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

POWELL'S BOOKS, INC.

Employer

and Case 36-UC-299

INTERNATIONAL LONGSHORE &
WAREHOUSE UNION, LOCAL 5, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

Upon a petition duly filed under Section 9(b) 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[1] in this proceeding, the undersigned makes the following findings and conclusions.[2]

I. SUMMARY

The Employer is a State of Oregon corporation engaged in the business of retail sales of books at various facilities located in and around Portland, Oregon. The Petitioner represents an existing unit comprised of all employees employed by the Employer at its Portland-metropolitan-area facilities; excluding all confidential employees, managerial employees, guards and supervisors as defined by the Act. In fall 2004, the Employer created a new job position entitled "data administrator," which was filled by Steve Lin in December 2004. Thereafter, the Petitioner filed the instant petition seeking to include the data administrator in the bargaining unit. The Employer asserts that the data administrator is a managerial and/or supervisory position and is properly excluded from the bargaining unit.

Based on a careful review of the record and the parties' respective briefs, I find that the Employer has not met its burden demonstrating that the data administrator is a managerial employee or a supervisor within the meaning of Section 2(11) of the Act. Accordingly, I shall clarify the existing all employee unit to include the data administrator position in the bargaining unit.

Below, I have set forth the record evidence concerning the Employer's computer support operations and the creation of the data administrator position. I have also set forth the record evidence regarding the alleged supervisory and managerial status of the data administrator. Following the presentation of the evidence, I have set forth a section applying the Board's legal standards to the evidence. The decision concludes with an order directing that the data administrator position be included in the bargaining unit and with a section on the right to request review of this Decision and Order.

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[1] The Employer and Petitioner timely filed briefs, which were duly considered.

[2] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

II. RECORD EVIDENCE [3]

A. The Employer's Computer Operations

The Employer operates eight retail bookstores that sell new and used books and two warehouses in the Portland, Oregon metropolitan region. The Employer's President is Michael Powell. In addition to Powell, the Employer's top managers are Miriam Sontz, the CEO of Development, and Ann Smith, the CEO of Operations. The Petitioner is the collective-bargaining representative of Employer's employees located at its Portland-metropolitan-area facilities. There are approximately 410 employees in the bargaining unit.

The Employer has a computer support department which creates and implements the Employer's information technology systems and provides computer support services throughout the Employer's operations. The Employer's computer support operations consist of seven non-bargaining unit employees, nineteen bargaining unit employees and Steve Lin, who is at issue here. The computer support department employees are located throughout the Employer's operations but are primarily located at the Employer's corporate headquarters in Portland, Oregon.

The Employer's computer support department is managed by Business Technology Manager Frank Walsh. Walsh reports to CEO of Development Miriam Sontz. Reporting to Walsh are Computer Projects Manager Russ Swafford, Computer User Support Services Manager (CUSSM) Terre Stack, Project Manager Sheila Keene, Intranet Manager Shelly Ambuehl and Data Entry Coordinator Doug Brown. Walsh, Stack, and Swafford are arguably the highest ranking managerial/supervisory officials in the Employer's computer support operations and, according to Stack, are referred to as "the triad" among the computer support operations. Only Walsh, Stack, and Swafford have direct reports. Keene and Ambuehl do not have direct reports and it is unclear from the record if they are excluded from the bargaining unit because of their managerial and/or supervisory status. Of the aforementioned seven individuals, only Doug Brown is a bargaining unit employee. Brown is responsible for implementing and training employees regarding the Employer's data entry standards and procedures.

Terre Stack is responsible for directly supervising thirteen undisputed bargaining unit employees, which includes the computer user support specialists (CUSS) and the in-store computer support specialists (ISCSS). According to the record evidence, there are five CUSSs[4] and eight ISCSSs. The CUSSs and ISCSSs are responsible for providing computer support to the Employer's employees, including hardware and software support; process analysis; logistical implementation; troubleshooting; training; software development; and programming. Stack is also responsible for supervising Nick Church, the Human Resources/Corporate System Specialist (a non-bargaining unit employee) and Steve Lin.

Russ Swafford is responsible for directly supervising five bargaining unit employees, including Paul Buder, the internal operations programmer; Suzanne Chabre, the system administrator - email/unix/bookstore; Brandon Cotter and Stephan Lam, the computer supports; and Bill McNeil, the communication specialist. These employees are responsible for hardware and software maintenance and program development for the Employer's operations. With Terre Stack,

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[3] At the outset, the Union requests that I draw an adverse inference from the Employer's failure to produce subpoenaed documents. However, the Union admitted on the record that either the Employer provided the subpoenaed documents or the Union was no longer seeking the subpoenaed documents. Accordingly, I decline to draw an adverse inference. Yet, I note that the Employer entered only one document (the Employer's organizational chart for its computer support department) into the record in support of its position in this case, despite numerous references to other relevant and material documents made by the Employer's witnesses.

