UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

In the Matter of	:	
	:	CASE NO. 30-CA-078663
WOODMAN'S FOOD MARKET, INC.	:	
	:	
And	:	
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UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1473	:	
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RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE JEFFREY D. WEDEKIND

COMES NOW the Respondent Woodman's Food Market, Inc. (hereinafter referred to as "Respondent", or "Employer"), by and through its undersigned representatives of record, and, pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, as amended, and submits this Brief In Support Of Exceptions To The Decision Of Administrative Law Judge Jeffrey D. Wedekind.

I. INTRODUCTION

The Employer asserts that the Board as it is currently constituted lacks the authority to decide whether or not their Exceptions have merit. Three members of the current Board were appointed by the President while the Senate was still in session – in direct contravention to the Recess Appointments Clause of the U.S. Constitution. However, notwithstanding the above, the ALJ committed reversible error by shifting the burden of proof to the Employer, making assumptions out of whole cloth, and incorrectly applying well-established Board law.

II. STATEMENT OF FACTS[1]

Mr. Wydeven has been working for Woodman's for about ten years. (Tr. 16). He has held his current position for a little over a year and reports to the Store Manager. (Tr. 17).[2] Just prior to being in his current position Mr. Wydeven was a Lube Technician and also reported to the Store Manager, Patti Frederick. (Tr. 19).[3]

Mr. Wydeven does the same thing as everyone else. He changes oil, handles customers, works the cash register, and orders product. (Tr. 27). Laurie Schavo is responsible for ordering product in the gas station. (Tr. 84). Taylor Keesey and RaShaina Anderson also order product for the lube center. (Tr. 85). Mr. Wydeven determines when to order product by looking at the stack. This is the same procedure as when Mr. Cortazzo was the Auto Center Manager. (Tr. 85).

Mr. Wydeven does not have a set of keys nor does he unlock the doors. (Tr. 27).

Anyone fills in for Mr. Wydeven when he is not there.[4]

The Store Manager visits the Auto Center "once or twice a week". She determines the price of gas to be sold after checking area prices. (Tr. 30). Mr. Wydeven will talk to the Store Manager about work related matters such as a customer complaint. (Tr. 31). Mr. Wydeven will handle minor customer issues such as checking the air pressure on a tire. (Tr. 33).

Mr. Wydeven did not sit down with Ms. Labby to explain her performance evaluation. He did not explain to her why her probation was being extended – "she just kind of read it". (Tr.

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[1] The Board is not bound by the ALJ's findings of fact and should engage in a de novo review of the record. *Standard Dry Wall Products,* 91 NLRB 544 (1950).

[2] GC Exh. 3 shows that the exact first date of his new position was June 19, 2011 and calls the position "Auto Center Manager". It is not in in dispute that the Auto Center encompasses both the gas station and lube center.

[3] It should be noted that Mr. Wydeven replaced Jaime Cortazzo in the current position. (Tr. 19). It would have been a very simple matter for the General Counsel to have called Mr. Cortazzo as a witness since he was demoted by the Employer into a non-supervisory position. As the burden of proving supervisory status rests with the General Counsel a negative inference should be drawn from this omission.

[4] GC Exh. 4 shows that Taylor Keesey is a "fill-in" supervisor. However, the General Counsel offered no testimony or evidence as to what this means and did not call Mr. Keesey as a witness – again, a glaring omission as the burden rests with the General Counsel to prove supervisor or agency status.

43). Mr. Wydeven did not decide to either extend the probation of Ms. Labby nor did he decide to pass Ms. Labby. (Tr. 46, 47). In fact, Ms. Frederick spoke to other employees about Ms. Labby's performance as well. (Tr. 47).

Mr. Wydeven did not decide that Mr. Keesey should pass probation. He met with Mr. Keesey for only "a minute or two" in a very informal meeting. (Tr. 91). Whenever Mr. Wydeven gives a performance review he said "I just kind of hand it to someone and have them sign it and bring it inside". He does not explain the ratings or the Xes in the boxes. (Tr. 91)[5].

