

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

PETRO STAR, INC. d/b/a  
NORTH PACIFIC FUEL

Employer

and

Case 19-RC-14559

GENERAL TEAMSTERS, LOCAL  
NO. 959, affiliated with INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record<sup>1</sup> in this proceeding, the undersigned makes the following findings and conclusions.<sup>2</sup>

**I. SUMMARY**

The Employer is engaged in the business of selling fuel, lube oil, and other products to fishing vessels and providing fueling and storage services to those vessels in Dutch Harbor, Alaska. The Petitioner filed the instant petition seeking a unit of all employees, including the Fuel Foremen, the Journeyman Mechanic Foreman, and the Warehouse Foreman. The Employer argues that such foremen are statutory supervisors within the meaning of Section 2(11) of the Act and, thus, should be excluded from the unit. The Petitioner disputes this argument.<sup>3</sup>

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<sup>1</sup> Both parties timely submitted briefs, which were duly considered.

<sup>2</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>3</sup> During the representation hearing in this matter, the Employer contested the Union's argument that Marketing Manager Norman Bautista be included in the unit as it asserted that Bautista is a statutory supervisor and manager. Subsequent to the hearing, the Union informed the Region that it agreed that Bautista should be excluded from the unit. Based on the Parties' positions, and as the record supports a

Based on the evidence presented and my legal analysis as described in the following sections, I find that the Fuel Foremen are statutory supervisors and are, therefore, excluded from the unit. However, I further find that the Journeyman Mechanic Foreman and Warehouse Foreman are not statutory supervisors and are, thus, properly included in the unit.<sup>4</sup>

Below, I have provided a section setting forth the record evidence relating to background information about the Employer's operations and to the duties of the various foremen. Following the evidence section is my analysis of the applicable legal standards in this matter and a section directing an election in this case.

## **II. EVIDENCE**

### **A. Background**

The Employer provides fueling and other services to fishing vessels at six locations in Dutch Harbor: Resoff, Ballyhoo, Westward Seafoods, Captains' Bay, Unisea Dock, and Alyeska Seafoods. At the Resoff Dock, the Employer services small fishing vessels and houses its administrative office, its main office, and a warehouse. At the Ballyhoo Dock, the Employer services large vessels and maintains a fuel tank "farm" and warehouse. The Employer additionally provides fueling services to powerhouses and/or vessels at docks located at the Westward Seafoods Facility and at the Captains' Bay Facility where there is an additional warehouse. Finally, at the Unisea Dock and Alyeska Seafoods, the Employer provides fuel to vessels and to the seafood processing plant, respectively, via fuel trucks. Resoff is the most northern located facility in Dutch Harbor. Captains' Bay is the most southern facility, located about four miles south of Resoff.

Mark Hughes has been the director of operations for the Dutch Harbor facilities since January 1, 2004. He resides in Seattle, Washington. Operations Manager Tim Napper and Marketing Manager Norman Bautista are stationed in Dutch Harbor and report directly to Hughes. Napper resides in Captains' Bay while Bautista resides near the Ballyhoo Dock. Both Napper and Bautista can be reached by their employees 24 hours a day, 7 days a week by cell phone or radio. Either Napper or Bautista must be in Dutch Harbor at all times to oversee the operations.

Napper, with Bautista's assistance, oversees three departments: fueling, mechanic, and warehouse. The three Fuel Foremen (FF), the Journeyman Mechanic Foreman (MF), and the Warehouse Foreman (WF) at issue in these departments report directly to Napper. In addition, the Employer employs nine fueler employees, one mechanic assistant, and one warehouse person.<sup>5</sup>

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finding of Bautista's supervisory status grounded, in part, on his ability to fire and effectively recommend the hiring of employees, I find Bautista is a statutory supervisor and, therefore, exclude him from the unit.

<sup>4</sup> During the representation hearing, the parties stipulated that employees of the Employer working at a completely separate operation, Gas-N-Go, are excluded from the unit. As such, these employees are excluded from the unit. The parties further stipulated to exclude Tim Napper as a manager or supervisor. As the record supports such stipulation in that Napper hires employees, I am excluding him from the unit based on his Section 2(11) status. Finally, the parties stipulated that employees Teresa Laxfoss, Beverly Maines, and April Claeys are properly excluded from the unit as they are clerical employees. Accordingly, I shall exclude clerical employees from the unit.

<sup>5</sup> The Employer also employs maintenance employee Campbell McLaughlin. The Employer concedes this employee should be included in the unit. Accordingly, I shall include this employee in the unit.

The Employer provides its fueling services 24 hours a day, 7 days a week in three shifts at each facility. Two FF are assigned to day shifts at Resoff and Captains' Bay, each having a small crew of fuelers. The third FF is assigned to the swing shift at Resoff with a fueler crew. Another crew of fuelers work without a foremen during the night shift at Resoff.<sup>6</sup> There are nine fuelers in total that work on the various fueler crews. The MF, mechanic assistant, WF and warehouse person each work a 9 hour shift, 5 days a week.

**B. Disputed Supervisory Positions**

**1. Fueller Foremen**

The Employer alleges that FF are statutory supervisors as they possess certain indicia delineated in Section 2(11) of the Act. Specifically, the Employer claims the FF have the authority to hire, promote, assign, discipline, and responsibly direct employees or to effectively recommend such actions while using independent judgment. The Employer also contends that the FF possess secondary indicia of supervisory status, including different pay rates, benefits, hours, and type of work.

