

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**In the Matter of:**

**SUTTER WEST BAY HOSPITALS d/b/a            Case No. 20-UC-076774**  
**CALIFORNIA PACIFIC MEDICAL**  
**CENTER,**

**Employer/Petitioner,**

**and**

**INTERNATIONAL UNION OF**  
**OPERATING ENGINEERS,**  
**STATIONARY ENGINEERS, LOCAL**  
**NO. 39,**

**Union.**

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**EMPLOYER'S STATEMENT IN OPPOSITION TO UNION'S REQUEST FOR  
REVIEW OF REGIONAL DIRECTOR'S DECISION AND ORDER**

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF ARGUMENT.	1
II. PROCEDURAL BACKGROUND.	3
III. STATEMENT OF THE FACTS.	3
A. California Pacific Medical Center.	3
B. The Union.	4
C. Chief Engineers.	4
IV. ARGUMENT.	6
A. The Regional Director's Decision And Order Does Not Depart From Officially Reported Board Precedent Because The Regional Director Appropriately Applied The Statutory Test For Supervisory Status.	7
B. The Regional Director's Decision And Order On The Factual Issue Of Whether Chief Engineers Have The Authority To Effectively Recommend The Hiring Of Employees Was Not Clearly Erroneous And Did Not Prejudicially Affect The Union's Rights.	10
1. Joo's And Hern's Testimony Supports The Regional Director's Decision That Chiefs Have The Authority To Effectively Recommend The Hiring Of Employees.	11
2. The Chiefs' Testimony Demonstrates That They Have The Authority To Effectively Recommend The Hiring of Employees.	12
C. Historical Inclusion In The Bargaining Unit Is Irrelevant To The 2(11) Status Of Chief Engineers.	13
V. CONCLUSION.	15

## TABLE OF AUTHORITIES

	Page(s)
<b>Statutes</b>	
29 C.F.R. § 102.67(c)(1)-(2) (1991) .....	1
29 U.S.C. §152(11) .....	6
<b>Cases</b>	
<i>Ariz. Elec. Power Cooperative, Inc.</i> , 250 NLRB 1132 (1980) .....	14
<i>Children's Farm Home</i> , 324 NLRB 61, 61 (1997) .....	11
<i>Dean &amp; Deluca New York, Inc.</i> , 338 NLRB 1046 (2003) .....	6, 8
<i>DirectTV U.S. DirectTV Holdings LLC</i> , 357 NLRB No. 149, slip op. p. 3 (2011) .....	11
<i>Elmhurst Extended Care Facilities</i> , 329 NLRB 535 (1999) .....	6, 8
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006) .....	6, 8, 10
<i>Washington Post Co.</i> , 254 NLRB 168 (1981) .....	14

## I. INTRODUCTION AND SUMMARY OF ARGUMENT.

The Union's Request for Review should be denied. With respect to its exclusion of Chief Engineers from the bargaining unit,<sup>1</sup> the Decision and Order neither raises a "substantial question of law or policy" because of "the absence of, or departure from, officially reported Board precedent;" nor is it "clearly erroneous on the record and such error prejudicially affects the rights of a party." 29 C.F.R. § 102.67(c)(1)-(2) (1991). The Union concedes in its Request for Review that Chiefs have the *authority to hire*, but instead argues that the Regional Director based its decision on the Chiefs' *authority to effectively recommend hiring*, rather than their *authority to hire*, and that the testimony on the record is not as clear regarding the authority of Chiefs to effectively recommend the hiring of employees.

This hollow argument defies logic for several reasons. *First*, the authority to hire, standing alone, constitutes a sufficient basis for conferring statutory supervisor status under Section 2(11) of the Act. Thus, the Union's concession on this point is fatal to its Request for Review. *Second*, as explained below, the record is clear that Chief Engineers have the authority to effectively recommend the hiring of employees. All of the witnesses testified that, absent adverse results from background checks, CPMC offered positions to the job applicants selected by the Chief Engineers, and that the Chiefs' next-level supervisor, Tim Hern, did not question the Chief Engineers' applicant selections.

*Third*, the Regional Director found it *unnecessary* in its Decision and Order to address whether Chief Engineers possessed any of the other supervisory functions set forth in Section 2(11) due to the strength of the evidence in support of Chief Engineers' authority to hire or to effectively recommend hiring. Decision and Order, p.18-19. Even if the Union's Request for Review were granted, and/or the matter were remanded to the Regional Director, the evidence demonstrates that CPMC and the Collective Bargaining

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<sup>1</sup> In its Decision and Order, the Regional Director incorrectly determined that Assistant Chief Engineers are not Section 2(11) supervisors. The Employer has separately submitted its arguments on this issue in its Request for Review.