Mr. Wydeven was not sure whether or not he gave the performance evaluation to Mr. Gosz and did not make the decision that he should pass probation. (Tr. 52).[6] If it was up to Mr. Wydeven he would not have terminated Mr. Gosz. (Tr. 88). Mr. Wydeven was at the meeting when Mr. Gosz was terminated. (Tr. 61). He has not been present for any other termination meetings.[7] (Tr. 64). Mr. Wydeven was not at this meeting in an official capacity but because he "was really good friends with Jesse". Mr. Wydeven "wanted to be there as support for him". (Tr. 88)[8].

Mr. Wydeven did not make the decision to "pass probation" for Mr. Radtke. (Tr. 70).

Mr. Wydeven did not make the decision to "not pass" Ms. Forster. In fact, Mr. Wydeven and the Store Manager argued as to whether or not Ms. Forster should pass probation. (Tr. 54). Mr. Wydeven recommended to the Store Manager that Ms. Forster should pass probation and was overruled. (Tr. 86, 87).

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[5] The General Counsel did not call any of the affected employees as witnesses to dispute Mr. Wydeven's testimony regarding their performance evaluations. As these evaluations were offered into evidence by the General Counsel, the burden is on him to provide a credible explanation as to their relevance.

[6] The General Counsel did not offer any other evidence as to who actually gave the review to Mr. Gosz.

[7] Ken King was terminated after Mr. Wydeven had become the Auto Center Manager and Mr. Wydeven was not in his termination meeting. (Tr. 114).

[8] Mr. Gosz was terminated for performance and therefore the assumption would be that he would be a hostile witness to the Employer. Yet, the General Counsel did not call Mr. Gosz for his version of the meeting. Once again, another adverse inference must be drawn due to the General Counsel's failure to call Mr. Gosz.

General Counsel Exhibit 9 was the only "disciplinary" notice with Mr. Wydeven's signature that was offered into evidence. He did not give it to Mr. Keesey. (Tr. 55 and 90). He also did not write "verbal" on the notice. (Tr. 56).[9] He did not decide the type of punishment Mr. Keesey would receive, hand the document to him, have a meeting with him nor did he explain it to him. (Tr. 90). The reason that Mr. Wydeven signed this notice was because the Store Manager told him to do so. (Tr. 115).

Mr. Wydeven was given a "Department Head Performance Evaluation" by the Store Manager. She did not explain what "Woodman's backer" meant. (Tr. 64). In fact, there was no meeting to discuss the performance review. She just "gave it to me and I signed it". (Tr. 83). She did not explain what any of the ratings meant in the review. (Tr. 83).

In 2010 Mr. Wydeven had not yet become the Auto Center Manager and was a "lube center employee" at the same level as everyone else in the Auto Center. (Tr. 92). Mr. Wydeven signed a performance evaluation for Blair Beyer on November 26, 2010 long before he had attained his current position. (Tr. 93). He handed her the form and had a meeting that lasted "just a couple of minutes"[10]. (Tr. 96).

The performance evaluation process itself begins with the corporate office. The top portion of the evaluation is filled out by corporate and sent to the service desk. From the service desk it is then put in a folder and sent to the gas station. (Tr. 97). Page 3 of Respondent Exhibit 2 shows filled out "short form" evaluations that are also sent down by the corporate office. These are meant to be filled out by other employees so that they can provide feedback on the

[9] The assumption is that "verbal" refers to the type of disciplinary action that was taken. However, the General Counsel did not offer any other evidence or testimony on this matter so the circumstances around this notice remain fuzzy and unexplored. The Store Manager was in the Hearing yet the General Counsel did not call her as a witness. Again, since the burden of proof in this matter resides with the General Counsel a negative inference must be drawn from this omission.