[4] This includes two CUSS leads or CUSS IIs, Doug Chase and Amy Norton. The CUSS IIs' job description includes the essential function "leads the CUSS department, [ISCSSs], and the company in planning for and implementing technology standards."

Swafford co-supervises Stewart Carrington, the Burnside ISCSS. Swafford also supervises two non-bargaining unit employees Marietta Marcolini, the system administrator - senior/bookstore and Scott Thomson, the system administrator - windows/supervisor.[5]

The Employer has an operation-wide bookstore application called Square One. Square One is based on a unix operating system and handles all bookstore functions such as purchasing, receiving, and registering the point of sale. Square One was originally developed by software company Computac. About February 2004, the Employer decided to replace Square One with another Computac product called [i]merchant. Two of the significant differences between Square One and [i]merchant are that 1) [i]merchant is based on the Microsoft Windows operating system utilizing the Windows SQL servers and 2) [i]merchant utilizes a relational database.[6] The Employer decided to switch to [i]merchant because of these two characteristics. At the time of the hearing, the [i]merchant program was not complete and the Employer was continuing to test the program. The Employer plans to go live with [i]merchant in February 2006 and will continue to use Square one until that date.

In fall 2004, the Employer created a new position entitled "data administrator." Terre Stack testified that the Employer decided to create the new position because the Employer needed someone with expertise in database management in that the [i]merchant program would give the Employer more functionality and choices with regard to its technology infrastructure. Further, the Employer wanted someone who could suggest, plan and make additional improvements to its technology infrastructure, such as database management, data warehousing, business intelligence, and program improvements. Terre Stack testified that the computer support department did not possess the requisite technical expertise to accomplish these tasks. However, there is evidence in the record that other bargaining unit employees, such as Doug Chase and Doug Brown, have been involved in leading, planning, and making other improvements to the Employer's technology infrastructure. For example, both Chase and Brown were involved in the initial decision to replace the Square One system and have continued to be involved in the transition from the Square One system to the [i]merchant system.[7]

The Employer initially posted the data administrator position internally and only one person applied for the position. According to Terre Stack, the applicant was unsuccessful because she did not have sufficient ability to direct and/or lead overall policies and procedures regarding where the Employer was going with its data and how the Employer wanted to use its data. Additionally, the applicant did not have sufficient knowledge of the Windows SQL servers or [i]merchant. Subsequently the Employer posted the job externally. In mid-December, the Employer hired Steve Lin as its data administrator.

Lin has a BA in economics and a master's degree in business administration. Although Lin's degrees are not specialized in information management systems, Lin was the database

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[5] With regard to Marcolini, Thomson, and Church, the record is unclear as to the specific reason(s) for their exclusion from the bargaining unit. According to Terre Stack's testimony, Marcolini and Thomson were in the bargaining unit until November 2004, but were removed from the bargaining unit because they were involved in checking employees' log-ins with respect to disciplinary proceedings. The Union filed an unfair labor practice charge and Marcolini and Thomson were placed back in the unit, but removed again shortly before the hearing in this matter.

[6] According to the record, the [i]merchant application is based on the SQL relational database. The relational database separates the application from the database and organizes data into tables. This system ultimately creates more options with regard to organizing, retrieving, and managing data. The Employer's previous system, Square One, fully integrated the application and database (called a flat file). Accordingly, the application was not separate from the database, which had the effect of limiting the Employer's use of its own data.

[7] In this regard, Brown and Chase were originally assigned with reviewing and implementing the Employer's original proposed replacement of Square One, which was designed by the company Alphameric. Ultimately, the Employer was unable to conclude a contract with Alphameric, and the Employer decided to change vendors to Computac and the [i]merchant system.

administrator with the Port of Portland for seven months and the database administrator with Multnomah County for two years. Lin is a Microsoft certified database administrator and a Microsoft certified professional. To be certified, Lin spent a total of 1 month class time and then took a series of four tests on deploying, administering, maintaining, and troubleshooting the SQL Server. The tests last approximately ½ an hour to several hours. According to Terre Stack's testimony, an individual can take the tests repeatedly until they pass, but he or she must pay for the test each time. Lin also participates in the Data Administrators Management Association in Portland, Oregon, which is a group of data administrators from different companies who meet monthly to discuss how the companies respectively manage their data.

B. Managerial Status

1. Job Description

According to the Employer's job description, the data administer "is responsible for formulating, determining, and systematically implementing [the Employer's] databases on Microsoft SQL Server" and is also "responsible for determining, maintaining, and monitoring corporate data management policies and procedures to further the [Employer's] vision and attain [the Employer's] goals." Additionally, the job description provides that the essential function includes, among other things, researching, planning and implementing new data management objectives as identified by the Employer's information technology management and corporate leadership group; participating in contract negotiations, investigations and grievance processes; directing team to develop data management plans and data warehousing, and administering and maintaining the Employer's bookstore system database and other Employer databases. The job requirements for the position include, among other things, two years managing databases on Microsoft SQL servers, in-depth knowledge of "best practices" in data management, experience implementing data management plans, experience with SQL statement tuning and stored procedures, and experience data modeling.

