

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ALSTATE MAINTENANCE, LLC

and

Case No. 29-CA-252004

VERNON HARRIS, an individual

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ**

and

Case No. 29-CB-252635

VERNON HARRIS, an individual

Matthew A. Jackson, Esq.,

for the General Counsel.

Ian B. Bogaty, Esq. and Mary-Ann P. Czak, Esq. (Jackson Lewis), of Melville, New York,
for the Respondent Employer.

Brent L. Garren, Esq.,

for the Respondent Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in a Zoom video hearing conducted on August 4, 5, 7, and 19, 2020. The complaint alleges that Respondent Employer Alstate Maintenance, LLC (Employer) violated Section 8(a)(2) and (1) of the National Labor Relations Act (Act) by providing unlawful financial assistance to Respondent Union Service Employees International Union, Local 32BJ (Union or Local 32BJ), and the Union violated Section 8(b)(1)(A) of the Act by demanding and accepting such support. More specifically, the General Counsel contends that the Respondents violated the Act by agreeing to the discharge of Charging Party Vernon Harris pursuant to the union security clause in the Respondents' collective-bargaining agreement because Harris, an alleged supervisor under Section 2(11) of the Act, failed to pay dues and/or fees to the Union.¹

As explained below, the allegations are without merit and the complaint is dismissed in its entirety. The General Counsel failed to prove that Harris was a supervisor and, even if such a showing had been made, the Respondents did not violate the Act as alleged.

¹ During the trial, the General Counsel confirmed that the complaint does not allege that Harris was unlawfully denied an opportunity to pay agency fees instead of full union dues or discharged because he wanted to pay agency fees. (Tr. 236–237) The General Counsel further confirmed that the complaint does not allege an independent violation of Section 8(a)(1) on the grounds that Harris's discharge had an intimidating or coercive effect on employees. (Tr. 237–238)

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs that were filed by the General Counsel and the Union, with the Employer joining in the Union's brief, I make these

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FINDINGS OF FACT²

JURISDICTION

10 The Employer is in the business of providing airport ground services, including baggage handling, wheelchair service, passenger service representation, and skycap services. Although the Employer initially asserted that it is a derivative carrier under the Railway Labor Act and not subject to the Board's jurisdiction, the Employer ultimately consented to the Board's jurisdiction in this case only, on a non-precedential basis. (Jt. Exh. 12) For purposes of this proceeding and decision, I find that the Employer has been engaged in commerce within the meaning of the Act. It is undisputed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and that the Board has jurisdiction over this case pursuant to Section 10(a) of the Act.

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ALLEGED UNFAIR LABOR PRACTICES

The Employer, the Unions, and Victor Harris

25 Airline carriers contract the Employer to provide ground services at certain terminals of John F. Kennedy International Airport (JFK) in Queens, New York. JFK Terminal 1 has eight airline counters with conveyor belts behind them for baggage.³

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30 The Employer employs employees in classifications including baggage handler,⁴ wheelchair agents, passenger service representative (PSR), and skycaps. The Employer also employs leads for each classification (four baggage leads, four wheelchair leads, four PSR

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² The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I rely upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951)). Where necessary, specific credibility determinations are set forth below.

³ The Employer also performs services at JFK Terminals 4 and 5. (Tr. 27) However, Harris worked in Terminal 1 and the operation/events described herein refer to Terminal 1 unless stated otherwise.

⁴ Baggage handlers are generally referred to herein as "handlers."

leads, and five sky captains). Leads report to supervisors and supervisors report to a terminal general manager. The Employer employs about nine supervisors. Vincent Gilmore has been the JFK Terminal 1 general manager since about 2018. The Employer's supervisors share an office and the general manager has a separate office. Handlers wear a black and blue-green uniform with the company logo on it. Leads wear black pants and white shirts without a company logo. Supervisors wear their own clothes rather than a uniform. (Tr. 22–25, 37–38, 42, 127–129, 254, 268–269, 278, 281–285)

The Employer has had a bargaining relationship with Local 32BJ as the bargaining representative of the following unit since October 2015 (Tr. 8):⁵

All employees employed on the premises of Newark Liberty Airport, LaGuardia Airport, and/or JFK Airport, or performing airport related services except for employees represented by another union or working on accounts between the Port Authority of NY-NJ ("PANY") and/or Federal Express and the Employer, excluding security guards, food service employees, engineers, retail employees, supervisors/managers, confidential and office employees as defined by the National Labor Relations Act.

The Employer and Local 32BJ were parties to a collective-bargaining agreement effective January 1, 2017 to February 9, 2020. (Jt. Exh. 2) The Respondents extended that contract through June 30, 2020. In 2019, Local 32BJ had 160,111 total members and collected \$103,614,698 in dues and agency fee payments. (Jt. Exh. 11)

Before Local 32BJ assumed representation of the unit in 2015, Local 660 was the union bargaining representative. The Employer and Local 660 were parties to a collective-bargaining agreement effective December 1, 2012 to November 30, 2015. Neither the Local 32BJ nor the Local 660 contract expressly included "leads" in the unit. (Tr. 102–103) (Jt. Exh. 2) (U. Exh. 2)

The Local 32BJ and Local 660 contracts contained union security provisions requiring unit employees to pay union dues or agency fees as a condition of employment. Accordingly, pursuant to those union security clauses, the union could contractually require the Employer to discharge a unit employee for nonpayment of dues or agency fees. (Jt. Exh. 2) (U. Exh. 2)

On December 24, 2008, the Employer hired Harris as a baggage handler. Harris was a dues paying member of Local 660 while he held that position. (Tr. 21–22)

In about May or June 2013, Local 660 appointed Harris to the position of shop steward. Harris stopped paying union dues at that time because Local 660 did not require shop stewards to pay dues. (Tr. 102–104)

In about August 2014, Harris was promoted to the position of baggage lead. (Tr. 23) He received no training for the position. Rather, he learned on the job from other leads. (Tr. 37–39) Harris's promotion to lead was accompanied by a wage raise of \$2.75 per hour.

⁵ I take administrative notice of the Decision and Certification of Representative which was issued by the Regional Director of Region 29 in 29–RC–159794 on October 30, 2015. Local 32BJ was the petitioner and Local 660, United Workers of America (Local 660) was the incumbent intervenor. An election was conducted on October 16, 2015, among 283 eligible voters. Local 32BJ was elected as the bargaining representative of the unit.

Supervisors are paid \$1.40 per hour more than leads. (Tr. 257)

5 Harris believed that, as a lead, he remained a unit member covered by the collective-bargaining agreement. In fact, Harris continued to act as Local 660's shop steward after he was promoted. (Tr. 102–104) Gilmore also testified that leads are unit members covered by the collective-bargaining agreement. (Tr. 124, 175, 195–196, 256)

10 As a lead, Harris worked from Wednesday to Friday, 6 a.m. to 2:30 p.m., and Saturday and Sunday, 3 a.m. to 11 a.m. Supervisors did not normally start work until 7 a.m. and Gilmore did not normally start work until 8 a.m. Harris worked primarily on the unsecured side of the Transportation Security Administration (TSA) checkpoint on the departures level. (Tr. 31, 33, 286–287, 297)

15 Harris testified that the Employer only employs general supervisors with authority over the entire location, including all departments and all terminals. According to Harris, the Employer does not employ baggage supervisors with specific authority over the baggage department. (Tr. 28–29, 379) (G.C. Exh. 7) Gilmore testified that the Employer employs general supervisors with authority over all departments and department supervisors (e.g., baggage supervisors) with authority over one department. (Tr. 256–257, 280–285)

20 Harris testified that supervisors work mostly on the secure side of the TSA checkpoint and are seldom present in areas where baggage handlers and leads work. (Tr. 30–31, 36) Former employee Eon Weldron testified that supervisors mostly worked in the supervisors' office.⁶ (Tr. 395) Gilmore testified that supervisors work exclusively on the unsecured departures level with handlers and leads, "working the counters, communicating with airline representatives, as well as the terminal." (Tr. 270)

30 Harris claimed he had keys to the supervisors' office. According to Harris, he entered the supervisors' office to check the notice board for messages from the overnight shift and obtain scanners for distribution to handlers who used them. Gilmore denied that leads have keys to the supervisors' office and noted that Harris did not turn in any keys when he was discharged. Gilmore admitted that handlers may need scanners for an early flight before a supervisor arrived, but claimed that handlers obtained scanners from the terminal group in those situations.⁷ Harris denied that the terminal group had scanners. (Tr. 268–269, 295–297, 369–371, 379–380, 396–398)

40 Gilmore testified that he goes to the departures level where Harris worked about 15 to 20 times per day in order to oversee the operation, interact with airline representatives, and interact with the Employer's terminal management. (Tr. 270–271, 297–298) Harris testified that he only saw Gilmore at departures about 1 or 2 times per day. (Tr. 379–380)

45 The Employer holds supervisor meetings twice per month. Gilmore testified that leads never attend those meetings and are never called for their input. (Tr. 273–274) Harris testified that he was sometimes asked to attend supervisor meetings or was called at home to answer questions about the morning shift. Harris claimed he has provided recommendations at these

⁶ Weldron worked as a handler and wheelchair agent.

