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LOCAL NO. 39

8
9 UNITED STATES OF AMERICA
10 NATIONAL LABOR RELATIONS BOARD

11
12 SUTTER WEST BAY HOSPITAL d/b/a
CALIFORNIA PACIFIC MEDICAL CENTER,

13
14 Petitioner-
Employer,

15 and

16 INTERNATIONAL UNION OF OPERATING
17 ENGINEERS, STATIONARY ENGINEERS
LOCAL NO. 39,

18 Intervenor-Union.
19
20

No. 20-UC-076774

**STATIONARY ENGINEERS LOCAL
NO. 39'S REQUEST FOR REVIEW**

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I. INTRODUCTION

Pursuant to Section 102.67 of the Board’s Rules and Regulations, the International Union of Operating Engineers, Stationary Engineers Local No. 39 (“Local 39”) hereby requests review of the Decision and Order in Case 20-UC-076774 issued by Regional Director Frankl on May 29, 2012.

The context in which Charging Party-Employer Sutter West Bay Hospital d/b/a California Pacific Medical Center (“CPMC”) filed the instant Petition for Unit Clarification is important. CPMC and Local 39 have a collective-bargaining history spanning more than thirty years. Historically included within that bargaining unit are chief engineers. In the decades that CPMC and Local 39 had been in a collective-bargaining relationship, CPMC did not object to the inclusion of chief engineers in the bargaining unit. After the parties’ collective-bargaining agreement expired in March 2012, Local 39 went on strike. Immediately thereafter, CPMC filed the instant Petition for Unit Clarification in retaliation for Local 39’s decision to strike. The Regional Director granted CPMC’s Petition for Unit Clarification, and ordered the exclusion of chief engineers from the bargaining unit. The Board, however, should not tolerate CPMC’s thinly-veiled attempt to retaliate against Local 39 bargaining-unit members for exercising their right to strike. As shown below, the Board has compelling grounds on which to overturn the Regional Director’s Decision and Order, and restore chief engineers to the Local-39 bargaining unit.

II. ARGUMENT

The Board will grant a motion for reconsideration if the requesting party shows one of the following “compelling reasons”: “(1) [t]hat a substantial question of law or policy is raised because of . . . a departure from[] officially reported Board precedent” and “(2) [t]hat the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.” BOARD RULES AND REGULATIONS § 102.67, subd. (c). As shown below, Local 39’s request for reconsideration is justified on both or either of these grounds.

///

1 **A. THE REGIONAL DIRECTOR’S DECISION AND ORDER RAISES A**
2 **SUBSTANTIAL QUESTION OF LAW OR POLICY BECAUSE IT DEPARTS**
3 **FROM OFFICALLY REPORTED BOARD PRECEDENT**

4 The statutory definition of “supervisor” requires an affirmative showing that the putative
5 supervisor uses “independent judgment” in exercising one of the twelve supervisory functions
6 listed in Section 2(11) of the Act. *Oakwood Healthcare, Inc.*, 348 NRLB 686, 687 (2006) (citing
7 *NLRB v. Kentucky River Comm. Care*, 532 U.S. 706, 713 (2011)). The Regional Director
8 concluded that chief engineers are statutory supervisors solely based on their putative “authority
9 to effectively recommend the hiring of employees.” (Regional Director Frankl’s Decision and
10 Order (hereinafter “Dec.”), p. 18.) The Regional Director, however, did not make any
11 determination whether the chief engineers use independent judgment in exercising their alleged
12 authority to recommend the hiring of employees. (*See* Dec., p. 18.) By not determining whether
13 chief engineers exercise independent judgment, the Regional Director did not appropriately
14 conduct the statutory test for supervisory status. The Regional Director’s determination that chief
15 engineers are statutory supervisors, therefore, cannot stand. The Board should not remand the
16 case to the Regional Director to make a determination about independent judgment, because there
17 is no evidence in the record that chief engineers use independent judgment in making
18 recommendations as to the hiring of employees.