Agreement between the parties has conferred upon the Chiefs the authority to exercise, or effectively recommend, many of the other Section 2(11) supervisory powers using their own discretion and independent judgment.<sup>2</sup> Thus, even assuming, *arguendo*, that the Regional Director's factual findings regarding Chiefs' authority to effectively recommend the hiring of employees were erroneous, the Union's rights were not prejudicially affected by this finding. The Union's Request for Review is ultimately futile because, in any event, the Regional Director would most likely have found that the Chiefs had other 2(11) supervisory powers.

Finally, and most importantly, the Union's position that Chief Engineers are not statutory supervisors with the authority to hire is ludicrous because the parties' past Collective Bargaining Agreements explicitly provide Chief Engineers with the authority to hire. The parties' most recent collective bargaining agreement, which the Union refers to repeatedly in its Request for Review, explicitly states: "The Chief Engineer shall have charge of the operation, care, and maintenance of the mechanical, electrical, refrigeration, and steam departments of the Medical Center, *including the hiring and discharging of help in the department . . .*" Er. Exh. 1, Art. II, § 2.<sup>3</sup> The Union's apparent denial of this authority, for purposes of its Request for Review, should not be condoned by the Board.

For these reasons and based on consideration of the record, CPMC respectfully requests that the Union's Request for Review of the Regional Director's Decision and Order be denied. The Regional Director correctly found that Chief Engineers are statutory supervisors under the Act.

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<sup>2</sup> Substantial evidence in the record supports the Chief Engineers' possession of the following, additional 2(11) supervisory powers: suspension, discipline, responsible direction of work, and promotion.

<sup>3</sup> The exact same language is present in the parties' Collective Bargaining Agreements from 1984 through 1993, the only years for which the Union entered contract examples into the record. U. Exhs. 3-5.

## **II. PROCEDURAL BACKGROUND.**

CPMC filed an amended Unit Clarification Petition on March 21, 2012, to exclude four job classifications from the bargaining unit represented by Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (“Local 39” or “Union”): 1) Chief Engineers; 2) Assistant Chief Engineers; 3) Supervising Chief Engineers; and 4) Director of Technical Services.<sup>4</sup> During the hearing, the Union and CPMC stipulated to exclude the Supervising Chief Engineer and the Director of Technical Services from the unit. As a result, the only job classifications in dispute are the Chief Engineers and Assistant Chief Engineers.

In its Decision and Order dated May 29, 2012, the Regional Director made two determinations; first, that individuals in the Chief Engineer position are statutory supervisors excluded from the bargaining unit; and second, that individuals in the position of Assistant Chief Engineer are not statutory supervisors and should not be excluded from the bargaining unit represented by Local 39.<sup>5</sup>

## **III. STATEMENT OF THE FACTS.**

### **A. California Pacific Medical Center.**

California Pacific Medical Center (“CPMC”) is made up of four, separate hospital campuses, all located in San Francisco, California. Tr. 11:6-8.<sup>6</sup> The St. Luke’s Campus is located in the Mission District at Cesar Chavez and Valencia streets; the Davies Campus is located on Castro and Duboce streets; the California Campus is on California and Maple streets; and the Pacific Campus is located on Buchanan and Clay. Tr. 11:11-

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<sup>4</sup>CPMC reserved the right at a later time to seek exclusion of an additional, currently vacant position, the Chief Biomedical Electronics Technician, if and when that vacancy is filled. Tr. 110:20-111:13.

<sup>5</sup>The Employer has separately submitted its arguments on this latter issue in its Request for Review.

<sup>6</sup>References to “Tr. \_\_\_” are to the official transcript of the hearing that took place before Hearing Officer Lucile L. Rosen, Esq., on April 26 and 27, 2012. The Employer’s, the Union’s, and the Regional Director’s exhibits are referred to as “Er. Exh. \_\_\_,” “U. Exh. \_\_\_,” and “Bd. Exh. \_\_\_,” respectively.

17.

CPMC employs approximately 6,800 employees at these four campuses, some of whom are represented by unions. One of these unions is the International Union of Operating Engineers, Stationary Engineers, Local 39. Tr. 12:3-7, 13-14.