[10] The process of just handing the performance evaluation to the employee without explanation appears to have been the same when Mr. Wydeven was handing them out as a clerk and when he handed them out as a Manager.

employee being evaluated. (Tr. 98). RaShaina Craddock signed one of these evaluations as a "Supervisor" on August 22, 2010. Kenny King also signed one of these evaluations as a "Supervisor" on August 22, 2010[11]. (Tr. 99).

The employees schedules are determined by the corporate office. Mr. Wydeven has no say whatsoever in scheduling the Auto Center employees. (Tr. 105). Lunch breaks are staggered throughout the day and are scheduled by the corporate office. (Tr. 106). In response to a question about how breaks are determined Mr. Wydeven responded "they just go whenever". (Tr. 106). This process for determining breaks was the same when Mr. Cortazzo was the Auto Center Manager. (Tr. 107).

The Lube Station Policies[12] are given to "whoever comes out to work in the auto center, or gas station…". These policies are given to them by the service desk. Employees sign something saying that they have received these policies. (Tr. 107). Respondent Exhibit 19 is the document Camille Madison signed saying that she read and received these policies on July 23, 2010. Mr. Wydeven signed this document under "Training Supervisor" long before he was the Auto Center Manager. (Tr. 107-108).

III. ARGUMENT

1. ALJ erred in accepting conclusionary statements on documents as evidence of supervisory status without any testimony or explanation as to what those statements mean. (Exceptions 1-4).

The ALJ has accepted the following statements from Employer records as fact:

- "Responsibilities include directing the workforce"[13]
- "In charge of the Auto Center"[14]

[11] Ms. Craddock, Mr. King and Mr. Wydeven were all Lube Center employees at this time and all signed as "Supervisor".
[12] GC Exh. 21
[13] GC Exh. 2

- "Ability to direct workforce"[15]

These are conclusory statements that cannot be relied upon without further explanation. As with the mere conference of the title of "supervisor" on the employee, "conclusionary evidence that an individual possesses employee oversight authority does not, without more specificity, establish the individual as a statutory supervisor". *A and G, Inc., d/b/a Alstyle Apparel and UFCW Local No. 324* 351 NLRB No. 92 (2007). In *American Directional Boring, Inc., d/b/a/ ADB Utility Contractors, Inc. and Local 2 IBEW* 2007 WL 2430006 the decision of the Judge was upheld that "The most evidence that Respondent presented was conclusory statements by various crew leaders about their being "bosses" and their responsibility for the productivity of their crews and to see that their job got done. However, conclusory statements, without supporting evidence, are insufficient to establish supervisory status and authority." The Board has made it clear that "general, conclusionary evidence, without specific evidence [that an employee] in fact exercises independent judgment …, does not establish supervisory authority". *Tree-Free Fiber Co.,* 328 NLRB 389 (1999).

2. **ALJ erred in finding as fact that the exclusion of the Auto Center Manager from the bargaining unit has any bearing whatsoever in the determination of supervisory or agency status. (Exceptions 5, 18).**

In stating as a fact (ALJD 2:41 – 3:3) that the Auto Center Manager position is excluded from the bargaining unit it is clear the ALJ based his decision on this unexplained and unexamined agreement between the Employer and the union. Further, the ALJ cites *Comau, Inc.,* 358 NLRB No. 73 (2012) as the basis for his finding agency status given that the position is not in the bargaining unit.

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[14] GC Exh. 3

[15] GC Exh. 11. Other conclusionary statements from this evaluation were also used without any explanation as to what they mean. (ALJD 2:33-38).

First, the ALJ has absolutely no idea why the position was excluded from the bargaining unit in 2009 based on what was presented by the General Counsel in the Hearing. Apparently, the ALJ is making the erroneous assumption that the reason for the exclusion is that the parties agreed the Auto Center Manager position was supervisory. Further, as it relates to *Comau*, the ALJ is making another assumption that employees would view the position as aligned with the Employer because it was not in the unit. These are assumptions wholly unsupportable by any testimony or documentary evidence.