19 **B. THE REGIONAL DIRECTOR’S DECISION AND ORDER ON THE**
20 **SUBSTANTIAL FACTUAL ISSUE OF WHETHER CHIEF ENGINEERS HAVE**
21 **THE AUTHORITY TO EFFECTIVELY RECOMMEND THE HIRING OF**
22 **EMPLOYEES IS CLEARLY ERRONEOUS ON THE RECORD AND**
23 **PREJUDICALLY AFFECTS THE RIGHTS OF LOCAL 39**

24 The Regional Director ordered the exclusion of chief engineers from the bargaining unit
25 because chief engineers allegedly possess the authority to effectively recommend the hiring of
26 employees. (Dec., p. 18.) The Regional Director’s conclusion rests on the testimony of two
27 CPMC management witnesses, Kevin Joo (“Joo”), Manager of Labor Relations at CPMC and
28 Timothy Hern (“Hern”), CPMC’s Director of Engineering and Facility Development. (Dec., p.
 18.). According to the Regional Director’s Decision and Order, the testimony of chief engineers
 Donald Haynes (“Haynes”), Brian Cassel (“Cassel”) and John Kimball (“Kimball”) corroborates
 the testimony of Joo and Hern. (Dec., p. 18.) Based on the testimony of these witnesses, the

1 Regional Director made the following findings of fact regarding the authority of chief engineers
2 to effectively recommend the hiring of employees:

3 *Chief engineers make their hiring recommendations to Hern, and Hern treats*
4 *their recommendations as final hiring decisions and does not overturn them.*
5 *The testimony of Chief Engineers Haynes, Cassel and Kimball is consistent*
6 *with Hern's testimony that their hiring recommendations are followed.* The
7 only occasions when their recommended candidates have not been hired are when
8 a background check renders an applicant unsuitable for hire. I do not find that
9 such evidence renders the hiring recommendations of the chief engineers
ineffective given the evidence that chief engineers are the highest-ranking
individuals involved in reviewing resumes, selecting candidates to interview, and
in make [sic.] hiring recommendations, and given that such recommendations
have been followed on almost all occasions. Furthermore, the evidence shows
that at least on one occasion when a recommended candidate was rejected due to a
background check, the chief engineer chose another candidate who was hired.”

10 (Dec., p. 18 (emphasis added).)

11 For the reasons discussed below, the Regional Director's factual findings regarding chief
12 engineers' authority to effectively recommend the hiring of employees are clearly erroneous and
13 prejudicially affect the rights of Local 39.

- 14 1. **Neither of CPMC's witnesses testified that chief engineers have the authority**
15 **to effectively recommend the hiring of employees**
16 a. **Joo's testimony does not establish that chief engineers have the**
17 **authority to effectively recommend the hiring of employees**

18 Kevin Joo, the Manager of Labor Relations at CPMC (Tr. 9:24), gave the following
19 relevant testimony:

20 Q. BY MR. SCANLAN: Mr. Joo, one final segment here. In your human
21 resources capacity, do you have contact with the hiring process at CPMC?

22 A. Yes.

23 Q. And who's responsible for hiring the engineers at the CPMC campuses?

24 A. The chiefs and assistant chief engineers.

25 (Tr. 57:22-58:3.)

26 Q. [BY MS. HILLMAN] Now, in terms of hiring, may a chief engineer hire
27 folks into the Local 39 bargaining unit?

28 A. Yes.

///

1 Q. And that hiring must also be with the approval of the administrator and/or
2 designee; is that correct?

3 A. That is how it is for all management, yes.

4 Q. So a chief engineer can't simply decide he or she wants to hire a brother or
5 a next-door neighbor and simply give them a job. It has to be approved?

6

7 A. Nobody in management can.

8 Q. I'm asking about a chief engineer. A chief engineer has to have approval;
9 correct?

10 A. Correct.

11

12 A. Wait. I'm sorry. By "approval," you mean for the posting of the vacancy
13 or the specific choosing of a specific individual?

14 Q. The specific choosing, the hiring.

15 A. *No. I think that's something that the chiefs are able to do independently.*
16 *I'm sorry. I thought you meant in terms of the process of posting a vacancy that*
17 *would be within a department. . . . [T]he chief or assistant chief would have the*
18 *authority to do so [to hire].*

19

20 (Tr. 94:18-95:22 (emphasis added).)