**B. The Union.**

Local 39 represents the Stationary Engineers, Biomedical Engineers, Assistant Chief Engineers, Chief Engineers, Supervising Chief Engineer, the Chief Biomedical Electronics Technician, the Director of Technical Services, painters, and carpenters at CPMC. Tr. 13:6-13; Tr. 110:20-111:13; Er. Exh. 2. At the hearing, the Union stipulated that the Supervising Chief Engineer (currently Jim Cronin) and the Director of Technical Services (currently John Dennis Layden) do not belong in the bargaining unit. Tr. 154:5-16; U. Exh. 1.

The employees represented by Local 39 are responsible for maintaining and operating the mechanical and electrical equipment within the four CPMC campuses. Among other tasks, they are responsible for maintaining and operating the heating, ventilation, cooling, electrical, plumbing, generator, and boiler systems. Tr. 117:18-118:1.

The parties stipulated that there was no contract bar to the instant proceedings. Tr. 7:7-13; Bd. Exh. 2.

**C. Chief Engineers.**

Each of the four hospital campuses employs one Chief Engineer ("Chief") and one Assistant Chief Engineer ("Assistant Chief"), with the exception of the Davies Campus, which has a "Supervising" Chief Engineer (an undisputed supervisor) and one Assistant Chief. Tr. 116:9-14. The Chiefs and Supervising Chief Engineer are the highest-ranking officials within the engineering function at each of their respective hospital campuses.<sup>7</sup>

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<sup>7</sup>At the Pacific campus, the highest-ranking engineering-related official is Tim Hern, the Director of Engineering and Facility Development. However, the Chief Engineer at Pacific, as with the other three campuses, is the top-ranking official in charge

Tr. 118:5-20. The three Chiefs and the Supervising Chief Engineer report to Tim Hern, who is the Director of Engineering and Facility Development. Tr. 113:14-18; 114:17-19. Hern spends a minimal amount of time supervising the Chiefs (during 1/2 hour meetings or calls once a week) and does not require the Chiefs or Assistant Chiefs to submit any formal written reports to him. Tr. 229:14-23. In all aspects, Hern expects the Chiefs to be responsible for the facility-specific engineering functions at their respective campuses. Tr. 119:11-16; 120:4-7.

The Chiefs supervise all the other Union engineers on their specific campus, including the Assistant Chiefs, rank-and-file Stationary Engineers, and painters and carpenters. Tr. 161:23-162:9. The written job description for the position provides that Chiefs have numerous supervisory responsibilities, including to:

- “develop and implement policies and procedures” for providing engineering services;
- “monitor service and staff performance;”
- “develop and implement orientation programs for new procedures and/or new personnel;”
- be “responsible for personnel functions for the department, including hiring, discipline, counseling, succession and salary administration;” and
- “seek and retain personnel with the qualifications and competence to support the skill level required.” Er. Exhs. 3 and 4.

Overall, the Chief’s job is to “provide leadership and vision for staff in the delivery” of engineering services. *Id.* This includes the participation on both engineering and CPMC committees to “develop and implement short and long term goals for the department individually, and for the Medical Center as a whole.” Er. Exh. 3. At the hearing, the Union did not dispute the accuracy of this job description for Chiefs.

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of “facility-specific” engineering issues at the hospital. Tr. 120:8-11.

#### IV. ARGUMENT.

The Union seeks review of the Regional Director's Decision and Order on the basis that 1) the Regional Director departed from officially reported Board precedent because it "did not appropriately conduct the statutory test for supervisory status;" and 2) the factual findings regarding Chiefs' authority to effectively recommend the hiring of employees are erroneous and prejudicially affect the rights of Local 39. Union's Request for Review, p.2.

Employees classified as Section 2(11) statutory supervisors under the NLRA are excluded from bargaining units. 29 U.S.C. §152(11). To classify an employee as a supervisor under the Act, the putative supervisor must have "the authority to exercise at least one of the powers enumerated in Section 2(11) of the Act" using a "degree of discretion that rises to the level of supervisory independent judgment." *Dean & Deluca*, 338 NLRB 1046, 1047 (2003) (citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 n.8 (1999)). Having the ability to exercise "any one of the 12 supervisory functions listed in Section 2(11)" is sufficient to establish supervisory status. *Oakwood Healthcare*, 348 NLRB 686, 688 (2006). Section 2(11) of the Act defines a "supervisor" as:

