

**United States of America
National Labor Relations Board**

ETO Magnetic Corp,

Employer,

Case Nos. 07-RC-087016

and

**United Food and Commercial Workers Union,
Local 951**

Union.

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**EMPLOYER'S PETITION FOR REVIEW
OF THE
DECISION AND DIRECTION OF ELECTION**

Pursuant to the provisions of Section 102.67 of the Board's Rules and Regulations, the Employer, ETO Magnetic Corp, by and through its attorneys, Clark Hill, and files the following Petition for Review of the Regional Director's September 28, 2012 Decision and Direction of Election in the above-captioned matter. This request is based on the following compelling grounds for review: (1) A substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent; and (2) The Regional Director's decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of a party. For the reasons that follow, the Employer hereby requests that the Decision of the Regional Director be set aside and that the Board issue an Order confirming the confidential and supervisory status of the Employer's Team Leaders and excluding them from inclusion in the unit ordered by the Regional Director.

I. BACKGROUND

The Employer, ETO Magnetic, Corp, designs and manufactures automotive and industrial electromagnetic solenoids¹. T-18 & 103. Although the Employer operated as LDI, Inc. until around 2011 (T-177), the Employer purchased the assets of that company in 2005 to expand its presence in North America. T-64 & 102. Globally, ETO has five other Facilities, however, the Employer's only North American operations are located at 4311 and 4323 Patterson² in Kentwood, Michigan. T-8 & 65.

The Employer's production is overseen by its Production Manager, Darren DesJardin, who relies upon 2nd (Charles Sellman) and 3rd (Joe Johnson) shift supervisors to ensure efficient operations over the plants various shifts. T-20-21, 164, E-1 & E-2. However, the actual production lines themselves (and the 87 employees working therein) are overseen by a group of ten Team Leaders, who staff their lines in accordance with the production sought by the Supervisor and/or Production Manager. T-21-22 & 164-66. Indeed, with the administrative responsibilities assigned to the Production Manager and two Shift Supervisors, they are rarely on the floor. T-325 & 370. As such, the Team Leaders are considered the "right hand extension" of the production management. T-331.

The Employer's operations are complicated by the fact that it has a highly diverse workforce. T-347. That is, the Employer employees individuals who identify as Vietnamese, Guatemalan, Hispanic, Bonsian, Russian, African American and Caucasion. Many of these individuals speak little or no English. T-348. As such, the Employer is forced to rely upon

¹ A solenoid is an electromagnetic devise that actuates something based on a request or demand. T-51.

² The two buildings are only separated by an approximately 150 foot wide parking lot and operate as a single operation . T-35.

several of its Team Leaders to communicate with a large number of its employees. *Id.* This is especially true for the large number of employees who speak primarily Spanish or Vietnamese. T-347.

On or about August 1, 2012, the United Food & Commercial Workers Union, Local 951 (the “Union”) filed a petition seeking to represent all of the Employer’s “full-time and part-time employees ... located at 4311 Patterson SE, Grand Rapids, MI.” *See 7-RC-086432.* That petition, however, was withdrawn on or about August 16, 2012. *Id.* Thereafter, the instant petition was filed on or about August 10, 2012 and a hearing was held on August 20 and 21, 2012. Following that hearing, the Regional Director issued a Decision and Direction of Election. Among other things, that Decision held that the Employer failed to prove that the team leaders who interpret/translate for other employees are confidential employees or supervisors under the Act. However, in doing so, the Regional Director made decisions on substantial factual issues is clearly erroneous on the record which prejudiced the Employer. Moreover, the Region’s decision departs from official Board precedent and was inhibited by the lack of any prior precedent addressing the confidential status of in-plant interpreters. As such, the Employer not petitions the Board for review of that Decision and Direction of Election.