21 Q. Now, the collective bargaining agreement indicates that the hiring of help
22 in the department is subject to the approval of the administrator and/or his
23 designee. *Is it still your testimony that a chief engineer can interview and then*
24 *select whomever he or she wants?*

25 A. *That has been the practice; correct.*

26 (Tr. 96:1-6 (emphasis added).)

27 Q. Then is it your testimony that approval from the administrator or the
28 administrator's designee is not necessary, despite the contractual language?

1 A. Correct.

2 (Tr. 96:24-97:1.)

3 Joo, therefore, testified that chief engineers have the *authority to hire* employees
4 into the bargaining unit. Joo offered no testimony about the authority of chief engineers
5 to effectively recommend the hiring of employees. Indeed, Joo testified that chief
6 engineers do *not* need management's approval to hire employees, despite the clear
7 language of the parties' CBA.

8 **b. Hern's testimony does not establish that chief engineers have the**
9 **authority to effectively recommend the hiring of employees**

10 Timothy Hern, the Director of Engineering and Facility Development (Tr.
11 113:18), gave the following relevant testimony:

12 Q. . . . Who's responsible for hiring help in the engineering
13 departments of the four campuses of CPMC?

14 A. Chief engineers for each area.

15 Q. Okay. What—can you describe what your role, if any, is in hiring
16 engineers?

17 A. My responsibility is to at least get a requisition signed if there's
18 opening, and put that forth to administration, to my next level. And then it
19 goes up through Bud Shaw, I think through administration for hiring. And
20 that's approved, then a requisition is opened up for that job. And then the
21 chief engineers receive all the resumes and basically interview . . . and
22 make their recommendation and hire.

23 Q. Okay. And then what's the next step after that?

24 A. The next step.

25 Q. They make a recommendation. *Do you approve or disapprove the*
26 *recommendation?*

27 A. *No.* I think—early on, the conversation I had with all the chief
28 engineers was that if they would like me to, I would basically interview

1 the candidate, but there was no means necessary that I needed to do that. I
2 trusted their judgment on who they wanted to pick and work. And I don't
3 think I—I can't remember any cases that they actually asked me to
4 interview anybody from the standpoint that—but—not that I would have
5 to do that, because they need to select the people that was going to work
6 with them—

7 Q. Okay.

8 A. —in their—you know, position to evaluate their abilities and stuff
9 than I would be.

10 (Tr. 140:16-141:20 (emphasis added).)

11 Q. If you would sort of walk me through that process a little bit, the hiring
12 process.

13 A. . . . I submit that requisition to upper management. It's approved and
14 then—from then the hiring process starts where the chief receives all the resumes.
15 Reviews those resumes, makes selections on who he'd like to interview.
16 Interviews the candidates and makes the selection.

17 (Tr. 165:12-23.)

18 A. The bottom line is my feeling if you have competent supervisors and
19 managers, you should allow them the flexibility to hire the people they want to
20 have working there. I did offer them at any time you'd like me to take a look at
21 the resumes and/or be part of the interviews I'd be glad to do that. But I don't
22 think—in only one case did one of the chief engineers ask me to sit in on an
23 interview and talk to the individual from that standpoint.

24 Q. Doesn't the Collective Bargaining Agreement require that a chief engineer
25 get approval before hiring an individual?

26 A. If it says in the Collective Bargaining Agreement, yes.

27 Q. *And have you given approval in your four years to hire somebody into the*
28 *bargaining unit?*

1 A. *Not to my knowledge.* I think what has happened and to clarify it, I mean,
2 the chief has come back to me and said they'd like to hire this individual and that
3 was it. They didn't ask my approval, they just let me know and informed me,
4 that's the individual they selected.

5 (Tr. 166:4-21 (emphasis added).)

6 Q. . . . So if a chief engineer comes to you and says, John Doe I think has
7 the necessary qualifications to work on the boiler, etcetera, etcetera and I want to
8 hire this person, you let them do it? You let them hire that individual?

9 A. I do.

10 (Tr. 167:6-10.)

11 Q. . . . You're familiar that a chief engineer must seek approval to hire an
12 individual, correct?

13 A. Actually, no.

14 (Tr. 168:2-5.)

