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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

SUTTER WEST BAY HOSPITAL d/b/a CALIFORNIA PACIFIC MEDICAL CENTER, Petitioner-Employer, and INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS LOCAL NO. 39, Intervenor-Union.	No. 20-UC-076774 **STATIONARY ENGINEERS LOCAL NO. 39'S STATEMENT IN OPPOSITION TO PETITIONER-EMPLOYER'S REQUEST FOR REVIEW**

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I. INTRODUCTION

Pursuant to Section 102.67(e) of the National Labor Relations Board's Rules and Regulations, the International Union of Operating Engineers, Stationary Engineers, Local No. 39 ("Local 39") hereby submits its Statement in Opposition to the Request for Review filed by Sutter West Bay Hospitals d/b/a California Pacific Medical Center ("CPMC").

The context in which CPMC filed its Petition for Unit Clarification and Request for Review is important. CPMC and Local 39 have a collective-bargaining history spanning more than thirty years. Historically included within that bargaining unit are Assistant 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 Assistant 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. In his Decision and Order, the Regional Director refused to exclude Assistant Chief Engineers from the bargaining unit, finding that they were not statutory supervisors. CPMC now seeks the Board's review of the Regional Director's Decision and Order. 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.

In its Request for Review, CPMC argues that the following determinations made by the Regional Director were "clearly erroneous": (1) that Assistant Chief Engineers do not have the authority to hire; (2) that Assistant Chief Engineers do not have the authority to suspend and discipline bargaining-unit members; (3) that Assistant Chief Engineers do not have the authority to assign with respect to bargaining-unit members; and (4) that Assistant Chief Engineers do not have the authority responsibly to direct bargaining-unit members. CPMC's arguments fail. As shown below, CPMC failed to carry its burden of proof to show that Assistant Chief Engineers possess any of the above-referenced supervisory authorities. Accordingly, the Board should deny CPMC's Request for Review, and uphold the Regional Director's Decision and Order as it applies to Assistant Chief Engineers.

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II. PROCEDURAL HISTORY

These proceedings were initiated when CPMC filed a Unit Clarification Petition seeking to exclude from the Local-39-represented bargaining unit Assistant Chief Engineers, in addition to several other classifications. Hearings were held from April 25 to April 26, 2012. Both CPMC and Local 39 filed post-hearing briefs with the Regional Director. The Regional Director issued his Decision and Order on May 29, 2012. CPMC now seeks from the Board a request for review of the Regional Director's ruling in the Decision and Order that Assistant Chief Engineers are not statutory supervisors and therefore are properly included in the Local-39-represented bargaining unit. Local 39 timely files the instant Statement in Opposition to CPMC's Request for Review.

III. LEGAL STANDARD

The Board will grant a party's request for review of a Regional Director's Decision and Order only where the appealing party has shown "compelling reasons" for the review. BOARD RULES & REGULATIONS § 102.67(c). The Board's Rules and Regulations further specify that "a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

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

§ 102.67(c)(1)-(4). A party seeking request for review under section 102.67(c)(2) is prohibited from "rais[ing] any issue or alleg[ing] any facts not timely presented to the Regional Director."

IV. ARGUMENT

CPMC pursues its Request for Review solely under Board Rules & Regulations section 102.67(c)(2). (*See* CPMC's Request for Review, p. 2 ("The Regional Director's decision that Assistant Chief Engineers are not statutory supervisors and thus should not be excluded from the

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unit based on their supervisory status is clearly erroneous based on the weight of the evidence and such error was prejudicial, inasmuch as it results in statutory supervisors owing divided loyalty to both the Employer and a labor organization.") The Board should deny CPMC's Request for Review, because CPMC fails to show that the Regional Director's determination that Assistant Chief Engineers are not statutory supervisors is clearly erroneous.