**a. Hire**

The three FF, Mike Gebhart, Roy Miettunen, and Albert Magalong, do not have the authority to hire employees on their own. That authority lies with Operations Manager Napper. However, Napper testified that he relies on his FF to recommend applicants for hire and follows such recommendations.

As the hiring pool in Dutch Harbor is quite small, Napper typically approaches the FF to see if they know of anyone for hire when there is a job vacancy. If the FF know of a potential applicant, they request that the individual fill out an application. Napper reviews the application, interviews the applicant and then asks the FF for their opinions of the applicant. The Employer presented evidence that in about January of this year, after being informed of a fueler vacancy, FF Magalong asked potential applicant Resty Dorey if he wanted to apply for the position. Magalong recommended Dorey by telling Napper that Dorey had a Class A CDL license (required in order to drive the fuel trucks) and that he was a "good guy". Napper testified that although he interviews all the individuals that he hires, many of the applicants, including Dorey, are hired based on such recommendations by the FF. However, there was at least one incident where FF Gebhart recommended that a prior employee be rehired, but such recommendation was rejected. The record does not indicate the circumstances of the rejection.

**b. Promote**

Napper testified that FF recommend fuelers for promotions. The Employer presented limited evidence that FF Meittunen and Gebhart recommended that then fueler Magalong be promoted to FF. Three other fuelers also applied for the position. Napper interviewed all four fuelers and then promoted Magalong. The record does not elaborate on why Napper would independently interview applicants if the FF are able to effectively recommend promotions.

**c. Assign & Responsibly Direct**

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<sup>6</sup> Although the record is not clear, it appears that the FF and fuelers are assigned to Captains' Bay or Resoff but also work at the other four facilities.

## **1. Work Schedules**

Each FF is assigned to either the day shift at Captains' Bay or Resoff or the swing shift at Resoff with a small crew of fuelers. The FF are not assigned to the night shift; rather, the fuelers on that shift are left instructions by the day shift FF. The FF and fuelers rotate between the shifts approximately every two months.<sup>7</sup> Napper develops the schedule a week or two prior to the rotation. Before posting the schedule, Napper circulates it among the FF for suggested modifications such as changing days off for particular fuelers or changing which fueler will cover another's shift. Although Napper testified that he always accepts the recommended changes, he also testified that in the most recent schedule, some of the FF wanted the schedule to increase from a 5-day week to a 6-day week, but he rejected the recommendation because he believed increasing the daily shift by one hour would suffice.

Changes to the posted schedule may be made when employees submit a form to their particular FF or directly to Napper. If the form is submitted to the FF, he first ensures that the schedule can be covered. The FF then signs the form and forwards it to Napper for his approval. The record does not indicate how the FF ensure coverage. If a request is submitted during the busy season, Napper asks the employee to reschedule his request as requests are usually denied during that time.

## **2. Assignment and Direction of Duties**

In general, the record reflects that the three FF enjoy the same responsibilities and authority with some minor differences depending on the assigned shift. The day shift FF are scheduled to arrive at work a half hour earlier than the fueler crew. The day shift FF then do a short inspection of the fuel tank farms to ensure all equipment is in proper working order. If there is a concern with a piece of equipment, the FF fill out a maintenance request form and submit it to Napper. The swing shift FF arrive at the same time as the crew.

Prior to beginning operations for their shifts, the FF go into the office and check a board which indicates which vessels are coming in to dock and at what time. Although there was some dispute in the record, it appears that the information on the board is typically completed by office personnel, and/or by Napper and Bautista, but the FF may also put information on the board if contacted directly by the vessels. The FF then speak to Napper and receive a briefing as to which vessels are coming in and the services for the vessels that need to be completed during the shift. The day shift FF may also speak to the night crew to see if anything notable occurred during that shift or if unscheduled vessels are expected. In the case of servicing vessels, the vessel's chief engineer typically contacts the FF by radio when they arrive and the FF directs them to the dock. Magalong testified that fuelers on occasion also direct vessels to the dock but it is unclear under what circumstances this would occur. Once the vessel has docked, the fuelers and the FF proceed to service the vessels, based on the FF assignments.

The FF assign the fuelers on their shift to duties at a particular facility whether it be for fueling operations, such as fueling a ship or providing oil to a vessel, or other non-fueling activities such as backloading materials for a vessel, cleaning fuel tanks, or moving inventory

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<sup>7</sup> The FF rotate between day and swing shifts while the fuelers rotate on all three shifts.

and oil drums between facilities.<sup>8</sup> However, the first priority for all FF is to assign fueling tasks. Thus, the FF must determine when non-fueling tasks should be accomplished and then assign those tasks to the fuelers to complete between fueling operations.

