

**Nos. 10-4348 & 10-4448**

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**COMPUCOM SYSTEMS, INC.**

**Respondent/Cross-Petitioner**

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**ON APPLICATION FOR ENFORCEMENT AND  
CROSS-PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**ROBERT J. ENGLEHART**  
*Supervisor Attorney*

**DANIEL A. BLITZ**  
*Attorney*

**National Labor Relations Board**  
**1099 14th Street, N.W.**  
**Washington, D.C. 20570**  
**(202) 273-2949**  
**(202) 273-1722**

**LAFE E. SOLOMON**  
*Acting General Counsel*

**CELESTE J. MATTINA**  
*Acting Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

**National Labor Relations Board**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of Compucom Systems, Inc. (“the Company”) to review, a Decision and Order of the Board that issued on November 12, 2010, and is reported at 356 NLRB No. 25.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) (“the Act”). The Board’s Decision and Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is appropriate because the unfair labor practice occurred in part of New Jersey. The Board filed its application for enforcement on November 16, 2010. The Company filed its cross-petition for review on November 23, 2010. Both filings are timely; the Act imposes no time limit on such filings.

The record in the Board’s underlying representation proceeding (Case No. 22-RC-12925) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. §159(d)), because the Board’s unfair labor practice order is based, in part, on findings made in that proceeding. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes review of the Board’s actions there for the limited purpose of deciding whether to enforce, modify, or set aside, in whole or in part, the Board’s unfair labor practice order (29 U.S.C. §159(d)). The Board retains authority under

Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair labor practice case. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publications, Inc.*, 274 NLRB 873, 875 (1985).

### **STATEMENT OF THE ISSUE PRESENTED**

The ultimate issue is whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, which had been certified as the representative of a unit of company employees. The subsidiary issue is whether substantial evidence supports the Board's finding that Robert Mikol and John Paynter are supervisors under Section 2(11) of the Act, so that their ballots were properly not opened, which prevents the Union's election victory from being altered.

### **STATEMENT OF THE CASE**

The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with Communication Workers of America, Local 1032 ("the Union") as the certified collective-bargaining representative of an appropriate unit of

company employees.<sup>1</sup> (A 7-9.)<sup>2</sup> The Company does not dispute that it refused to bargain, but instead contests the validity of the Board’s resolution, in the underlying representation proceeding, of the challenges to the ballots of Robert Mikol and John Paynter. (A 7.) The Board’s findings in the representation proceeding and the unfair labor practice proceeding, as well as the Decision and Order that is the subject of the instant proceeding, are summarized below.

## **STATEMENT OF FACTS**

### **I. THE BOARD’S FINDINGS OF FACT**

#### **A. The Representation Proceeding**

##### **1. Background; the Company’s operations at its Novartis locations**

The Company provides information technology services to business customers throughout the United States. These services include the

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<sup>1</sup> The description of the certified unit is as follows (A 11):

All full-time and regular part-time Technical Support Specialists, Network Engineers, Logistics Coordinators and Help Desk Analyst employees employed by the [Company] at its Florham Park, New Jersey, East Hanover, New Jersey, and Suffern, New York facilities, but excluding all Office Clerical employees, Business Analysts, Project IC Managers, Guards, and Supervisors as defined in the Act.

<sup>2</sup> “A” refers to the joint appendix filed by the Company. “SA” refers to the Board’s Supplemental Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

installation, maintenance, and support of customers' information technology infrastructure. (A 7 n.5, 8, 17; A 73-74, 144-45, 221, 223, 267.)<sup>3</sup> The majority of the Company's employees in the United States work at customer sites located throughout various regions. (A 17; A 267.)

The Company manages information technology services for its customer Novartis (A 17; A 74, 145-46.) The Company employs between 150 and 200 employees, including the approximately 30 individuals in the bargaining unit in the instant case ("the unit employees"), at 3 of Novartis's sites. The Novartis sites are in Suffern, New York; Florham Park, New Jersey; and East Hanover, New Jersey. (A 9, 17; A 146.)

Pat Llewellyn is the Company's Program Director for the Novartis sites. (A 17; A 264.) Carl Stager is the Program Director II for the site in East Hanover, New Jersey, and he reports to Llewellyn. (A 17; A 149, 264.) William Schultz is the Operations Manager II for the Novartis sites. He is responsible for making sure that the Company meets its contractual obligations with Novartis, such as completing services within a particular timeframe. (A 17; A 147, 264.) He reports to Stager. (A 17; 264.) Bruce

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<sup>3</sup> The Company is the undisputed successor employer to an entity called Gentronics, which it acquired in August 2008. (A 7 n.2, 8 & n.5; A 244A.)

Strow is the Operations Manager I/Desk Site Support Manager for the Novartis sites, and he reports to Schultz. (A 17; A 75, 147-48, 221, 264.)

**2. Robert Mikol and John Paynter are two of the Company's most experienced Technical Support Specialists; Mikol's and Paynter's duties and responsibilities as "Team Leads"**

The majority of the unit employees are called Technical Support Specialists ("TSS"). (A 17; A 229-30.) TSS are further classified as levels TSS I through TSS IV—with TSS IV being the highest level—based on their amount of technical skill, experience, and knowledge. (A 17 & n.1; A 229-31.)

The Company refers to four very experienced and knowledgeable TSS IVs, including the two individuals whose status is at issue in the instant case— Robert Mikol and John Paynter—as "Team Leads." (A 17-18; A 69-71, 76, 150, 161, 231-33.)<sup>4</sup> The Company's internal organizational flowchart lists Mikol and Paynter on a box immediately below a box identifying Operations Manager Schultz. (A 3; A 76, 266.) The organizational flowchart also lists six employees under Mikol's team and

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<sup>4</sup> Charles Corby is the Company's most experienced TSS IV, but the Company does not refer to him as a "Team Lead." Prior to the "Team Lead" designation, all employees went to Corby when they had questions about technical matters. With the "Team Lead" designation in place, employees may now contact any of the "Team Leads" instead of Corby, thus reducing the burden on Corby. (A 18; A 150-51, 232.)

eight employees under Paynter's team. (A 18; A 72, 148, 266.) Members of Mikol's and Paynter's respective teams regard them as supervisors. (A 28; SA 11, 15.)