A. CPMC FAILS TO SHOW THAT THE REGIONAL DIRECTOR'S DETERMINATION THAT CPMC DID NOT SATISFY ITS BURDEN OF PROVING THAT ASSISTANT CHIEF ENGINEERS ARE STATUTORY SUPERVISORS IS "CLEARLY ERRONEOUS"

In the Decision and Order, Regional Director Frankl concluded, after weighing all the evidence in the record, that CPMC failed to carry its burden to prove that Assistant Chief Engineers exercise one of the supervisory functions enumerated in Section 2(11) of the Act. (*See* Decision and Order, p. 22 ("For all the reasons discussed above, I do not find that the Employer has meet its burden to establish that the assistant chief engineers are statutory supervisors, and I decline to exclude them from the unit.").) As the party requesting review of the Regional Director's Decision and Order, CPMC now has the burden of showing "[t]hat the Regional Director's decision on a substantial factual issue is *clearly erroneous on the record . . . .*" BOARD RULES AND REGULATIONS § 102.67(c)(2). CPMC fails to meet its burden of proof in its Request for Review, just as it failed to meet its burden of proof at the hearing on its Unit Clarification Petition.

1. <u>CPMC fails to show that the Regional Director's determination that Assistant Chief Engineers do not have the authority to hire is clearly erroneous</u>

CPMC contends that Assistant Chief Engineers have authority to hire bargaining unit members, because they, along with the Chief Engineers, "jointly review the resumes [of applicants] and determine whom to interview," "schedule appointments with and interview their preferred candidates," and "decide who should be hired." (CPMC's Request for Review, p. 6.) CPMC further contends that Assistant Chief Engineers' job description entrusts Assistant Chief Engineers with hiring authority. (CPMC's Request for Review, p. 7 (citing Petitioner-Employer's Exhibit (hereinafter "Er. Exh.") 5).) In addition, Assistant Chief Engineers are allegedly

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evaluated in part based on their "ability to '*recruit*[], *select*[], and manage[] individuals . . . .'" (CPMC's Request for Review, p. 7 (citing Er. Exh. 9) (emphasis in original.)

The Regional Director considered all of the evidence CPMC identified in its Request for Review regarding Assistant Chief Engineers' alleged hiring authority. Indeed, the Regional Director found "that assistant chief engineers have participated with chief engineers in reviewing resumes; selecting candidates to interview; and conducting job interviews." (Decision and Order, p. 6.) The Regional Director also found that assistant chief engineers "have also given their opinions about the candidates being interviewed to the chief engineer." (Decision and Order, pp. 6-7.) The Regional Director also noted the "references to hiring authority" in the job description for Assistant Chief Engineers and the criteria for CPMC's performance appraisals of Assistant Chief Engineers. (Decision and Order, p. 6.).

Having taken this evidence into account, the Regional Director nevertheless concluded that Assistant Chief Engineers are not statutory supervisors. Determinative for the Regional Director was that there was no evidence in the record "that the assistant chief engineers have made hiring recommendations or that the opinions of candidates that they have expressed to chief engineers have affected the hiring recommendations made by the chief engineers." (Decision and Order, p. 6.) In its Request for Review, CPMC has still not come forward with evidence that Assistant Chief Engineers have the authority to hire or have the authority to effectively recommend the hiring of employees. Despite CPMC's failure to satisfy its burden of proof, the record nevertheless demonstrates that Assistant Chief Engineers lack the authority to either hire or to effectively recommend the hiring of employees.

Regarding authority to hire, the Collective Bargaining Agreement does not authorize Assistant Chief Engineers to hire employees into the bargaining unit. (Er. Exh. 1, Art. II, § 3.)[1] Moreover, John Kimball ("Kimball") testified that, as an Assistant Chief Engineer, he had no authority to hire. (Official Report of Proceedings Before the National Labor Relations Board

[1] Kevin Joo, Manager of Labor Relations at CPMC, admitted on cross-examination that CPMC did not bargain with the Union over the job descriptions identified in Employer's Exhibits 4 and 5. (Tr. 58:18-23.)