15 Q. Well the first time somebody was hired or wanted to be hired by the chief
16 engineer you did not demand that you review or approve the hiring?

17 A. No.

18 (Tr. 170:15-18.)

19 Like Joo, Hern repeatedly testified that chief engineers have the *authority to hire*, despite
20 the explicit language of the CBA. Hern, in fact, explicitly denied that he approves any hiring
21 recommendation made by the chief engineers. Indeed, Hearing Officer Rosen found that,
22 "Irrespective of what the contract says, he [Hern] doesn't participate or approve hiring decisions."
23 (Tr. 169:14-18.) Hern did not offer any testimony about the authority of chiefs to *effectively*
24 *recommend* the hiring of employees or his approval of such recommendations.

25 **c. Conclusion**

26 Neither Joo nor Hern offered any testimony that chief engineers actually make any
27 recommendations as to the hiring of employees. Moreover, neither Joo nor Hern offered any
28 testimony that CPMC management considers any hiring recommendations made by chief

1 engineers. In fact, both Hern and Joo testified that chief engineers have the *authority to hire*,
2 which not only contradicts the parties' CBA but also is unsupported by the chief engineers'
3 testimony. Accordingly, there is no basis for the Regional Director's conclusion that "[c]hief
4 engineers make their hiring recommendations to Hern, and Hern treats their recommendations as
5 final hiring decisions and does not overturn them." (Dec., p. 18.)

6 **2. The chief engineers' testimony is contradicted by CPMC's management**
7 **witnesses, which completely undermines the Regional Director's conclusion**
8 **that chief engineers have the authority to effectively recommend the hiring of**
 employees

9 In contradiction of the testimony of CPMC's management witnesses, several chief
10 engineers testified that they make hiring recommendations (only one chief engineer testified that
11 he makes hiring recommendations to Hern). Based on this testimony, the Regional Director
12 mistakenly concluded that "[t]he testimony of Chief Engineers Haynes, Cassel and Kimball is
13 consistent with Hern's testimony that their [chief engineers'] hiring recommendations are
14 followed." (Dec., p. 18.) There are several significant defects in the Regional Director's
15 conclusion. First, as noted above, neither Hern nor Joo testified that CPMC management follows
16 chief engineers' hiring recommendations. In fact, neither Hern nor Joo testified that chief
17 engineers actually make hiring recommendations to CPMC management. That the chief
18 engineers' testimony is consistent with CPMC's management witnesses' testimony is, therefore,
19 entirely factually inaccurate. And second, as explained below, none of the chief engineers
20 testified that Hern actually followed their hiring recommendations. Finally, even if chief
21 engineers testified that Hern follows their hiring recommendations, such testimony should have
22 been completely discredited in light of Hern's own testimony that he does not follow chief
23 engineers' hiring recommendations. Effective recommendation requires that management
24 actually take into consideration and follow the putative supervisor's recommendation. *DirectTV*
25 *U.S. DirectTV Holdings LLC*, 357 NLRB No. 149, slip op. p. 3 (2011) ("The authority to
26 'effectively recommend' an action 'generally means that the recommended action is taken
27 without independent investigation by superiors, not simply that the recommendation is ultimately
28 followed."). Here, however, CPMC's management witnesses explicitly and repeatedly denied

1 that they take into account chief engineers' recommendations as to hiring. The Regional
2 Director's determination that chief engineers have the authority to effectively recommend the
3 hiring of employees is therefore *contradicted* by the factual record, and must be overturned.

4 a. Cassel testified that he does *not* make hiring recommendations to Hern
5 Quoted below at length is Cassel's testimony about his authority to hire.

6 Q. . . . Do you have any responsibilities for hiring additional help in the
7 department?

8 A. . . . And so what happens then is we set up appointments. I set up the
9 appointments, you know, it's generally myself and the assistant chief. We
10 interview the person, people, and—and choose who we're going to hire. And
11 then it goes back—we tell HR, you know, that this is the—you know, there's a
12 recruiter at HR, we tell the recruiter that this is the person that we've chosen, and
13 then they send them out a formal letter saying that, you know, they've been, you
14 know, this—that's it. . . .