2. Establishing Employer's Procedures

During the hearing, the Employer's witnesses testified at length regarding the data administrator's ability to establish the Employer's data procedures. Specifically, Terre Stack testified that the data administrator is responsible for establishing procedures regarding how the Employer would use data, where the data would be located, what format the data would have, who would have access to the data, and what kind of access employees would have. Stack testified that the data administrator would have the discretion, without prior approval, to make decisions with regard to data management as specified above. Stack testified that the data administrator's authority would not extend to just the existing databases but to any future database system the Employer may acquire. The data administrator would also assist the Employer in planning any expansion of the Employer's technology infrastructure.[8] Stack further testified that one of the Employer's goals is to standardize its technology practices and that Lin is expected to apply his technical skill to the Employer's business to make decisions regarding data management.

Stack testified that Lin currently is the most knowledgeable employee regarding database work. However, Stack and other employees are not ignorant of database work because some considerations are common to all databases. For example, Stack testified that she and other employees have worked on developing databases. However, Stack testified that the employees did

[8] Although there is ample evidence that the data administrator is responsible for work related to the Employer's databases and data storage, it is unclear what the data administrator's role is regarding the establishment and implementation of the Employer's overall technology goals. According to Union Exhibit 6, Frank Walsh was responsible for drafting the Employer's technology goals, which includes a wide range of topics such as [i]merchant, outside access, desktop changes, e-mail, intranet, data migration, business intelligence, and development. According to the Exhibit, Walsh solicited input from Terre Stack, Russ Swafford, Marietta Marcolini, Scott Thomson, and Steve Lin. It is unclear from the record what contributions and/or changes Lin made to these goals. However, Stack testified that Lin's role in this group (the IT management group) is to provide input from the database perspective.

not make choices regarding developing or setting up the databases independent of management oversight. For example, CUSS I Kevin Maniak developed a Microsoft Access database of PC Charge, but only after securing management's approval. Stack further testified that setting up a database is not the same as managing a database. According to Stack, managing a database involves monitoring the database to ensure that it is operating correctly, tuning the database, and making decisions regarding database management. There is no evidence that the Employer currently has a database similar to the database that will exist as part of [i]merchant. Additionally, there is no evidence that any of the CUSSs have managed a database in a manner similar to that envisioned for the data administrator.

Lin testified that when he began employment with the Employer, he was told that there will be new servers to set up and he would decide how to proceed with his work. Lin testified that during his employment, no one had directed or prioritized his work. At the time of the hearing, all the Employer's servers, except the timekeeping server and the credit care server, were under Lin's direct control.[9] He is currently spending the majority of his time working on setting up the [i]merchant database but Stack testified that Lin will do more work after the data is transferred to the new system. One of Lin's first projects was auditing the Employer's existing computer system and making a list of recommended changes to the Employer's backup, access and security practices.[10] Lin also drafted a procedure document regarding the Windows SQL Servers. The Employer asserts that the list of recommended changes and the Windows SQL Server procedures document demonstrates the data administrator's managerial authority. Each of these items is discussed more fully below.

a) Backup, Access and Security Procedures

Terre Stack testified that the Employer will rely on the data administrator for recommendations regarding database security. When Lin started, one of the first things he did was create an applications inventory and audit the security of the current databases, including who had access and what the backup procedures were. Lin engaged in this activity without prior direction or approval. Based on Lin's audits of the computer system, Lin recommended to Terre Stack and Frank Walsh a list of changes regarding the backup and security procedures for some of the servers and independently effectuated some changes on the servers under his control, such as changing the frequency and timing of the backups. Lin created a document regarding backup procedures that applied to the [i]merchant test server, the development server, the graphic database, the time keeping system and voicemail system.[11] The back up procedures included the time and the manner for the system backups to take place. The procedure also encompassed which employees should complete the backups and how the backup tapes should be maintained.

Stack testified that no one directed Lin to create the backup procedures. Lin testified that there were no written backup procedures before he began and he did not check with Stack or Walsh before establishing the backup procedures for the servers under his direct control. (See footnote 7 above). Lin testified that he did check with Stack and Walsh before implementing the procedures on servers outside his control because he did not want to step on people's toes. Stack and Walsh authorized Lin to do whatever needed to be done because, according to Stack, that is why he was hired. Lin testified that he similarly presented his back up procedures recommendations to system administrators Scott Thompson and Marietta Marcolini. Lin also met with Thompson and Marcolini to review Lin's recommendations and find out if they had any concerns about his recommendations.

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[9] It is unclear from the record what specific servers Lin has control over and what the extent of his authority is with regard to each server. As discussed more fully below, Lin also spoke with Marcolini and Thomson before changing the backup procedures on their servers. Regardless, it is clear that the Employer is currently operating an SQL Server that contains the test [i]merchant program and that Lin is the only employee who controls and works with the database on this server.