It is a matter of public record that Local 1473 argued in an earlier case this same position was supervisory[16]. In that Decision the Regional Director for Region 30 concluded there was insufficient evidence to find it was supervisory. This is not offered for the truth of the matter in the case at bar, merely to show that the employees (knowing of this Decision) could easily have a different conclusion about the Auto Center Manager position.[17] Mr. Wydeven testified that he paid union dues while in the position of Auto Center Manager. If the ALJ were to make an assumption in this matter he should have more properly assumed that since Mr. Wydeven was paying dues, and believed he was still in the union, that employees would have seen him as being more closely aligned with the union than with the Employer. (Tr. 89:1-2).

The ALJ's citation of *Comau* is an example of the right case but the wrong analysis. In *Comau* the employees in question had previously held leadership positions in the union. The only testimony on the matter as stated above is that Mr. Wydeven believed himself to be in the

[16] Decision and Direction of Election in 30-RD-1488.

[17] No doubt the General Counsel may object to this argument as it was not argued in the Post Hearing Brief. However, it was not argued earlier because the Employer did not contemplate the ALJ would make such wild assumptions regarding the reasons for the position's exclusion and whether the employees would believe the position was aligned with management. The Employer's Representative did state on the record that this agreement does not have "any relevance in determining any issues before us". (Tr. 121:6-8). The Employer did not offer any testimony regarding this letter because the burden is not on them to explain it. The burden is on the General Counsel to show what the reason for the exclusion was – or at least to show why the union entered into this agreement in 2009. As nothing was offered regarding the letter the Employer made the correct decision to ignore it as the ALJ should have placed no weight on it without any explanation.

union and was paying dues. A correct application of *Comau* would be that the employees would see Mr. Wydeven as aligned with other bargaining unit employees since he paid dues and believed himself to be in the union. However, none of this should have to be argued because the ALJ should not have made the extraordinary assumption as to the reasons for the position's exclusion from the bargaining unit without there being any explanation on the matter whatsoever in the record evidence. Since this agreement between the Employer and the union was entered into evidence by the General Counsel it was the General Counsel's burden to explain its relevance.

3. **ALJ erred in finding as fact that Mr. Wydeven recommends whether employees should be retained or have their probationary period extended. (Exceptions 6, 11).**

The ALJ is ignoring the fact that on only one occasion did Mr. Wydeven make any recommendation to the Store Manager. It was the Store Manager who decided to pass Ms. Labby. (Tr. 42:22-23, 46:18-47:3). It was the Store Manager who decided to pass Mr. Keesey. (Tr. 49:18-24). It was the Store Manager who decided to pass Mr. Gosz. (Tr. 52:3-7). It was the Store Manager who decided to not pass Ms. Forster. (Tr. 54:2-13). In point of fact, the only time Mr. Wydeven did make a recommendation was in the case of Ms. Forster – and he made the very clear recommendation that she pass probation. However, the Store Manager, **in direct contravention of Mr. Wydeven's recommendation**, decided to not pass Ms. Forster. (Tr. 86:14-87:14).

As stated in *ITT Lighting Fixtures*[18] in order for a recommendation to be effective it must be "taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed". The undisputed testimony of Mr. Wydeven is crystal clear – he made no decision to pass or not pass employees on probation, he did not have unreviewable authority, and

[18] *ITT Lighting Fixtures*, 265 NLRB 1480 (1982).

he was overruled by the Store Manager on at least two occasions. The Employer was so clear Mr. Wydeven did not have this authority that he was not even allowed to check the appropriate box on the evaluation forms indicating passing or not passing probation.

Moreover, Respondent Exhibits 1 and 2 are performance evaluations signed by and filled out in part by Mr. Wydeven **long before he held the position of Auto Center Manager**. It appears that it is the clerical practice of the Employer to have unit employees partially fill out and sign these forms and it has been so practiced since well before Mr. Wydeven took on his current responsibilities.