The FF assign fuelers to carry out the needed services depending on the fuelers' knowledge of the facilities, experience, appropriate certifications, availability, and the size of the vessel and the services required. Thus, the FF assess what needs to be done and choose a fueler to complete the task based on some or all of these criteria. In relation to the experience level of the fuelers, there are three specific instances where the FF assign work after they have approved the ability of the fuelers to perform certain work. First, FF are in charge of determining whether a particular fueler has the experience to fuel a vessel alone. A FF will typically train a fueler for 2-4 months and then make a recommendation to Napper when he feels that the fueler is ready to fuel alone. Such recommendations are made exclusively by the FF and are always accepted by Napper. Second, FF also determine whether and when a fueler is allowed to drive a fuel truck. Again, the FF make this determination and recommendation based on their observations; such recommendations are always accepted by Napper. However, as seven of the nine fuelers are currently trained to drive the fuel trucks, the FF must also determine which of the trained fuelers should be assigned at any particular time. The details of such a determination were not discussed in the record. Finally, in terms of qualifications, Napper testified that 99% of the fuelers are certified to clean the fuel tanks at the farms. The FF determines which of the certified fuelers should clean the tanks. However, the record does not indicate how the FF chooses among the certified fuelers to complete this task.

In assigning work at the various docks during inclement weather, the FF must first decide if a vessel should dock. Napper testified that based on the weather, the FF must determine if docking the vessel would be threatening to the vessel or the dock. Magalong indicated that if there is wind or bad weather at Captains' Bay, he calls Napper or Bautista to have either of them decide if a vessel should dock there since he is usually at the Resoff dock and can not see the conditions at Captains' Bay. Magalong's testimony regarding weather situations at Resoff was rather unclear. However, based on his limited testimony, it appears that at times he checks with Napper or Bautista prior to docking vessels at Resoff, but will also assert his authority to make the decision himself on other occasions. Magalong testified that fuelers also direct vessels to the dock but did not clarify whether the fuelers make this determination during poor weather or only in good conditions. However, it is clear from the testimony that in any emergency situation, the FF must contact Napper or Bautista. Details of what would constitute an emergency were not explained in the record.

FF also have the authority to determine if a vessel may dock overnight. Gebhart testified that he will check with Napper or Bautista to see if any other vessels are scheduled to arrive and then determines if there is room for an overnight stay.

In addition to assigning work, FF must make sure that the proper equipment, including fuel and lube trucks, is present at each facility for the fuelers' use. Throughout the shifts, FF also answer questions from the fuelers and assist the fuelers in completing tasks if needed. However, since there are different facilities and only one to three fuelers assigned to each FF, fuelers often work alone, away from the FF. Contact is nevertheless maintained by hand-held radios. The FF also stay in contact with Napper or Bautista to inform them of what is being

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<sup>8</sup> Vessels may offload used oil at the docks. The FF determine when the barrels must be transported from the dock to the fuel farms as the docks are not designated to store oil. The record is silent as to exactly how the FF decides when to transport the barrels and to whom to assign that work.

done and if any unscheduled vessels called in over night. The swing shift FF leaves notes for Napper regarding what occurred during that shift as Napper is not at work at the end of that shift. Further, Napper testified that both he and Bautista drive by the facilities during the shifts to make sure the operation is running smoothly.

At the end of the shift, fuelers must check in with their respective FF in case the FF need the fuelers to stay late to complete a job. Although FF do not have unlimited authority to approve overtime for all job duties, FF have the authority to call in scheduled fuelers early or to make fuelers stay late to complete fueling operations as fueling is priority work.<sup>9</sup> Although the next shift of fuelers could presumably take over the work of the prior shift, apparently there are occasions where the FF need to make a determination as to whether it would be necessary or more efficient to have their current crew finish needed work. The details of how or when such a determination is needed was not provided in the record.<sup>10</sup> The FF do not have the authority, however, to call in fuelers who are not scheduled to work; the FF must discuss the situation with Napper or Bautista before calling in the worker.

Although Napper testified that the FF are held responsible for the work of the fuelers, the evidence presented did not reflect what actions are taken against the FF if the work is not completed or performed improperly. The record does not indicate that the FF are routinely evaluated in this regard. Further, none of the FF have been disciplined due to the performance of any of the people they supervise even though the record reflects disciplinary actions have been taken against at least one fueler for performance issues.

There was varying testimony regarding the amount of time FF spend on foremen activities versus the amount of time they spend actively completing fueler tasks. Magalong testified that he spends 20% of his time on FF activities while Gebhart testified that in the busy season he spends only 25% of his time on FF duties, and in the slow season of November and December, he spends about 60-70% of his time on FF activities. Napper testified that FF spend 50% of their time on foremen activities.

#### **d. Discipline**

The Employer does not have a progressive disciplinary system. As such, neither verbal nor written disciplinary actions necessarily lead to more severe forms of discipline. Nevertheless, the Employer presented evidence of two occasions where two FF issued written disciplinary notices to fuelers. In the first instance, FF Gebhart issued a written warning to a fueler for leaving work without first checking in with him. In the second instance, FF Miettunen and Napper filled out a written warning together for a fueler who had failed to follow Miettunen's directions. The failure resulted in delayed services to a scheduled vessel. There is no evidence that either disciplinary notice contained disciplinary recommendations or affected the job status of either fueler. None of the FF have been involved in the termination or suspension of employees.

#### **e. Secondary Indicia**

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<sup>9</sup> FF also have the authority to work overtime themselves if necessary for fueling operations. The FF do not need to request permission to work the overtime.

<sup>10</sup> Although the record indicates that, at least in the busy season, the fuelers regularly work overtime, the record fails to indicate whether the majority of the overtime is scheduled overtime or if it is based on the FF's decision that extra hours are necessary on a particular day.