[10] The Employer did not enter this document into the record.

[11] The Employer did not enter this document into the record.

In terms of database access, Stack testified that Lin will have the authority to determine access to the SQL Server databases. However, Stack further testified that Walsh has the authority to reverse an access decision by Lin. According to Stack, access to the credit card database was determined by the credit card security group, which was composed of Walsh, Lin, and Marcolini. Although the access decision was made jointly, Walsh made the ultimate decision. Also as a result of his audit, Lin directed the employee in possession of the credit card database to physically move the database to the "cold room," which is a securer location. Additionally, Lin instructed another employee to create audit trails for the credit card database, which shows which employees are using the program to look up customer credit cards.[12] Lin testified that there were no audit trails on the credit card system when he began and that the audit trails were necessary to be in compliance with the credit card companies' requirements.

Stack testified that, in making the above changes to the Employer's computer system, Lin made decisions based on his past experience and education. For example, Stack testified that the decision of when to backup the various servers depends on how the backups should be completed, whom to page if the system fails to backup and what time of day the system backup should occur. Stack testified that the decisions regarding the backup procedures are important because the backup can interfere with employees' work by slowing down the system. Accordingly, it is important not to have any one using the system while the backups are occurring. Lin also testified that when creating the backup procedures, he had to make decisions regarding how much data the Employer could afford to lose while not interfering with the employees' ability to complete their work on the system. Lin testified that the backup process can take between forty minutes to a few seconds.

b) Procedure Document "MS SQL Server Standards and Procedures"

As further evidence of the data administrator's authority to create Employer procedures, the Employer relied on a document Lin created entitled "MS SQL Server Standards and Procedures." The "short version" of that document is 29 pages in length[13] and, according to the document heading, pertains to database implementation, naming database objects, and stored procedure coding rules. Stack testified that the purpose of the short version was to avoid creating bad data and to establish standardized procedures for creating and maintaining data, such as naming conventions, storage procedures and coding rules. Prior to the creation of this short version (or procedures document), the Employer did not have a database procedural document as broad and as far reaching as the document Lin created. Stack testified that although the procedures document headings do not refer to the Employer's business and are not unique to the Employer's business, some of the minor points in that document may be specific to the Employer's business. However, neither Lin nor Stack provided specific testimony regarding what provisions of the procedures document were specific to the Employer's business. In creating the document, Stack testified that one could not find a textbook that presented the document's information in the same fashion. Rather, Stack testified that Lin had to make a decision regarding what procedures would be good for the Employer and what procedures would not work for the Employer. Neither Lin nor Stack testified regarding how much of the procedures document was standard practice and/or specifically how much Lin cut, pasted, and tweaked to fit the Employer's business. Regardless, it is clear that Lin copied substantial portions of the procedures' document from another source (or sources) and he alone fashioned the procedures document without direction.

However, section 1.2 of the procedures document provides that "upon review and approval of the Powell's Books Information Technology Managers, this document becomes the foundation for

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[12] Employer witnesses did not elaborate or detail how Lin made his decisions directing or instructing employees to perform these discrete tasks.

[13] Several witnesses testified that there is a long version of the 29 page procedures document. However, the Employer did not enter this long version into the record, notwithstanding that it had been circulated to Walsh, Stack, and Swafford. Only the short version, which was entered into the record by Petitioner, was circulated to the Employer's other employees. In short, there is very little discussion in the record regarding the creation and content of this long version.

future development of MS SQL Server systems." Accordingly, Lin testified that he presented the document to Stack, Swafford and Walsh for prior approval. Stack testified that she, Swafford and Walsh did not conduct a line-by-line by review. Additionally, Stack testified that although they had the authority to change the document, they did not have the technical expertise to do so. Stack also testified that she gave Lin verbal approval to implement the procedures document.

The procedures document was circulated to the computer support department employees and placed on the Employer's intranet drive. Lin testified that he received a suggested change to the procedures document from Paul Buder. Lin discussed the document with Buder and made a minor revision based on the discussion. Lin testified that he could not recall what Buder and he spoke about, but that it was a minor item. In sharing the document with Buder, Lin testified that he wanted to make sure that other employees doing database work would not have any major objection to following the procedures document. Lin testified that he had the authority to reject Buder's suggested change but did not do so.

Lin gave a 45 minute to 1 hour presentation on the procedures document during a CUSS staff meeting and trained the computer support staff regarding the document's application. Terre Stack testified that no one instructed Lin how to present the document and train the employees. Stack further testified that Frank Walsh attended this CUSS staff meeting. Stack testified that other CUSSs have made similar presentations, including Amy Hendrix's presentation on her evaluation of a program called "Above the Treeline" and Michael Karman's presentation on the Employer's "Square Deal" book sale.