III. The Region Erroneously Concludes That Team Leaders Who Interpret are not Confidential Employees

In concluding that the Team Leaders who interpret were not confidential employees, the Region incorrectly noted that “none” of the Employer’s “evidence establishes that the team leaders who interpret/translate have access to confidential labor relations information or act in a confidential capacity regarding such information to anyone formulating, determining or effectuating management policies in the field of labor relations.” D-15. However, in doing so,

the Region completely ignored the evidence confirming that Darren Desjardin and Judy Hughes both determine and effectuate policies in the field of labor relations and the role the individuals translator/interpreters play in assisting them in this areas. For instance, where it can be shown that the employee has played some role in creating the document or in making the substantive decision being recorded, or that the employee regularly has access to labor relations policy information before it becomes known to the union or employees concerned, the Board will find the employee to have confidential status. *See United States Postal Service*, 232 NLRB 556, 558 (1978); *Pullman Standard Division of Pullman, Incorporated*, 214 NLRB 762, 763 (1974), and *Weyerhaeuser Co.*, 173 NLRB 1170, 1172--73 (1968).

Needless to say, the current record more than satisfies the Employer's burden of demonstrating the confidential status of the Team Leaders at issue due to the role they play in assisting the plant leadership with the creation of documents and/or the substantive decision making processes that regularly occur in the Employer's operations. Indeed, Coyoy and Hughes both confirmed that these individuals are involved in helping the Employer draft policies impacting the Employer employees. (T-245, 358-60, 378-79, 397-98 & 403-05). In doing so, Coyoy testified regarding how he attempts to help employees understand new policies. T-245. He also specifically confirmed that he helped human resources actually write policies. *Id.*

In this regard, DesJardin provided undisputed testimony regarding how he utilized the translator/interpreters when he implemented the policy changing the third shift hours. T-358-60. Specifically, he testified that he utilized the translator/interpreters to help translate the policy documents into Spanish and Vietnamese for distribution to the work force generally. T-358. He also confirmed that these individuals made changes in the documents and that they were given access to the policies even before the documents were released to the other Team Leaders. T-

359-60. Moreover, he testified that this same process occurred for the release of a safety glasses policy as well. T-358. As such, there should be little doubt that the record not only establishes that DesJardin formulates, determines or effectuates management policies in the field of labor relations, but also that the interpretor/translaters act in a confidential capacity in assisting him in these capacities. However, this evidence is completely ignored by the Region's Decision.

Indeed, the Region even went so far as to indicate that the "Employer never established that Hughes[,the Employer's Human Resource Manager,] formulates, determines or effectuates management policy in the field of labor relations." D-15 n. 14. However, in doing so, the Region completely ignored her testimony regarding the responsibilities of her position, which she testified included: "recruiting, interviewing, hiring, training, new hire orientation, policies and procedures, benefits. I'm involved in the safety, I'm involved with the worker's comp claims, if there are any claims. Liaison between the staff and the other employees and managers, kind of in a nutshell." T-392. Indeed, Hughes presented specific information regarding her implementation of a new policy addressing synthetic drugs. Needless to say, these types of policies are mandatory subjects of bargaining that would be subject to the collective bargaining process should a unit of the Employer's staff be certified. As such, given Hughes role as "liason between the staff and other employees and managers" there should be little doubt that she formulates, determines or effectuates management policy in the field of labor relations and the Regions failure to recognize that fact was a material error that prejudiced the Employer.

Indeed, the Region's conclusions ignore the testimony of Coyoy, DesJardin, and Hughes regarding the confidential role the five disputed Team Leaders play in assisting upper management. That is, in assisting the Production Manager and Human Resources Manager, these individuals are regularly given access to policies or communications prior to the distribution of

those policies to others (T-245, 358-60, 378-79, 397-98 & 403-05), play a role in determining whether employee absences will be excused (T-237, 258, & 393), help relay important safety information to the production staff (T-350-51, 394), investigate, relay and/or resolve employee grievances (T-242-43, 354-55 & 394), assist in responding to employee inquiries regarding pay and/or benefits (T-395-97), and are involved in disciplinary investigations (T-395-96). Needless to say, these areas are fully intertwined with the area of the Employer's Labor Relations. Moreover, the record confirms that this is not just limited to individuals on their own lines or shifts. T-244, 355 & 405. Accordingly, there should be little doubt that the current record satisfies the burden necessary to demonstrate that these individuals should be excluded as confidential employees and the Region's conclusions to the contrary were material errors prejudicing the Employer in this regard.