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Region 20 (hereinafter "Tr.") 285:1-3.) The testimony of John Groen ("Groen"), who presently works as an Assistant Chief Engineer, confirms Kimball's testimony. Groen testified that, as an Assistant Chief Engineer, he has never hired anyone into the bargaining unit. (Tr. 316:15-18). Groen also testified that, as an Assistant Chief Engineer, he has no authority to determine who will be hired into the bargaining unit (Tr. 317:6-8); rather, the authority to hire lies with Cronin, a Supervising Chief who is not in the bargaining unit (Tr. 322:5-11). The Regional Director's Decision and Order similarly concluded that Assistant Chief Engineers lack the authority to hire. (Decision and Order, p. 7.)

Regarding the authority to effectively recommend hiring, CPMC cites to two meager pieces of evidence to justify the denial of collective-bargaining rights to Assistant Chief Engineers. First CPMC cites the testimony of Chief Engineer John Kimball. (CPMC's Request for Review, p. 6 (citing Tr. 290:25-291:9).) Kimball's testimony, however, does not establish that Assistant Chief Engineers make recommendations as to hiring. Indeed, when Kimball was asked if he, in his capacity as a Chief Engineer, "ha[s] the authority to make the decision as far as who is going to be hired," Kimball responded that "*I* can make a recommendation." (Tr. 291:18-20.) Kimball did *not* testify that the Assistant Chief Engineer could make a recommendation as to hiring. Moreover, Kimball did *not* testify that he actually considered the alleged recommendations made by Assistant Chief Engineers as to hiring matters.

Second, CPMC cites the testimony of Assistant Chief Engineer John Groen. (CPMC's Request for Review, p. 6 (citing Tr. 317:3-5).) Groen offered vague testimony that Chief Engineers have requested his "opinion" about the hiring of applicants for employment. (Tr. 317:3-5.) An "opinion," however, is not synonymous with "recommendation." An "opinion" about the quality of an applicant is not tantamount to a suggestion that CPMC management pursue a particular course of action. Moreover, Groen did not testify that he had actually ever offered his recommendation as to hiring; nor did Groen cite one instance where a Chief Engineer had actually requested Groen's hiring recommendation. Critically, Groen offered no testimony that Chief Engineers actually take into account his "opinions" about hiring matters.

The Regional Director was aware of the testimony of Kimball and Groen. The testimony

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of Kimball and Groen cited by CPMC in its Request for Review is insufficient to establish supervisory authority, because there is absolutely no evidence in the record that Assistant Chief Engineers' opinions of applicants have actually affected Chief Engineers' alleged hiring recommendations to CPMC management. (*See* Decision and Order, p. 7.) For these reasons, CPMC has failed to show that the Regional Director's determination that Assistant Chief Engineers do not have the authority to hire or to effectively recommend such action is clearly erroneous.

2. <u>CPMC fails to show that the Regional Director's determination that Assistant Chief Engineers do not have the authority to suspend and discipline bargaining unit members is clearly erroneous</u>

a. CPMC failed to show by a preponderance of the evidence that Assistant Chief Engineers have the authority to independently issue discipline

CPMC cites nine alleged instances where Assistant Chief Engineers independently issued discipline. (CPMC's Request for Review, pp. 8-9.) Several of these alleged instances of Assistant-Chief-Engineer-issued discipline are verbal warnings. (CPMC's Request for Review, p. 8 (citing Er. Exh. 13; Er. Exh. 16; Er. Exh. 22.).) Verbal warnings alone, however, are insufficient to establish supervisory status. *See Northcrest Nursing Home*, 313 NLRB 491, 497 (1993); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989) ("[M]ere authority to issue oral and written warnings that do not alone affect job status does not constitute supervisory authority."). The verbal warnings at issue here are, as in *Northcrest Nursing Home*, merely "reportorial" in nature, because there is no evidence to establish that the verbal "warnings, either individually or in the aggregate, . . . lead to personnel action." 313 NLRB at 497. Moreover, there is no evidence to establish that, even if the warnings do lead to personnel action, that such action is "taken without independent investigation or review by others." 313 NRLB at 497.