Stack also testified that Lin met with the Computac representative to review the data storing procedures document to ensure that Computac follows the same procedures when creating the new [i]merchant program. Stack testified that the computer support staff employees are also expected to follow the procedures and, if they did not, there would be ramifications. Stack did not specify what the ramifications would be or what authority Lin would have, if any, for enforcing compliance with the procedures document.

Stack testified that the procedures document will impact the Employer's entire operation because that document will prevent inaccurate database information, such as duplicate entries. Currently the procedures document is only in affect on a test database. In terms of specific impact, of the three sections in the document, the first section (database implementation) will only apply to the data administrator position and the second and third sections (naming standards and stored procedure coding rules) will only apply to the programmers and developers. Stack specified that the directly impacted employees will include Paul Buder, and possibly Amy Norton, Michael Karman, Terre Stack and Frank Walsh. Stack testified that Lin specifically trained Paul Buder on the stored procedures portion of the procedures document.

c) Business Intelligence and Data Warehousing

As part of Lin's responsibility for establishing procedures regarding the use of data, data location, data format, and access to data, the Employer's witnesses testified regarding the future vision for the Employer's data management and the role of the data administrator. In this regard, the Employer presented evidence that Lin will have a crucial role in improving the Employer's business intelligence (i.e., the ability to utilize data to make informed business decisions). Central to improving the Employer's business intelligence is the implementation of data warehousing, which is a program designed to store large amounts of data. According to Stack's testimony, Lin will be responsible for warehousing the data, and in this regard, is responsible for investigating whether to use Microsoft Report Service, which is a data warehousing program. As part of Lin's investigation, he presented related information during a staff meeting and trained Frank Walsh and Paul Buder regarding data warehousing. Stack testified that although Lin was given overall direction to look into data warehousing, he independently conducted the investigation on his own. According to a March 3, 2005 e-mail, Lin researched and proposed two possible data warehousing companies, Informatica

and Ascential. In response, Frank Walsh rejected Lin's proposed companies because they were too expensive and outside the Employer's current data warehousing needs.

3. Working Terms and Conditions

As mentioned above, Lin has a BA in economics and an MBA. The record does not describe the formal and/or professional training of the other computer support department employees. In the Employer's operations, Lin is the only certified database administrator and the only one who attends the data administrators management association meetings.[14] Unlike the other computer support department employees, Lin is a salaried employee. The record is unclear as to the amount of money Lin earns compared to the other computer support department employees. Lin works Monday through Friday, 8:00 AM to 4:00 PM. The CUSSs work varying schedules. All CUSSs, except one, work 4 or 5 days a week Monday through Friday. One CUSS works on Saturday.

Lin has an office, which he shares with Terre Stack. The other CUSSs sit in cubicles outside Stack and Lin's office. Stack testified that Lin shares her office because he has access to "confidential" information and may deal with grievances. However, Stack testified that Lin has not yet dealt with grievances. Additionally, it is unclear what sort of confidential information Lin has access to. Regardless, the record reveals that the data administrator could obtain information related to grievances, such as someone not accessing the database or accessing the database incorrectly. Additionally, the data administrator could audit individual's computers regarding their computer use. In the past, this type of investigation had been completed by Scott Thomson, Marietta Marcolini, Terre Stack, and Frank Walsh. Stack further testified that the data administrator could obtain information from the data warehouse in preparation for the Employer's contract negotiations. Stack testified that gathering information in preparation of contract negotiations is currently handled by accounting but it may change.

Nick Church, the human resources/corporate systems specialist, also has an office next to Lin and Stack, which he shares with two other human resource employees. All the employees, including Stack, Lin, and the CUSSs interact with each other every day. Lin also received a 3-hour human resources training on the collective-bargaining agreement. This training was available only to non-bargaining unit employees. It is unclear from the record what specifically was taught during the training. Furthermore, Lin attended a leadership management class conducted by an outside consultant, which was also only available to non-unit employees. Each week, Lin and all CUSSs respectively prepare a report of the work that they are doing, which they submit to Terre Stack.[15]

4. Working Groups

It appears from the record that the Employer's computer support department commonly makes decisions in a collaborative process through group meetings. For example, bargaining unit employee Doug Chase testified that he participated in the bookstore group which initiated the process leading to the dissolution of Square One and implementation of [i]merchant. Chase also participates in the used book and the data migration group, both of which are led by another bargaining unit employee, Doug Brown. The data administrator participates in several of these groups including the weekly CUSS staff meeting, the development group, the IT management group, the credit card security group and the bibliographic database group.

The weekly CUSS staff meeting is attended by all employees who report to Terre Stack and by Frank Walsh, who occasionally attends this meeting. The purpose of the meeting is to review employees' work, check on the status of projects, and present employees various work projects. Thus, this weekly meeting and the reports discussed above would appear to establish that while Lin is working independent of others, he must still regularly report on his work to management.

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[14] There is no additional evidence regarding the nature of these meetings, such as the number of attendees, the time and place of the meetings or the outcome of the meetings.

[15] The Employer did not enter copies of Lin's or the CUSSs' reporters into the record and Employer witnesses did not elaborate further on the nature and extent of these reports.