⁷ Gilmore occasionally referred to the terminal group or terminal management, but did not explain what the group does or how they fit within the overall management hierarchy. (Tr. 297, 300, 304, 307)

meetings regarding staffing and that his recommendations were always followed. According to Harris, he only attended one supervisor meeting (in June 2019) since Gilmore became manager. Harris's testimony was unclear regarding what he allegedly discussed and/or recommended at that meeting with Gilmore. (Tr. 130, 199–200, 213–215)

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Unit Employees and Unit Work

Handlers are largely responsible for putting bags on and taking bags off conveyor belts, arranging bags, and moving bags around the airport. Handlers use carts and bins in doing so. Handlers retrieve and store carts and bins at the beginning and end of each day. Carts are locked when they are stored for the evening and handlers do not have keys to unlock the cart station. Handlers in certain locations use handheld devices to scan bag tags. Handlers sign for the scanners when they are issued one for work. The scanners are locked overnight in the supervisors' office. Handlers do not have keys to the supervisors' office. Like Harris, Handlers mostly work on the unsecured side of the TSP checkpoint. (Tr. 22, 26, 33–36, 141–144, 293–297)

Handlers work at airline counter belts, a CEBRA room, custom border protection (CBP), and an oversized bag or CTX room. Counters open for operation 3 hours before a flight departs and are staffed by airline and Employer employees. Airline agents deal with passenger ticketing while handlers deal with the bags. The handlers load bags on conveyor belts behind the counter and make sure the bags are spaced appropriately. The bags are transported by conveyor belt to the CEBRA room, where TSA agents inspect them. Handlers in the CEBRA room take bags off the belt and arrange them so the TSA agents have enough space to work. Handlers in the CEBRA room also scan the tags of each bag for entry into a computer system. Once the bags are inspected and scanned, handlers transport them to airplanes. (Tr. 26, 34–36, 269–270, 287, 369–371)

In addition to the CEBRA room, bags are inspected, scanned, and transported to airplanes from other rooms. Oversized bags that cannot fit on the airline counter conveyor belts are transported by handlers to and from the CTX room. Inbound bags from arriving planes are transported by handlers to a recheck room and reinspected by TSA. After they are reinspected, those bags are transported to connecting flights. Bags that passengers need to check after they pass through security are taken by handlers to and from the CBP room for inspection. In each of these rooms, TSA agents inspect the bags while handlers move bags, arrange bags, and scan bag tags. (Tr. 33–36, 369–371)

There appears to be little difference in the type of tasks handlers perform at the various work locations discussed above. Although not entirely clear as to what it entailed, Harris testified that some airlines have different procedures at their respective counters. According to Harris, for example, Japan Airline requires handlers to take a sticker from each oversized bag that is sent to CTX and put it on a different sheet with the time the bag was sent. However, Weldron (a General Counsel witness) testified that handlers perform the same job regardless of the particular airline counter to which they are assigned.⁸ (Tr. 78, 416)

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⁸ The credible evidence, including the testimony of Weldron, reflects that handlers are responsible for a limited number of unskilled tasks that do not significantly vary by duty station. Although handlers must be shown how to use a scanner to scan the bag tags into a computer system, scanning does not seem to require any particularly difficult skill or ability. (Tr. 378-379)

In addition to handlers, the Employer employs wheelchair agents, PSRs, and Skycaps. Wheelchair agents assist travelers in wheelchairs. PSRs assist passengers as they come in from arriving flights and go through security checkpoints. Skycaps provide curbside baggage services to departing passengers who need assistance moving bags to the airline counters. (Tr. 24–26)

Baggage Leads

Harris spent most of his time walking back and forth in the terminal to ensure that the baggage operation was functioning properly. Harris testified that he made sure handlers clocked in on time, were properly attired, had the equipment they needed (e.g., scanners, bins, carts), were assigned to and working at their proper duty stations, and otherwise performed their duties properly. Harris initially testified that it was not his job to handle bags and scan bag tags, but later admitted that he performed such unit work when the operation was short staffed. Harris testified that he handled regular sized bags about 2 or 3 times per week, handled oversized bags less than an hour a day, scanned bags about 10 minutes a day, and labelled large oversized bags about 5 minutes a day. (Tr. 37–39, 41–44, 127–129, 142, 396–398) Gilmore testified that leads are primarily responsible for communicating information from supervisors to employees and helping handlers with their work. (Tr. 256)

Assignment

Harris testified that, as lead, he assigned handlers to their duty stations at the start of each shift and changed their work locations during the day as required by workflow. Thus, for example, according to Harris, he might reassign a handler from the Lufthansa counter to the Korean Air counter if the former was not in operation. Harris claimed that he assigned employees in this manner on a daily basis without consulting a supervisor. Harris also testified that an airline might request a certain person who was performing well to be permanently stationed at its counter. (Tr. 36–37, 77–80, 137, 139–141, 373–376)

Gilmore testified that leads do not assign handlers to their duty stations. Rather, according to Gilmore, every 3 months, each handler bids a shift and work location. Gilmore claimed that, once this “baggage bid” process was complete and shifts were allocated, the handler worked at a single location for his/her entire shift and was not reassigned to different work locations throughout the day, regardless of workflow. Gilmore further testified that handlers did not report to their leads for assignments because they already knew where to go pursuant to the baggage bid. (Tr. 261–262, 290–292)

Former handler and union shop steward Ivan Johnson, a witness for the Union, testified that the night shift lead assigned him to a counter every day. Johnson was mostly assigned to the Air France counter but was sometimes assigned to Turkish Air. Johnson testified that he was kept at those belts because he did a good job. However, on rare occasions when his belt shut down for some reason, a supervisor or lead assigned Johnson to a different counter.⁹ (Tr. 342–344)

⁹ I find that handlers were generally assigned to the same work location on a fairly consistent basis. Harris testified that airlines sometimes requested that a handler be permanently assigned to its counter and Johnson testified that he mostly worked at the Air France counter. Gilmore testified that employees bid shifts at particular duty stations and work at those stations on a permanent basis.

Weldron testified that leads assign handlers to a counter at the start of a shift, but might move the handler to a different counter if the flight is delayed or the counter is not busy for some other reason. (Tr. 398–399)

5 Harris was initially unclear and not effectively responsive when asked on direct examination how he determined which handler should be assigned to which airline counter. Harris testified (Tr. 79):

10 Q So how did you determine which worker should be assigned to any particular counter on a given day?

15 A Depend on the ability to work, how they could perform the duty. And after a while that they would perform the duty, efficiently, the airline themselves require this personnel must be used by their company to get the job done efficiently. But they -- then we have to put a mechanism in place that no one time this two person must be off duty at the same time. So we would replace them with a junior man so he could learn the operation and in fact, all the baggage handlers, we train them to do all the work at any given time, as the time goes by so they will be able to work independently when they have been called upon.

20 The General Counsel then asked Harris by leading question whether he “assign[ed] workers to work particular counters based on your assessment of their skills and abilities?” Harris answered, “Yes, sir.”¹⁰ (Tr. 79)

25 Harris testified that certain employees received special training to work in the CEBRA room. According to Harris, he recommended to a supervisor which handlers to train for CEBRA. Harris and the supervisor then allegedly discussed the matter and came to an understanding about the most appropriate person based on the handler’s punctuality and ability to follow instructions from TSA. Harris was not clear or consistent as to who made the ultimate decision regarding the selection of the handler to be trained. Harris initially testified on direct examination that it was the lead who made the decision, but testified to the contrary on cross examination. On redirect examination, in response to a leading question, Harris testified that the supervisor typically followed his recommendation as to who should be trained.¹¹ (Tr. 85–86, 186–187, 207)

35 Gilmore testified that there is no specific training program for baggage agents who work in the CEBRA room and that CEBRA handlers have no special skills. Gilmore noted that CEBRA handlers receive the same pay as those who work elsewhere. Gilmore further testified that supervisors do not consult with leads regarding the selection of handlers to work in the CEBRA room. (Tr. 269–270)

40 Harris testified that he participated in the assignment of overtime to handlers about 3 or 4 days per week. (Tr. 86–88) According to Harris, when the supervisor asked him for people to

¹⁰ The General Counsel did not establish, through Harris or other evidence, that handlers possessed particular skills and abilities that might be a basis for such a determination. Rather, the record reflects that handlers largely performed the same unskilled work regardless of location.