[A]ny individual having the authority, in the interest of the employer, to *hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action*, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (29 U.S.C. §152(11) (emphasis added))

The evidence demonstrates, and the Regional Director correctly determined, that CPMC has conferred to the Chiefs supervisory authority requiring their exclusion from the bargaining unit. Chiefs have the authority to exercise, or effectively recommend, many of the 2(11) powers using their own discretion, including but not limited to: hiring, suspension, discipline, responsible direction of work, and promotion. Additionally, the Collective Bargaining Agreement between the parties confers upon Chiefs the authority

to hire. Article II, Section 2 of the most recent Collective Bargaining Agreement requires the Chief Engineers to “have charge of the operation, care, and maintenance of the mechanical, electrical, refrigeration, and steam departments of the Medical Center, *including the hiring and discharging of help* in the departments. Er. Exh. 1, Art. II, § 2. Thus, the Regional Director properly determined that the “record establishes that the chief engineers are statutory supervisors based on their authority to effectively recommend the hiring of employees.” Decision and Order, p. 18. Accordingly, “[b]ecause Section 2(11) of the Act is read in the disjunctive and possession of any one of the indicia listed therein is sufficient to establish supervisory authority,” the Regional Director determined it was “unnecessary to address whether the chief engineers possess any other of the supervisory indicia set forth in Section 2(11).” Decision and Order, p.19. Thus, the Regional Director correctly excluded Chiefs from the bargaining unit.

**A. The Regional Director’s Decision And Order Does Not Depart From Officially Reported Board Precedent Because The Regional Director Appropriately Applied The Statutory Test For Supervisory Status.**

In its Request for Review, the Union alleges that the Regional Director did not make a determination about whether Chiefs use independent judgment in exercising their authority to effectively recommend the hiring of employees. *See* Union’s Request for Review, p.2. To the contrary, the Regional Director carefully considered the evidence on the record in determining that Chiefs are statutory supervisors based on their authority to effectively recommend the hiring of employees using their independent judgment. The Regional Director relied on the testimony of several witnesses to support his conclusion: Manager of Labor Relations, Kevin Joo; Director of Engineering and Facility Development Tim Hern; and Chief Engineers Donald Haynes, Brian Cassel, and John Kimball. *See* Decision and Order, p.18.

The Regional Director correctly made findings that Chiefs review resumes, select candidates for interview, and interview the candidates they have selected, without any input from their next-level supervisor, Tim Hern. *Id.* The Regional Director

appropriately relied on the evidence on the record that Hern does not review resumes, only participates in interviews when he is requested to do so by a Chief, and has participated in only one interview—and it was not a hiring interview—since becoming Director in 2008. *Id.* Significantly, the Regional Director correctly determined that Chiefs make their hiring recommendations to Hern who “treats their recommendations as final hiring decisions and does not overturn them,” and found that the testimony of Chiefs Haynes, Cassel, and Kimball was consistent with Hern’s testimony that hiring recommendations are followed. *Id.* Finally, the fact that a recommended candidate is not hired when a background check renders the candidate unsuitable for hire did not prove that the Chiefs’ hiring recommendations are ineffective “given the evidence that chief engineers are the highest-ranking individuals involved in reviewing resumes, selecting candidates to interview, and in making hiring recommendations, and given that such recommendations have been followed on almost all occasions.” *Id.*

As the Regional Director determined, Chiefs use independent judgment in exercising their authority to recommend the hiring of employees and the independent judgments they make regarding hiring are treated as final hiring recommendations by Hern. Decision and Order, p.18. To be classified as a supervisor under the Act, the supervisor must have “the authority to exercise *at least one* of the powers enumerated in Section 2(11) of the Act,” using a “degree of discretion that rises to the level of supervisory independent judgment.” *Dean & Deluca*, 338 NLRB at 1047 (citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 n.8 (1999)). Further, Section 2(11) contrasts “independent judgment” with actions that are “of a merely routine or clerical nature.” *Oakwood Healthcare*, 348 NLRB at 694. The evidence demonstrates that CPMC has conferred to the Chiefs and Assistant Chiefs the authority to hire using a degree of discretion that rises to the level of independent judgment. Some of the Chiefs choose to run their supervisory decisions past their next-level supervisor, Hern, which he virtually always approves; others recognize that they have the ultimate authority to make

such decisions without consulting Hern. Hern and CPMC have the expectation that Chiefs can, and do, make supervisory hiring decisions, or to effectively recommend them, using their own independent judgment.