The Employer's development group consists of both Union and non-unit employees, including Paul Buder, Amy Norton, Michael Karman, Terre Stack, Nick Church, Russ Swafford and Frank Walsh. Walsh leads this group, which also meets weekly. The purpose of the development group is to discuss programming and software development.

The IT management group involves only non-bargaining unit employees, including Lin, Walsh, Swafford, Marcolini, Thomson, and Stack. The IT management group is responsible for setting standards and procedures for the Employer's technology infrastructure. The IT management group is also led by Walsh, and meets weekly. Lin's role in the IT management group is to contribute based on his database expertise, specifically regarding SQL server and data management.

Lin also participates in the credit card security group, which is led by Frank Walsh and includes Marietta Marcolini. It appears from the record that the only attendees for this group are Walsh, Lin, and Marcolini. The group determines access to the credit card system. It is unclear from the record how often this group meets or if it is currently meeting. Further, it is unclear what if any basis exists for limiting access to the credit card system and what specifically turns the Employer's decisions in this regard.

The database administrator has overall direct responsibility for the bibliographic database group. The bibliographic database group consists of Frank Walsh, Steve Lin, Paul Buder, Amy Norton, and Doug Brown. This group is responsible for designing and implementing the bibliographic database. Although it is not entirely clear from the record, the bibliographic database will exist outside of the current [i]merchant database and will be created by gathering book information from third party sources such as the Library of Congress and books out of print. The primary focus of the group is determining how the data will be accumulated and in what format. Lin is responsible for scheduling the meetings for bibliographic database group and setting the agenda for the group. As part of his responsibilities, Lin drafted a business analysis for upper management regarding the proposed new bibliographic database. The business analysis was approximately 20 pages long and included 2 or 3 pages of graphics.[16] As part of the business analysis, Lin requested that Frank Walsh draft a return on investment, which Walsh attached to the business analysis. Terre Stack testified that Lin also directs the work of other members of the bibliographic database group, including directing Paul Buder to conduct research regarding the data fields used by the Library of Congress and books out of print.[17] Terre Stack further testified that the bibliographic database group began meeting shortly before the hearing in this matter, but the group will continue to meet until at least 2006. The Employer currently does not have a bibliographic database.

There is evidence in the record that Walsh, Swafford, and Stack also meet weekly for a couple of hours. It is unclear from the record what the purpose of this meeting is. The data administrator does not attend these meetings.

C. <u>Supervisory Authority</u>

The Employer also asserts that the data administrator possesses supervisory authority. In this regard, the Employer relies on evidence that Lin possesses the authority to discipline and evaluate employees and has the authority to assign and direct employees. With regard to discipline and evaluations, there is no reference to Lin's authority to discipline and/or evaluate employees in the data administrator's job description. Terre Stack testified that Lin has not had the opportunity to discipline or evaluate employees. Stack further testified that when she is conducting an evaluation of someone, she may ask for Lin's input, if such is needed. Stack provided no details regarding the nature and extent of Lin's input and whether Lin's input would include a recommendation. With regard to discipline, Stack testified that if someone refused to follow Lin's instructions or followed his

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[16] The Employer did not submit the business analysis into the record.

[17] However, Stack did not elaborate further on the nature and extent of Lin's directions or detail how Lin made his decisions directing employees to perform these discrete tasks.

instructions incorrectly, he would ask that individual to do the task correctly or there would be "ramifications." Stack did not elaborate on what specific disciplinary authority Lin might possess, who would enact these "ramifications," and what the "ramifications" would be. Lin testified that if someone did not follow his direction, he would work with that employee's immediate supervisor and there would be possible discipline. Lin did not elaborate further on what his role would be with regard to implementing or effectively recommending such discipline or what sort of discipline would result.

With regard to assignment and direction, the Employer presented several specific instances where Lin has directed other bargaining unit members and non-bargaining unit employees to accomplish discrete tasks. Lin directed Nick Church, Scott Thomson, and Marcolini to change backup procedures for the systems under their respective controls. Lin also directed Michael Karman to create a program that would periodically audit the credit card server and directed Kevin Maniak to move the credit card server to a securer location. Within the bibliographic database group, Lin has directed other employees to engage in certain research activities, such as directing Paul Buder to research the data fields for the Library of Congress and books out of print systems. Additionally, Lin directed Doug Brown and Amy Norton to create data maps for the data migration from the third party systems, such as the Library of Congress, to the Employer's system. The Employer also relies on Lin's creation of the SQL Server procedures document and his direction that employees follow this document.