Clearly, in the matter of whether or not an employee passes probation it is the Store Manager who makes the decision and even checks off the appropriate box on the evaluation form. It cannot therefore be stated accurately that Mr. Wydeven has any unreviewable authority in this matter. The ALJ is confusing observations by Mr. Wydeven with effective recommendations. Even if, as the General Counsel suggests, Mr. Wydeven made recommendations to the Store Manager it is clear that these recommendations are not always followed.

4. **ALJ erred in finding as fact that Mr. Wydeven recommends whether employees should be retained or have their probationary period extended. (Exception 7).**

The ALJ wrote: "It makes little sense that Frederick would have involved Wydeven with the notice if he had no significant role in it." (ALJD 5:40-41). The ALJ belies his prejudice in this matter with the preceding sentence: "In essence, Wydeven testified that he was simply Frederick's scribe". (ALJD 5:39). Apparently, the ALJ does not believe that any employee could be in the position of filling out such a document simply because he was told to. However, the Board has dealt with this precise issue. In *Connecticut Human Society*[19] the Board ruled that when one is directed to sign a disciplinary form by upper management it cannot be used as an

[19] *Connecticut Humane Society*, 358 NLRB No. 31, 358 NLRB 1 (2012).

example of exercising independent judgment in the issuance of the discipline. Mr. Wydeven testified that he was directed by the Store Manager to sign the disciplinary notice. Under *Connecticut Humane Society* this cannot be used as an example of independent judgment.

The ALJ further wrote: "I find that Wydeven likely had a significantly greater role in the notice than he admitted to at the Hearing." There is no basis for this inference. No other witnesses were called by the General Counsel. Even assuming, arguendo, that Mr. Wydeven is not credible there is no other testimony on this matter. It is the party asserting supervisory status, in this case the General Counsel, that bears the burden of proving any of the indicia are met. *Vencor Hospital-Los Angeles,* 328 NLRB 101, 102 (1992). Clearly, the Board believes it is possible for an employee to be a "scribe" for management, as the ALJ put it. If the ALJ believes Mr. Wydeven is not credible then the problem is really with the General Counsel's argument. With no other witnesses being presented the General Counsel has therefore presented no credible testimony on this matter. The ALJ cannot fashion an inference out of whole cloth where he believes no credible testimony has been taken.

5. **ALJ erred by inferring that the burden was on the Employer to provide corroboration for Mr. Wydeven's testimony. (Exception 8).**

The ALJ wrote: "…Wydeven was not a credible witness generally, and his testimony in this respect was not corroborated by Frederick or Keesey (neither of whom, as indicated above, were called to testify." (ALJD 6:7-9). The ALJ is failing to recognize that the disciplinary notice he is referring to is a document entered as evidence by the General Counsel.[20] This is the only example of Mr. Wydeven having anything to do with a disciplinary notice. It is the General Counsel's burden to explain the notice. By itself, the document means virtually nothing containing only Mr. Wydeven's signature. The General Counsel called Mr. Wydeven to explain

[20] GC Exh. 9

his involvement with the notice. Apparently, neither the General Counsel nor the ALJ believed Mr. Wydeven. While the Employer disagrees with their characterization of Mr. Wydeven it is within their rights to have this opinion. However, it still remains the General Counsel's burden to explain document's relevance to determining whether or not Mr. Wydeven is a supervisor. Ms. Frederick was in the Hearing as the Employer's observer and could have been called by the General Counsel at any time. Mr. Keesey could have been easily subpoenaed by the General Counsel. The ALJ has committed reversible error by placing the burden of explaining the General Counsel's evidence on the Employer.