In addition to the indicia described above (hours of work, type of work, etc.), the Employer contends the FF differ from the fuelers in several respects including pay rates, benefits, and equipment requisition.

In terms of wages, both the FF and fuelers are paid an hourly wage, but the FF earn from \$19.45 to \$22.34 per hour, while the fuelers wages range from \$14.00 to \$19.09 per hour. All three FF also receive free company housing while the fuelers pay \$300 to \$350 in company housing costs. Two of the three FF are also provided company vehicles.<sup>11</sup> As for equipment requisition, if the FF believe that certain equipment needs to be maintained or repaired, the FF report such on a form to Napper who forwards it to the Journeyman Mechanic Foreman.

## **2. Journeyman Mechanic Foreman**

The Employer alleges that the Journeyman Mechanic Foreman (MF) is a statutory supervisor as he possesses some of the criteria listed in Section 2(11) of the Act, including the authority to transfer, assign and responsibly direct, and discipline employees, or to effectively recommend such actions, while using independent judgment. The Employer also contends that the MF possesses secondary indicia of supervisory status, including different pay rates, benefits, hours and type of work than the Mechanic Assistant.

MF Robinson is responsible for maintaining the Employer's stock of four fuel trucks, numerous pickup trucks, over twelve forklifts, and the fuel tank farms. Robinson was hired in September 2001 as journeyman mechanic. Mechanic Assistant Matt Lightner works in the mechanic shop at Captains' Bay with Robinson. Robinson's title of "Journeyman Mechanic" is reflected on the Employer's written job description. Robinson testified that he was never informed that his job entailed supervising Lightner. Rather, Robinson stated he was hired as a mechanic and was told that he would have a helper as in any mechanic shop.

### **a. Transfer**

The Employer asserts that Robinson has the authority to or is involved in the transfer of employees. The Employer points to a specific instance involving a replacement employee, John Syring. Robinson was injured on the job in early 2002 and was off from work for about three months. Although Napper testified on this issue, he had no direct knowledge of circumstances surrounding the transfer since it occurred prior to his employment. In any event, Napper testified that while Robinson was on sick leave, Bautista hired mechanic Syring to temporarily replace Robinson. When Robinson returned, he complained to Rusty Sinnot, Napper's predecessor, about his displeasure with Syring's performance and informed Sinnot that he (Robinson) did not want to work with Syring. Syring was subsequently transferred to a fueler position. The specifics of how the decision to transfer was made and Bautista's involvement in the decision are not explained in the record.

The Employer also points to a separate occasion in which Robinson was involved in a transfer decision. In 2002, Robinson complained to Napper about Lightner's work performance. Napper instructed Robinson to complete a written evaluation on Lightner and to submit it to Napper for review. Napper testified that he told Robinson that if Lightner was not able to complete his tasks, he would move Lightner to a fueler position. Robinson stated that he would like Lightner to remain a mechanic if he improved. Once Robinson completed the evaluation,

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<sup>11</sup> FF Magalong is not provided with a company vehicle as the policy was initiated under the prior owner. The Employer did not extend this policy to Magalong when he was hired.

Napper reviewed it and then he and Robinson signed it.<sup>12</sup> They both then met with Lightner to discuss the evaluation. Napper testified that after the evaluation, Lightner's performance greatly improved. Thus, no transfer ever occurred.

**b. Assign and Responsibly Direct**

Robinson and Lightner work according to a posted schedule. They both work five days a week but are not allowed to have the same days off so that there will be coverage seven days a week. In writing the schedule, Napper testified that he calls Robinson and asks him which days he would like off during the week. However, Robinson testified that he and Lightner initially decide together which days they will have off and then Robinson informs Napper which days he wishes to have off. With that information, Napper then completes the schedule.

In reference to changes to the schedule, Robinson testified that he was told in a safety meeting that the Employer has a no-overtime policy unless authorized by management. If overtime work is needed, Robinson testified that he will talk to Napper and let him know what work still needs to be completed on that day and then Napper authorizes the overtime. Although Napper provided some conflicting testimony on this issue, in the end, he testified that Robinson did not have unlimited authority for approving overtime. Rather, Napper testified that once Robinson informs him of the workload and need for overtime, Napper generally approves overtime work. At that point, Robinson informs Lightner that he is authorized to work extra hours to complete the necessary work. As for time off, Robinson testified that if Lightner wants time off, Lightner faxes the request to Napper. Napper then checks with Robinson to make sure Robinson can complete the work alone and, if so, approves the request.

In general, it appears that Robinson receives work assignments via maintenance request forms and telephone conversations with Napper. Napper testified that he receives the maintenance request forms from the FF and passes them on, without revision, to Robinson. Napper further stated that he and Robinson talk each day by phone and he informs Robinson of any repair work that must be done that day. Napper testified that at times he will direct Robinson to prioritize a particular project. Napper testified that he has also, on at least six occasions in the last year, assigned projects directly to Lightner. However, as Napper infrequently visits the maintenance shop and as he rarely has any interaction with Lightner, Napper testified that Robinson is, therefore, completely in charge of prioritizing the work and assigning and directing Lightner's work.