15 Q. And when people are applying, who do they send their resumes to?

16 A. To me.

17 (Tr. 210:14-211:22.)

18 Q. . . . And then you also—you—next step essentially would be the
19 interview process once you've collected the resumes and gone through them.

20 A. Right. I mean, yeah, to—you know, to go through all that. Yeah, we—
21 what we do is we generally collect a stack of, you know, of resumes, right. We'll
22 go through them. You know, I'll file through them.”

23 (Tr. 245:6-12.)

24 Q. And once a decision is made or there's an individual that you want to hire
25 . . . into the position, do you then get approval to hire that person?

26 A. At that point, it's already been approved. Once—if we're interviewing it's
27 been approved.

28 (Tr. 246:7-14.)

1 Q. My question is once you've made a determination in your mind that you
2 want to hire John Doe—

3 A. I call—

4 Q. —out of a lot—

5 A. Yeah.

6 Q. —of people—

7 A. Right.

8 Q. —that you have whittled it down to—

9 A. Yes.

10 Q. —do you then seek approval from Mr. Hern and say this is the person that
11 I want to meet or I want to hire, the person has the following qualifications, can
12 we hire him?

13 A. Right. No, I don't. I just—no, I don't.

14 Q. Do you contact HR and say—

15 A. Yes.

16 Q. —this is the person that I want to hire with the following qualifications,
17 this is why I want to do it?

18 A. I just tell them—I don't. No, I—what I do is I contact them. I contact the
19 recruiter. And I say this is the person that we want to hire, and that's pretty much
20 it. And then they go and send a offer letter to that person.

21 (Tr. 247:10-248:5 (emphasis added).)

22 Cassel's testimony, therefore, does not support the Regional Director's conclusion that
23 chief engineers make hiring recommendations to Hern. In fact, Cassel's testimony squarely
24 contradicts the Regional Director's finding.

25 **b. Although Kimball testified that he has made a recommendation as to**
26 **hiring, he did not specify the individual to whom he made the**
27 **recommendation, nor did he testify that his recommendation was**
28 **actually taken into account by CPMC management**

28 Quoted below at length is Kimball's testimony about his authority to hire.

1 Q. . . . And as a chief engineer, have you had occasion to hire any new
2 employees?

3 A. Yes.

4 Q. Approximately how many have you hired?

5

6 A. . . . Probably six, seven, eight in that range as far as new additions to our
7 crew, yeah.

8 Q. Okay. Now, can you walk us through the process of hiring somebody into
9 the bargaining unit? What is the first step? What happens first?

10 A. First there has to be an opening, and we have to put in a request for an
11 open position to fill that position.

12 Q. Okay. And who do you make that request to?

13 A. To my supervisor.

14 Q. And is that Mr. Hern?

15 A. Correct, yeah.

16 Q. Okay. And assuming that the request to fill an opening is approved, what
17 is the next step?

18 A. The next step is it goes through HR through the process to—the potential
19 employees have to put all their information online at CPMC, and then it goes
20 through—the position is posted online. And it's usually posted through the Local
21 39. And then we just start getting applicants. After it's been approved, then we
22 get calls—we get emails from the HR with these different applicants and all their
23 resumes. Then we just start calling people and scheduling for interviews.

24 Q. So do the applications and resumes go directly to you, or do they go to HR
25 and then somehow make their way to you?

26 A. They go to HR, and HR sends them to me.

27 Q. Okay. Do you know whether they are also sent to Mr. Hern for his
28 review?

1 A. I don't know if they send them to him or not. They may CC Tim on that.
2 I'm not a hundred percent sure.

3 Q. Okay. So once you receive the resumes and applications, then what do
4 you do?

5 A. Then we just go through them and look at who looks like a reasonable
6 applicant, somebody with skills and people that we're looking for to fill that spot.
7 And then I call them up, and we set up interviews. . . .

8 (Tr. 288:25-290:15.)

9 Q. . . . And once a decision is made as far as who the best applicant is, then
10 what do you do?

11 A. Then we call HR. I talk to Tim and I tell him basically we think we found
12 somebody for this position. And then we get a hold of our HR rep and tell them
13 that we found somebody. So then they can go through the background check and
14 make an offer.