The Company pays Mikol and Paynter a substantially higher salary than it pays its other TSS. (A 18-19; A 114, SA 4, 6.) Mikol and Paynter also have duties and responsibilities that are different from those of other TSS. (A 18; A 72-74, 77-78, 163, 165, SA 10.) In this regard, they serve as a contact point for other technicians who need assistance in resolving customers' technical issues. (A 18; A 72-73, 114.) They also serve as a contact point for employees in the event that work issues arise, particularly during periods when Schultz or Strow are not present. In addition, they work on process flow, policy and procedure matters, and regularly attend production meetings, client meetings, and Team Lead meetings. (A 24; A 72-73, 121-25, 127, SA 12-13.) During Team Lead meetings, Paynter and Mikol discuss production issues, problems the Company's clients are having, and changes in upcoming projects. Paynter and Mikol also provide management officials with input about whether proposed changes in upcoming projects will have a substantial impact on the Company's operations. (A 24, 28; A 91-92, 122, 124-25, 150.)

**3. In determining whether to hire job applicants, the Company's managers routinely rely on Mikol's and Paynter's assessments of applicants during interviews, and they routinely follow their hiring recommendations**

The Company interviews job applicants in order to determine whether to hire them for openings. (A 19-20, 29; A 90-91, 129, 151, 171, 175.)

Mikol and Paynter play active and important roles during applicants' interviews. During interviews, Mikol and Paynter try to determine whether an applicant will be capable of doing the job and, ultimately, whether the applicant would be a good fit for the job. (A 19-20, 29; 130-32, 171, 173-75.) As part of the selection process, Schultz or Strow conduct a post-interview group meeting with all of the other company participants in order to discuss the merits of the applicant and his or her performance during the interview. (A 19-20; A 90, 133, 156, 174.) During these meetings, Schultz or Strow ask Mikol or Paynter—and both Mikol and Paynter when they have participated together, as they often have—for their opinions about the applicant's suitability for the position. (A 19-20; A 90, 133-35, 174, 178-79.) In response, Mikol and Paynter provide their opinions to Strow or Schultz, including their opinions about whether an applicant "fits the bill" and whether an applicant would be a good hire or a bad hire. (A 19-20; A 90, 134-35, 138, 140, 174.) Mikol or Paynter recommend to Schultz or Strow—either of whom will make the ultimate hiring decision and

telephonically discuss matters such as compensation and benefits with the applicant—whether the Company should hire an applicant. (A 19-23, 29-34; A 90, 135, 138, 140, 153, 174, 240.)

Mikol and Paynter have made numerous recommendations to Schultz and Strow regarding whether the Company hire a particular applicant, and Paynter has made similar recommendations regarding whether an employee should be transferred. (A 19-23, 29-34; A 90, 135, 138, 140, 153, 174, 240.) The Company regularly follows their recommendations. (A 20; A 179.)

**4. The Board conducts an election among the unit employees and certifies the Union as their collective-bargaining representative**

On May 20, 2008, the Union filed a representation petition with the Board seeking certification as the collective-bargaining representative for the unit employees. (A 16; A 258.) Pursuant to a stipulated election agreement entered into by the parties, the Board conducted a secret-ballot election on June 27, 2008. (A 13-14, 16.) The employees voted in favor of union representation by a margin of 14 to 10, with the Union challenging the ballots of 5 other voters, including Mikol and Paynter, on the ground that they were supervisors under Section 2(11) of the Act. (A 13-14, 16-17.) The challenged ballots were sufficient in number to affect the outcome of

the election. (A 16.) The Union also filed timely objections to conduct affecting the results of the election. (A 16.)

The Board's Regional Director directed that a hearing be held to adduce evidence on the challenges and objections. (A 16-17.) On September 26, 2008, an administrative law judge held a hearing to resolve the issues raised by the challenges and objections. (A 17.) On December 30, 2008, the judge issued his recommended decision on objections and challenges. The judge overruled all of the objections. He sustained the challenges to the ballots of Mikol and Paynter, and overruled the challenges to the other three voters. Specifically, with respect to Mikol and Paynter, the judge found that they were supervisors under Section 2(11) of the Act based on their authority to effectively recommend hiring employees. Accordingly, the judge recommended that the Board certify the Union as the employees' collective-bargaining representative. (A 51-52.) Thereafter, the Company filed with the Board exceptions to the judge's recommended decision. (A \_\_, SA \_\_.) The Union did not file any exceptions to the judge's decision to overrule their election objections or to overrule their challenges to the three other ballots. Those three ballots have not been opened as they could not affect the result of the Union's 14-10 election victory. (A 14.)

On April 27, 2009, the two sitting members of the Board issued a Decision and Certification of Representative, adopting the judge's findings and recommendations, and certifying the Union as the exclusive collective-bargaining representative of the employees in the unit.<sup>5</sup> (A 13-15.)

### **B. The Unfair Labor Practice Proceeding**

Following its certification as unit employees' bargaining representative, the Union requested that the Company bargain with it as the exclusive collective-bargaining representative of the certified unit of company employees. (A 8.) The Company has failed and refused to bargain with the Union. (A 8.) Acting on an unfair labor practice charge filed by the Union on June 19, 2009, the Board's General Counsel issued an unfair labor practice complaint on July 24, 2009, alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to recognize and bargain with the Union. (A 7.) The Company filed an answer, admitting its refusal to recognize and bargain with the Union, but contesting the propriety of the Board's certification of the Union, based on its resolution of the challenged ballots. (A 7-8.)

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<sup>5</sup> In the absence of exceptions, the Board adopted, pro forma, the judge's recommendations to overrule the objections to the election, and to overrule the challenges to the three other voters. (A 14 n.3.)

On August 12, 2009, the General Counsel filed a motion for summary judgment with the Board, and the Board issued a notice to show cause why the motion should not be granted. (A 7.) The Company filed a response in which it reiterated its position with respect to the underlying certification. (A 7.)

On September 30, 2009, the two sitting members of the Board issued a Decision and Order granting the motion for summary judgment. (A 7.) That Decision and Order was reported at 354 NLRB No. 87. (A 7.) The Company filed a petition for review of the Board's Order in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its Order in that same circuit. (A 7.) The D.C. Circuit put the case in abeyance before the Board filed the record. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that the two-member Board did not have authority to issue decisions where there were no other sitting Board members. Thereafter, the Board issued an Order setting aside its Decision and Order, and retaining this case on its docket for further action as appropriate. (A 7.) On July 13, 2010, the Board, in light of its Order setting aside the Decision and Order, moved the

D.C. Circuit to dismiss the case and deny all pending motions as moot. On August 19, 2010, the D.C. Circuit granted the Board's motion.