VI. The Region Erroneously Concluded That Team Leaders Who Translate are Not Supervisors

A. Contrary to the Determinations of the Region The Team Leaders Possession of Several of the Indicia of Supervisory Authority and the Required Use of Independent Judgment in the Interest of the Employer Mandates a Finding of Supervisory Status.

In reviewing the current record under this analysis, the Region must be mindful that an individual "need not actually perform an enumerated duty ... so long as the employee has the authority to do so, 'for *it is the power and not the frequency of its use* which is dispositive.'" *Beverly Enterprises, Virginia v. NLRB*, 165 F.3d 290, 294 (4th Cir. 1999) (emphasis added)(en banc) (*quoting NLRB v. St. Mary's Home, Inc.*, 690 F.2d 608, 612 (4th Cir. 1981). *See also Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 360 (1st Cir. 1980) (recognizing that question under Section 2(11) is whether supervisory authority exists, not how frequently it is exercised). In this regard, there is a fine line between "straw bosses, lead men, and set-up men"

and an individual(s) with supervisory authority who does not regularly use it. However, in the later, the Board mandate's a finding of Section 2(11) status.

Indeed, although the Board exercises caution “not to construe supervisory status too broadly,” the Board specifically confirmed that it must “be mindful of the legislative and judicial constraints that guide [its] application and interpretation of the statute.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). As such, the Region should be mindful of the judiciary's repeated rejection of “overly narrow construction of Section 2(11) of the Act as ‘inconsistent with the Act.’” *NLRB v Kentucky River Community Care, Inc.*, 532 US 706, 721-22 (2001). Indeed, the Eleventh Circuit recently found the Board improperly certified a unit of LPN team leaders where the Board “meticulously excluded or disregarded” evidence. *Lakeland Health Care Assocs. v. NLRB*, No. 11-12000 (11th Cir. October 2, 2012). As such, there should be little question that the Employer need not prove supervisory status beyond a reasonable doubt. Rather, the Board must be mindful that the Employer needed only demonstrate the supervisory status of its Team Leaders by a preponderance of the evidence. *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

Following the reasoning and analysis of Board and Courts in this area, while they clearly do not possess every one of the supervisor authority set forth in Section 2(11), the record amply demonstrates that the Employers Team Leaders possess sufficient authority to be considered supervisors under the Act.³ In this regard, the authority of the Team Leaders at issue was

³ Based upon any reasonable reading of the current record, the Employer asserts that the Team Leaders at issue undisputedly have the authority, in the interest of the Employer, to assign, reward, discipline, responsibly direct, evaluate, reward, transfer, and adjust the grievances of employees under their supervision (and that the Region's findings to the contrary were clearly erroneous and prejudiced the Employer), though their authority is not limited to these areas. They also have the ability to effectively recommend individuals for hire, lay off, discipline, suspension, promotion, reward, in the adjustment of grievances, and discharge, though their ability to effectively make recommendations regarding other staff is not limited to these areas. In the exercise of this authority, the must exercise their independent judgment and do so in the interest of the Employer. Although, for the purposes of

corroborated by substantial and undisputed evidence presented during the current proceeding. As such, they must be excluded from the currently proposed unit as they are supervisors, and therefore not employees, under the Act and are not appropriate for inclusion in any bargaining unit.

1. Contrary to the Findings of the Region, Team Leaders Regularly Exercise Independent Discretion in Assigning Staff.

As noted previously, the courts have taken issue with the Board's historical interpretation of "independent judgment," which excluded the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." As such, the Board, in *Oakwood, supra* at 692-94, set forth its new analysis regarding its interpretation of "independent judgment." In doing so, the Board held that, to be considered exercised with "independent judgment," a supervisory authority must be "independent," that is, "free of the control of others," it must "involve a judgment," that is, it requires "forming an opinion or evaluation by discerning and comparing data," and the judgment must involve a "degree of discretion that rises above the 'routine or clerical.'" (Id.). Thus, the discretion exercised by the Employer's Team Leaders, and the choices available to them, require an acknowledgment of their independent discretion.