¹¹ As discussed in greater detail below, I did not find Harris an entirely credible witness. His inconsistent testimony and susceptibility to suggestion are among the reasons for my evaluation of him in this respect.

work overtime, he would find the employee “who we trusted to work overtime and allow them the overtime.” (Tr. 86) Harris added that he would “select the employees according to the ability” (Tr. 87) However, when asked by the General Counsel what factors he used to select employees for overtime, Harris was unclear. He ultimately testified, “We have some employees who are willing to work . . . every minute of the day if we give them the . . . opportunity” and some people “say that they will come and they won’t show up.” (Tr. 88–89)

Gilmore testified that the airline carrier tells a supervisor when overtime is needed and the supervisor consults with him. The lead is not involved in the process. According to Gilmore, overtime is either assigned to the person who is currently at the duty station where overtime is required or, if that person will not stay, to the most senior person who is willing to stay.¹² (Tr. 263, 307–308, 311–312)

Weldron testified that leads solicited the names of employees who were willing to work overtime and ultimately notified the employee who was selected to do so. (Tr. 406–407) Johnson testified that the supervisor told him whether he was going to work overtime. (Tr. 338)

Employees receive a 30-minute lunch break and a 15-minute break between flights. Gilmore testified that these breaks are prescheduled and that supervisors, not leads, monitor when employees take their breaks. Weldron also testified that breaks are prescheduled by supervisors. According to Weldron, employees typically notify a lead before taking a break and the lead radios that information to a supervisor. (Tr. 271–272, 416–417) Weldron testified that he was sometimes told by leads that it was not a good time to take a break. (Tr. 406) Harris testified that employees asked leads to be released for breaks, including lunch break and ad hoc 5-minute breaks. (Tr. 51–52, 203) Harris admitted that he has never denied an employee a request for a 5-minute break. (Tr. 194)

Direction

Harris testified that he monitored handlers to ensure they were moving bags in a timely manner, scanning tags, and otherwise working properly. If a handler was not working quickly enough, Harris would tell the employee to speed up. Harris also made sure that handlers followed Employer rules and policies. For example, Harris told employees not to eat on duty or in restricted locations, sit on TSA tables, or dress inappropriately. The Employer’s handbook states that “[e]mployees must follow Rules and Regulations and Job Assignment given by Management and/or Leads.” (G.C. Exh. 6) (Tr. 37, 44–53, 82–85, 90–92)

When asked if he was held accountable for the poor job performance of handlers, Harris testified that he would be fined and disciplined if he did not ensure that the operation was performing properly. In support of this assertion, Harris testified regarding two incidents. On one occasion in or before 2016, then General Manager Patricia Cassidy gave Harris an oral warning (not a written verbal warning) after the airport manager on duty (MOD) complained that the Employer was not properly staffing an airport tower. Harris also claimed that, in about 2014, he received a written verbal warning for failing to transfer two employees to Terminal 5.

¹² Gilmore was credible in his demeanor and clear in articulating this method of assigning overtime. Harris was not clear or credible in discussing how employees were selected for overtime. (Tr. 86–90, 147) Accordingly, I credit Gilmore.

According to Harris, he did not receive a copy of this warning.¹³ Harris testified that he successfully grieved the alleged discipline on the grounds that he did not receive written instructions regarding the transfer. (Tr. 73–77, 185–186) Gilmore testified that a lead would not be held responsible for a handler’s poor job performance. (Tr. 263)

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Discipline

Harris testified that, as lead, he verbally corrected employee misconduct, but did not take “further action in writing them up, or give them a warning, or give them to a supervisor or to the manager himself” unless the misconduct was repetitive. (Tr. 54–55). According to Harris, he completed about eight or nine “Accident/Incident Reports” regarding employee misconduct. Two of those incident reports were entered into evidence; one dated November 25, 2016 (G.C. Exh. 4) and the other dated November 28, 2016 (G.C. Exh. 5).¹⁴ On both reports, Harris crossed out “Supervisor’s Statement” and wrote “Lead Agent’s Statement.” Harris was repeatedly asked by the General Counsel why he wrote such reports, but failed to testify that he did so to recommend discipline.¹⁵ (Tr. 205-206) Harris admitted he did not complete an incident report from 2016 to his discharge in October 2019. (Tr. 181–182) Harris testified that he rarely reported employees because he told them to correct misconduct and they normally complied. (Tr. 54–55, 73, 154, 181–182)

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The November 25, 2016 incident report concerned an employee who left his duty station early and did not return. Harris was directed to write this report by a supervisor. Accordingly, Harris wrote a description of the incident and concluded that the employee “did not follow the Rules and Regulations of his job assignment that was given to him by his lead: by leaving his post before the ending of his shift.” Harris did not recommend that a particular disciplinary action be taken against the employee (e.g., suspension). (G.C. Exh. 4) (Tr. 55–60, 163)

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The November 28, 2016 incident report concerned an employee who signed out early and failed to start the airline counter belt at 4 a.m., as Harris had directed. Harris later told the employee he would talk “to the supervisor when he comes in because [the employee] was in violation of company policies, for refusing [a] direct order.” At 7 a.m., the employee asked Harris for permission to go home because he felt sick, but Harris told him to wait until the supervisor arrived for work. When supervisor Wilfred Chance arrived, Harris explained the situation to Chance and gave him the incident report. According to Harris, Chance took over the matter from there and he (Harris) returned to work. Chance later told Harris he had given the employee a stern verbal warning. (G.C. Exh. 5) (Tr. 60–62, 163–165)

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Other than Accident/Incident Reports he reduced to writing, Harris recalled three incidents in which he verbally reported employee misconduct to supervisors and/or managers. (Tr. 63–72) In about 2015 or 2016, Harris reported to then General Manager Cassidy that an

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¹³ The General Counsel did not attempt to establish why the alleged disciplinary form was not obtained by subpoena and entered into evidence. Absent such an explanation, Harris’s testimony is not best evidence of the contents of the writing and I do not rely on it. Fed. R. Evid. 1004. *Shaw v. Unum Life Insurance Co. of America*, 1989 WL 52713, fn. 5 (D.N.J. May 15, 1989).

¹⁴ Harris testified that he received copies of all the reports, but could only find two. (Tr. 166)

¹⁵ The General Counsel began this line of examination by asking the leading question, “You wrote those incident reports, Mr. Harris, because you believed that discipline was in order; is that correct?” Nevertheless, Harris failed to testify that he wrote incident reports because he believed discipline was in order. (Tr. 205–206)

employee was away from his duty station 2 days in a row. Harris did not know if Cassidy conducted an independent investigation of the matter. However, Cassidy later told Harris she discharged the employee for stealing time. (Tr. 63–65, 182–183)

5 In about 2019, on multiple occasions, Harris reported an employee for failing to punch in and inaccurately recording his arrival times on the time sheet. Harris first reported this conduct to three supervisors, but the supervisors refused to do anything because they thought the employee was friends with Gilmore. Harris claimed he next took the employee directly to Gilmore. Harris did not recommend that Gilmore take any particular disciplinary action. The
10 employee requested a change of schedule because he had two jobs, and Gilmore granted this accommodation. However, thereafter, the employee’s misconduct continued. According to Harris, he again spoke to Gilmore and recommended that the employee “be suspended or whatever he think[s] was necessary.” (Tr. 155–156) Gilmore said, “I will deal with it. (Tr. 69–70) Harris was not present when Gilmore spoke to the employee, but later learned that the
15 employee had been terminated. (Tr. 66–70, 155–156, 183–184, 221) Gilmore testified that he discharged the employee for time and attendance problems after reviewing his timecards. Gilmore denied that Harris reported misconduct by this or any other employee.¹⁶ (Tr. 272–273, 277)

20 In about 2019, Harris saw three CEBRA room employees improperly dressed and directed them to change their clothes. Two of the employees complied, but the third refused. Harris brought the employee to the supervisors’ office and notified supervisor Cebren Crawford of the incident. Crawford said he would speak to the employee. According to Harris, Crawford
25 also told the employee he would be sent home in the future if he failed to follow the direction of a lead. (Tr. 71–72, 184–185) Gilmore testified that he was not aware of any discipline issued to the employee in question. (Tr. 277)

The Employer issues “Notices of Disciplinary Action” to employees who engage in misconduct with four boxes to check as options for the type of disciplinary action: “Verbal
30 Warning,” “Written Warning,” “Suspension,” or “Termination.” (E. Exh. 1) Harris understood that the Accident/Incident Report was a different form than the Notice of Disciplinary Action. (Tr. 160–161) Harris testified on cross and redirect-examination that he issued one such notice to an employee between 2014 and 2016 and confirmed this on redirect examination. (Tr. 152–154, 202–204) However, on recross examination, Harris admitted that the document was an
35 Accident/Incident Report rather than a Notice of Disciplinary Action.¹⁷ (Tr. 216)

Early Morning Weekend Hours

40 As noted above, supervisors and managers do not report to work until about 7 or 8 a.m. On weekends, Harris arrived for work at 3 a.m. Harris reluctantly admitted that the terminal was less busy before 9 a.m. than after 9 a.m. (Tr. 144–145) However, the Employer did service some flights during the early morning hours. A flight might leave after 3 a.m. because it was delayed. Further, although no longer in service as of the hearing, flights to Casablanca and a

¹⁶ I credit Harris. Harris provided a more detailed description of the events than Gilmore and Harris’s involvement in those events was likely more prominent in his own mind than in the mind of Gilmore. Further, Harris appeared more spontaneously certain regarding the sequence of these events than at other times during his testimony.

¹⁷ Harris’s inconsistent testimony in this regard is another incident which leads me to question his overall credibility.