The Employer did not provide concrete evidence surrounding Lin's direction in each of the specific instances mentioned above. Specifically, the record contains no evidence of the factors or considerations Lin took into account when directing these employees. The evidence suggests that with regard to the direction of Church, Marcolini, Thomson, and Maniak, the direction was based on the fact that the relevant systems/servers at issue were in the possession of those individuals at the time of Lin's purported and respective directions. The evidence also demonstrates that Lin obtained prior approval from Frank Walsh and Terre Stack before directing Marcolini and Thomson to change the backups on their systems. Lin testified, without further explanation, that he obtained Walsh and Stack's approval because he did not want to hurt other people's feelings or step on anyone's toes. Moreover, there is no evidence in the record that the Employer has held Lin accountable and/or responsible for the performance and work product of the employees whom he supposedly directs. In particular, the Employer submitted no testimony or documents regarding whether the Employer has either disciplined or evaluated Lin in connection with his alleged responsibility to direct employees. Although Stack testified that she told employees that the data administrator would have "ultimate authority," she subsequently testified that since Lin was hired, she has only informed employees that they are expected to follow the SQL Server procedures document. Stack testified that she has not otherwise informed employees that Lin has the authority to enforce the SQL Server procedures document or that there would be any difference in the reporting relationship between the Employer and the employees, as a result of Lin's hire or work. In sum, the record does not reveal whether the Employer has informed Lin or employees of Lin's purported managerial and/or supervisory authority.

III. ANALYSIS

A. Managerial Status

Although the Act makes no specific provision for "managerial employees," the Board has traditionally excluded managerial employees from the Act. In this regard, the Board has defined managerial employees as "those who formulate and effectuate management polices by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics Corp.*, 213 NLRB 851 (1974). The Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), further explained that:

> [managerial employees] are "much higher in the managerial structure" than those explicitly mentioned by Congress which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary." Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. [Id. at 682–683.]

See also Bakersfield Californian, 316 NLRB 1211, 1214 (1995); *Case Corp.*, 304 NLRB 939 (1991). The party seeking a statutory exclusion, such as managerial authority, has the burden of proof. *See NLRB v. Kentucky River Community Care Inc.*, 532 US 706 (2001); *Allstate Insurance Co.*, 332 NLRB 759 (2000).

Lin's primary responsibilities relate to the implementation of the Employer's databases on the SQL Servers (including the book database for the [i]merchant program), as well as developing the Employer's data management procedures. The record demonstrates, however, that data administration is just one element of the Employer's overall technology operations. Petitioner's Exhibit 6 provides that the Employer's overall goals for its technology operations relate to numerous areas including [i]merchant, outside access, desktop changes, e-mail, intranet, data migration, business intelligence, and development. Additionally, the majority of the Employer's computer support department employees have little or nothing to do with data administration or database management. Accordingly, while the Employer's overall technology operations are very broad, the data administrator's role is very specific and applies to a discrete area of the Employer's technology infrastructure. Indeed, Terre Stack testified that the data administrator spends the majority of his time currently dealing with the implementation of the [i]merchant system.

With regard to broader future planning, such as implementing a data warehousing system, the evidence demonstrates that Frank Walsh has the final authority to accept or reject any proposals made by Lin.[18] Lin's job requirements are also revealing in that they are narrowly focused on data administration and database management. The job description includes, among other things, two years managing databases on Microsoft SQL servers, in-depth knowledge of "best practices" in data management, experience implementing data management plans, experience with SQL statement tuning and stored procedures, and experience in data modeling. Moreover, the record demonstrates that other bargaining unit employees, such as Doug Brown and Doug Chase, have had similar advisory and consultative roles in determining the Employer's future technology planning and procedures. Additionally, several employees, including Brown, Chase, and Any Norton, have been assigned independent projects relating to the implementation of the Employer's new technology. For example, Brown and Chase were assigned with reviewing and implementing the Employer's original proposed replacement for Square One, and Amy Norton has researched other data warehousing systems, such as Above the Treeline.

The record also establishes that Lin is a highly skilled technical employee, who spends some time working independently.[19] He is the only certified database administrator working for the Employer. Stack and Walsh testified that currently Lin is the most knowledgeable employee

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[18] Indeed, Walsh rejected two proposals by Lin with regard to the latter's proposals for implementation plans because the proposals were expensive and failed to meet the Employer's needs.

[19] It is unclear from the record how much time Lin spends working independently of direction and how much time he spends working on projects directed by the Employer. However, it is evident from the record and the data administrator's job description that Employer management identifies "new data management objectives" and that Lin and other bargaining unit employees must report on their work on a regular basis in both a weekly meeting and in written reports. Thus, I find that the Employer closely monitors Lin and other bargaining unit employees with regard to their work and that the Employer's assertion of "independence" in this regard is certainly not without limits.

regarding database management and the SQL Server system. Indeed, when Lin created the Employer's SQL Server policy and procedures document, Stack and Walsh only conducted a cursory review of the document because they did not have the technical expertise to conduct a line-by-line review. It is also clear from the record that Lin is given broad discretion to complete his work. However, this broad discretion appears to be the result of Lin's high-level of technical expertise rather than a result of his managerial status. For example, the Employer relied on this expertise in connection with Lin's determination of database access and backup procedures. In this regard, the Board has held that qualifications and advice based on technical qualifications does not, by itself, create managerial status. *See General Dynamics Corp.*, 231 NRLB at 858 ("A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone which, by itself, would not make him managerial.")