In this regard, while it was undisputed that "team leaders assign employees to work on certain machines on their lines", the Region's conclusion that this authority does not involve independent judgment is clearly erroneous and prejudices the Employer. Indeed, it should not be lost that the Employer's Team Leaders are not given any set of instruction or guidelines that dictate the operation of their lines. T-193-95. Rather, they must formulate their own opinions

efficiency, this brief will focus on certain authority possessed by the Employer's Team Leaders, the failure to mention any specific authority should in no way be construed as a waiver on behalf of the Employer to assert that its Team Leaders possess that authority or can effectively make recommendations in that area, since their authority clearly goes into other areas.

with regard to what will be required to satisfy the production requirement presented and, in doing so, evaluate their staff to determine where they should be placed on the line to allow the line to safely and efficiently meet that production request. Moreover, it should not be lost that the needs of the line change constantly. As such, Team Leaders are constantly required to exercise their discretion in updating transferring staff to address absences, assigning staff to various stations on the line based upon their skills and ability, and stopping and/or starting the line to respond to engineer requests, maintenance or safety issues.

Needless to say, based upon the complete lack of evidence regarding any instruction or guideline dictating the assignment of their staff, the Region's conclusion that the assignments of the Team Leaders "do not involve a 'degree of discretion that rises above routine or clerical'" D-9 is completely unsupported by the record and, in fact clearly erroneous. Given this error and the failure of the Region to appropriately follow the Board's precedent regarding the sufficiency of "independent judgment", the Board must now remedy the Region's decision in this error. In doing, so the Board must confirm that the team leaders are supervisors due to the judgment they exercise in assigning the staff on their lines.

Moreover, the Region must acknowledge that the Region's assertion that "the Employer failed to establish that team leaders can require employees perform tasks" is also clearly erroneous and prejudices the Employer. D-10. Indeed, the record confirms that individuals cannot refuse the instruction of their Team Leaders without consequences. For example, Eliel Molina confirmed that Julio Coyoy is his "boss" (T-301) and that Molina cannot even go to the bathroom without Coyoy's permission. T-303-04. Indeed, Molina confirmed that he was well aware of the fact that there would be consequences if he disobeyed Coyoy's instructions. T-301. As such, there is ample evidence to establish the authority of the Team Leaders to direct/assign

the work of others and the Region's conclusion to the contrary is clearly erroneous and prejudices the Employer.

2. Contrary to the Findings of the Region, the Preponderance of the Evidence Demonstrates that Team Leaders Responsibly Direct Operators in the Interest of the Employer, While Using Their Independent Judgment.

The authority "responsibly to direct" employees was included in Section 2(11) to ensure the exemption included "those individuals who exercise basic supervisory authority but lack the authority or opportunity to carry out any of the other statutory supervisory powers." *Oakwood, supra* at 690. The proposal was made to ensure that the person directly overseeing the work being done and responsible if work is done poorly or not at all was included in the exemption of Section 2(11). *Oakwood, supra* at 690-91. Thus, "[i]f a person on the shop floor has 'men under him,' and that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." *Oakwood, supra* at 691. Needless to say, the Team Leaders in dispute qualify as supervisors under this analysis.

3. Contrary to the findings of the Region, the Record Demonstrates that Team Leaders are "Responsible" for the Work of Their Lines.

An individual is "responsible" for the direction of employees if the person directing and performing oversight of employees is "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." *Oakwood, supra* at 691-92. In the case at hand, this requirement is more than satisfied by the evidence that the Team Leaders have been repeatedly informed that they will experience material consequences to their terms and conditions of employment as a result of deficiencies involving their lines. *See Golden Crest,*

supra at 731. Indeed, in the case at hand, there should be no dispute that Team Leaders are accountable for the work of the individuals on the lines they oversee.