Cayman Airlines flight departed before 9 a.m. Harris also testified that, at some point, there were about three additional early flights. Weldon testified that Casablanca was the main early morning flight, but there were two or three others. (Tr. 288–289, 356–363, 368–369, 403–406)

5 Harris claimed that, on weekend mornings before supervisors and managers arrived for work, he was responsible for the Employer's entire operation, including the skycaps, PSR, and wheelchair departments.¹⁸ (Tr. 92–94) Harris testified that he ensured employees had everything they needed and started work on time once the airlines opened. According to Harris, he used keys to unlock the carts and access the supervisors' office to obtain and distribute scanner guns. Harris testified that, if the MOD asked Harris to send a PSR, wheelchair assistant, or skycap to a certain location, he would do so. Harris further testified that he was not required to call a superior if an incident involving an employee occurred early in the morning, but was supposed to deal with the situation himself. The Employer did not provide Harris with the telephone numbers of supervisors and he only had contact information for two of them. Harris never called a supervisor or general manager during the weekend early morning hours. (Tr. 24, 10 43, 92–94, 95–102, 269, 377–378)

20 Gilmore denied that Harris, as a baggage lead, was ever responsible for supervising employees in other departments, including early morning weekend hours. According to Gilmore, if any incident occurred regarding an employee, the lead needed to call him or a supervisor. (Tr. 269, 300–304)

25 Harris testified that about 11 or 12 baggage handlers and between 18 to 32 total employees worked during the early morning hours. Gilmore testified that only about three handlers worked from 3 to 7 a.m. (Tr. 77, 141–145, 364, 369–371)

30 Harris identified two instances during the early morning weekend hours when he sent employees home before a supervisor arrived. One employee had a history of discipline for poor hygiene and, after receiving a written warning on October 18, 2017 (E. Exh. 2), supervisor Geoffrey Benjamin told Harris to send the employee home if he came to work in that condition again. (Tr. 204–205, 216) Accordingly, on a Sunday in about 2018, Harris sent the employee home because he was poorly attired, dirty, and malodorous. Harris did not contact a supervisor or manager before taking this action. Harris claimed that the employee was not paid for the day, but the evidence does not establish that Harris had personal knowledge of the employee's pay. When the supervisor arrived for work, Harris told him what happened. The supervisor told Harris to send the employee home if he arrived for work again in that condition. The incident was not reduced to writing and the employee did not receive any formal discipline. (Tr. 73, 99–102, 151, 216)

40 Harris testified that, on another occasion in about 2016 or 2017, he sent an employee home for failing to obey a direction to help remove wheelchair travelers from an airplane after an early morning departing flight returned to the airport. According to Harris, the MOD asked for additional wheelchair operators to help disembark the flight and Harris directed handlers and skycaps to assist. The handler in question took one person off the airplane in a wheelchair, but

¹⁸ According to Harris, each successive general manager told him that he was responsible for the entire operation during weekend early morning hours. (Tr. 92–94) However, the Employer employs multiple leads and the record was unclear as to how many leads were present during early morning weekend hours. Further, the record was unclear as to why, if multiple leads were on duty, Harris was the one lead responsible for the Employer's entire operation.

then disappeared. Harris testified that he subsequently found the employee and sent him home after 6.5 hours of work. Harris claimed that the employee was not paid for the lost hours, but the evidence does not establish that Harris had personal knowledge of the employee's pay. When supervisor Kenny Mitchell arrived, Harris told him what happened. Harris also told Mitchell he would send the employee home again if the employee ever did the same thing. Mitchell said, "ok." (Tr. 95–99) Harris admitted that he did not remember or describe this incident in the affidavit he provided during the Regional investigation of the case.¹⁹ (Tr. 430)

Gilmore testified that early morning weekend hours mostly involved organizing necessary equipment for flights later in the day. According to Gilmore, during these hours, leads such as Harris performed largely the same tasks as handlers. (Tr. 257–259)

Discharge of Victor Harris

Harris did not have a consistent recollection of communications with the Union before he was ultimately discharged on October 3, 2019. Harris initially testified that he first met Union Representative Todd Jennings in July 2018 and told Jennings he wanted to be a nonmember agency fee payer instead of a full dues paying member of the Union. According to Harris, Jennings promised to give him the document he would need to complete to opt out of membership. Harris subsequently testified that this conversation occurred in October 2018. In about December 2018, according to Harris, Jennings again promised to give him the agency fee document when he returned from a trip out of the country. Harris testified that, in July 2019, Jennings finally told him he did not have time to get Harris the form and that Harris needed to pay \$800 to "join the Union, if not, you get no help."²⁰ (Tr. 108–109) Harris claimed he talked to Jennings about seven times between October 2018 and July 2019 regarding the document he needed to become an agency fee payer. (Tr. 106–109)

Jennings testified that he had two or three conversations with Harris before October 2019. According to Jennings, he initially talked to Harris about continuing in the position as shop steward and to discuss how things were done. Jennings also claimed he spoke to Harris about his financial obligations and explained that the union needed dues in order to function. According to Jennings, Harris was opposed to paying dues and joining the Union because Local 32BJ did not have a contract with him. Jennings denied that Harris requested to be an agency fee payer or *Beck* objector. Jennings further testified that Harris never asked for the forms to select such an option. According to Jennings, Harris never claimed to be a supervisor. Jennings noted that he would never recruit a supervisor to be a shop steward. (Tr. 349-354)

The Union mailed a letter dated April 1, 2019 to Harris, which stated (Jt. Exh. 3)

According to the Union's records, you are not paying Union dues or agency fees or initiation fee. As you may know, paying an amount generally equivalent to dues is a CONDITION OF CONTINUED EMPLOYMENT under the union security clause of your employer's collective bargaining agreement with the

¹⁹ Harris did describe in his affidavit the other incident in which he sent the employee home for poor hygiene. (Tr. 371–372) In my opinion, the fact that Harris described one but not both of the alleged incidents actually renders the incident which was not described more dubious. However, as discussed above, I would not find Harris to be a supervisor even if both incidents occurred.

²⁰ The complaint contains no allegation that the Union, by Jennings, threatened not to represent Harris if he refused to join the Union.

Union. Our records show that you have not been paying dues or agency fees through March 2019 and that you owe \$810.

5 If you believe that this amount is in error, please immediately contact our Dues Department at 212-388-3800 to discuss your situation. You may also come to the Dues Department located on the 5th floor at 25 West 18th Street, New York City between 8:30 a.m. and 5:00 p.m., where the dues staff can assist you by reviewing your records if you think there is an error. Otherwise, please pay the amount listed above within 30 days of the date of this letter. You should send
10 your payment for the entire amount due in the enclosed pre-paid envelope to: SEIU Local 32BJ, Dues Department, 25 West 18th Street, 5th Floor, New York, New York 10011

15 Again, your obligation is to remain current in your dues or agency fees payments, which means they must be paid on a monthly basis. A failure to remain current in your dues or agency fee obligations may result in the loss of your employment.

20 Meanwhile, we are enclosing a Notice Regarding Union Security Agreement and Agency Fee Obligations, which describes the rights and obligations of union members and of non-member agency fee payers.

Harris testified that he did not receive this letter in the mail until early May 2019. (Tr. 110) The enclosed "Notice Regarding Union Security Agreements and Agency Fee Obligations" stated that "employees must become and remain members of the Union as a condition of
25 employment." (Jt. Exh. 3) The notice further stated that, "If you are covered by a union security clause, you may fulfill your 'union security' obligations either by joining the Union, and thereby enjoying full rights and benefits of Union membership; or you may choose not to become a Union member, and fulfill your financial obligations to the Union under the union security clause as an 'agency fee payer.'" The notice explained that "Agency fee payers generally are charged
30 the same dues and initiation fees uniformly required of Union members." With regard to the Union's policy on agency fee objections, the notice stated:

35 Local 32BJ's Policy on Agency Fee Objections is the Union's means of meeting its legal obligations to employees covered by union security clauses. Under this Policy, objections for the 2018 objection year which is the 12-month period beginning August 1, 2018 and running through July 31, 2019 must be sent to the Union no later than October 31, 2018. To be timely, the objection must be postmarked no later than October 31, 2018. In addition, agency fee payers who are new to the bargaining unit or who have not previously received this notice
40 may object within 30 days of receiving this notice or by October 31, 2018, whichever is later; and employees who resign Union membership may object within 30 days of becoming an agency fee payer or by October 31, 2018, whichever is later. All non-members who file timely objections will be charged only for chargeable expenditures for the 12-month period beginning with August
45 1, 2018 and running through July 31, 2019, or for new non-members, from the date of their timely objection through the remainder of the objection year. New bargaining unit members are to receive this notice prior to any demand being made upon them for the payment of agency fees. However, if, for any reason a new unit member begins paying agency fees prior to receipt of this notice, he or
50 she may object retroactively to the commencement of such payments and for the duration of the current annual objection period.

5 Objections should be in writing and sent to Agency Fee Administrator, SEIU, Local 32BJ, 25 West 181st street, 5th Floor, New York NY 10011. No special form is required to register an objection. However, the letter of objection should include the objector's name, address, employer, and social security number.