CPMC also cites to several written warnings and final written warnings allegedly independently issued by Assistant Chief Engineers. (CPMC's Request for Review, pp. 8-9 (Er. Exh. 14; Er. Exh. 18; Er. Exh. 15).) Each of the written warnings cited by CPMC requires approval from the Assistant Chief Engineers' next-level manager. Accordingly, the text of the exhibits flatly contradicts CPMC's representation that Assistant Chief Engineers can

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independently issue written warnings. Moreover, as in *Northcrest Nursing Home*, these written warnings may not serve as a basis for a finding of supervisor status, because CPMC has submitted no evidence that written warnings lead to personnel action. 313 NRLB at 497. And, even if the written warnings do in fact lead to personnel action, there is no evidence in the record that these written warnings may serve as the basis for a personnel action that is taken without independent investigation.[2]

CPMC also relies on three unpaid suspensions allegedly issued by Assistant Chief Engineers. (CPMC's Request for Review, p. 8 (citing Er. Exh. 17; Er. Exh. 19; Er. Exh. 21).) As with the written warnings, unpaid suspensions require the approval of the next-level manager. It is therefore factually inaccurate to represent that Assistant Chief Engineers have the authority to independently issue unpaid suspensions. In addition, the Regional Director found that both Kevin Joo ("Joo"), Manager of Labor Relations at CPMC, and Tim Hern ("Hern"), Director of Engineering and Facility Development, testified that Assistant Chief Engineers must have the approval of a higher level manager to take any disciplinary action beyond an oral counseling. (Decision and Order, p. 9.)

b. CPMC failed to show by a preponderance of the evidence that Assistant Chief Engineers have the authority to effectively recommend the discipline of employees

Having utterly failed to show that Assistant Chief Engineers can independently issue any discipline beyond simple reportorial warnings, it was incumbent upon CPMC to submit evidence that Assistant Chief Engineers have the authority to effectively recommend the discipline of employees. CPMC has utterly failed to do so. CPMC cites to the testimony of Chief Engineer Brian Cassel. (CPMC's Request for Review, p. 9 (citing Tr. 204:20-205:25).) The referenced testimony does not support the assertion that Assistant Chief Engineers have the authority to

[2] In its Request for Review, CPMC represents that "[v]erbal warnings and even instances of informal counseling are significant because they can (but are not necessarily required to) lead to greater discipline, such as written warnings, unpaid suspensions, and terminations." (CPMC's Request for Review, p. 11.) CPMC's bare representation, however, is insufficient to overcome *Northcrest Nursing Home*, because CPMC failed to establish that such warnings *do in fact* lead to personnel action. Moreover, CPMC failed to show that such personnel action would be taken without an independent investigation.

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effectively recommend discipline. The most the referenced testimony establishes is that Assistant Chief Engineers have some vaguely defined role in creating performance improvement plans with Chief Engineers. There is no evidence in the record whatsoever that bargaining-unit employees are subject to discipline for not meeting their performance improvement plans; nor is there any evidence that Chief Engineers actually consider Assistant Chief Engineers' recommendations as to performance improvement plans.

CPMC also cites to Exhibit 32, a memorandum allegedly written by Assistant Chief Engineer Donald Haynes. (CPMC's Request for Review, pp. 9-10.) Haynes himself describes the memorandum as a "notice." (Er. Exh. 32.) In short, it is *not* discipline. Nor does this document establish that Assistant Chief Engineer Haynes had the authority to effectively recommend discipline. Although Haynes may have written that he "will wait for Chief Cronin's written account before deciding on disciplinary action to be taken," it is beyond dispute that any disciplinary action beyond a reportorial warning requires the approval of the next-level manager.