Specifically, there is actual undisputed evidence of a Team Leader having experienced material consequences for the work of the individuals on the lines they oversee, as well as their own supervisory deficiencies. *See* E-8 (Discipline of Julio Coyoy for allowing his line to produce a faulty part); E-9 (criticism in evaluation of Coyoy for not giving adequate training to production operators); E-10 (criticizing Coyoy for not “developing a good cross functional team”) and E-17 (Discipline of Delp for failing to find her line something to do). There is also direct evidence that the Team Leaders were informed that they would face consequences for the performance of the individuals on their lines and their responsibility in this area is confirmed in their job descriptions. T-316-17, 366 & E-5. In this regard, the Region completely ignored the discipline received by Delp (See T-343-44 & 380), and misconstrued the discipline received by Coyoy, who confirmed he was disciplined because he allowed the individual being trained to produce defective parts. T-264-65. As such, the responsibility of the Team Leaders to ensure the individuals on their lines perform their duties must be recognized and the Region’s conclusions to the contrary was a material error that prejudiced the Employer.

4. The Region’s Conclusion that Team Leader Recommendations Regarding Hiring are Accompanied by the Independent Investigation of the Production Manager Was a Material Error

In determining that the Employer’s Team Leaders did not make effective recommendations regarding the hiring of employees the Region held that “it appears that the team leaders recommendations are accompanied by independent investigation by the production manager.” D-11. However, this statement is completely contrary to the testimony presented. Indeed, the record demonstrates that it is the Employer’s Team Leaders (i.e. not the Production

Manager) who evaluate and determine which temporary employees should be offered a position with the Employer. T-25-26, 225-27, 266, 269, 330-34, & 372-73. In this regard, although they do actually do the hiring, the record clearly establishes that the Production Manager consults with the Team Leaders to determine whether someone is worthy of a permanent employment with the Employer. T-77-78

In fact, the record confirms that several individuals were hired based upon the recommendations of several Team Leaders. T-226, 330-34 & 372. For example, Jarek Martinez and Francisco Buruel were offered employment based upon the recommendation of Julio Coyoy. T-226, 227-28 & 332. Maria Cruz, Son Le, Sun Nguyen and Lang T. Huynh were hired based upon the recommendation of Leo Baes Tajeda. T-332-33 & 372-73. In addition, DesJardin confirmed that he had already made the decision to hire Angel Acosta and Canh Lou based upon the recommendations of Juan Contreras and Vi Le respectively. T-330, 334 & 373. However, in none of these instances was there testimony regarding any independent investigation by DesJardin. In fact, when questioned about whether the decision to hire Angel Acosta was based upon his own observations DesJardin specifically denied that it was, stating as follows:

No. It was Juan's -- Juan coming to me and telling me, 'This guy -- I really want this guy on my line. He works well, he works well with others. I've seen him. You know, he gets along with the other operators that have been there.' You know, to be honest with you, Richard Willard, Juan Contreras, Julio Coyoy, Vi Le, Leo, Floridalma, all 10 team leaders I consider pretty much a right-hand extension of myself. I can't -- you know, with my responsibilities and my duties in the company, there's no way I could run all of these lines with all of these operators, and yet still handle all the managerial tasks that I have to do every day of the week.

T-331. As such, there should be little doubt that the Production Manager does not independently investigate whether to hire staff after he seeks out the input of the Team Leaders as to whether

someone should be offered employment. Needless to say, the Region's conclusion to the contrary was a clear error that materially prejudiced the Employer.

5. Contrary to the Conclusion of the Region, Team Leaders Have Authority to Discipline Employees While Using Their Independent Judgment in the Interest of the Employer, or at Least Make Effective Recommendations Regarding Employee Discipline

There should be no doubt that "discipline is rare" in the Employer's operations. T-338. However, the evidence presented at the hearing demonstrated that the Employer's Team Leaders have the authority to issue discipline. Indeed, the Production Manager undisputedly testified that he informed several of the Employer's Team Leaders of their authority in this regard. T-338 & 374. Moreover, no evidence was presented that would contradict DesJardin's testimony that he informed Richard Willard, Juan Contreras and Vi Le that they had the authority to discipline operators. T-338 & 374. Similarly, there was no evidence to contradict his testimony that he had similar discussions with Diane Delp and Pedro Diaz as well. *Id.* As such, there should be little doubt of the ability of the Team Leaders to discipline staff.