**C. Board Proceedings After the D.C. Circuit's Dismissal of the Board's Two-Member Decision and Order**

On August 23, 2010, a three-member panel of the Board issued a Decision, Certification of Representative and Notice to Show Cause adopting the administrative law judge's findings and recommendations with respect to the post-election representation issues to the extent and for the reasons stated in the April 27, 2009 Decision and Certification of Representative, which was incorporated by reference. (A 11.) The Board also directed the Company to show cause why the General Counsel's motion for summary judgment should not be granted. (A 11.)

Thereafter, the Acting General Counsel filed an amended complaint, the Company filed an amended answer, and the Acting General Counsel filed a supplemental memorandum in support of his motion for summary judgment. (A 7.) The Union filed a response to the notice to show cause. (A 7.) On November 12, 2010, a three-member panel of the Board issued the Decision and Order that is the subject of the instant proceeding. (A 7-10.) That Decision and Order is described immediately below.

## II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Liebman and Members Pearce and Hayes) issued a Decision and Order granting the motion for summary judgment and finding that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 7-10.) In reaching that conclusion, the Board found that the issues the Company raised in the unfair labor practice proceeding were or could have been litigated in the underlying representation proceeding. (A 7.) Further, the Board found that the Company neither offered to adduce any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (A 7.)

The Board's Order requires the Company to cease and desist from refusing to bargain with the Union, and in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157).

Affirmatively, the Order requires the Company to bargain with the Union upon request, to embody an understanding reached in a signed agreement, and to post copies of a remedial notice. (A 9.)

## STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before the Court previously. Board counsel are not aware of any related case or proceeding that is completed, pending, or about to be presented to this Court, or any other court, or any state or federal agency.

## STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

The Board's findings of fact are conclusive if they are supported by substantial evidence on the record as a whole. Section 10(e) and (f) the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1151-52 (3d Cir. 1993). Moreover, the Board's factual inferences are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it de novo. *Universal Camera Corp.*, 340 U.S. at 488; *Allentown Mack Sales & Serv. Indus. v. NLRB*, 522 U.S. 259, 378 (1999); *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 231 (3d Cir. 2001). Further, as this Court has repeatedly stated, "[t]he resolution of issues of credibility is clearly not for the Court." *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 171 (1962). Accordingly, as this Court has recognized, "great deference" should be given to the affirmed credibility determinations of the administrative law judge, who conducted the hearing and observed the

witnesses. *ABC Trans-National Transp. v. NLRB*, 642 F.2d 675, 684-86 (3d Cir. 1981).

This Court exercises plenary review over questions of law. *See NLRB v. Attleboro Assoc. Ltd.*, 176 F.3d 154, 160 (3d Cir. 1999); *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243, 246 (3d Cir. 1998).

However, to the extent that the Board's finding rests upon its construction of the Act, a court must defer to that construction if it is reasonable. *See generally Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 & n.11 (1984) (discussing deference due agency's interpretation of statute it is charge with enforcing). *Accord NLRB v. Pizza Crust Co. of Penn., Inc.*, 862 F.2d 49, 54 (3d Cir. 1988).

### **SUMMARY OF ARGUMENT**

The Company admits its refusal to recognize and bargain with the Union. However, the Company defends its refusal by arguing that Mikol and Paynter are not statutory supervisors and that their challenged ballots should therefore have been counted in the election results. If the Company prevails in this argument, it is their hope that the opening of Mikol's and Paynter's ballots, along with the opening of the ballots of the three other employees who were once challenged as supervisors, will give the Company

5 more votes so that the Union's 14-10 electoral victory will be transformed to a 14-15 electoral loss and the obligation to bargain will be extinguished.

Substantial evidence supports the Board's finding, however, that Mikol and Paynter possess the requisite authority to be deemed statutory supervisors so that their ballots should not be opened. Specifically, Mikol and Paynter exercise independent judgment in effectively recommending employees for hire or transfer. Mikol and Paynter play key roles in interviewing applicants and recommending whether the Company should hire them. During interviews, Mikol and Paynter question applicants to determine whether applicants would be a good fit, and whether, ultimately, the Company should extend an offer to them. During post-interview meetings, Mikol and Paynter share their impressions of applicants with Company managers, and the managers routinely follow their hiring recommendations. Indeed, the Company has followed Mikol's hiring recommendations nearly 80 percent of the time. As the Board emphasized, the record contains numerous specific examples of Mikol and Paynter effectively recommending the hiring of employees and an additional example of Paynter recommending the transfer of an employee.

The Company's challenges to the Board's finding are without merit. The Company essentially contends that Mikol's and Paynter's role during

interviews consists of nothing more than determining whether an applicant has the technical ability to perform a particular task. But, as the Board explained, in distinguishing cases relied on by the Company, Mikol's and Paynter's role goes beyond that. They do not administer a task-based test of an applicant's abilities and their role cannot be likened to one that encompasses nothing more than that. Although Mikol and Paynter seek to determine whether an applicant has the necessary knowledge to perform the job, they go further in their assessments of applicants: they determine, among other things, whether an applicant could handle the pressure of the job and whether an applicant is being forthright about his level of knowledge and experience. The remainder of the Company's arguments amount to little more than an unsuccessful attempt to convince the Court that the Board's findings and inferences were unreasonable.

## **ARGUMENT**

### **THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION AS THE DULY CERTIFIED REPRESENTATIVE OF A UNIT OF THE COMPANY'S EMPLOYEES**

#### **A. Introduction**

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the duly certified collective-

bargaining representative of an appropriate unit of its employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-37 (1967); *North American Directory Corp. v. NLRB*, 939 F.2d 74, 76 (3d Cir. 1991); *Carlisle Paper Box Co. v. NLRB*, 398 F.2d 1, 3 (3d Cir. 1968).<sup>6</sup> Here, the Company does not dispute the Board’s finding that it refused to recognize and bargain with the Union. Rather, the Company contests the Board’s certification of the Union on the ground that the Board improperly sustained the challenges to the ballots of Mikol and Paynter. But, if substantial evidence supports the Board’s finding that they are supervisors, their ballots will not be counted, the Company’s refusal to bargain violated Section 8(a)(5) and (1), and the Board’s Order is entitled to enforcement. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1949); *North American Directory Corp.*, 939 F.2d at 76.