10 Objectors will be given a full explanation of the basis for the reduced fee charged to them. The explanation will include a more detailed list of the categories of expenditures deemed to be "chargeable" and those deemed to be "non-chargeable," and the independent certified public accountants' report showing the Union's expenditures upon which the fee is based. For the objection year beginning August 2018, 29 percent of the Union's expenditures will be non-chargeable. In addition to any other avenue of relief available under the law, objectors will have the option of challenging the Union's calculation of the reduced fee before an impartial arbitrator appointed by the American Arbitration Association. Details of the method of making such a challenge and the rights accorded to those who do so will be provided to objectors along with the explanation of the fee calculation. Pending the arbitrator's decision, the Union will hold in escrow a portion of the fees paid by the objector, in an amount sufficient to ensure that the portion of the fee reasonably in dispute will not be expended during the appeals procedure

25 Harris claimed he did not understand the letter, but failed to explain what specifically confused him. (Tr. 177–179)

30 After the April 1, 2019 letter was introduced into evidence, in response to my questioning, Harris testified that he did not speak to Jennings until he received it. Harris testified that he did not understand why he owed \$810 and had not previously spoken to anyone from the Union about paying agency fees instead of full dues. In fact, Harris testified that, before he received the letter, he did not know it was an option to pay agency fees instead of full dues. (Tr. 191-194) On redirect examination, Harris initially confirmed that he did not talk to Jennings until after he received the April 1, 2019 letter. However, upon further questioning by the General Counsel, Harris returned to his original testimony that he spoke to Jennings multiple times before receiving the letter. (Tr. 207–211)

35 PSR and Union Shop Steward Vladimir Clairjeune testified that, on May 15, 2019, he attempted to personally serve Harris with another letter dated May 6, 2019. (Tr. 321–327) (J. Exh. 4(a) & 4(b)) The letter stated (J. Exh. 4(a)):

40 We write about **A VERY SERIOUS MATTER THAT COULD AFFECT YOUR EMPLOYMENT**. Please read this letter carefully.

45 The collective bargaining agreement between Local 32BJ and your employer contains a union security clause requiring **AS A CONDITION OF EMPLOYMENT** that employees covered by the agreement pay to Local 32BJ an amount generally equal to the period dues uniformly required of Union members. For non-members, these payments are called agency fees. Generally, the obligation to pay Union dues or fees begins on the 30th day following the beginning of covered employment. The legal significance of the union security clause is explained more fully in the enclosed ***Notice Regarding Union Security Agreement and Agency Fee Obligations***.

Our records indicate that you owe Union dues or fees for at least the past three (3) months. Monthly dues or agency fees for employees such as yourself, working FT are \$45.

5

Our records show that for the past three (3) months you owe the following: March 2019-\$45, April 209-45, May 2019-\$45, for a total of \$135.

10

While Local 32BJ may be legally entitled to collect dues or fees covering a longer period, in the interest of quickly settling this matter, we are willing to accept this amount as full payment of all back amounts you may owe. You may pay the amount due in a lump sum or in three equal installments, over the next three months. If you choose the installment plan, you must honor your plan or all back amounts will become owed again. In addition, you must also begin paying all current and future dues or fees on time, which is no later than the last day of each month.

15

To make payment arrangements, contact the Dues Department on the 5th floor at 25 West 18th Street, NYC 10011 or call at 212-388-3800 an ask for Agency Fee Administrator

20

If you do not make suitable arrangements to pay the amount due within **30 days** of the date your receipt of this letter, **and** begin paying Union dues or fees each month as they become due, all back amounts will become due and **LOCAL 32BJ WILL CONTACT YOUR EMPLOYER TO REQUEST THAT YOU BE DISCHARGED FROM EMPLOYMENT.**

25

According to Clairjeune, on May 15, 2019, he was sitting in the food court with two co-workers when he saw Harris walk by. Clairjeune told Harris he could pay agency fees and would be terminated if he did not, but Harris swatted the documents away and left. Clairjeune filled out a service sheet titled, "Proof of Letter Delivery Service." (Jt. Exh. 4(b)).

30

Harris denied he ever saw the May 6, 2019 letter or that Clairjeune attempted to serve it upon him. (Tr. 113–114)

35

The Union sent a final letter to Harris dated September 9, 2019, which stated as follows (Jt. Exh. 5):

40

This is to request enforcement of the Union security clause in your collective bargaining agreement with Local 32BJ.

45

The above-named employee covered by that agreement, after having been fully informed of the obligation to pay Union dues or agency fees, and given a reasonable opportunity to make such payments, has refused to do so. Please advise the employee that unless he paid union dues owe within 15 days of the date of this letter, that you will have no choice but to discharge him for failure to meet this requirement of employment.

50

If you have any questions, you may contact Izabella Kernel, Agency Fee Administrator, Dues Department at 212-388-3925

Harris testified that he received this letter in about late September 2019. Harris spoke to Gilmore about it, but Gilmore referred him to Jennings. Harris did not contact Jennings or anyone else from the Union. (Tr. 116–117)

5 Gilmore testified that he received the September 9, 2019 letter and talked to Harris regarding it about three times. According to Gilmore, he warned Harris that he (Harris) had 15 days to pay unpaid dues or he would be discharged pursuant to the collective-bargaining agreement. (Tr. 274–276)

10 On October 3, 2019, Gilmore discharged Harris. Harris testified that Gilmore told him he was being discharged because he refused to join the Union. Harris claimed he told Gilmore he asked Jennings to be a nonmember and was still waiting for Jennings to give him the documents to make that selection. According to Harris, Gilmore confirmed the discharge pursuant to orders from the company, but said Harris had done nothing wrong. (Tr. 117–118)
 15 Gilmore claimed he explained to Harris that he was being discharged because he had been given 15 days to pay his unpaid dues and failed to do. Gilmore testified that Harris did not say anything in response.²¹ (Tr. 274-276)

CREDIBILITY

20 Before turning to my analysis, I will add here some additional observations regarding the credibility of the witnesses.

I found Harris less than completely credible. He often failed to provide straightforward
 25 answers as an unbiased fact witness and sometimes veered into advocacy. For example, Harris appeared to exaggerate his authority, discretion, and responsibility in order to portray himself as a 2(11) supervisor. Harris initially testified that he merely directed employees to do unit work and performed no handler work himself, but later admitted he helped perform unit work when necessary. (Tr. 41–42, 127–129) It was an exaggeration by Harris, in my opinion,
 30 to claim he wrote employees up by completing “Accident/Injury Reports” when he knew the Employer had a different formal disciplinary form. (Tr. 161–166) I also found it noteworthy that, upon cross-examination and redirect examination, Harris claimed he completed a disciplinary form (which he allegedly forgot to mention on direct), but ultimately retracted that claim upon recross-examination. (Tr. 152–154, 202–204, 216) I further note that Harris claimed that
 35 handlers performed different work at different counters, while General Counsel witness Weldron testified that the opposite was true. (Tr. 77-80, 416) Harris claimed that he assigned handlers overtime and locations according to their “ability,” but failed to explain any significant difference in the abilities of handlers. (Tr. 77-80, 87)

40 I found Clairjeune credible in testifying that he served Harris with a dues delinquency letter. Although Clairjeune is employed by the Employer and a shop steward of the Union, unlike Harris, he does not have backpay and reinstatement riding on this case. Clairjeune’s demeanor in response to questions from all parties was that of a fair and neutral fact witness. I credit Clairjeune’s account of the incident over Harris’s denial. Further, I believe the incident
 45 was a notable one and find it unlikely that Harris simply forgot. Rather, I believe Harris testified falsely in the belief that doing so would help the General Counsel’s case. Accordingly, I find that

²¹ I credit Gilmore’s account of the discharge. Gilmore, Clairjeune, and Jennings were more consistent and credible than Harris with regard to events leading to Harris’s discharge and the discharge itself.

Harris's testimony in this regard undermined his overall credibility.

5 Like Clairjeune, I found Jennings credible and credit his testimony regarding conversations he had with Harris. Harris was not clear or consistent in his account of the timing and substance of events leading to his discharge. In any event, the General Counsel does not claim that the Respondents agreed to the discharge of Harris because he wanted to pay agency fees instead of full union dues. Therefore, Harris's conversations with Jennings have little relevance. It is undisputed that Harris was notified of his dues delinquency, failed to cure it, and was discharged for that reason.

10 Johnson and Weldon were credible fact witnesses who appeared to answer questions in an honest and unbiased manner.

15 My impression of Gilmore as a witness was that he often testified about how he thought the operation was supposed to function and did not necessarily establish his personal knowledge of the actual operation. For example, Gilmore purported to testify to the early morning operation even though he did not work early morning hours. Gilmore purported to testify that leads did not have keys to the supervisors' office and cart station even though he was not in a position to confirm the same and failed to offer a clear explanation as to how handlers obtained equipment if leads did not have the keys.

25 With these observations in mind, I confirm the following findings of fact. Baggage leads assign handlers to duty stations. However, handlers do not perform significantly different tasks or exercise significantly different levels of skill at different duty stations. Employees often receive the same assignment on a consistent basis (sometimes at the request of the airline), but may be moved by leads as workflow requires. Leads inquire whether employees are willing to work overtime and often tell employees if they have been selected to do so. However, the actual selection of the employee to work overtime does not involve any discretion. An employee is simply asked to stay longer at their station if overtime is required at that station or, if that employee cannot stay, overtime is assigned by seniority. Harris did not regularly attend and was not regularly called during biweekly supervisor meetings. Handlers do not receive special training to work in CEBRA. Harris had keys to the supervisors' office and the cart station.