That said, the Region dismisses this express grant of authority as "conclusory testimony." D-11. However, the fact of the matter was this testimony was undisputed direct evidence of how and when the Employer's Team Leaders were granted the authority to discipline their staff, despite the fact that it may not be mentioned in their job descriptions. As such, it was a clear error for the Region to ignore this testimony regarding specific discussions that occurred.

Indeed, the record contains a specific example of one of those Team Leaders having actually disciplined an operator. E-15. That document confirms that Willard disciplined one of the individuals on his line for excessive scrap. *Id.* This is important since the Employer does not

maintain any test or guideline to determine how much scrap is excessive. Rather, Willard had a choice as to whether discipline was appropriate when he proceeded to issue the discipline in this instance. T-413-14. In this regard, it is significant that the Production Manager never thought to question Willard on his action because it was consistent with his expectations. T-337. Indeed, he confirmed that Willard's issuance of discipline to an operator was authority held by all the Employer's Team Leaders. T-335.

Based upon these facts, it should not matter that there is only one discipline in the record since it is the possession of the authority to discipline and not its exercise that establishes supervisory authority under the Act. Indeed, the record firmly establishes that disciplines are not very common to begin with and "99.9 percent of the time [the Employer's Team Leaders] do not feel comfortable doing it." T-338 & 386. Thus, the record contains a rational explanation as to why there are not more examples of Team Leaders having disciplined individuals despite the uncontested authority granted them in this area. However, this rational does not change the fact that it is the possession of the authority to discipline that makes the Employer's Team Leaders supervise, not how often they exercise that authority.

Moreover, the record confirms that the Employer's Team Leaders who interpret play a greater role in disciplinary investigations than their English only counterparts. Specifically, they regularly are involved in interviewing non-English speaking staff to determine what occurred. A specific example of this was described by several witnesses (i.e. the fight on Vi Le's line where Julio Coyoy needed to discuss the incident with several Spanish speaking operators). T-238-9, 352-53, 395-96 & 405. Although that incident did not involve the issuance of discipline, it could have had Coyoy reported allegations that would have demonstrated more than a misunderstanding. Thus, the ability of the disputed five Team Leaders to recommend discipline

is far greater because of the Employer's reliance on their interpretations and the Region's refusal to consider the evidence presented resulted in a clear error in this area.

6. Contrary to the Conclusion of the Region the Evaluations of Team Leaders Constitute Effective Recommendations and Affect the Evaluated Employees Job Status.

While there is no dispute that Section 2(11) does not include "evaluate" in its enumeration of supervisory functions, it is well settled that the Board regularly finds that individuals are statutory supervisors when they evaluate others in circumstances where the evaluations lead to personnel actions affecting the appraised employees, such as the grant of merit increases, or the determination that the rated employees will be retained, discharged, or placed on probation. See generally, *Northcrest Nursing Home*, 313 NLRB 491, 498 notes 36 and 37 (1993). As such, this authority is more than the "Secondary Indicia" that the Region labeled its analysis on this topic. Rather, the Board consistently finds supervisory status because of the existence of this authority.

Nonetheless, the Region attempts to minimize the evaluations performed by the Employer's Team Leaders by insinuating that they are the product of "detailed work instructions" and a lock step skill progression. D-13. However, in doing so, the Region completely ignores the evidence in this area. Indeed, DesJardin specifically confirmed that there is no test or guideline that tells a team leader when an individual should be progressed to the next step in the evaluation process. T-315. Rather, a Team Leader determines that "based on his observations." *Id.*

In addition, the Region's analysis completely misconstrues the nature of the Employer's work instructions. That is, while the Employer does not dispute that its various machines have detailed work instructions, the undisputed testimony presented confirmed that the team leaders

are involved in drafting and updating those instructions. T-388-89. Moreover, the record confirmed that the Employer's Team Leaders have the ability to disregard those instructions when they deem it appropriate. T-390. Thus, the evaluations done by the Employer's Team Leaders are significantly more than that depicted in the Region's Decision.