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<sup>6</sup> Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees.” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” Section 7 (29 U.S.C. § 157), in turn, grants employees “the right to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing . . . .” A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). See generally *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

## B. Applicable Principles

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act (29 U.S.C. § 152(11)), in turn, defines the term “supervisor” as follows:

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

Because the statutory definition is written in the disjunctive, it is settled that an individual who has the authority to use independent judgment in the execution of any one of the twelve statutory functions listed in Section 2(11) is a statutory supervisor. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001). *Accord Mon River Towing, Inc. v. NLRB*, 421 F.2d 1, 5 n.11 (3d Cir. 1969) (“a person having authority in only one of the enumerated areas may be held to be a supervisor”). Moreover, supervisors under the Act “include persons who have the power to make effective recommendations . . . [concerning any one of these statutory functions], not just those who carry them out.” *Elliot Coal Mining Co. v. Dir., Office of Workers’ Comp. Programs*, 17 F.3d 616, 637 (3d Cir. 1994). *Accord*

*Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 721 (7th Cir. 2000).

Indeed, “the relevant consideration is effective recommendation or control rather than final authority.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 683 n.17 (1980).

Accordingly, individuals are statutory supervisors “if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’” *Kentucky River*, 532 U.S. at 712 (citation omitted). *Accord NLRB v. Prime Energy Ltd. P’ship*, 224 F.3d 206, 209 (3d Cir. 2000); *NLRB v. Konig*, 79 F.3d 354, 357-58 (3d Cir. 1996). The party alleging supervisory status has the burden of establishing its existence.

*Kentucky River*, 532 U.S. at 712. Specifically, it is settled that an individual who exercises independent judgment in effectively recommending the hiring of employees is a statutory supervisor. *See, e.g., Donaldson Bros.*, 341 NLRB 958, 959 (2004); *Venture Industries*, 327 NLRB 918, 919 (1999). *See also NLRB v. Prime Energy Ltd. P’ship*, 244 F.3d 206, 212 (3d Cir.

2000) (individual who “had substantial influence in [a] hiring decision” was a supervisor).<sup>7</sup>

The Board’s supervisory determination will be upheld as long as it is supported by substantial evidence, and will not be easily overturned on appeal. *See, e.g., NLRB v. W.C. McQuaid, Inc.*, 552 F.2d 519, 532-33 (3d Cir. 1977); *Beverly Enterprises-Mass*, 165 F.3d at 962 (D.C. Cir. 1999). Indeed, “determinations respecting supervisor status are particularly suited to the Board’s expertise.” *W.C. McQuaid, Inc.*, 552 F.2d at 532 (citing *Mon River Towing, Inc. v. NLRB*, 421 F.2d 1, 5 (3d Cir. 1969)). Such determinations involve “gradations of authority so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical

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<sup>7</sup> The Company’s reliance on certain appellate cases does not help its cause. Thus, in *Cooper/T.Smith v. NLRB*, 177 F.3d 1259 (11th Cir. 1999), the Eleventh Circuit stated *its* position that the authority to make recommendations alone does not constitute supervisory authority. The Board, however, has long held that an individual may be a supervisor under the Act based on his or her authority to effectively recommend hire, and Eleventh Circuit law is not controlling here. In fact, as noted above, this Court has recognized that individuals who play an influential and substantial role in hiring are statutory supervisors. *NLRB v. Prime Energy Ltd. P’ship*, 244 F.2d at 212. Also, *Ohio River Co. v. NLRB*, 961 F.2d 1578 (6th Cir. 1992), which is an unpublished decision, offers no support for the Company’s position either. In that case, the mates at issue made certain initial recommendations, but the manager undertook his own, independent review of candidates, and often made decisions without the benefit of any recommendations. *Id.* at 1568.

matter fall within the statutory definition of a ‘supervisor.’” *Warner Co. v. NLRB*, 365 F.2d 435, 437 (3d Cir. 1966) (quoting *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)). *See also Oil Chemical & Atomic Workers Int’l Union*, 445 F.2d at 241 (supervisory determinations “lie squarely within the Board’s ambit of expertise” and are “entitled to great weight”). The determination of whether an individual is a supervisor under the Act is an intensely factual inquiry that calls upon “the Board’s special function of applying the general provisions of the Act to the complexities of industrial life.” *Dynamic Machine Co. v. NLRB*, 552 F.2d 1195, 1202 (7th Cir. 1977) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

**C. Substantial Evidence Supports the Board’s Finding that Robert Mikol and John Paynter Are Statutory Supervisors Because they Exercise Independent Judgment in Effectively Recommending the Hiring of Employees**

Substantial evidence supports the Board’s finding (A 11, 13-15 & 14 n.3, 29, 32, 34, 51-52) that Mikol and Paynter are statutory supervisors who were ineligible to vote in the representation election. As we now show, the Board reasonably found (A 11-12, 14 & 14 n.3, 29, 34-35) that Mikol and Paynter exercise independent judgment in effectively recommending the hiring and transfer of employees and are therefore supervisors under Section 2(11) of the Act.

Mikol and Paynter play a key role both in interviewing applicants and in determining, during post-interview meetings with company managers, whether the Company should hire a particular applicant. As the Board explained (A 19-23, 29, 33-35), Mikol and Paynter participate in applicant interviews at the request of managers Strow and Schultz. Mikol's and Paynter's role in these interviews is critical, because, due to their knowledge and experience, they are able to make assessments about applicants that Strow and Schultz—who have other areas of expertise and cannot form a full view of an applicant's actual abilities—generally cannot make. (A 19-20, 29; A 132, 152, 171.) The Company therefore needs Mikol and Paynter to participate in interviews to make informed hiring decisions. (A 19; A 152.)

During interviews, Mikol and Paynter try to get a “feel” for the applicant—that is, they try to determine whether an applicant would be suitable for the job. (A 19-20, 29; A 90, 130-32.) Accordingly, they question applicants in order to determine whether they have the knowledge and experience that is needed to perform the duties associated with the job. (A 19-20, 29; A 130-32.) In this vein, Mikol and Paynter are able to determine, through their questions, whether an applicant has been forthright about the level of knowledge and experience he or she claims to possess;

whether the applicant could perform the tasks associated with the job; and whether the applicant could handle the pressure of the job. (A 19-20, 29; A 131-32.)