Hern testified that in the four years since he became the Director of Facilities, he has never needed to give approval for hiring someone into the bargaining unit: “I think what has happened . . . the chief has come back to me and said they’d like to hire this individual and that was it. *They didn’t ask my approval, they just let me know and informed me, that’s the individual they selected.*” Tr. 166:15-21 (emphasis added). As far as Hern is concerned, the Chiefs have ultimate authority to hire engineers to fill any existing vacancies.<sup>8</sup> Tr. 141:7-17. In fact, Hern is barely involved in the hiring process for bargaining unit members. He does not review resumes and only recalls one occasion since 2008 that he was asked by a Chief to sit in on an interview. Tr. 165:25-1; 166:9-11. As the hearing officer pointed out: “I think it’s clear that [Hern has] delegated this authority. He has testified he only attended the interview of one potential applicant. Irrespective of what the contract says, *he doesn’t participate or approve hiring decisions.*” Tr. 169:14-18 (emphasis added).

This is the very definition of “independent judgment” and “effective recommendation;” the Chiefs’ next level supervisor has granted to Chiefs the discretion to independently make hiring decisions. Hern’s testimony shows that the Chiefs’ degree of discretion in exercising their authority to effectively recommend the hiring of employees rises to the level of supervisory independent judgment because Chiefs’ decisions on whom to recommend for hiring are taken without independent investigation

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<sup>8</sup>An employee named “Steven Stevens” was the next level supervisor for Chiefs prior to Tim Hern. Chief Engineer John Kimball testified that since 2007, he has made the decision to hire approximately “six to eight” individuals into the bargaining unit, and on only one occasion was his decision to hire an applicant overturned by his next level supervisor. Tr. 307:17-308:24. On that occasion, Stevens had rejected Kimball’s decision to hire an applicant due to the applicant’s criminal background; after that rejection, Kimball selected another candidate, who was accepted for employment. Tr. 308:3-24. None of Kimball’s hiring decisions have been overturned since Hern became his next-level supervisor in 2008.

by superiors and dictate who is hired as long as background check requirements are met. The Regional Director's analysis of the record, especially regarding the degree to which Chiefs make hiring decisions and whether Chiefs' recommendations are taken without independent investigation by superiors in hiring, is exactly the type of consideration required to contrast "independent judgment" with actions that are "of a merely routine or clerical nature" as required by the Act. *See Oakwood Healthcare*, 348 NLRB at 688. Accordingly, the Regional Director's Decision and Order does not depart from officially reported Board precedent because the Regional Director appropriately conducted the statutory test for supervisory status as required under the Act.

**B. The Regional Director's Decision And Order On The Factual Issue Of Whether Chief Engineers Have The Authority To Effectively Recommend The Hiring Of Employees Was Not Clearly Erroneous And Did Not Prejudicially Affect The Union's Rights.**

The Union alleges in its Request for Review that the factual findings regarding Chiefs' authority to effectively recommend the hiring of employees are erroneous and prejudicially affect the Union's rights. *See Union's Request for Review*, p.2. The Union's argument on this point rests on 1) the allegation that Joo's and Hern's testimony does not establish that Chiefs have the authority to effectively recommend the hiring of employees; and 2) that the Chiefs' testimony contradicts Joo's and Hern's testimony. *See Union's Request for Review*, pp.3-15. However, the Union unequivocally acknowledges that Joo and Hern testified that Chiefs have the *authority to hire*, which is sufficient, standing alone, to meet the test of statutory supervisor under Section 2(11) of the Act. *See Union's Request for Review*, pp.5-8. Indeed, Joo's and Hern's testimony also supports that Chiefs have the authority to effectively recommend the hiring of employees.

Further, even if the Regional Director's factual findings regarding Chiefs' authority to hire or to effectively recommend the hiring of employees were erroneous, the Union's rights were not prejudicially affected by this finding. Substantial evidence exists in the record that Chiefs exercise other 2(11) supervisory powers, in addition to hiring.

**1. Joo's And Hern's Testimony Supports The Regional Director's Decision That Chiefs Have The Authority To Effectively Recommend The Hiring Of Employees.**

The Regional Director correctly concluded that the Chiefs have the authority to hire bargaining unit members, or to effectively recommend their hiring, based on the testimony of Joo, Hern, and Chief Engineers Haynes, Cassel and Kimball. *See* Decision and Order, p. 18. The Union argues in its Request for Review that Joo and Hern testified that Chiefs have the authority to hire employees into the bargaining unit, but did not offer testimony about the authority of chief engineers to effectively recommend the hiring of employees. Union's Request for Review, pp.5-7.