Robinson, in contrast, testified that Napper calls him and tells him what work is to be done and assigns the work to either Robinson or Lightner. Robinson states that Napper also prioritizes the work. Robinson further testified that on a couple of occasions, he has arrived at the shop and Lightner was already gone, working elsewhere at the direction of Napper. Robinson also indicated that in the unusual circumstance that Napper does not dictate who should do what work, Robinson and Lightner collaboratively decide how to divide the work. The only exception is work needed on the forklifts; for that type of work, Robinson testified that he decides what work he wants to do on the forklifts and Lightner does the remaining work. In that regard, Robinson testified that since he has more experience, Lightner generally ends up doing routine maintenance work and that he usually checks Lightner's work to make sure it was done correctly. If it was not, he has Lightner redo the work or does it himself. On days that Robinson is not present, he leaves a prioritized list of work to be done for Lightner. The testimony did not

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<sup>12</sup> Although one of the items in the evaluation stated that Lightner needed to, "accept assigned changes and tasks," the testimony did not reveal who made such changes.

indicate how this list was compiled or who prioritized the work. Although the Employer argues that Robinson is completely in charge of the shop, there is no specific indication in the record as to how Robinson is held accountable for Lightner's work.

**c. Discipline**

The Employer argues that Robinson has the authority to discipline employees in that if Robinson has had a problem with Lightner's performance, Napper has instructed him to have a "heart to heart" talk with Lightner. In contrast, Robinson testified that he was told by Napper's predecessor that he did not have the authority to discipline employees, and, in fact, has never disciplined anyone.

**d. Secondary Indicia**

In addition to the above, the Employer contends Robinson's employment differs from Lightner's in several respects including pay rates, benefits, and job duties. Regarding wages and benefits, Robinson earns \$26.35 per hour while Lightner earns \$18.01. Robinson also receives free housing while Lightner has to pay \$300 in rent. Finally, Robinson was offered the use of a company car while Lightner was not.<sup>13</sup>

In relation to the job duties, when Robinson was hired, he was told to develop and maintain a preventative maintenance program. Robinson testified that he did so, but the record is silent as to exactly how he did this or what the program entails. Robinson was also directed to obtain quotes for new forklifts. He submitted the quotes to management with a recommendation to purchase a particular forklift. Such recommendation was eventually followed, but beyond that, no other details on this purchase were put into the record.

**3. Warehouse Foreman**

The Employer alleges that the Warehouse Foreman (WF) is a statutory supervisor as he possesses the following Section 2(11) indicia: the authority to hire, assign, and responsibly direct employees or to effectively recommend such actions while using independent judgment. The Employer also contends that the WF possesses secondary indicia of supervisory status, including a different pay rate and benefits.

WF Joey Fernandez is in charge of storing warehouse processing supplies such as fiber and strapping, and storing products taken off vessels. Fernandez works at both the warehouses at the city dock at Ballyhoo and at Captains' Bay but is based at the Ballyhoo warehouse. Fernandez works with one other warehouse person, Florinor Bucaneg.<sup>14</sup>

**a. Hire**

The Employer's testimony regarding the WF involvement in hiring parallels that of the FF involvement discussed above. In particular, Napper testified that when there was an opening for a warehouse person, Fernandez informed him of someone that he knew who would "fit the bill" – Bucaneg. Napper ran Bucaneg's name by both Bautista and the FF prior to hiring Bucaneg. Napper testified that although there were no other candidates, Bucaneg was hired based on Fernandez's recommendation. On a second occasion, the Employer had a fueller

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<sup>13</sup> Robinson testified that the car is not in running condition and, therefore, he can not use it.

<sup>14</sup> Neither Fernandez nor Bucaneg testified.

position available. Fernandez told Napper that his nephew, Guillermo, would be a good candidate. Napper testified that when he asked the FF about Guillermo, they stated that if he was Fernandez's nephew, that he would be a good choice. Napper then hired Guillermo.<sup>15</sup>

**b. Assign and Responsibly Direct**

In determining the work to be done, the vessels contact either Fernandez or Bautista and inform them of services needed such as the need for particular products to be loaded on board. Fernandez then tells Bucaneg to place the requested items on the dock.<sup>16</sup> If Fernandez is not at work, the FF inform Bucaneg directly of what the vessels need. The record also does not indicate how Fernandez is held accountable for Bucaneg's work.

**c. Secondary Criteria**

The Employer contends the WF also possess secondary criteria supporting a finding of supervisory status. Such criteria, in addition to that noted above, involves differing pay rates, benefits, and training. Fernandez earns \$21.84 per hour while the warehouse person earns \$15.23 per hour. Fernandez receives a discount of \$100 off of his housing expenses, in addition to the use of a company car. Bucaneg does not receive these additional benefits. Fernandez is also in charge of training Bucaneg on how to handle and transport cargo and how to stage equipment. The record does not reflect the nature and extend of this training.

**III. LEGAL ANALYSIS**

As noted above, the Employer contends that the FF, the MF and the WF possess indicia of supervisory authority as that term is defined by Section 2(11) of the Act while the Petitioner maintains that the Employer has not met its burden of establishing that those foremen possess supervisory authority. For the reasons set forth below, upon a careful review of the record and on the analysis of applicable precedent, I find that the FF are supervisors within the meaning of Section 2(11), but that the MF and WF are not statutory supervisors.

The term "supervisor" is defined in Section 2(11) of the Act as follows:

[A]uthority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility 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 merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. §152(11).