15 Q. . . . So you don't make an offer to the individual? You don't make an
16 offer of employment?

17 A. No. I can't until all the background check is done. No, I don't.

18

19 Q. Do you have the authority to make the decision as far as who is going to
20 be hired?

21 A. I can make a recommendation.

22 Q. Have you had occasion where your recommendation as to which applicant
23 to be hired has been denied?

24 A. Yes

25 Q. And when was that?

26 A. 2006 or 2007 roughly. 2008. We wanted to hire somebody, and I was
27 told by my director not—I was not allowed to do it.”

28 (Tr. 291:3-292:2.)

1 Q. Talking about hiring since 2007, you've brought in six to eight people
2 approximately?

3 A. Roughly. . . .

4

5 Q. Okay. And there was one situation where you were not permitted to hire
6 the person who wanted to hire, correct?

7 A. Correct.

8 Q. And all the other situations you were permitted to hire the person you
9 wanted to, correct?

10 A. Probably a couple.

11 Q. And in the one situation where you were told you couldn't hire the person
12 you wanted to, who told you you couldn't hire the person you wanted to?

13 A. Steven Stephens. He was my director at the time.

14

15 Q. So you then went back to the pool and selected who you wanted as your
16 second choice?

17 A. Well, I made the recommendation, and that was accepted.

18 Q. Okay. Did Mr. Stevens interview the candidate that you had wanted to
19 hire?

20 A. I think he did sit in with him, yes.

21 (Tr. 307:17-309:2.)

22 Kimball's testimony, therefore, does not support the Regional Director's conclusion that
23 chief engineers make hiring recommendations to Hern. Moreover, Kimball did not offer any
24 testimony that his hiring recommendations were acted upon by CPMC management.

25 c. **Although Haynes testified that he makes hiring recommendations to**
26 **Hern, there is no foundation on which to conclude that Hern actually**
approved Haynes' hiring recommendations

27 Quoted below at length is Haynes's testimony about his authority to hire.

28 Q. . . . [A]s the chief, have you had occasion to hire any employees?

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A. I've been in the process, yes.

Q. Okay.

A. I've been involved in several hirings.

Q. Okay. Approximately how many?

A. Probably a dozen.

Q. Okay. And when you say you've been involved in the process, explain for us what you mean by involved? What is your level of involvement?

A. Compiling applications, performing interviews with my assistant chief, compiling information, making recommendations, doing second interviews. And then asking for permission to move forward.

Q. Okay. When you say permission to move forward meaning to recommend hiring—

A. Correct.

Q. —or to actually hire?

A. No, I cannot tell anybody to hire. I've had a lot of disappointments trying to hire people. Onboarding can take up to six months.

Q. Okay. So who [do] you make a recommendation to?

A. My director Tim Hern.

Q. Okay. And prior to Tim Hern coming on to CPMC, who was your director?

A. Dennis Layden.

Q. Okay. Have you had occasion, you indicated that there was some level of disappointment. Have you had occasion where you wanted to hire an individual and your recommendation was not approved?

A. No, no, we just have had a lot of employees fall through the cracks.

Q. I see. Meaning they were no longer available?

A. Potential employees.

Q. I see.

1 A. Background checks don't tick, don't come up properly. They are too late
2 in the process and sometimes already in the process of giving up their job and
3 ready to onboard and then they're cut loose. And we start the process all over
4 again.

5 (Tr. 332:20-334:8.)

6 Q. . . . And you testified with regard to hiring that every time you've
7 recommended that someone be hired, that it has been approved, correct?

8 A. Yeah.

9 (Tr. 346:6-9.)

10 Kimball, therefore, offers the *only* testimony in support of the Regional Director's
11 conclusion that chief engineers make hiring recommendations to Hern. Kimball, however, offers
12 no testimony that he has any knowledge about CPMC management's approval of his hiring
13 recommendations. Thus, although Kimball testified that all of his hiring recommendations had
14 been approved (Tr. 346:6-9), the Regional Director lacked any foundation on which to conclude
15 that CPMC management actually took Kimball's recommendation into account. Indeed, the
16 testimony of Hern and Joo support the conclusion that CPMC management does *not* take into
17 account the hiring recommendations of chief engineers.