For example, if an applicant makes “brash” assertions with respect to his or her alleged abilities and knowledge, Mikol and Paynter will challenge the applicant to see if he or she is, in fact, being forthright about those matters. (A 19; A 131.) Their role, in this regard, is to see if an applicant’s representations on his or resume is consistent or her actual knowledge. (A 19; A 131.) Through these inquiries, and related ones, Mikol and Paynter are able to determine whether the Company should extend an offer to an applicant. (A 19, 33; A 137-38.) In sum, as Paynter testified (A 19, 33; A 173-74), the purpose of such questioning during interviews is to determine if the applicant “could do the job that is going to be asked of them” and to discover whether the applicant “would be a good fit for what the job is going to be requiring of them.”

The impressions that Mikol and Paynter form of an applicant during an interview are vital components of the Company’s hiring process and carry great, if not conclusive, weight with Company managers Strow and Schultz. (A 34.) Thus, following the interviews, Schultz or Strow, along with the other company participants in the interviews, convene to discuss the merits

of the applicant (or applicants). (A 19; A 90, 133, 174.) Mikol and Paynter routinely participate in these discussions. (A 19, 29-30; A 90, 133.) During these discussions, Schultz or Strow asks Mikol and Paynter how the applicant handled the interview, whether the applicant's responses to technical questions were accurate, whether Mikol and Paynter discovered anything about the applicant's technical knowledge, whether the applicant would be a good hire or a bad hire, and whether they would recommend that the Company should hire the applicant. (A 19, 29-35; A 133-34, 153.) In response, Mikol and Paynter inform Schultz or Strow about their assessment of the applicant, and whether the Company should hire the applicant. (A 19-20, 29-35; A 133, 138.) The Company relies on their recommendations to a great extent. (A 137-38.)

Thus, as the Board found, the Company "routinely and consistently follow[s] the recommendations of" Mikol and Paynter to hire employees. (A 32, 34.) As the Board noted (A 29), Mikol made approximately 18 overall hiring recommendations based on participation in interviews. In nine instances, he recommended that the Company hire a particular applicant; the Company followed his recommendation seven or eight times. On the nine other occasions, he recommended that the Company not hire a particular applicant. The Company agreed with those recommendations seven or eight

times. (A 29; A 138-41.) This constitutes compelling evidence of Mikol's supervisor status based on effective recommendations for hire. (A 29.) The Company followed Mikol's recommendation a total of 78 percent of the time, *at a minimum*. See, e.g., *Donaldson Bros.*, 341 NLRB 958, 959 (2004) (finding effective recommendation to hire where recommendations are followed 75 percent of the time); *Venture Industries*, 327 NLRB 918, 919 (1999). The Board also found (A 20-21, 29-34) that the Company routinely follows Paynter's hiring recommendations.

The record contains numerous concrete examples of instances in which Mikol and Paynter played substantial roles in hiring decisions, and thereby exercising independent judgment in effectively recommending the hiring and transfer of employees. See, e.g., *Donaldson Bros.*, 341 NLRB 958, 962 (2004) (finding that putative supervisor exercised independent judgment in effectively recommending the hiring of employees).

First, Mikol and Paynter and Strow participated in the interview process which led to the Company hiring Mark Andersen for an open position. Mikol's and Paynter's roles in this process were substantial and influential. (A 20, 29; A 175, 180-81, 183-85.) Three individuals applied for the job. Mikol and Paynter recommended rejecting the first applicant, because they felt that, based on his responses to their questions, the applicant

lacked the necessary technical skills for the job, and he came across as very nervous during the interview. (A 20, 29; A 183.) Based on their assessment of the applicant, Mikol and Paynter believed that he could not handle the pressure of the job. They thus recommended to Strow that the Company not hire this applicant. (A 20, 29, 33; A 183-84.) Strow agreed, and the participants met with the next applicant right away. (A 20; A 184-85.)

Mikol and Paynter questioned the next applicant, and, based on his responses to their questions, they discerned that he did not have the technical skills necessary for this position. Strow agreed with this recommendation as well. (A 20, 29; A 185.) Thus, in both instances, Strow immediately agreed with Mikol's and Paynter's recommendations—which were based on their impressions of the applicants—and he did not conduct any independent interviews with the applicants. (A 29, 32.) These examples are significant, for as the Board found (A 29, 32), it is settled that an effective recommendation not to hire an applicant demonstrates that a putative supervisor has the authority to effectively recommend hire under Section 2(11). *See, e.g., Sheraton Universal*, 350 NLRB 1114, 1118 (2007); *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980), *enforced*, 678 F.2d 679 (7th Cir. 1982).

Mikol and Paynter were just as influential in effectively recommending to the Company which applicant to ultimately hire for this position. Thus, following the two rejected applicants' interviews, Mikol, Paynter, and Strow met with the last applicant, Mark Andersen. Mikol and Paynter questioned Andersen. They determined that, although Anderson was "really nervous" during the interview, his responses to their questions were good enough. (A 20, 29; A 181.) They therefore recommended to Strow that he be hired, and Strow agreed. (A 20, 29; 142, 182.) Shortly thereafter, the Company hired Andersen. (A 20, 29; A 180, 182, 186.) In these circumstances, the Board was warranted in finding that that Mikol and exercised independent judgment in recommending the hiring of Anderson.

Similarly, as the Board found (A 20-22, 29-30), there are other specific examples of Mikol and Paynter effectively recommending the hiring of employees. Mikol and Strow were equally influential in the Company's decision to hire Nicholas Battista for a job opening. (A 20-21, 29.) Thus, Mikol, Paynter, and Strow interviewed Battista for a position. (A 20, 29; A 175-79.) In order to determine whether Battista was a suitable fit for the position, Mikol and Paynter asked Battista questions about his experience, abilities, technical competence, and knowledge of certain terms used in the computer field. (A 20; A 178-79.) Following the interview, Mikol and

Paynter told Strow that, in their view, Battista was a “good fit” for the job and that the Company should hire him. (A 20-21; A 179-80.) Strow agreed, and the Company hired Battista soon thereafter. (A 21; A 180.) As the Board found (A 21, 29), this also constitutes an effective recommendation of hire.