Contrary to the Union's assertion, Joo and Hern's testimony supports the Regional Director's conclusion that Chiefs have the authority to effectively recommend the hiring of employees. The responsibility to "effectively recommend" an action "generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *DirectTV U.S. DirectTV Holdings LLC*, 357 NLRB No. 149, slip op. p.3 (2011), quoting *Children's Farm Home*, 324 NLRB 61, 61 (1997). Accordingly, Joo's testimony that it "has been the practice" that Chiefs can interview and then select whomever they want to hire and that Chiefs "would have the authority [to hire]" clearly demonstrates that Chiefs recommend job applicants for employment, and that CPMC makes offers to those applicants without independent investigation by higher-level managers. Tr. 96:4-6; 95:20-22. Hern's testimony further supports that Chiefs' recommended actions about who to hire are taken without Hern's independent investigation: "The chief engineers receive all the resumes and basically interview . . . and make their recommendation and hire." Tr. 141:1-4. Further, Hern testified that he "trust[s] [the Chiefs'] judgment on who [*sic*] they wanted to pick," and his view that "if you have competent supervisors and managers, you should allow them the flexibility to hire the people they want to have working there." Tr. 141: 12-13; 166:4-6. This is corroborated by the Chiefs' testimony, as discussed below.

Accordingly, Joo's and Hern's testimony support the Regional Director's decision that Chiefs have the authority to effectively recommend the hiring of employees.

**2. The Chiefs' Testimony Demonstrates That They Have The Authority To Effectively Recommend The Hiring of Employees.**

The Union's Request for Review alleges that the testimony by Chiefs Haynes, Cassel, and Kimball does not support the Regional Director's conclusion that Chiefs have the authority to effectively recommend the hiring of employees. Union's Request for Review, pp.8-15. As discussed above, it is clear that the Chiefs effectively recommend hiring because they recommend action—who to hire—and such actions are taken without independent investigation by supervisors. When a vacancy exists within the engineering department at one of the hospital campuses, resumes are sent directly to the Chief in charge of that campus. Tr. 165:20-24. Then, the Chief and the Assistant Chief jointly review the resumes and determine whom to interview. Tr. 290:10-19; 316:19-24. Together, the Chiefs and Assistant Chiefs schedule appointments with and interview their preferred candidates, without the input of Hern. Tr. 211:5-12; 290:20-24; 316:23-24. Subsequently, the Chief and Assistant Chief decide who should be hired. Tr. 290:25-291:9; 317:3-5. Finally, the Chief and Assistant Chief inform the Human Resources Department and Hern about their selection. Tr. 210:14-211:17.

Further, Chief Engineer John Kimball specifically testified that he "can make a recommendation" as to who should be hired. Contrary to the Union's statements in its Request for Review that Kimball offered "no testimony that he has any knowledge about CPMC management's approval of his hiring recommendations," Kimball testified that his hiring recommendations are routinely accepted and approved. Tr. 291:18-20; 308:19-24; 346:6-9. *See also* Union's Request for Review, p.15. Haynes also testified that effectively recommending employees to hire is part of his responsibilities in the hiring process: "compiling applications, performing interviews with my assistant chief, compiling information, making recommendations, doing second interviews . . . and then

asking for permission to move forward . . . [meaning to recommend hiring].” Tr. 333:2-11.

The Union contends, on page 10 of its Request for Review, that Chief Engineer Brian Cassel’s testimony “squarely contradicts the Regional Director’s finding” that “chief engineers make hiring recommendations to Hern.” The Union, oddly, cites to Cassel’s testimony that unequivocally demonstrates that Tim Hern’s approval is *not even necessary* (in Cassel’s opinion) for his hiring decisions. Cassel testified that after he and his Assistant Chief collect resumes, interview candidates, and determine who they wish to hire, he informs the HR recruiter about their selection, who then sends a formal offer letter to the applicant. Tr. 247:10-248:5. He does not need to justify his decision to Hern. To the contrary, he has the authority to hire. This testimony is entirely consistent with the testimony of Hern. Thus, Cassel’s testimony supports the Regional Director’s finding that Chiefs are Section 2(11) supervisors.