18 **3. The Regional Director's factual finding was clearly erroneous and**
19 **prejudicially affects the rights of Local 39**

20 None of the testimony of CPMC's management witnesses supports the Regional
21 Director's conclusion that chief engineers make hiring recommendations to Hern. Furthermore,
22 the testimony of the chief engineers relied upon by the Regional Director is clearly insufficient to
23 sustain the Regional Director's conclusion. In weighing the witnesses' conflicting testimony,
24 only one chief engineer testified that he makes hiring recommendations to Hern, but Hern himself
25 and Joo flatly contradicted this testimony. Given that all of CPMC's management witnesses deny
26 that chief engineers make hiring recommendations, the Regional Director's conclusion that chief
27 engineers do in fact make hiring recommendations to Hern is clearly erroneous. The Regional
28 Director's clearly erroneous factual conclusion prejudicially affects the rights of Local 39,

1 because the Decision and Order excludes from the Local-39 bargaining unit the historically-
2 included chief engineers.

3 **III. CONCLUSION**

4 For the foregoing reasons, Local 39 has shown that “compelling reasons” exist for the
5 Board to reconsider the Regional Director’s Decision and Order. First, Local 39 has shown that
6 the Regional Director failed to determine whether chief engineers use “independent judgment”
7 when making recommendations as to the hiring of employees. Such a determination about the
8 use of “independent judgment” is necessary for a finding that a person is a statutory “supervisor.”
9 Absent this determination, the Regional Director’s decision that chief engineers’ are
10 “supervisors” is fatally flawed and must be overturned. Second, Local 39 has shown that the
11 Regional Director’s factual finding that chief engineers have the authority to effectively
12 recommend the hiring of employees is clearly erroneous, and that such clearly erroneous factual
13 finding prejudicially affects the rights of Local 39. The Board should therefore grant Local 39’s
14 request for reconsideration of the Regional Director’s Decision and Order.

15 Dated: June 12, 2012

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

17 By: /s/ Kristina L. Hillman
KRISTINA L. HILLMAN

Attorneys for Respondent-Union
INTERNATIONAL UNION OF OPERATING
ENGINEERS, STATIONARY ENGINEERS
LOCAL NO. 39

1 **PROOF OF SERVICE**
2 **(CCP §1013)**

3 I am a citizen of the United States and resident of the State of California. I am employed
4 in the County of Alameda, State of California, in the office of a member of the bar of this Court,
5 at whose direction the service was made. I am over the age of eighteen years and not a party to
6 the within action.

7 On June 12, 2012, I served the following documents in the manner described below:

8 **STATIONARY ENGINEERS LOCAL NO. 39'S**
9 **REQUEST FOR REVIEW**

- 10 (BY U.S. MAIL) I am personally and readily familiar with the business practice of
11 Weinberg, Roger & Rosenfeld for collection and processing of correspondence for
12 mailing with the United States Parcel Service, and I caused such envelope(s) with
13 postage thereon fully prepaid to be placed in the United States Postal Service at
14 Alameda, California.
- 15 (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier
16 and/or process server for hand delivery on this date.
- 17 (BY FACSIMILE) I am personally and readily familiar with the business practice of
18 Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be
19 transmitted by facsimile and I caused such document(s) on this date to be transmitted by
20 facsimile to the offices of addressee(s) at the numbers listed below.
- 21 (BY OVERNIGHT MAIL) I am personally and readily familiar with the business
22 practice of Weinberg, Roger & Rosenfeld for collection and processing of
23 correspondence for overnight delivery, and I caused such document(s) described herein
24 to be deposited for delivery to a facility regularly maintained by United Parcel Service
25 for overnight delivery.
- 26 (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the
27 offices of each addressee below.

28 On the following part(ies) in this action:

Mr. Christopher T. Scanlan
Arnold & Porter, LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
(415) 471-3400 (fax)

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 12, 2012, at Alameda, California.

/s/ Stephanie Mizuhara
Stephanie Mizuhara