Further, Mikol and Paynter exercised independent judgment in effectively recommending the hire of Andy Albertsen, and the hire and subsequent transfer of David Sullivan. Thus, Mikol and Paynter interviewed Albertsen for the position of Inventory Coordinator. (A 21, 29; A 187-88.) They questioned him in order to determine whether he understood part numbers, because such knowledge was a core component of the job. (A 21; A 187-88.) Following the interview, Mikol and Paynter recommended to Strow that the Company hire Albertsen, because they thought that he “could do the job.” Shortly thereafter, the Company hired Albertsen. (A 21; A 188.) As the Board found (A 21), this constitutes an effective recommendation of hire.

Likewise, Mikol and Paynter played a pivotal role in the initial decision to hire an applicant named David Sullivan. During Sullivan’s interview, they questioned him about technical aspects of his experience and the job. (A 21, 29; A 189-90.) Following the interview, Mikol and Paynter

recommended to Strow that the Company hire Sullivan. Strow agreed, and the Company hired Sullivan. (A 21, 29; A 189-90.)

In addition to making this effective recommendation for hire, Paynter recommended that the Company select Sullivan for a lateral transfer position several years later. (A 21, 29-30; A 190-93.) Two other employees applied for this lateral transfer position, along with Sullivan.<sup>8</sup> (A 21, 29-30.)

Paynter and Strow interviewed the first applicant, Evelyn Otero. (A 21, 29-30; A193-95.) Paynter questioned the applicant, and he was able to determine that she did not possess the necessary experience to do the job.

Based on his assessment, he recommended to Strow that the Company not hire this applicant and, instead, keep looking. (A 21, 29-30; A 195.) Strow

agreed, and Strow and Paynter interviewed the second applicant, Ross

Rivera. (A 21, 30; A 195.) Paynter questioned this applicant, and

determined that he lacked the necessary level of experience. Based on his

assessment of the applicant, Paynter recommended to Strow that the

Company not hire this applicant. Strow again agreed, and they proceeded to

interview Sullivan. Paynter asked Sullivan about the type of work he was

currently doing, and he determined that the work was similar to the type of

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<sup>8</sup> The Board treats the authority to recommend transfer as part of the authority to recommend hire. *See, e.g., Fred Meyer Alaska*, 334 NLRB 646, 648 (2001) and cases cited at A 30.

work that would be involved in the lateral position. (A 21, 30; A 192.)

Further, Paynter had worked with Sullivan in the past, and was familiar with his skill set. (A 30.) Based on his familiarity with Sullivan's work, and his opinion that Sullivan had the skills to do the job, he recommended to Strow that the Company offer Sullivan the lateral transfer. Strow agreed. (A 30; A 193.) In sum, Paynter's recommendations not to transfer Otero and Rivera, along with his recommendation to hire, and thereafter transfer, Sullivan provide further evidence that he exercised independent judgment in authority to effectively recommending hiring. (A 30.)

Based on this evidence, the Board was warranted in finding that Mikol and Paynter had the authority to make effective hiring recommendations. *See, e.g., NLRB v. Prime Energy Ltd. P'ship*, 244 F.3d 206, 212 (3d Cir. 2000) (individual who "had substantial influence in [a] hiring decision" was a supervisor); *NLRB v. Joe B. Foods, Inc.*, 953 F.2d 287, 296 (7th Cir. 1992) (supervisory status found where manager "interviewed applicants for employment" in his department and his recommendation was accepted by a higher management official); *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F.2d 551, 554 (6th Cir. 1967) (supervisory status found where food managers "interview applicants for jobs" and their "recommendations are generally followed" by higher management); *Fred Meyer Alaska*, 334

NLRB 646, 648-49 (2001) (supervisory status found where meat and seafood managers made effective recommendations to hire “based on their own assessments of what skills are needed and whether the individuals they are considering hiring have the appropriate skills or qualifications”).

As a final matter, the Board reasonably found that, because Mikol and Paynter possessed one of the primary indicia of supervisory status—effectively recommend hire—it was appropriate, under settled Board law, to look at secondary indicia as supportive factors. (A 39-40.) As the Board found (A 39-40), the record reflected that Mikol and Paynter possess numerous secondary indicia of supervisory status. Specifically, they receive substantially higher salaries than other TSS, their team members consider them to be supervisors, they attend management meetings, and they regularly perform different types of work than their subordinates perform. (A 39-40; A 121-25.) *See, e.g. NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 527 (9th Cir. 1986) (stating that employees’ perception of co-worker as a supervisor is one of the “secondary indicia”); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 347 (1st Cir. 1980) (stating that higher pay and attendance at management meetings are “secondary indicia”); A 39-40.

In sum, the Board reasonably found that Mikol and Paynter are statutory supervisors and were therefore ineligible to vote in the

representation election. As we now show, the Company has provided no basis for unsettling this finding.

#### **D. The Company's Challenges to the Board's Findings Are Without Merit**

On review, the Company essentially claims that the Board's finding, that Mikol and Paynter are statutory supervisors, "is a vast departure" from Board cases—principally *Aardvark Post*, 331 NLRB 320 (2000), and related cases—regarding the significance to be attached to putative supervisors' assessment of "the technical abilities of an applicant." (Br 22.) In this regard, the Company seems to argue (Br 22-24) that the only role Mikol and Paynter played in the Company's hiring process was to assess and report applicants' technical skills in a way that did not require the exercise of independent judgment, and that, under *Aardvark Post*, this is an insufficient basis for finding supervisory status. As we show below, the Company's effort to shoehorn the present case into the readily distinguishable facts of *Aardvark Post* and related cases is unpersuasive.

Before turning to the merits of the Company's claim, though, it is necessary, as a baseline matter, to dispose of the Company's argument that the Board stated that the viability of *Aardvark Post* and its predecessors is in "considerable doubt" following the Board's post-*Kentucky River* decision in

*Oakwood Healthcare*, 348 NLRB 686 (2006).<sup>9</sup> The Board made no such statement. Although the *administrative law judge*, in dicta, questioned the continued viability of *Aardvark Post* in light of *Oakwood Healthcare*, the Board explicitly made it clear that those remarks were not its own. Thus, the Board stated (A 14 n.3) in its Decision and Certification of Representative of April 27, 2009, that, “[b]ecause *Aardvark Post* is distinguishable [from the present case], we find it unnecessary to pass on the judge’s statement questioning the continued viability of that case in light of *Oakwood Healthcare* . . . .” (emphasis added). Rather, the Board addressed *Aardvark Post* straight on, and provided a solid explanation for why that case is readily distinguishable from the present case.