35 ANALYSIS

Supervisory Status of Victor Harris

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

40 [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but
45 requires the use of independent judgment.

The burden of proving supervisory status rests with the party alleging that such status exists. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *Pratt Towers, Inc.*, 338 NLRB 61, 71 (2002). Accordingly, "[t]he Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status."
50 *Busco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012). A party seeking to prove that an

individual is a supervisor must do so by the presentation of “detailed, specific evidence” that is not “in conflict or otherwise inconclusive.” *Id.* See also *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003) (“any lack of specific evidence that would support a finding of supervisory status must be construed against the . . . party asserting supervisory status”).

5

The “Board has exercised caution ‘not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.’” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). Thus, the Act protects “straw bosses, lead men, and set up men” even though they perform “minor supervisory duties.” *Id.* quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–281(1974). To be classified a supervisor, an individual must use independent judgement in such a way as to affect employees’ terms and conditions of employment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006); *Children’s Farm Home*, 324 NLRB 61 (1997). “Independent judgement” will not be found where a result “is dictated or controlled by detailed instructions. . . .” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). See also *Busco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012). Likewise, “independent judgement” does not include recommendations to a decision maker who conducts independent investigations of the events and fails to follow the recommendations. *Children’s Farm Home*, 324 NLRB 61 (1997). Authority that is exercised on a rare, isolated, and irregular basis will not confer supervisory status. *Offshore Shipbuilding*, 274 NLRB 539, 555 (1985).

10

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The mere fact that a lead is at times the highest-ranking employee or “in charge” of an operation does not establish the exercise of supervisory authority during those times and will not confer supervisory status. *Flex-N-Gate Texas, LLC.*, 358 NLRB 622, 635 (2012); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *Billows Electric Supply*, 311 NLRB 878, 879 (1993).

30

In “borderline cases,” the Board may look at secondary indicia such as the attendance at supervisor meetings, granting time off, and other factors suggesting that the alleged supervisor possesses a status separate and apart from rank-and-file employees. *Pratt Towers, Inc.*, 338 NLRB 61, 71 (2002). However, secondary indicia will not establish supervisory status absent some showing of at least one supervisory authority among those expressly listed in Section 2(11) of the Act. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

35

Assignment

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), a case involving charge nurses, the Board sought to clarify supervisory “assignment” as follows:

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The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as “assign” within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to “assign.” To illustrate our point in the health care setting, if a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, the charge nurse’s ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment. In sum, to “assign” for purposes of Section 2(11) refers to the [supervisors] designation of significant overall duties to an

employee, not to the [supervisors] ad hoc instruction that the employee perform a discrete task.

5 In this regard, “[i]t is enough that the assignment affects the employment of the employee in a manner similar to the other supervisory functions in the series set forth in Section 2(11).” Id. By way of further illustration, the Board noted that “there can be ‘plum assignments’ and ‘bum assignments’—assignments that are more difficult and demanding than others. The power to assign an employee to one or the other is of importance to the employee and management as well.” Id. The matching of the needs of the operation “to the skills and training of a particular” employee is critical to the employer’s ability to succeed in business and reflects supervisory authority. Id.

15 Harris did not engage in assignment within the meaning of Section 2(11) of the Act. Harris did not permanently transfer employees between departments (such as from baggage handler to wheelchair agent) or permanently assign employees to perform particular tasks. Rather, if the need arose, perhaps at the request of the MOD, Harris assigned handlers to assist wheelchair travelers. However, these were discrete temporary assignments on an irregular and ad hoc basis which do not confer supervisory status. *Busco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012).

20 Harris sometimes assigned handlers to different airline counters if workflow required. It is not clear whether Harris also moved handlers between counters and baggage rooms during the day. Regardless, any such assignments were made on a limited and ad hoc basis. Further, there was no significant distinction in the tasks performed and skills employed by handlers at different duty stations. See *Washington Nursing Home, Inc.*, 321 NLRB 366 fn. 4 (1996). Handlers use scanners in certain rooms (as opposed to the counters), but the General Counsel failed to prove that the operation of scanners was difficult, skilled, or onerous. Other than asking a leading question and receiving a conclusory response, the General Counsel did not establish that leads such as Harris matched the skills or abilities of an employee with the nature or difficulty of a particular task.

30 Releasing employees for breaks did not involve the exercise of independent judgement in a manner that affected employees’ terms or conditions of employment. Routine 30 and 15-minute breaks are prescheduled, and employees simply notify leads when it is time for those breaks. Harris testified that an employee can ask for a 5-minute break, but admitted he has never denied such a request. To the extent a lead might on occasion ask an employee to postpone a break because work is busy, the exercise of such authority is discrete and ad hoc. The function of leads in releasing employees for breaks is a routine clerical duty that does not involve independent judgement or affect employees’ terms of employment within the meaning of Section 2(11) of the Act.

45 The function of soliciting employees to stay late to perform overtime is similar to the function of releasing employees for breaks. As noted above, I credit Gilmore’s testimony that the selection is mechanically based on the duty station or seniority of the employee. To the extent Harris may have taken it upon himself not to solicit overtime from employees who are not punctual, his practice in this regard was equally ministerial and lacking independent judgement.

Responsibly to Direct

50 It is as an element of “responsible” direction that “the person directing and performing the oversight of the employee must be accountable for the performance of

the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed.” *Oakwood Healthcare, Inc.*, 348 NLRB at 692. Thus, an employer must not only delegate direction to the putative supervisor but hold the supervisor responsible for it with the prospect of adverse consequences if the directed task is not performed. Id.

Harris recalled two incidents of direction, neither of which qualify as “responsible” under Section 2(11) of the Act. Harris did not receive a disciplinary notice from Cassidy for failing to properly staff an airport tower and his characterization of the incident as disciplinary was misplaced. The Employer has a specific disciplinary form and Harris did not receive one. Indeed, the General Counsel failed to establish that the incident was kept in Harris’s personnel file or was otherwise held against him in any way. See *Flex-N-Gate Texas, LLC*, 358 NLRB 622, 634 (2012).

Regarding the second incident, Harris claimed he received a written “verbal” warning for failing to transfer certain employees to a different terminal. However, under the best evidence rule, such testimony is not reliable absent an explanation as to why the actual disciplinary form was missing. Nevertheless, even if I were to accept testimony in lieu of the document itself, Harris did not describe a situation in which employees refused to go where they were assigned and he was held accountable for their misconduct. Rather, Harris claimed he was disciplined for his own conduct of failing to send the employees to another terminal. Indeed, Harris admitted that, as shop steward, he grieved the matter and was able to have the alleged discipline quashed because he was not given a directive to transfer the employees.

The two alleged incidents the General Counsel relies on to prove responsible direction are not only lacking in a showing of “responsibility,” but remote and isolated events. Accordingly, the General Counsel did not establish that Harris responsibly directed employees within the meaning of Section 2(11) of the Act.

Discipline and Sending Employees Home

The General Counsel failed to prove that Harris exercised independent judgement in disciplining employees or recommending discipline. Harris did not prepare or administer written disciplinary notices. He only completed Accident/Incident Reports which have no boxes or space specifically dedicated to a description of employee misconduct and the type of disciplinary action being administered (i.e., verbal warning, written warning, suspension, discharge). Rather, the reports merely have space for a “Supervisor’s statement.” Harris actually crossed out “Supervisor” and wrote in “Lead Agent.” It is also noteworthy that Harris prepared the November 25, 2016 incident report after a supervisor told him to do so. The record contains no evidence that these reports are maintained in employees’ file for use in progressive discipline.

The evidence failed to establish that Harris effectively recommended specific disciplinary action when reporting (verbally or in writing) what he perceived as employee misconduct to a supervisor or manager. For example, Harris merely gave his November 28, 2016 incident report to a supervisor and the supervisor took the matter from there. At most, Harris claimed he once told Gilmore that a certain employee should be “suspended or whatever he thinks was necessary” for ongoing attendance problems and improperly recording time. However, the employee was not suspended. Harris initially talked to three supervisors who refused to take any action and, when Harris first spoke to Gilmore, Gilmore accommodated the employee’s

request for a change of schedule. When Harris later recommended that the employee be “suspended or whatever,” Gilmore said, “I will deal with it” and discharged the employee instead of suspending him. As Harris did not effectively recommend specific disciplinary action and his reports of misconduct were handled independently by supervisors and managers, Harris did not effectively recommend discipline withing the meaning of Section 2(11) of the Act.

Similarly, Harris was not a supervisor because, on two occasions during early morning weekend hours, he sent employees home. Supervisor Geoffrey Benjamin gave Harris a standing instruction to send one of those employees home if his hygiene was poor. Harris merely followed that instruction. As the Board has found, following such an instruction does not involve “independent judgement.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006).

