 WL 1737910 (2017) (Miscimarra, dissenting) (quoting dissent in *Longwood* and discussing an objection related to a business agent acting as the Union's observer for an election). The facts animating those dissents cannot be stretched to encompass the facts here, where the Union's representatives were nowhere near the ballot box, where no voter had to pass them in order to vote, where no voters even knew they were present until after they voted, and where there were other entrances to the polling place and indeed other voting locations with no party representatives anywhere in the vicinity.¹⁹

¹⁸ Walking past an entrance to a building where an election is taking place does not constitute objectionable conduct. *Electric Hose*, 262 NLRB at 216, *see also Good Samaritan Hospital*, 31-RD-1555, 2009 WL 981075 (2009).

¹⁹ The dissent in *Baker DC, LLC* is likewise distinguishable, as it involved a situation in which every voter would have to pass by the representatives in order to vote. Moreover, the dissent by Member Miscimarra does not state that the conduct should be found objectionable, but rather, that

In the end, the objection comes down to two employees²⁰—neither of whom could even identify the union representatives until after they voted—stating that they were intimidated and upset. But this is not the standard for objectionable conduct. *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 619 (4th Cir. 2013) (subjective reactions of employees irrelevant to question of whether there was, in fact, objectionable conduct.) The test is an objective one that asks whether the alleged conduct has the tendency to interfere with employees’ freedom of choice. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). The Employer cannot meet that test, and consequently, the Employer’s Request for Review must be denied on this ground as well.

V. THE EMPLOYER’S REQUEST FOR EXTRAORDINARY RELIEF MUST BE DENIED IN FULL

At the conclusion of its Request, the Employer asks that the Board stay the Certification issued by the Regional Director and the Employer’s attendant duty to bargain. Board law does not permit the grant of such extraordinary relief in these circumstances.

According to the Board’s clear regulations, a mere request for review—or even a grant of review—of the Acting Regional Director’s decision does not warrant a stay of the election. 29 C.F.R. § 102.67(c) (explaining that a request for review “shall not, unless specifically ordered by the Board, operate as a stay of any action by the Regional Director”); 29 C.F.R. § 102.67(h) (explaining that a granted request of review “shall not stay the regional director’s action unless otherwise ordered by the Board”). Rather, such extraordinary relief may only be granted “*upon a clear showing that it is necessary* under the particular circumstances of the case.” 29 C.F.R. § 102.67(j)(2).

the conduct should be remanded for a hearing rather than summarily overruled. 2017 WL 5067470 *slip op.* *2.

²⁰ One of whom was Jon Effinger.

The Employer has not made any showing – much less a “clear showing” – that a stay of the certification is necessary, nor that the circumstances of this case in any way warrant the same. Rather, it simply requests such relief without more and relies upon two cases in which elections – not certification – were stayed under markedly different facts. *See Piscataway Assocs.*, 220 NLRB 730 (1975) (granting a request for review and staying an election where the record evidence clearly established – contrary to the Regional Director’s finding – that superintendents were supervisors who should be excluded from the unit); *Angelica Healthcare Services Group, Inc.*, 315 NLRB 1320 (1995) (staying an election and granting a request for review where the case presented novel and significant issues regarding contract bars to petitions). The Employer’s request to stay its duty to bargain likewise finds no support in the facts presented by this case or in Board law.

VI. CONCLUSION

For the foregoing reasons, the Board should deny the Employer’s Request for Review and for extraordinary relief in its entirety.

DATED: February 18, 2020

Respectfully submitted,

/s/ Jennifer R. Simon
Jennifer R. Simon
Kathleen Bichner
O’DONOGHUE & O’DONOGHUE LLP
5301 Wisconsin Avenue, N.W.
Suite 800
Washington, D.C. 20015
(202) 362-0041
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 18, 2020, a true and correct copy of the above was e-filed with the Office of the Executive Secretary using the Board's electronic filing system and that a copy of the same was served upon the following via electronic mail:

J. Garrett Wozniak
Kollman & Saucier, PA
1823 York Road
The Business Law Building
Timonium, Maryland 21093
GWozniak@KollmanLaw.com
Counsel for the Respondent

Patricia K. Nachand, Regional Director,
Renee Laux, Secretary, and
Roger Chastain
National Labor Relations Board, Region 25
Minton-Capehart Federal Building
575 N. Pennsylvania Street
Room 238
Indianapolis, IN 46204-1577
patricia.nachand@nlrb.gov
renee.laux@nlrb.gov
roger.chastain@nlrb.gov

/s/ Jennifer R. Simon _____
Jennifer R. Simon
Kathleen Bichner
O'DONOGHUE & O'DONOGHUE LLP
5301 Wisconsin Avenue, N.W.
Suite 800
Washington, D.C. 20015
(202) 362-0041
Counsel for Petitioner