In *Aardvark Post*, the Board held that an employee did not effectively recommend applicants for hire because his “role in the hiring process was limited to testing each applicant’s technical skills by conducting editing tests and reporting those results to” a company manager. *Aardvark Post*, 331 NLRB 320, 320-21 (2000). The Board there also cited *Hogan Mfg., Inc.*, 305 NLRB 806 (1991), *The Door*, 297 NLRB 601 (1990), and *Plumbers Local 195 (Jefferson Chemical Co.)*, 237 NLRB 1099, 1102 (1978), for the

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<sup>9</sup> In *Oakwood Healthcare*, and two companion cases, the Board clarified its standards in examining supervisory status in light of the Supreme Court’s decision in *NLRB v. Kentucky River Cmty Care, Inc.*, 532 U.S. 706 (2001).

proposition that it “has consistently found that such an assessment of an applicant’s technical ability to perform the required work does not constitute an effective recommendation to hire.” *Aardvark Post*, 331 NLRB at 321. In *Hogan Mfg. Inc.*, the Board found that the putative supervisor played no role in the hiring process other than conducting welding tests and reporting the results to a manager. 305 NLRB at 806-07. In *The Door*, the Board found that the putative supervisor’s recommendations were limited to seeing if applicants’ technical ability met the minimum criteria for the job. 297 NLRB at 601-02. Further, there was no evidence that her recommendations carried any weight at all in the hiring process. *Id.* at 602. Finally, in *Plumbers Local 195*, the Board found that the putative supervisor administered welding tests to applicants, and the evidence did not otherwise show that he made effective recommendations to hire. 237 NLRB at 1101-02.

Contrary to the Company’s claim (Br 22-23, 29-30), the Board provided a reasonable basis for finding that Mikol’s and Paynter’s roles in the hiring process were more extensive and of a different sort than the roles played by the putative supervisors in the above-mentioned cases.<sup>10</sup> As the

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<sup>10</sup> The Company gets nowhere in citing three administrative law judge decisions that it claims support its argument. (Br 30.) Two of these cases—*The Closet Factory, Inc.*, 2009 WL 856019 (N.L.R.B. Div. of Judges) and *In*

Board found (A 14 n.3), unlike the putative supervisors in *Aardvark Post*, *Hogan Mfg.*, and *Jefferson Chemical*, Mikol and Paynter did not administer any type of test to applicants and did not function in a merely reportorial role. (A 33.) Instead, Mikol and Paynter engaged in questioning during the interviews and, based on the applicant's answers and overall demeanor during the interviews, gave their recommendations to the Company's managers about whether an applicant "fit the bill" for a position or not. (A 20, 33-34; A 183-84.) Thus, as the Board emphasized (A 18, 33-34), their recommendations were based on more than their technical assessments of applicants. Their recommendations included, among other things, an assessment of an applicant's forthrightness, poise during the interview and

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*re Univar*, 2003 WL 22082147 (N.L.R.B. Div. of Judges)—are of no precedential value at all in this context because *they are not Board decisions*. That is, no exceptions were filed to these judges' decisions, and, per longstanding Board policy, they are not considered precedent for any other case. *See, e.g., Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997). In a third case, *Pacific Coast M.S. Indus. Co.*, the Company cites only the judge's decision, but overlooks the fact that the Board subsequently entered its own decision in the case, modifying the judge's findings. 355 NLRB No. 226 (2010), 2010 WL 3864538, at \*5 (N.L.R.B.) Significantly, in its decision, the Board modified the judge's analysis of the authority-to-hire supervisory issue, and explained that one putative supervisor testified that her reviews of temporary employees stopped short of recommendations, and that credited evidence showed that the other putative supervisor did not make an effective recommendation to hire.

ability to handle the pressures of the job. (A 18-19, 33-34; A 179, 184.) In this respect, as the Board also noted, Mikol's and Paynter's assessment of whether an applicant is being "brash" about his or her degree of knowledge and experience cannot be likened to the role of the putative supervisors in *Aardvark Post* and similar cases. (A 18, 33; A 179.) Paynter also based part of his assessment of a transfer applicant on information gained from having worked with the applicant. (A 30; A 193.) Moreover, that Mikol and Paynter interviewed and recommended for hire an applicant for a position requiring no technical skills undermines the Company's argument their role is akin to administering a test of applicants' technical skills and reporting the results to management. (A 33; A 187.)

The Company argues (Br 30) that the Board essentially overlooked the fact that in *The Door*, 297 NLRB 601 (1990), as in this case, a putative supervisor interviewed applicants about their technical skills. To the contrary, the Board fully acknowledged that the putative supervisor in that case did not give a task-based test to an applicant. (A 34.) However, as the Board emphasized, the putative supervisor's recommendations were limited to whether an applicant had the technical ability to perform the work of a lab technician. (A 34.) Mikol and Paynter, by contrast, considered other factors, such as whether an applicant was a good fit for a job, whether an

applicant could handle the pressure of the job, and whether, in one instance, an applicant could answer simple, nontechnical questions. (A 34.) Also, as the Board noted, in *The Door* there was no evidence that the putative supervisor's recommendations carried any weight with the company's managers. (A 34.) This is hardly the case with Mikol and Paynter, whose numerous hiring recommendations carried great, and "frequently conclusive" weight in the Company's hiring decisions. (A 34.)<sup>11</sup>

The Company's remaining contentions are without merit. First, the Company claims that the Board took aspects of Mikol's and Paynter's testimony out of context. (Br 39-44.) The Board did no such thing. Mikol and Paynter plainly testified that they assess applicants in order to determine whether they would be a good fit for a position and that they make hiring recommendations. Their testimony, as the Board found (A 28-34), demonstrates that their role is not limited to technical matters. At bottom, the Company seeks to supplant the Board's findings and inferences with its

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<sup>11</sup> The Company's reference to *Ryder Truck Rental, Inc.*, 326 NLRB 1386 n.9 (1998) does nothing to advance its cause. In that case, the Board simply observed that the putative supervisor's occasional participation in interviews did not rise to the level of effective recommendation. *Id.*

own, speculative (and erroneous) view of what certain testimony means. It has provided no basis for unsettling the Board's reasonable interpretation of testimony, however. *See* cases cited at pp. 15-16.