The testimony of the Chiefs, Joo, and Hern consistently supports that Chiefs have the authority to effectively recommend hiring in addition to having the authority to hire. Furthermore, the Union clearly concedes that Chiefs possess authority to hire, which is sufficient to determine supervisory status under the Act without further analysis.

**C. Historical Inclusion In The Bargaining Unit Is Irrelevant To The 2(11) Status Of Chief Engineers.**

In its Request for the Review, the Union brazenly asserts that CPMC’s Petition for Unit Clarification was in retaliation for Local 39’s decision to strike because, historically, the bargaining unit included Chiefs and that CPMC did not request unit clarification prior to the instant case. *See* Union’s Request for Review, p.1. CPMC does not dispute that Chiefs were covered by prior Collective Bargaining Agreements with Local 39. But past inclusion of job classifications in a bargaining unit is irrelevant. The only relevant issue is whether Chiefs exercise 2(11) supervisory functions. As recognized by the Regional Director, the exclusion of Chiefs from the bargaining unit would not undermine the

collective bargaining relationship in any way, where the Collective Bargaining Agreement had come to an end. Decision and Order, p.16; *Ariz. Elec. Power Cooperative, Inc.*, 250 NLRB 1132, 1133 (1980) (noting that the Board may refuse to entertain unit clarification petitions filed during the middle of a contract term). Indeed, the parties expressly stipulated there was no contract bar to the unit clarification petition. Tr. 7:7-13; Bd. Exh. 2.

In *Arizona Electric*, as in the instant case, the employer had voluntarily included supervisors (load dispatchers) in the bargaining unit in the past. During the term of an existing contract, the employer withdrew recognition from the union for all the load dispatchers on the ground that they were supervisors. *Id.* at 1133. The Board held that it would not permit the employer to flout its obligation to bargain in good faith with the union, during the agreed-upon term of the parties' Collective Bargaining Agreement. *Id.* at 1133-34. However, the Board continued: "Of course, were the load dispatchers found to be supervisors or managerial employees, *Respondent's duty to bargain concerning them would terminate on the expiration of the current contract, provided that Respondent took appropriate steps at that time to contest their continued inclusion in the unit.*" *Id.* at 1134 n.10 (emphasis added).

Indeed, the Board has explicitly recognized that even in situations where disputed classifications have historically and voluntarily been included in the bargaining unit, the Board is *required* to exclude positions from the bargaining unit where the inclusion of those positions "would violate the principles of the Act." *Washington Post Co.*, 254 NLRB 168, 169 (1981). For example, because the Act provides specifically for the exclusion of supervisors, the Board is required to exclude them. *Id.* Here, the Collective Bargaining Agreement had expired and CPMC then took the "appropriate steps" to contest the continued inclusion of Chiefs in the unit. Even though, like in *Arizona Electric*, Chiefs have been included in the bargaining unit for years, their status as 2(11) supervisors compels their exclusion from the unit.

**V. CONCLUSION.**

For the reasons stated above and based on consideration of the record, CPMC respectfully requests that the Union's Request for Review of the Regional Director's Decision and Order be denied. Even if the Request for Review were granted, the record evidence demonstrates that Chief Engineers possess other Section 2(11) powers, in addition to hiring. Thus, the Regional Director correctly found that Chief Engineers are statutory supervisors under the Act, as requested in CPMC's amended Unit Clarification Petition.

June 19, 2012

Respectfully submitted,



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**PROOF OF SERVICE**

1  
2 1. I am over eighteen years of age and not a party to this action. I am employed in the County  
3 of San Francisco, State of California. My business address is 3 Embarcadero Center, 7<sup>th</sup>  
Floor, San Francisco, CA 94111.

4 2. On June 19, 2012, I served the following document(s):

5  EMPLOYER'S STATEMENT IN OPPOSITION TO UNION'S REQUEST FOR REVIEW  
6 OF REGIONAL DIRECTOR'S DECISION AND ORDER

7  The document(s) served are included in the attached List of Documents.

8 3.  I served the document(s) on the following person(s):

Kristina Hillman Weinberg, Roger & Rosenberg 1001 Marina Parkway, Suite 200 Alameda, CA 94501-1091 Email: khillman@unioncounsel.net	National Labor Relations Board Region 20 901 Market Street, Suite 400 San Francisco, CA 94103-1735 Email: <a href="mailto:NLRBRegion20@nlrb.gov">NLRBRegion20@nlrb.gov</a>
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11  
12  The names, addresses, and other applicable information about the persons served is  
13 included in the attached Service List.