Indeed, the Region's conclusion that the team leaders evaluations do not impact employees job status or constitute effective recommendations for promotions is clearly erroneous on the record. Contrary to the Regional Director's Decision and Order, the current record undisputedly demonstrates that there is a direct correlation between the evaluations completed by the Employer's Team Leaders and the eligibility of the evaluated production staff to be considered for promotion. T-291-92 & 314-15. Indeed, on the date of the hearing, there was not a single individual on Julio Coyoy's line that was eligible for promotion because he had not determined they were sufficiently skilled. T-292. As such, the impact of these evaluations should be relatively undisputed.

Indeed, these evaluations not only determine an individual's eligibility for promotion, but the Employer's assembly operators cannot operate certain machinery until their Team Leader verifies their ability to do so. There is no timeframe in which this may occur or test involved. T-264 & 315. Rather, it is determined exclusively at the discretion of the Team Leader involved and based solely upon their own observations of the individuals skills and ability. T-291-92. What is more, these evaluations are maintained by the Team Leaders themselves and relied upon by anyone who may need to verify an individual's skill set later on. Thus, there should be little doubt that the Region's analysis regarding the evaluation process of the Employer's Team Leaders is clearly erroneous on the record and prejudiced the Employer.

7. Secondary Indicia Support a Finding of Section 2(11) Supervisory Authority.

It should be noted that the Board has held that non-statutory indicia can be used as background evidence of supervisory status. *See Training School of Vineland*, 332 NLRB 1412 (2000) and *Chrome Deposit Corp.*, 323 NLRB 961, 963 n. 9 (1997). Indeed, in the current record, a plethora of secondary indicia also support the supervisory status of the disputed Team Leader currently at issue. For example, although the Board has determined that the supervision of one individual is sufficient for exclusion from a bargaining unit (*Holland & Son*, 237 NLRB 263 (1978)), the ratio of supervisors to rank-and-file production employees in the case at hand further demonstrates the supervisory status of the Employer's Team Leaders. *See Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). In this regard, the Employer relies upon a Production Manager, a 2nd shift Supervisor, a 3rd shift Supervisor, and ten Team Leaders to oversee around 87 production employees in the plant.⁴ (T-165-67, 384 & E-3). If all of those supervisory individuals were constantly on the floor (which is impossible since they work different shifts) it would amount to approximately 7 employees for every supervisor. However, if the Team Leaders are removed that ratio jumps to around 30 employees for every supervisor. Needless to say, any analysis that results in a supervisory ratio of around 30 employees for every supervisor should be avoided. *See Formco, Inc.*, 245 NLRB 127 (1979) (ratio of 30 to 1 disproportionate). This is especially true in this instance, where the undisputed testimony confirmed that the Production Manager and other Supervisors are rarely on the floor. (T-325 & 370). As such, contrary to the conclusion of the Region, the ratio of supervisory staff further solidifies the

⁴ Contrary to the indications of the Region, there is no evidence to establish that the Employer's Human Resources Manager or Logistics Manager play any role in supervising the production staff. Thus, the Region's utilization of these individuals to attempt to dilute the day shift supervisory ratio was clearly erroneous on the record and prejudiced the Employer.

important role the Team Leaders play in overseeing the operations of the Employer's various lines and ensuring the safe and efficient operations of the Employer's plant. *See Ken Crest Services*, 335 NLRB No. 63 (2001), and *Pennsylvania Truck Lines*, 199 NLRB 641 (1972).