The Company also argues that Mikol and Paynter cannot be supervisors because managers make hiring decisions only after undertaking "independent investigations." (Br 46-47.) The Company does not point to any evidence to support its contention. As the Board found (A 32), the Company's managers sometimes had phone conversations with applicants, following a post-interview meeting, but there is no evidence that these conversations addressed anything other than matters such as compensation and benefits. This does not provide evidence of an independent investigation. To the contrary, it appears that such phone calls were a routine part of the process leading up to hiring formalities, such as the issuance of a letter of intent. (A 32; A 182.) Further, Strow and Schultz could not cite any instance in the last 7 or 8 years when they disagreed with Mikol or Paynter about a hiring recommendation. (A 32.) Moreover, as the Board explained (A 32), there were several instances where managers accepted Mikol's and Paynter's recommendations and immediately moved on to the next applicant. These examples include Mikol's and Paynter's recommendations to reject two applicants for the position that ultimately

went to Andersen and two applicants for the transfer position that ultimately went to Sullivan. Strow did not make *any* phone calls in these instances. (A 32; A 185.) Further, the mere fact that Strow appears to have been present at these interviews does not, in any way, lessen the role that Mikol and Paynter played. It is undisputed that Mikol and Paynter carried out their own inquiries of applicants, and based their assessments on the applicant's answers to those questions.<sup>12</sup>

The Company's argument (Br 50-52) that Mikol's and Paynter's hiring recommendations occurred too long ago to constitute evidence of their authority to effectively recommend hire is, as the Board found, without merit. As the Board explained (A 31), it is the *possession* of supervisory

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<sup>12</sup> There is no merit to the Company's argument (Br 45-46) that the administrative law judge erred in finding that Mikol made a total of 18 employment recommendations and that the Company followed his recommendations at least 15 times. The Company argues that Mikol's testimony in this respect was ambiguous, because he answered a question from the judge relating to hiring in the eight months prior to the hearing date. The Company, however, failed to take exception to this finding by the judge. (SA 1-3.) As a result, the Court is jurisdictionally barred from addressing it now. Section 10(e) of the Act (29 U.S.C. § 160(e)) (absent extraordinary circumstances, "[n]o objection that has not been urged before the Board . . . shall be considered by the reviewing court"); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *See also NLRB v. Konig*, 79 F.3d 354, 359-60 (3d Cir. 1996). In any event, in his answer, Mikol described his role in hiring decisions that occurred during periods when the Company was hiring permanent employees, thus also making the Company's argument incorrect as a factual matter. (A 142-43.)

authority that is controlling. *See, e.g., Allstate Ins.* 322 NLRB 759, 760 (2000); *Pepsi Cola Co.*, 327 NLRB 1062, 1062 (1999); A 31. Further, the Company did not hire any permanent employees in the past two-and-a-half years from the date of the hearing, so it makes little sense to blame Mikol and Paynter for not participating in a process that has, in recent years, been nonexistent. In any case, as the Board explained, Paynter did, actually, participate in a transfer decision for a lateral transfer some two-and-a-half years prior to the date of the hearing, and this constitutes recent evidence of his supervisory status. (A 31.) And, as the Board noted, there is no evidence that the Company ever revoked Mikol's and Paynter's hiring authority.<sup>13</sup> (A 31-32.)

In conclusion, substantial evidence supports the Board's finding that Mikol and Paynter are statutory supervisors. Because Mikol and Paynter were therefore ineligible to vote in the election, the Board properly did not count their ballots, and the Union's election victory stands. Accordingly, the

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<sup>13</sup> Finally, the Company's challenges (Br 52-56) to the Board's findings regarding secondary indicia of supervisory status are unpersuasive. (A 39-40.) The Company has provided no basis for disturbing the Board's credibility-driven findings, and reasonable inferences, that Mikol and Paynter displayed numerous secondary indicia of supervisory status. (A 39-40.) And the Company does not dispute that Mikol and Paynter received salaries that were substantially higher than the salaries of other TSS.

Board also properly found that the Company violated the Act by refusing to recognize and bargain with the Union.

**CONCLUSION**

For the foregoing reasons, the Board respectfully submits that the Court should enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

s/ Robert J. Englehart  
**ROBERT J. ENGLEHART**  
*Supervisory Attorney*

s/ Daniel A. Blitz  
**DANIEL A. BLITZ**  
*Attorney*

National Labor Relations Board  
1099 14th St., NW  
Washington, DC 20570  
(202) 273-2978  
(202) 273-1722

**LAFE E. SOLOMON**  
*Acting General Counsel*

**CELESTE J. MATTINA**  
*Acting Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

National Labor Relations Board

May 2011



UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner/Cross-Respondent	* Nos. 10-4348,
	* 10-4448
v.	*
	* Board Case No.
COMPUCOM SYSTEMS, INC.	* 22-CA-28969
	*
Respondent/Cross-Petitioner	*

**COMBINED CERTIFICATES OF CONTENT AND VIRUS SCAN REQUIREMENT**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 9,535 words of proportionally-spaced, 14-point type, and the word proceeding system used was Microsoft Office Word 2003. Board counsel certifies that the contents of the pdf file containing a copy of the Board's brief that was filed with the Court is identical to the hard copy of the Board's brief filed with the Court and served on respondent/cross-petitioner, and was scanned for viruses using Symantec Endpoint Protection version 11.0.6100.645, and according to that program, was free of viruses.

/s Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 9th day of May, 2011

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I hereby certify that on May 9, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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Jacqueline R. Barrett, Esq.  
Kristine G. Derewicz, Esq.  
Littler Mendelson  
1601 Cherry Street  
Three Parkway, Suite 1400  
Philadelphia, PA 19102

Edward F. Berbarie, Esq.  
Steven L. Rahhal, Esq.  
Littler Mendelson  
2001 Ross Avenue  
Suite 1500  
Lock Box 116  
Dallas, TX 75201

Alison N. Davis, Esq.  
Littler Mendelson  
1150 17th Street, N.W.  
Suite 900  
Washington, DC 20036-0000

/s Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 9th day of May, 2011