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status. *Stephens Produce Co., Inc.*, 214 NLRB 131 (1974); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). Moreover, the Supreme Court in *Kentucky River* emphasized that the degree, not the kind, of independent judgment is critical with respect to a finding of supervisory status. Such judgment does not depend on the complexity of the work from the perspective of the

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<sup>15</sup> As noted before, since Napper testified that he interviews all hires, he presumably interviewed both Bucaneg and Guillermo prior to hiring them.

<sup>16</sup> The record does not reflect whether it is Bucaneg's regularly assigned duty to place requested items on the dock.

alleged supervisor; rather, the judgment must just exceed that which is merely routine or clerical in nature. See *Phillips Industries, Inc.*, 295 NLRB 717, 735 (1989). Independent judgment occurs when a supervisor makes decisions independent of consultation with higher management. *Id.* However, “[t]he Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect.” *Hydro Conduit Corp.*, 254 NLRB 433 (1981). “A worker is presumed to be a statutory employee and the burden of providing a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act.” *Hicks Oil & Hickgas, Inc.*, 293 NLRB 84 (1989); *Kentucky River*, supra. Here, that burden falls on the Employer.

#### **A. Fueler Foremen**

As described below, I find that the record reveals sufficient evidence to establish that the FF are statutory supervisors as they possess the authority to assign work to the fuelers and do so with the use of independent judgment. However, in contrast to the Employer’s position, I find that the FF do not possess the authority to hire, promote, discipline, or direct employees or effectively recommend such actions.

With respect to assigning work, the record reveals that the FF assign fuelers to perform various activities at several different facilities. The FF assign the work to a particular fueler based on the fueler’s knowledge of a particular facility, experience, possession of appropriate certifications, availability, the size of the vessel to be serviced, services required, and weather conditions. The record as a whole shows that the FF use these criteria to exercise their discretion as to who should complete distinct tasks and when such tasks should be undertaken. The Petitioner nevertheless argues that the FF do not exercise independent judgment because the assigned tasks are routine and repetitive.

In support of this argument, the Petitioner cites *Clock Electric, Inc.*, 338 NLRB No. 110 (2003). In that case, the Board affirmed, without comment, the ALJ’s findings that certain electrical lead men were not supervisors. In *Clock Electric, Inc.*, the lead men were constrained by the use of drawings and blue prints and the work was truly repetitive in that there were only two different types of tasks to assign – pulling wire or running pipe. Further, the assignments were based on whether the employees were journeymen, apprentices, or helpers with distinct skills in each classification.<sup>17</sup> As such, the ALJ found that the assignment and direction of work was routine in nature and did not require the use of independent judgment. *Clock Electric, Inc.* is distinguishable from the case at hand because, here, the FF are not following a predetermined blueprint or pattern of assigning work. Rather, the FF use independent judgment in determining to whom and when to assign to a particular task. For example, a FF must decide in inclement weather and crowded conditions whether it is safe to dock fishing vessels in order to allow his crew to service the vessels. This decision requires independent judgment based on weighing non-routine factors of weather and congested conditions. *Commercial Barge Line Co.*, 337 NLRB 1070, 1071 (2002).<sup>18</sup> Further, the FF must assign and prioritize non-fueling tasks to be completed by fuelers during each shift without compromising the fueling operations.

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<sup>17</sup> Although fuelers are required to have training or certifications to fuel, drive fuel trucks, or clean the fuel tanks, this is not a defining issue in this case as a majority of fuelers have the necessary qualifications. The question in assigning the fuelers, therefore, encompasses the level of experience of the qualified fuelers, their knowledge of the operations, etc.

<sup>18</sup> Although the Petitioner presented Magalong’s testimony on this issue, the Petitioner did not clearly rebut the Employer’s evidence that FF determine when vessels dock in poor weather conditions.

Completing this mission, especially during the busy season, is not routine or repetitive. The FF also make critical, independent decisions as to whether fuelers are capable of fueling a vessel or driving a fuel truck without assistance. These decisions, which can take anywhere from 2-4 months to come to fruition, greatly affect the type of work a fueler is allowed to do. Without the FF's approval, the fueler will not be able to, on his own, perform the Employer's main priority, fueling vessels. Finally, the record shows that FF have independent authority to require fuelers to work overtime by coming in early for a shift or staying late into the next shift to complete necessary work. Although the record was not clear on how such determinations are made, it is evident that such decisions require the use of independent judgment. If it was merely a question of completing work, the next shift could easily fill in. Thus, the record as a whole indicates the FF must use independent judgment in deciding if overtime is necessary for a particular situation.

Based on the above, the record reveals that the FF's assignment of work is not perfunctory or routine in nature. Rather, the FF use independent judgment to assign the fuelers in the performance of their work.

Secondary indicia presented in the record supports my finding that FF are supervisors. In particular, the FF earn more than the fuelers and, unlike fuelers, receive free housing and the use of company cars. These are benefits that the fuelers do not receive.

Regarding the FF's authority to hire and promote employees, I find the Employer provided insufficient evidence to establish that FF effectively recommend such actions without an independent investigation by their superiors. Where the evidence shows that a recommended action is not adopted without any independent investigation by higher authorities, the recommending individual is not a supervisor. *Ryder Truck Rental, Inc.*, 326 NLRB 1386, fn 9 (1998). Here, Napper testified that although he asks for recommendations regarding candidates, he interviews all candidates before hiring them. Where "supervisors like [Napper] participate in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Sec. 2(11)." *Id.* Similarly, FF Meittunen's and Gebhart's recommendations to promote Magalong cannot establish supervisory status as Napper interviewed Magalong and other applicants before deciding to promote Magalong.<sup>19</sup> Accordingly, the Employer has not proffered sufficient evidence that the FF effectively recommend hiring and promoting employees as envisioned by Section 2(11) of the Act.