On another occasion in about 2016 or 2017, Harris sent an employee home 1.5 hours early for failing to help remove wheelchaired travelers from an airplane as directed. However, such a single, isolated, and remote incident does not confer supervisory status. *Offshore Shipbuilding*, 274 NLRB 539, 555 (1985). Further, although Harris claimed the employee was not paid for the loss of 1.5 hours, the General Counsel did not establish that Harris had personal knowledge of the same and such ambiguities are resolved against the party asserting supervisory status. See *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047–1048 (2003) (bare testimony that witness heard alleged supervisor fired an employee lacks evidentiary basis and is not grounds for establishing supervisory authority). The employee in question received no written discipline and the incident was not otherwise held against him. *Children’s Farm Home*, 324 NLRB 61 (1997); *Northern Montana Health Care Center*, 24 NLRB 752, 754 (1997). Accordingly, the General Counsel did not satisfy the burden of proving that, by sending this employee home, Harris regularly acted in a manner that affected the terms and conditions of employees. See *Washington Nursing Home, Inc.*, 321 NLRB 366 fn. 4 (1996).

Early Morning Weekend Hours and Secondary Indicia

That Harris may have been the highest-ranking person in the operation at Terminal 1 and other secondary indicia are immaterial to his alleged supervisory status because the General Counsel did not establish that Harris exercised any primary 2(11) authority. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047–1048 (2003) (employee not supervisor even though he may have been “in charge” on Saturdays and attended certain management meetings). Indeed, here, the General Counsel failed to prove that second indicia significantly favored a finding of supervisory status.

The General Counsel did not present evidence that Harris was the only lead working in Terminal 1 on Saturday and Sunday from 3 to 7 a.m. Harris claimed he was told by certain general managers that he was in charge during these hours, but it is unclear whether other leads were on duty and whether those leads possessed the same authority. The burden of proof rests with the General Counsel and the General Counsel is responsible for clarifying such ambiguities against the Respondents. Accordingly, I do not find that Harris was actually “in charge” of the Employer’s entire operation during early morning weekend hours and do not find him to be a supervisor on that basis.

With regard to other secondary indicia, I find it particularly notable that Harris was a shop steward for Local 660. It is hard to believe that employees would perceive an individual who was designated as a representative of the unit in dealings with the Employer as an exclusive supervisory agent of the Employer. Harris also performed unit work when necessary and did not, as a lead, have significantly different pay, hours, or

5 other terms and conditions of employment of employees. The Respondents applied the collective-bargaining agreement to Harris and Harris did not object to his coverage by the contract until after he was discharged. The \$2.75 per hour pay increase that Harris received when he was promoted to lead is not a strong secondary indicia of supervisory status. As noted by the judge in *Intrepid Museum Found., Inc.*, 335 NLRB 1, 13 (2001):

10 [E]ven if I were to consider these secondary indicia, they are not indicative of supervisory status herein. The additional salary of \$3 per hour has little significance, since the Board routinely finds employees who receive extra pay for assuming leadman responsibilities not to be supervisors under Section 2(11) of the Act. *Lincoln Park*, [318 NLRB 1160,1162-1163 (1995)] (maintenance supervisor received extra \$2 per hour), *Jordan Marsh Stores*, 317 NLRB 460, 467 (1995); *Brown & Root*, [314 NLRB 19 (1994)].

15 Harris did not regularly attend supervisory meetings, particularly once Gilmore became terminal manager. Although Harris did have keys to the supervisors' office and for the cart locking station, he did not work in the supervisors' office as a duty station. Harris wore a different uniform than rank-and-file employees, but did not wear personal
20 attire like supervisors or management.

25 Ultimately, the General Counsel did not meet the burden of proving that Harris possessed primary or secondary indicia of supervisory status. Since the General Counsel's theory of this case is that the Respondents violated the Act by applying the contractual union security clause to a nonunit supervisor, the complaint must be dismissed upon my finding that Harris was not, in fact, a supervisor.

The Respondents did not Violate the Act even if Harris was a Supervisor

The Respondents Intended and were Entitled to Include Leads in the Unit

30 Section 8(a)(2) of the Act states that it shall be an unfair labor practice for an employer:

35 to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay[.]

40 The General Counsel contends that the Employer violated Section 8(a)(2) and (1) of the Act and the Union violated Section 8(b)(1)(A) of the Act when they agreed to the discharge of an alleged supervisor pursuant to the contractual union security clause. Section 8(a)(3) of the Act contains a proviso that specifically allows employers to enter into such union security agreements. As discussed above, I found that the General Counsel did not establish Harris's
45 supervisory status. However, even if Harris was a supervisor, the Respondents did not violate the Act as alleged in the complaint.

50 The unit description in the Local 32BJ contract excludes supervisors and does not expressly reference leads. However, it is undisputed that all parties – i.e., the Employer, two successive unions, and Harris himself – understood and treated leads as nonsupervisory unit employees. In fact, Harris was a union steward for Local 660 and Jennings talked to him about

continuing in that position for Local 32BJ. The parties' undisputed practice of including leads in the unit did not contradict or modify the collective-bargaining agreement. The practice merely confirmed an understanding and agreement that leads were not supervisors and not excluded from the unit. The only issue here is whether the Board should consider de novo and reject the parties' understanding in this regard.

Unit scope and placement issues are ultimately contractual matters determined by the bargaining parties, not the Board. In *Gariot Community Hospital*, 312 NLRB 1075 fn.2 (1993), a unilateral change case, the Board applied a collective-bargaining agreement to certain nurses found by the judge to be supervisors even though, as here, the contract's recognition clause excluded "supervisors within the meaning of the [Act]." The Board determined that it "need not reach the issue" of the nurses' supervisory status because the employer "agreed to a contract that covered certain individuals [later] found to be supervisors." *Id.* citing *N.L.R.B. v. News Syndicate Co.*, 365 U.S. 695 fn.2 (1961) (as reflected in Section 14(a) of the Act, supervisors may be union members and included by contractual agreement in bargaining units). Thus, the Board effectively deferred to the parties' understanding of nurses' supervisory status.

In representation cases, the Board routinely relies on unit stipulations among the parties, including unit exclusions or inclusions of supervisors. See e.g., *Grancare, Inc.*, 331 NLRB 123, 123 (2000) (Board is not "required to determine the supervisory status of job classifications in the stipulated bargaining unit any time the issue is raised"); *White Cloud Products, Inc.*, 214 NLRB 516, 516–517 (1974) (Board must ascertain the intent of the parties to exclude "leaders" and, if clear, need not address their individual supervisory authority to discipline). Admittedly, in unfair labor practice cases "involving independent violations of the Act," the Board may revisit the supervisory status of individuals who were stipulated to be supervisors during the representation case because the General Counsel was not a party to the stipulation. *Flatbush Manor Care Center*, 287 NLRB 457, 469 (1987). However, this case does not involve an "independent violation" of the Act (e.g. an alleged 8(a)(3) discharge of a stipulated supervisor). This case is controlled by an agreement between bargaining parties as to unit scope and placement. Neither the General Counsel nor Harris are bargaining parties. Rather, it is the contractual intent of the Respondents that is controlling.

Nevertheless, citing *International Ladies Garment Workers' Union, AFL–CIO v. NLRB*, 366 U.S. 731 (1961), the General Counsel asserts that a good-faith but mistaken belief as to the application of a union security clause to leads is not a defense to a Section 8(a)(2) allegation. As noted above in the previous section of this analysis, I disagree that the Respondents were mistaken in their belief regarding the supervisory status and unit inclusion of Harris. But regardless, *International Ladies Garment Workers Union* is inapposite as it deals with an employer's recognition of a union without majority support. Outside the construction industry, Section 9(a) of the Act statutorily restricts exclusive bargaining representative status to those unions designated as such by a majority of the unit employees. *Id.* at 739. See also *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 718 (2001). Conversely, Section 14(a) of the Act specifically allows supervisors to be union and unit members if bargaining parties consent to the same. It violates no fundamental policy of the Act for bargaining partners to include in the contractual unit a lead classification upon the reasonable, mutual, and good-faith, but perhaps

mistaken, belief that the classification is not supervisory.²² *Child Day Care Center*, 252 NLRB 1177 (1980).

5 It should be emphasized that Harris never contested his inclusion in the unit or claimed
 he was not covered by successive union contracts. In fact, Harris was a shop steward for Local
 660 and freely admitted he always believed he was a unit employee. Even if I were to credit
 Harris regarding his conversations with Jennings, Harris only expressed a desire to pay what he
 thought would be less costly agency fees than full union dues. Harris did not take the position
 10 that he was not required to pay dues or fees at all because he was a supervisor. In fact, when
 completing incident reports regarding employee misconduct, Harris crossed out “supervisor”
 and wrote in “lead agent.” In *Arizona Electric Power Cooperative Inc.*, 250 NLRB 1132 (1980),
 an employer and union included load dispatchers in the contractual unit even though the
 employer had asserted during pre-election proceedings that load dispatchers were supervisors.
 15 The Board ruled that an employer cannot subsequently withdraw recognition from the union or
 file a mid-term unit clarification petition upon a convenient and opportunistically renewed
 assertion that classifications previously included in the contractual unit are supervisors. In so
 ruling, the Board quoted *Arthur C. Logan Memorial Hospital*, 231 NLRB 778, 778 (1977), as
 follows:

20 In our judgment, to permit the Employer to knowingly execute a contract and
 immediately thereafter petition the Board for clarification of that agreement to
 exclude classifications would tend to undermine the parties’ collective bargaining
 relationship.