In addition, the evidence presented clearly demonstrates that the Employer's Team Leaders receive a significantly higher rate of pay than other non-supervisory production staff (approximately two to three or four dollars (\$2-3 or 4) more an hour). T-357, 393 & 402 (starting salary for a team leader is around \$9 to \$9.50 versus the normal (i.e. absent special prior circumstances) maximum rate for an operator, which is \$7.98). In this regard, the Board has regularly found higher rates of pay (or other benefits) to be indicative of supervisory status. *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); *Illini Steel Fabricators*, 197 NLRB 303 (1972); *Grand Union Co.*, 193 NLRB 525 (1971); *Little Rock Hardboard Co.*, 140 NLRB 264 (1962). However, in this instance, the compensation of the Team Leaders is further bolstered by the fact that they arrive early to set up their lines and leave later than other production staff, resulting in an additional hour or so of overtime a week. T-274. As such, their overall compensation is further bolstered by their regular receipt of overtime and their greater income only further supports a finding of their supervisory status.

Lastly, the Employer limits access to certain items, like desks and computers, to its supervisory staff. Indeed, the Employer's Team Leaders are stationed at a desk at the head of their various lines, which is the only location on the line with access to a company computer. T-289. In addition, each Team Leader maintains their own operator training books and testing gauges at their workstation. T-321-23 & 356. Many of them also have access to e-mail. T-340,

376, 378. Thus, the additional access to resources of the Team Leaders should also bolster their supervisory status as well.

Moreover, the evidence demonstrates that the Employer's Team Leaders are required to have special training above that required of normal operators. T-294-95. For example, the Team Leader job description (E-5) and testimony presented confirm that Team Leaders are required to have "SPC Training" and "QS 9000 training" whereas general production employees do not. *Id.* As such, the elevated status of the Team Leaders, as compared to the general production staff they oversee, should be undisputed. Indeed, overall the Team Leader's knowledge of the lines "is higher than any other operator [the Employer] has out there." T-391.

That said, while the Region is quick to point out that "Team leaders do not have access to employee personnel files" (D-12), it fails to mention the testimony of the Employer's Human Resources manager, who confirmed that Team Leaders "could" have access to files if they asked, though admittedly no one has asked. T-407. Moreover, in reality, only two people in the entire company have keys to the Employer's personnel files (i.e. the Human Resource Manager and her assistant). T-409. Thus, the record confirms Employer's Production Manager and President have the same access to personnel files that the Employer's Team Leaders do.

Based upon that failure, it should not be any surprise that the Region also fails to acknowledge that the Employer's Team Leaders maintain their own personnel files at their work station. That is, the entire employee training logs are maintained at the Team Leader's work station. T-321

Although these factors are not dispositive of the supervisory status of Team Leaders at issue, they do further demonstrate the distinction between the supervisory and non-supervisory personnel of the Employer. As such, these factors should have been used by the Region to

confirm that the Team Leaders should be excluded from the unit because they are supervisors under the Act. Needless to say, the Region's failure to do so was clearly erroneous on the record and prejudiced the Employer.

VII. CONCLUSION

Based upon the evidence presented, the Regional Director's Decision includes decisions on substantial factual issues that are clearly erroneous on the record, prejudiced the rights of the Employer, and were inconsistent with prior Board precedent. Moreover, the current matter raises a substantial question of law or policy because of the absence of precedent considering the status of in-plant interpreters/translators. As such, the Board should grant the current petition for review.

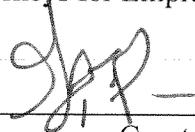
In doing so, the Board should confirm that it was not appropriate to include the Employer's Team Leaders who translate and/or interpret. At a minimum, these individuals are confidential employees not appropriate for inclusion in the current bargaining unit. However, the more likely conclusion is that these individuals (if not all of the Employer's Team Leaders) are supervisors under the Act and, therefore, they are not appropriate for inclusion in any bargaining unit. Accordingly, they should be excluded from the current bargaining unit.

Respectfully submitted,

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Dated: October 12, 2012

By: _____



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Petition for Review have been filed electronically through the Board's E-Filing Program this 12th day of October, 2012.

Copies of said filing have been serviced upon the following persons by electronic mail:

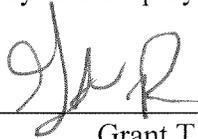
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