The Employer has also not met its burden in establishing that the FF have the authority to discipline or effectively recommend such action. It is well established that an employee's power to point out deficiencies in the job performance of other employees does not establish statutory supervisory authority. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). Simply memorializing such job deficiencies is merely reportorial in nature and, alone, does not constitute discipline as contemplated by the Act. The mere authority to issue oral and written warnings also does not constitute supervisory authority if the warnings do not have any effect on an employee's employment status. *Azuza Ranch Market*, 321 NLRB 811, 812-813 (1996). Finally, if the warnings merely relay performance issues without any recommendation for actual discipline, such warnings fail to establish supervisory authority. *Williamette Industries, Inc.*, 336

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<sup>19</sup> *Donaldson Bros. Ready Mix, Inc.*, 341, NLRB No. 124 (2004), cited by the Employer is distinguishable. In contrast to the instant case, the individual in question in *Donaldson Bros.*, conducted interviews alone and then made hiring recommendations. The higher level manager merely reviewed the applications before accepting the recommendation. Such facts do not exist in this case.

NLRB No. 59 (2001); *Illinois Veterans Home at Anna*, 323 NLRB 890 (1997). Here, the record evidence establishes that the FF have not themselves issued discipline that affected the employment status of fuelers and have not made any effective recommendations for discipline. As such, I find that FF do not possess the authority to independently discipline employees or effectively recommend such action.

Finally, I conclude that the record does not support a finding that the FF responsibly direct the work of the fuelers. Although assignment and direction of employees is often discussed together, they are separate and distinct indicia under Section 2(11) of the Act. Responsible direction “depends ‘on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs.’” *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002), citing *Schnurmacher*, 214 F.3d 260, 267 (2<sup>nd</sup> Cir. 2000). Here, there is insufficient evidence showing that the FF are held accountable for the fuelers’ performance. I, therefore, find that the FF do not possess the authority to responsibly direct the fuelers.

In light of the above finding that the FF have the authority to assign the work of employees and the record as a whole, I find that the FF are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude the FF position from the unit.

#### **B. Journeyman Mechanic Foreman**

The Employer asserts that the MF possesses the authority to transfer, assign, discipline, and direct the work of the Mechanic Assistant, and further, possesses secondary indicia of supervisory status. I find that the MF does not possess such authority or indicia and is thus, not a statutory supervisor.

With respect to the Employer’s evidence surrounding the transfer of John Syring to a fueller position, the Employer argues that such transfer occurred due to Robinson’s effective recommendation. However, the record lacks the requisite detail to establish that Robinson effectively recommended the transfer. Thus, although Napper testified to this transfer, he was not employed at the time the transfer took place. Rather, Napper testified that Bautista was involved in the decision, but as Bautista did not testify, the extent of his involvement is not know. As such, it is uncertain whether Robinson’s wish to have Syring leave the mechanic division was accepted without question or whether an independent investigation was made after Robinson raised his concerns. As such, the Employer’s evidence on this transfer fails to demonstrate that Robinson effectively recommended Syring’s transfer.

The Employer also contends that Robinson prevented the transfer of Lightner to a different position after he complained to Napper about Lightner’s job performance. However, the evidence shows that Napper and Robinson were merely discussing Robinson’s concerns and how to deal with them. There is insufficient evidence to show that Robinson’s suggestions to give Lightner a chance to improve was an effective recommendation. Rather, it appears to merely be in accordance with Napper’s original directive to evaluate Lightner in order to give him an opportunity to review his performance issues. Moreover, Napper was actively engaged in the entire process as he, among other things, reviewed and signed the evaluation and met with Lightner and Robinson to discuss Lightner’s performance issues and need for improvement. Under these circumstances, the Employer provided insufficient evidence to establish that Robinson effectively recommended that Lightner not be transferred.

I also find that the record does not support the Employer's contention that Robinson possesses the authority to assign work to Lightner with the use of independent judgment. I note that Napper's testimony regarding Robinson's role in assigning work is in almost direct conflict with Robinson's testimony. While Napper testified that Robinson is nearly always in complete control of assigning and prioritizing work, Robinson testified that Napper holds and implements this authority. The evidence as a whole fails to resolve this conflict in the testimony. In any event, the balance of the testimony supports a finding of non-supervisory status. Here, unlike in *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99 (2003), cited by the Employer, Napper admitted that he has prioritized work for Robinson and Lightner, and on at least six occasions, personally assigned work to Lightner. Robinson also testified that there are times when he has arrived at the shop and Lightner had already left to complete work assigned to him by Napper. This evidence is in contrast to that found in *Arlington Masonry Supply, Inc.*, where the Board held that a maintenance worker was a statutory supervisor. In that case, the supervisor was in complete control of assigning work with "absolutely no input" from management regarding the priority or assignment of work. Here, Napper admittedly has daily input regarding work to be completed by Robinson and Lightner and has directly assigned work to Lightner. Moreover, Robinson testified that because of the difference in their experience levels, Lightner's work typically involves routine maintenance. The Employer did rebut this testimony. The assignment of work that is routine and repetitive does not support a finding of supervisory status as it does not involve the exercise of independent judgment.