25 Harris, who enjoyed the benefits of contract coverage during his employment²³ and is not
 a bargaining party, has no standing or basis for opportunistically asserting that he was not
 covered by the contract when the union security clause was applied to him.

30 The Board did not rule in *Arizona Electric*, as the General Counsel contends, that parties
 may only include supervisors in a unit with rank-and-file employees “where both parties had
 knowledge of or had admitted the supervisory duties an Section 2(11) status of employees in
 disputed classifications.” (G.C. Brief p. 50) In that case, the union never admitted or agreed
 load dispatchers were supervisors when the parties included that classification in a broader
 production and maintenance unit. Rather, prior to the election, the parties only stipulated that
 35 one lead load dispatcher was a supervisor. When the employer withdrew recognition from the

²² In *General Truck Drivers, Chauffeurs and Helpers Union Local No. 692*, 209 NLRB 1144 (1974), a union lawfully sought to apply a union security clause to an employee even though the contractual unit excluded confidential employees and an ALJ determined that the employee was, in fact, confidential. The charging party employer included the confidential employee on the election excelsior list and treated her as a unit employee within an included bookkeeper classification. Although the employer ultimately reversed positions when the union requested the discharge of this employee for nonpayment of dues, a Board majority held that the union did not violate the Act because it was misled as to the employee’s proper unit placement. A two-member concurring opinion determined that the employer agreed to the inclusion in the unit of the confidential employee and was bound by it. Here, the concurring opinion is more applicable because the bargaining parties agreed and do not contest the inclusion of leads as nonsupervisory employees. The Employer has never, unlike in *General Truck Drivers*, challenged the supervisory status or unit placement of Harris. Any agreement by the parties on that issue is not a “mistake,” but controlling contractual intent.

²³ For example, Harris testified that, when he was the shop steward for Local 660, he successfully grieved a discipline he received.

union on the ground that *all* load dispatchers were supervisors, the Board refused to address the supervisory status of that classification and found the employer's action unlawful. The Board noted that the employer had full knowledge of the duties of the dispatchers and agreed to their inclusion regardless of any supervisory authority they may possess. The Board explained its ruling as follows:

In the circumstances of this case, where a contract executed with full knowledge of the nature of the present duties of the dispatchers is currently in force, to permit Respondent to alter unilaterally the scope of the established bargaining unit would unnecessarily encourage parties to productive and viable collective-bargaining relationships to refuse to bargain over wages and other terms and conditions of employment of individuals who were intended to benefit from these relationships.

Furthermore, we note that in circumstances similar to those here, the Board would refuse to entertain a mid-term unit clarification petition to exclude alleged supervisors.

The Board's *Arizona Electric* decision does not suggest that contracting parties must obtain a precontract ruling or formally express in writing an agreement that certain included classifications are 2(11) supervisors before including them in the unit. Rather, that decision merely confirms that parties are bound by contractual agreements as to included unit classifications absent some showing that they were unaware of the duties of those classification. Here, the Respondents agreed, in writing, to exclude supervisors and agreed, by practice, to include nonsupervisory leads. The evidence does not indicate that the Respondents were unaware of leads' responsibilities.

The General Counsel is also misplaced in relying on *Mortuary Employees' Union*, 192 NLRB 616 (1971), where a union was found to have violated Section 8(b)(2) of the Act by coercing an employer into discharging a nonunit management trainee pursuant to a union security clause. In that case, the employer *always* opposed the trainee's inclusion in the unit and only agreed to his discharge after the union threatened to strike. In fact, as the judge observed, the union's belief that the contract applied to the trainee was "not well-founded." *Id.* at 622. There was no valid or mutual agreement by the parties to include the trainee in the unit and, therefore, the application of the union security clause to a nonunit employee for refusing to pay dues was discriminatory and unlawful. Here, for reasons explained above, the Respondents' belief regarding the supervisory status and unit placement of leads was both mutual and well-founded.

Ultimately, the General Counsel's case can be boiled down to the following: The Respondents intended to exclude supervisors and were, *as to be determined by the Board*, mistaken in their belief that leads are not supervisors; therefore, the Respondents intended to exclude leads. However, that position, in my opinion, is an unfounded and strained second-guessing of the parties' intent. The Respondents know what leads do and have always treated them as unit employees. The Board is not in the practice, in a context such as this, of rigorously reviewing the unit inclusions of contracting parties or the factual and legal determinations on which those inclusions are based. Indeed, the Board has admitted that the "2(11) supervisory function [of an employee] has not always been readily discernible by either the Board or reviewing courts." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). If the Employer or Union wanted the Board to intervene in their mutual and long-standing arrangement regarding the supervisory status of leads, they could have pursued such a position during the 2015

representation case or filed a clarification petition after the contract expired. Although not a bargaining party, Harris could at least have told the Employer and/or Union (perhaps when he was assessed the dues delinquency) that he considered himself a nonunit supervisor and objected to the payment of any dues or fees on that basis. This did not happen. All interested parties at all relevant times reasonably understood leads such as Harris to be nonsupervisory unit employees subject to the collective-bargaining agreement and the Respondents acted lawfully in applying the union security clause of that contract to Harris.

The Union did not Demand, and the Employer did not Provide, Unlawful Financial Support under Section 8(a)(2) of the Act

The General Counsel failed to establish that the Union demanded and the Employer provided the type of financial support which would violate Section 8(a)(2) and 8(b)(1)(A) of the Act. Specifically, the Employer did not agree to financially assist the Union in a manner that would constitute a windfall and create a conflict of interest.

The enforcement of a lawful union security clause does not provide the Union with a financial windfall. A union provides a service and is legally entitled to negotiate a contractual provision that requires employees to pay the cost of those services as a condition of employment. In *Raley's*, 348 NLRB 382, 387 (2006), the Board dismissed a Section 8(a)(2) allegation that the employer acted unlawfully by enforcing a union security provision which required employees to pay a \$5 late fee for dues delinquency because, in part, the fee “was not disproportionate to the cost [the union] incurred in collecting late dues” Here, the Employer acted lawfully because it did not pay and did not require employees to pay money that the union was not reasonably entitled to receive.²⁴ During his employment by the Employer, Harris was represented by unions and covered by collective-bargaining agreements. The Union would receive no financial windfall by receipt from Harris of dues or fees to cover the cost of that representation. In fact, if the Board were to determine that Harris was not required to pay dues for periods of employment when he was represented by the Union and covered by a contract, it is he who would receive the windfall.

Even if enforcement of a union security clause could be considered some sort of windfall or gain by the Union, it was not in an amount that would create a conflict of interest and violate the Act.²⁵ The Board will not find a violation of Section 8(a)(2) of the Act when assistance is “de minimis” and falls within “the permissible limits of employer cooperation” *Coamo Knitting Mills, Inc.*, 150 NLRB 579 (1964) (employer acted lawfully in allowing 3 percent of the workforce to attend union meeting on company time and property). Here, the proviso of Section 8(a)(3) specifically defines union security clauses as falling within the permissible limits of cooperation between bargaining parties. Further, Harris was only one of about 283 unit employees eligible to vote in the October 16, 2015 election and, in 2019, one of about 160,000 total Union members. In 2019, Local 32BJ collected \$103,614,698 of dues and Harris would have been

²⁴ The Board’s salting decision in *Sundland Construction Co.*, 309 NLRB 1224, 1230 fn.37 (1992), is also instructive. An employer does not violate Section 8(a)(2) of the Act by paying employees who are also union organizers since the employer pays for its work (e.g., construction) and the union pays for other work (i.e., organizing). The union does not necessarily receive a windfall as a result of this arrangement.

²⁵ As a union is responsible for negotiating with an employer, it creates a conflict of interest if the union accepts significant financial assistance from the employer (e.g., the employer pays for the union dues of unit employees).

responsible for \$540 (\$45 monthly) or 0.0005 percent of that revenue. In this context and under these circumstances, the Respondents' enforcement of the union security clause rendered, at most, de minimis financial assistance.

5 For all the foregoing reasons, I find that the Respondents did not violate the Act as alleged in the complaint.

CONCLUSIONS OF LAW

- 10 1. Respondent Union Service Employees International Union, Local 32BJ is a labor organization within the meaning of Section 2(5) of the Act.
- 15 2. Respondent Employer Alstate Maintenance, LLC is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 20 3. The Respondent Union did not violate Section 8(b)(1)(A) of the Act by demanding or accepting financial assistance from the Respondent Employer.
4. The Respondent Employer did not violate Section 8(a)(2) and (1) of the Act by financially assisting the Respondent Union.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²⁶

ORDER

The complaint is dismissed in its entirety.

Dated: Washington, D.C., November 12, 2020



Benjamin W. Green
Administrative Law Judge

²⁶ If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the finding, conclusion, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.