CPMC attempts to evade its utter failure of proof by relying on authority that would establish supervisory status for any employee who simply reports misconduct to management. (CPMC's Request for Review, p. 12 (citing *Progressive Transportation Servs., Inc.*, 340 NLRB 1044, 1045 (2003).) Critical in that case was the fact that management did not conduct an independent investigation of the matter reported by the putative supervisor. Moreover, *Progressive Transportation* relied on the fact that management approved the putative supervisor's recommendation as *to the level* of discipline 75 percent of the time. CPMC's reliance on *Progressive Transportation* is misguided, because CPMC did not establish that CPMC management does not conduct an independent investigation of the matters allegedly reported by the Assistant Chief Engineers. Moreover, CPMC offered no statistical evidence of management's approval of Assistant Chief Engineers' alleged recommendations for discipline.

As the Regional Director found, the weight of the evidence establishes that Assistant Chief Engineers lack the authority to independently issue discipline, and CPMC failed to establish that Assistant Chief Engineers have the authority to effectively recommend the discipline of bargaining-unit employees.

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3. **CPMC fails to show that the Regional Director's determination that Assistant Chief Engineers do not have the authority to assign bargaining unit employees is clearly erroneous**

CPMC failed to show that Assistant Chief Engineers have the authority to assign bargaining-unit employees work locations, shifts, work hours, or overall duties, except on an *ad hoc* basis for the purpose of performing discrete tasks.

To "assign" means "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). "To 'assign' for purposes of Section 2(11) refers to the [putative supervisor]'s designation of significant overall duties to an employee, not to the [putative supervisor]'s ad hoc instruction that the employee perform a discrete task." *Ibid*. Accordingly, "[t]he assignment of an employee to a certain department . . . or to a certain shift . . . or to certain significant overall tasks . . . would generally qualify as 'assign' . . . ." *Id*.

Hern failed to give any definite testimony that Assistant Chief Engineers have any role in scheduling stationary engineers. (Tr. 120:24-121:9 ("I *think* they were together, at least the involvement I've seen at the Pac campus. *I haven't been able to see it at the other campuses*. I've been there. But I *think* there's a conversation always been (sic) the assistant chief and chief about the scheduling . . . .") (emphasis added).) Cassel, on the other hand, testified that the "assistant chief pretty much handles a lot of the scheduling." (Tr. 214:19-20.) But Cassel did not clarify what "pretty much handles" means in specific detail. Kimball, however, testified that the standard practice for scheduling is through "bid shift," which means that the shifts are bid on a seniority basis. (Tr. 302:24-303:3.) Kimball's testimony that seniority determines employees' shifts explains the ambiguity in Cassel's testimony that Assistant Chief Engineers "handle" scheduling: Assistant Chief Engineers at most simply apply a seniority-based formula provided for by the parties' CBA. This "bid shift" process clearly does not involve the use of independent judgment, but rather constitutes a routine clerical function.

Cassel also testified that Assistant Chief Engineers have authority to order an employee to stop a certain project and begin work on a new project. (Tr. 201:22-202:4.) However, Cassel

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offered no testimony that any Assistant Chief Engineer has actually exercised this alleged authority; nor did Cassel offer any testimony about the *frequency* of Assistant Chief Engineers' exercise of this alleged authority. Furthermore, that Assistant Chief Engineers may assign bargaining-unit members to perform "work orders" is not determinative, because "work orders" are discrete tasks; in assigning a "work order," the Assistant Chief Engineer is not assigning the engineer "overall duties." Accordingly, Cassel's testimony is wholly insufficient to establish Assistant Chief Engineers' supervisory status.

CPMC thus clearly fails to establish Assistant Chief Engineers' supervisory status on the basis of this indicium.

4. <u>CPMC fails to show that the Regional Director's determination that Assistant Chief Engineers do not have the authority to responsibly direct bargaining unit members is clearly erroneous</u>

"Minor supervisory functions performed by lead employees, straw bosses, and set-up men" are not within the scope of "responsibility to direct." *Oakwood Healthcare, Inc.*, 348 NLRB at 689. *"[E]ven if the instruction is more general and it is repeated, supervisory status will only be found if the party asserting supervisory status also demonstrated that the purported supervisor is 'responsible' for the directed employees' performance . . . ."* *Id*. at 691 (emphasis added). "[F]or direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Id*. at 691-92. In turn, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id*. at 692.