6. **ALJ erred in finding as fact that Mr. Wydeven had "a much greater role in the notice than he admitted to at the Hearing". (Exception 9).**

The ALJ wrote: "Specifically, it is likely that, at the very least, Wydeven participated in the investigation of the customer's complaint, reported his findings, conclusions, and recommendations to Frederick, and completed and signed the notice pursuant to his duties and responsibilities as the auto center manager". (ALJD 6:11-15). There is no testimony or documentary evidence that Mr. Wydeven participated in the investigation of the customer's complaint. There is no testimony or documentary evidence that Mr. Wydeven reported any findings to the Store Manager. There is no testimony or documentary evidence that Mr. Wydeven drew any conclusions from any investigation of the customer's complaint. There is certainly no evidence whatsoever that Mr. Wydeven reported any recommendations to the Store Manager. The ALJ has again fashioned this belief out of whole cloth basing this inference only on the fact that he finds Mr. Wydeven to generally be not credible and on no other testimony or evidence.

7. **ALJ erred in finding as fact that Mr. Wydeven attended the termination meeting of Mr. Gosz in his role as Auto Center Manager. (Exception 10).**

The ALJ quotes the following testimony from Mr. Wydeven in his Decision:

> "I was really good friends with [Gosz], I actually lived with him for a couple of years, and I felt really bad for him, with the situation. We were really good friends and I didn't want to see him go, so I kind of wanted to be there as support for him."[21]

The ALJ goes on to write: "I do not credit this uncorroborated testimony…". (ALJD 6:29).

Again, the ALJ is inferring that it is the Employer's responsibility to corroborate the testimony. It is the General Counsel who is using Gosz's termination as an example of Mr. Wydeven's exercise of supervisory authority. It is the General Counsel who elected to only call Mr. Wydeven as a witness regarding this termination. If Mr. Wydeven is found to be not credible then it is the General Counsel's burden to provide some credible basis for determining that Mr. Wydeven exercised one of the primary supervisory indicia by attending this meeting. The ALJ is apparently substituting his own personal belief of how the termination meeting should have been conducted for the evidence presented in the Hearing. Apart from Mr. Wydeven's testimony, there was no evidence presented by the General Counsel that Mr. Wydeven had any role in the meeting at all. To say first that Mr. Wydeven was not credible in this matter, and to then say that it is the responsibility of the Employer to corroborate his statements when called as a General Counsel witness, is to unlawfully shift the burden of proof from the General Counsel to the Employer.

8. **ALJ erred in finding that Mr. Wydeven exercises independent judgment in his recommendations and that evidence to the contrary is just an "historical curiosity". (Exceptions 12, 14).**

As stated in #3 above, testimony and documentary evidence clearly show that Mr. Wydeven only made one recommendation which was not followed by the Store Manager. The ALJ is basing his finding in part on the performance evaluations submitted as evidence by the General Counsel. As stated above, Mr. Wydeven was not even allowed to check the box indicating

[21] ALJD 6:25-27

whether or not the employee passed probation. Mr. Wydeven's comments on these evaluations are nothing more than observations and do not in any way constitute "recommendations".

The General Counsel further ignored Respondent Exhibits 1 and 2 – performance evaluations signed by and filled out in part by Mr. Wydeven **long before he held the position of Auto Center Manager**. It appears that it is the clerical practice of the Employer to have unit employees partially fill out and sign these forms – and it has been so practiced since well before Mr. Wydeven took on his current responsibilities.[22] These evaluations were shown to be relevant and significant because they were filled out and signed before Mr. Wydeven was an Auto Center Manager. As he was in a position that has not been shown or even alleged to be supervisory when he filled out and signed these evaluations it can hardly be argued that continuing this practice in his new position is evidence of primary supervisory indicia.

9. **ALJ erred in not assuming that Mr. Wydeven was not a supervisor in 2010. (Exception 13).**

In footnote 13 of his decision the ALJ stated the following:

> "To conclude that the 2010 evaluations show a "clerical" practice of using unit employees to evaluate each other requires an assumption that Wydeven was not a statutory supervisor in 2010."