Finally, the Employer's argument that Robinson assigns overtime using independent judgment is contradicted by Napper's testimony that Robinson can only assign overtime after Napper is informed of the work to be completed and approves overtime for such work. Based on these facts and the record as a whole, I find that the Employer has failed to meet its burden of proving that Robinson assigns work to other employees.

Regarding discipline, the Employer contends that Robinson possesses the authority to impose discipline in that he has "heart to heart" talks with Lightner over performance issues. As discussed above, the fact that an employee may point out work deficiencies to another employee does not establish statutory supervisory authority. *Franklin Home Health Agency*, 337 at 830. Further, as the record does not reveal that any of Robinson's discussions with Lightner resulted in true discipline affecting his job status, I find that Robinson does not possess the authority to independently discipline employees or effectively recommend such action.

Finally, with respect to primary indicia, although the Employer argues that Robinson responsibly directs Lightner, the record does not indicate how the Employer holds Robinson accountable for Lightner's performance and work product. The Employer's allegation that Robinson is accountable is conclusionary and without support in the record. *Franklin Home Health Agency*, 337 NLRB at 830. I, therefore, find for the reasons previously discussed, that Robinson does not possess the authority to responsibly direct Lightner.

In support of its position that the MF possesses supervisory authority, the Employer also points to secondary indicia such as the MF's higher rate of pay, free housing, use of a company car, and having developed a maintenance program, recommended the acquisition of equipment, and evaluated employees. However, absent evidence that individuals possess any of the enumerated indicia of supervisory status in Section 2(11), secondary indicia is not relevant as it alone will not support the finding of supervisory status. *Housner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998). Additionally, the Board has found that the authority to evaluate (standing alone) is not one of the indicia of supervisory status set out in Section 2(11) of the Act.

*Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Thus, Robinson' evaluation of Lightner is not pertinent at this point.<sup>20</sup>

In view of the above and the record as a whole, I find that the Employer did not meet the burden of establishing that Robinson is a supervisor as that term is defined in the Act. I shall, therefore, include the MF position in the unit sought by the Petitioner.

### **C. Warehouse Foreman**

The Employer asserts that the WF has the authority to hire, assign and direct the work of the warehouse person and also possesses secondary indicia of supervisory status. I find that the record does not support such an argument and, therefore, conclude the WF is not a statutory supervisor.

The evidence regarding WF Fernandez's authority to hire or recommend hiring employees corresponds to the evidence proffered by the Employer for the FF. The Employer cited two occasions where Fernandez recommended individuals for hire. However, Napper hired the individuals after interviewing the applicants and requesting opinions from other individuals. In light of the above and the record as a whole, I find that Fernandez does not possess the authority to hire or effectively recommend the same.

The record evidence regarding Fernandez's authority to assign and direct work is quite limited. Essentially, Napper testified that Fernandez informs Bucaneg as to what products need to be staged on the dock for a vessel. The record does not elaborate on this or any other alleged authority that Fernandez has over Bucaneg. Indeed, from the record, it is equally plausible that Fernandez merely relays work assignments or tasks to Bucaneg. In short, the Employer's conclusionary statements and the scant evidence surrounding Fernandez's duties, responsibilities, and accountability fail to support a finding that he assigns and/or responsibly directs Bucaneg in his work. *Franklin Home Health Agency*, 337 NLRB at 830.

In consideration of the above and the record as a whole, I find that the Employer has failed to meet its burden of establishing that WF Fernandez possesses indicia of supervisory authority. Therefore, I shall include the WF position in the unit.<sup>21</sup>

## **IV. CONCLUSION**

Based on the above, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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<sup>20</sup> Even assuming primary indicia have been found, "when an evaluation does not, by itself, affect wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." *Id.* at 536. In the instant case, the record reflects that the one evaluation completed by Robinson was intended to assist Lightner rather than to affect his wages or employment status. In effect, the evaluation served as nothing more than a warning to Lightner. Oral or written warnings that do not have any effect on an employee's employment status do not establish supervisory authority. *Azuza Ranch Market*, 321 NLRB at 812-813. Here any impact on Lightner's job status would apparently only flow as a result of his future job performance. Such speculative impact is insufficient, under the circumstances of this case, to warrant a conclusion that Robinson possesses the authority to transfer and/or discipline employees.

<sup>21</sup> As the Employer failed to meet its burden that Fernandez possesses Section 2(11) authority, the secondary criteria he may possess is of no relevance.

All full-time and regular part-time employees employed by the Employer at its Dutch Harbor, Alaska facilities; excluding fuel foremen, employees of the Employer at its Gas-N-Go facility, office clericals employees, managers, guards and supervisors as defined by the Act.

There are approximately 13 employees in the appropriate unit.

## **V. DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by General Teamsters, Local No. 959, affiliated with International Brotherhood of Teamsters, AFL-CIO.

### **A. List Of Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before September 20, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

**B. Notice Posting Obligations**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

**C. Right To Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by September 27, 2004.

**DATED** at Seattle, Washington, this 13<sup>th</sup> day of September 2004.

/s/ Richard L. Ahearn  
Richard L. Ahearn, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174