CPMC halfheartedly attempts to demonstrate Assistant Chief Engineers' supervisory status based on two criteria for the performance evaluation of Assistant Chief Engineers. The first criterion is Item 2.1, which measures "Inpatient Satisfaction," and Item 6.1, which measures "Employee Satisfaction." (Er. Exh. 9; CPMC's Request for Review, p. 15.) Items 2.1 and 6.1

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bear no relationship to accountability for the direction of bargaining-unit members. Moreover, assuming *arguendo* that these items are relevant to direction of bargaining-unit members, Exhibit 9 does not establish that Assistant Chief Engineers are held accountable for their alleged direction of bargaining-unit members. In particular, CPMC has not even alleged—much less established—that Assistant Chief Engineers could suffer an adverse employment action for improperly directing bargaining-unit employees. Contrary to CPMC's assertions, the alleged incentive plan is not a means of holding an Assistant Chief Engineer accountable, not the least because receipt of the benefits of the incentive plan is determined by "the performance and assessment of the entire team." (CPMC's Request for Review, p. 16.) Moreover, there is no evidence in the record that any Assistant Chief Engineer has ever received or been denied the benefits of the incentive plan. For these reasons, CPMC has utterly failed to establish that Assistant Chief Engineers have the authority responsibly to direct bargaining-unit members.[3]

B. SECONDARY INDICIA ARE IRRELEVANT BECAUSE CPMC HAS NOT ESTABLISHED THAT ASSISTANT CHIEF ENGINEERS EXERCISE A STATUTORY SUPERVISORY FUNCTION

"Absent primary indicia of supervisory status, secondary indicia are not dispositive." *Pacific Coast M.S. Industries*, 355 NLRB No. 226, *9, n.13 (2010) (citing *Training School at Vineland*, 332 NLRB 1412, 1412-13, n.3 (2000)). Indeed, secondary indicia are wholly irrelevant unless the petitioner actually proves that a putative supervisor exercises one of the enumerated supervisory authorities. *Jochims v. NLRB*, 480 F.3d 1161, 1173 (D.C. Cir. 2007). Because CPMC has not demonstrated a single indicium of supervisory status for Assistant Chief Engineers, an analysis of secondary indicia of supervisory status is foreclosed. Assuming that the Board finds it necessary to consider secondary indicia, CPMC nevertheless has failed to prove that any secondary indicia show that Assistant Chief Engineers are supervisors under Section 2(11) of the Act.

[3] Likewise, CPMC has failed to show that Assistant Chief Engineers can be held accountable for granting or denying time off to a bargaining-unit employee.

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C. HISTORICAL INCLUSION OF ASSISTANT CHIEF ENGINEERS IN THE BARGAINING UNIT IS RELEVANT TO THE SUPERVISORY STATUS OF ASSISTANT CHIEF ENGINEERS

"[A] history of inclusion in the bargaining unit for many years may be evidence that such a classification in fact is properly included in the unit. If there are no changed circumstances in terms of job duties, this, too, may constitute evidence on the status of the individuals sought to be excluded." *The Washington Post Co.*, 254 NLRB 168, 169 (1981).

Here, it is beyond doubt that the inclusion of Assistant Chief Engineers in the Local-39 bargaining unit is an established collective-bargaining practice between CPMC and Local 39. Through uncontradicted and unrebutted testimony, Local 39 established that, since 1981, Assistant Chief Engineers have been included in the Local-39 bargaining unit with CPMC and CPMC's predecessor hospitals. Specifically, Local 39 and the Ralph K. Davies Medical Center, which is currently one of the four CPMC campuses, were parties to a CBA from 1981-1984. (Union Ex. 2; Tr. 273:3-6; Tr. 275:19-23.) In that CBA, Assistant Chief Engineers were members of the Local-39 bargaining unit. (Tr. 273:16-17; *see* Union Ex. 2, Art. II, §§ 2, 7.) Local 39 negotiated wages and benefits for the Assistant Chief Engineers in the CBA for 1981-1984. (Tr. 273:21-24; Union Ex. 2, Art. III, § 1.)