The only lawful assumption that can be drawn is that Wydeven was not a Section 2(11) supervisor in 2010. As stated earlier in *Vencor* the burden of proving supervisory status is on the party alleging it. It is axiomatic to say that there must first be an allegation of supervisory status before a position can even be thought of as supervisory. There is no such allegation of supervisory status for Mr. Wydeven in the 2010 timeframe. To not assume that Mr. Wydeven

[22] It is interesting that the ALJ states "the Company bears the burden of persuading that the evidence is relevant, material and significant…". (ALJD 9:23-24). This merely is the same standard the ALJ should be applying to the General Counsel's evidence instead of making assumptions where no credible testimony has been given.

was not a supervisor is **to place the burden of proof on the Employer for an allegation that has not even been made**.

10. **ALJ erred in finding that Mr. Wydeven responsibly directs employees in the Auto Center. (Exceptions 14, 15, 16).**

Contrary to the ALJ's assertion Mr. Wydeven did not have a significant role in the disciplinary warning that was issued to Mr. Keesey (see #6 above). The ALJ erred by using Ms. Frederick's evaluation of Mr. Wydeven as proof that he responsibly directed the employees (GC Exh. 11). In reality, there was no meeting to discuss the evaluation. None of the ratings were explained to Mr. Wydeven. Ms. Frederick just "gave it to me and I signed it, and that was that" (Tr. 83:3 – 84:3). Other than unexplained conclusory statements on an evaluation form that Mr. Wydeven signed without discussion, there is no evidence that he directed anyone regarding anything but minor work related issues.

The ALJ suggests that Mr. Wydeven's pay raise is an example of his being rewarded for his performance in the direction of others. This is such a large leap of the imagination as to clearly constitute reversible error. First, as stated above there is no testimonial or documentary evidence that the performance ratings were ever explained to Mr. Wydeven. Second, the ALJ acknowledges that "there is no record evidence that the Company awarded Wydeven the raise solely because of his performance in directing employees and holding them accountable" (ALJD 11:6-8). In fact, **there is no record evidence as to the reason Mr. Wydeven received the increase at all**. It is the General Counsel who bears the burden of explaining why his evidence is material. It is the General Counsel who introduced Mr. Wydeven's pay raise and it is the General Counsel who bears the burden of explaining it. The only testimony on the subject shows that Mr. Wydeven has no idea what sales and service points are or why he received them. (Tr. 24:14-19). The General Counsel never produced any testimony or documentary evidence to

show the reason for the wage increase. For all the ALJ knows based on the record evidence it could have been an across-the-board increase given to all employees. The ALJ has attempted to cross a bridge that does not exist from the performance evaluation to the wage increase.

Further, the ALJ erred by finding that Mr. Wydeven uses independent judgment in the direction of employees. He bases his finding on the fact that the lube center policy manual "repeatedly instructs employees to contact their manager or supervisor before doing certain tasks if they have questions or problems". (ALJD 11:12-15). It is unarguable that the Board does not recognize conclusory statements in a company document as evidence of supervisory indicia. The ALJ does not state which "questions or problems" meet the definition of "independent judgment". The policy manual itself is a large document (GC Exh. 21). It would not be productive to go through each page of the document to show how it does not support a finding of responsible direction. Conclusory statements in the manual that one must go to a manager or supervisor are irrelevant without explanation. It is not what is in the manual that is important but what Mr. Wydeven's actual duties are. Under direct examination Mr. Wydeven testified that he would be the person an employee goes to if he/she had a problem with the hood latch. (Tr. 36: 13-20). He also testified that he would be the person an employee goes to if he/she had a problem with the prop rod. (Tr. 36:23 – 37:12). Mr. Wydeven also testified to the following:

> "Basically, I just come in to work and I do the same thing as everyone else all day. I change oil and handle customers, work the cash register, and then I order products for the lube center." (Tr. 27:4-7).

This is consistent with his later statement that he spends "98 to 99 percent of the time" doing what everyone else does. Mr. Wydeven is clearly the person to go to if an employee has a work related question. Questions regarding changing oil, hood latches or prop rods hardly fall into the category of responsible direction. In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006)

the Board found that in order for direction to be "responsible" there must be the possibility of adverse action if the direction is not given. No evidence of adverse or positive consequences has been presented in the record as it relates to answering the questions of the employees. Indeed, Mr. Wydeven is an experienced employee having been a Lube Technician for 4 or five years prior to his current position. (Tr. 20:2). It would seem appropriate for him to be the person to help with work-related questions as described above.