14 4. The documents were served by the following means:

15  **By U.S. mail.** I enclosed the document(s) in a sealed envelope or package addressed to the  
16 person(s) at the address(es) in Item 3 and (**check one**):

17  deposited the sealed envelope with the United States Postal Service, with the postage  
18 fully prepaid.

19  placed the envelope for collection and mailing, following our ordinary business  
20 practices. I am readily familiar with this business' practice for collecting and processing  
21 correspondence for mailing. On the same day the correspondence is placed for collection  
22 and mailing, it is deposited in the ordinary course of business with the United States Postal  
23 Service, in a sealed envelope with postage fully prepaid.

24 I am employed in the county where the mailing occurred. The envelope or package was  
25 placed in the mail at Los Angeles, California.

26  **By Overnight Delivery/Express Mail.** I enclosed the documents and an unsigned copy of  
27 this declaration in a sealed envelope or package designated by Federal Express addressed to  
28 the persons at the address(es) listed in Item 3, with fees prepaid or provided for. I placed the  
sealed envelope or package for collection and delivery, following our ordinary business  
practices. I am readily familiar with this business' practice for collecting and processing  
correspondence for express delivery. On the same day the correspondence is collected for  
delivery, it is placed for collection in the ordinary course of business in a box regularly  
maintained by Federal Express or delivered to a courier or driver authorized by Federal  
Express to receive documents.

**By Messenger Service.** I served the documents by placing them in an envelope or package  
addressed to the persons at the address(es) listed in Item 3 and providing them to a  
professional messenger service for service. (See Declaration of Messenger below.)

1  **By Facsimile Transmission.** Based on an agreement between the parties to accept service  
2 by facsimile transmission, which was confirmed in writing, I faxed the document(s) and an  
3 unsigned copy of this declaration to the person(s) at the facsimile numbers listed in Item 3  
4 on [type date], at [type time]. The transmission was reported as complete without error by a  
5 transmission report issued by the facsimile machine that I used immediately following the  
6 transmission. A true and correct copy of the facsimile transmission report, which I printed  
7 out, is attached hereto.

8  **By Electronic Service (E-mail).** Based on a court order or an agreement of the parties to  
9 accept service by electronic transmission, I transmitted the document(s) and an unsigned  
10 copy of this declaration to the person(s) at the electronic notification address(es) listed in  
11 Item 3 on June 19, 2012 before 5:00 p.m. PST. (add, as applicable)

12  The transmission of the document was reported as complete and without error by  
13 electronic receipt of a delivery confirmation, a true and correct copy of which is attached  
14 hereto.

15  I did not receive, within a reasonable time after the transmission, any electronic  
16 message or other indication that the transmission was unsuccessful.

17  **Via Court Notice of Electronic Filing.** The document(s) will be served by the court via  
18 NEF and hyperlink to the document. On [type date], I checked the CM/ECF docket for this  
19 case or adversary proceeding and determined that the person(s) listed in Item 3 are on the  
20 Electronic Mail Notice List to receive NEF transmission at the email addresses indicated in  
21 Item 3 [or on the attached service list, if applicable].

22  **STATE:** I declare under penalty of perjury under the laws of the State of California that the  
23 foregoing is true and correct.

24  **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court  
25 at whose direction the service was made.

26 Dated: 6/19/12 Signature: Laura Famber  
27 Type or Print Name: Laura Famber

28 **DECLARATION OF MESSENGER**

**By personal service.** I personally delivered the envelope or package received from the  
declarant above to the persons at the addresses listed in Item 3. (1) For a party represented  
by an attorney, delivery was made to the attorney or at the attorney's office by leaving the  
documents in an envelope or package, which was clearly labeled to identify the attorney  
being served, with a receptionist or an individual in charge of the office or in a conspicuous  
place in the office, between the hours of nine in the morning and five in the evening.  
(2) For a party, delivery was made to the party or by leaving the documents at the party's  
residence with some person not younger than 18 years of age between the hours of eight in  
the morning and six in the evening. At the time of service, I was over 18 years of age. I am  
not a party to the above-referenced legal proceeding. I served the envelope or package, as  
stated above, on [type date].

I declare under penalty of perjury under the laws of the State of California that the foregoing  
is true and correct.

Dated: \_\_\_\_\_ Signature: \_\_\_\_\_  
Type or Print Name: \_\_\_\_\_