From 1984-1987, Local 39 and the Ralph K. Davies Medical Center were parties to a CBA. (Tr. 274:7-14; Union Ex. 3.) As in the CBA for 1981-1984, the CBA covering 1984-1987 likewise included Assistant Chief Engineers in the Local-39 bargaining unit. (Tr. 274:22-24; 275:1-3; Union Ex. 3, Art. II, §§ 2-3.) As with the previous CBA, Local 39 negotiated the wages and benefits for the Assistant Chief Engineers. (Tr. 275:6-9; Union Ex. 3, Art. III, § 1.)

From 1987-1990, Local 39 entered into a CBA (Union Ex. 4), with a number of predecessor hospitals that currently constitute CPMC's California and Pacific campuses. (Tr. 277:5-278:2.) As in the CBAs from 1981-1984 and 1984-1987, the CBA from 1987-1990 includes the classification of Assistant Chief Engineers in the Local-39 bargaining unit; indeed, the contract language essentially remained consistent with the previous CBAs. (Tr. 279:13-19; Union Ex. 4, Art. II §§ 2-3.) And, as in the previous CBAs, Local 39 negotiated the wages and benefits for the Assistant Chief Engineers. (Union Ex. 4, Art. III, § 1.)

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Local 39 and CPMC, the Petitioner in this case, entered into their first CBA for the years 1990-1993. (Tr. 280:1-6; Union Ex. 5.) As in the CBAs from 1981-1984, 1984-1987, and 1987-1990, the CBA for 1990-1993 includes the classification of Assistant Chief Engineer in the Local-39 bargaining unit. (Union Ex. 5, Art. II, §§ 2-3.) There is no material difference in the contract language with the previous CBAs. Moreover, as in the previous CBAs, Local 39 negotiated the benefits for the Assistant Chief Engineer classification. (Union Ex. 5, Art. III, § 1.)

Through these various CBAs between Local 39 and CPMC and its predecessor hospitals, including the parties' most recent CBA which expired in March 2012 (Tr. 7:12-13), Assistant Chief Engineers have been included in the Local-39 bargaining unit and Local 39 has represented and bargained on behalf of Assistant Chief Engineers for wages and benefits (Tr. 281:12; Employer Ex. 1, Art. II, §§ 2-3; CPMC Ex. 1, Art. III, § 1). Accordingly, the inclusion of Assistant Chief Engineers in the Local-39 bargaining unit constitutes a practice established by more than 30 years of collective bargaining between Local 39 and CPMC. In fact, CPMC did not even attempt to rebut this decades-long established practice of including Assistant Chief Engineers in the Local 39 bargaining unit.

CPMC completely failed to offer any evidence of "significant changes" in the job duties of Assistant Chief Engineers or the organizational structure of CPMC that would provide "compelling circumstances" to override the established practice of including Assistant Chief Engineers in the bargaining unit. The decades-long practice of including Assistant Chief Engineers in the Local-39-represented bargaining unit, and the absence of any significant changes in the job duties of Assistant Chief Engineers strongly weighs in favor of affirming the Regional Director's determination that Assistant Chief Engineers are not statutory supervisors.

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V. CONCLUSION

For these reasons, the Board should affirm the Regional Director's determination in the Decision and Order that the Local-39 represented Assistant Chief Engineers are *not* statutory supervisors, and therefore are properly included in the Local-39-represented bargaining unit.

Dated: June 18, 2012

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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

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

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PROOF OF SERVICE
(CCP §1013)

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

On June 18, 2012, I served the following documents in the manner described below:

STATIONARY ENGINEERS LOCAL NO. 39'S STATEMENT IN OPPOSITION TO PETITIONER-EMPLOYER'S REQUEST FOR REVIEW

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from sgraham@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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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 18, 2012, at Alameda, California.

/s/ Sean D. Graham
Sean D. Graham

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