11. **ALJ erred in finding that Mr. Wydeven is an agent of the Employer. (Exception 17).**

The ALJ erred in relying upon the agreement between the Employer and the union to exclude his position from the bargaining unit – as addressed in #2 above. In addition, the ALJ erred in finding that the Employer used Mr. Wydeven as a conduit of information.

In support of the ALJ's "conduit" theory he writes that Mr. Wydeven is responsible for "transmitting information to employees about whether they will be retained following their probationary period". (ALJD 13:2-3). However, as has been shown earlier, Mr. Wydeven merely handed the reviews to the employees without explaining what any of the ratings meant. A clerical function of informing employees of the Store Manager's decisions can hardly be an example of functioning as an agent of the Employer.

In determining whether or not an employee is an agent the Board has consistently applied common law principles. In *SAIA Motor Freight, Inc*., 334 NLRB 979 (2001), the Board stated: "Under the doctrine of apparent authority, an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question." Stated another way, the issue is whether "...employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Albertsons, Inc*., 344

NLRB 1172 (2005). *California Gas Transport, Inc*., 347 NLRB 1314, 1317 (2006) stated: "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief."

The "act in question" here is the employee petition. The most relevant issue is whether the forwarding to the employees of the evaluations, without explaining what the ratings meant and without being responsible for whether or not they passed, would lead a reasonable person to believe that Mr. Wydeven was speaking and acting for management when he helped with the petition. Since Mr. Wydeven does not provide the policies to the unit employees, does the same work they do virtually all of the time, does not schedule employees, does not determine their lunches or breaks, paid union dues, believed himself to be in the union, and since no evidence was offered by the General Counsel regarding any other indicia of agency status, it cannot be found that Mr. Wydeven was so cloaked in the apparent authority of the employer that any unit employee would know that he was speaking and acting for management when he was circulating the petition.

IV. CONCLUSION

The General Counsel only offered one witness. The ALJ struck at the heart of the problem when he said "Actually, I think I wish I had more facts". (Tr. 123:14). This paucity of facts is a failure of the General counsel to put forward an adequate case. The Employer is not responsible for proving that Mr. Wydeven is not a supervisor or agent. The General Counsel is responsible for proving that Mr. Wydeven is. The Board has further made it quite clear that extreme caution should be exercised before finding supervisory status since supervisors are excluded from the protections of Section 7 of the Act. *King Broadcasting Co.,* 329 NLRB 378,381 (1999). "In light of this, the Board must guard against construing supervisory status too broadly to avoid

unnecessarily stripping workers of their organizational rights". *Beverly Enterprises-Massachusetts, Inc. v. NLRB,* 165 F.3d 960, 963 (D.C. Cir. 1999). The Board exercises "extreme caution" when granting supervisory status as doing so will deprive someone of their protection under the Act[23]. In this case, it would recklessly deprive the majority of employees their clearly stated wish not to be represented by Local 1473.

For the within and foregoing reasons, Respondent prays that the ALJ's Decision be reversed in its entirety, that the actions taken by the Respondent be sustained and that Respondent receive such all other and further relief as may be just and proper.

Respectfully submitted,

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[23] *King Broadcasting,* supra.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

In the Matter of	:	
	:	CASE NO. 30-CA-078663
WOODMAN'S FOOD MARKET, INC.	:	
	:	
And	:	
	:	
	:	
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1473	:	
	:	
	:	

CERTIFICATE OF SERVICE

This is to certify that I have on this day served a copy of the within and foregoing "Brief In Support Of Exceptions" upon the Board using the E-Filing system.

This is also to certify that I have on this day served a copy of the within and foregoing "Brief In Support Of Exceptions" via email upon the parties as follows:

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This 1st day of November, 2012.

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