With respect to Lin's alleged authority to formulate and effectuate Employer policies, the record fails to demonstrate that he has formulated and effectuated policies in a manner that would make him a managerial employee. Regarding the computer access policies, there is no evidence in the record that Lin has unilaterally denied access to any of the Employer's employees. Indeed, the record demonstrates that Walsh may override Lin's determination and may grant or deny access to an employee.[20] Additionally with regard to the backup procedures, the evidence demonstrates that Lin only implemented the backup procedures on two other employees' servers after checking with Stack and Walsh, as well as the two employees involved. Moreover, I have noted above that none of the documents the Employer relied on to demonstrate Lin's managerial authority, including his audit of the computer applications and his proposed backup procedures, were offered/entered into evidence.

In addition to Lin's access and backup procedures, the Employer relies on Lin's creation of the "MS SQL Server Standards and Procedures" document. The record demonstrates that he made this procedures document without prior direction. Additionally, the witnesses provided unrebutted testimony that Lin made decisions regarding what procedures would be good for the Employer and what procedures would not work for the Employer. However, it is unclear from the record how much of the document is standard practice in the industry and how much of the document Lin tailored to the Employer's business. Other than the opening paragraphs, the procedural document makes no reference to the Employer and only refers to the "enterprise" in very general terms. Stack testified that only minor points of the document may be specific to the Employer. However, Stack further testified that she did not conduct a line-by-line review of the document as she did not have technical expertise to fully review the document. Moreover, although Lin repeatedly testified that he made decisions regarding what would work best for the Employer when creating the procedural document, Lin provided no concrete testimony describing how he created the document and how his decisions are specifically reflected in the document. Rather, both Lin and Stack testified in vague and conclusory terms about Lin's discretion and decision making when creating the procedures document. Further, Lin obtained prior approval from Walsh and Stack before implementing the document, as well as solicited comments from another bargaining unit employee. The fact that Lin gave a presentation on the document does not demonstrate managerial status in light of evidence that other bargaining unit employees have given similar presentations on projects for which they were responsible. Additionally, although the document has company-wide implications, it only directly impacts the work of one other employee, Buder and only possibly impacts the work of Norton, Karman, Stack, and Walsh.

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[20] Moreover, the Employer failed to elaborate on the nature and extent of any purported decision making authority that Lin possessed or exercised with regard to granting or denying access and what if any factors drove such decision. Indeed, the record indicates credit card companies drive some of the policies and/or procedures in this regard. Without more, I am unable to conclude on this record, that Lin possesses managerial authority with regard to credit card access.

The Employer relies on the Board's decision in *Miller Electric Co.*, 301 NLRB 294 (1991) to contend that the creation of a procedures document proves managerial status. In that case, the alleged managerial employee was one of two employees in charge of the Employer's quality control training department. In this role, the employee reviewed all quality control procedures, produced a training outline and was responsible for making training presentations to supervisors. As part of his duties, the employee created a craft procedures manual which provided "detailed information related to electrical work, inspection of tools and equipment, safety, and work verification procedures." It also established the employees' payroll procedure and payroll responsibilities of the supervisors. The document was approximately 70 pages in length. The employee also created a 155-page foreman's training manual.

Unlike the extensive manuals created by the managerial employee in *Miller Electric Co.*, the procedures document in the present case does not prove managerial authority. The 29-page[21] procedures document is a narrowly focused technical manual. Indeed, without an extensive background in database technology, it is difficult to understand. However, it is clear that the manual only covers three subjects: database implementation, naming database objects, and stored procedure coding rules. These subjects, unlike the broad-reaching training manuals in *Miller*, are only indirectly related to the Employer's business of selling books. In this regard, the policy and procedure document only immediately affects the work of a very small number of employees. Furthermore, unlike the manager in *Miller*, who created multiple manuals and was one of two employees in charge of the Employer's overall supervisory training program, Lin is one of 23 employees responsible for the Employer's computer support department, 19 of whom are in the bargaining unit. Moreover, the record demonstrates that Lin's overall authority does not have the similar impact on the Employer's operation as the manager's authority in *Miller.* Indeed, the most significant change the Employer has made in its computer support department, the switch from Square One to [i]merchant, was decided before Lin was hired.

With regard to the group meetings, the Employer's computer support department relies heavily on collaboration and group projects. The record establishes that the Employer has numerous group meetings which are attended and led by various individuals, including bargaining unit employees. Indeed, Lin attends several group meetings, including the CUSS staff meeting and the development group meeting, which include both bargaining unit and non-bargaining unit employees. There is no evidence in the record that Lin's role in these group meetings is distinguishable from the other individuals who attend these meetings. Although all members of the IT management group are non-bargaining unit employees, the meeting is led by Walsh. Moreover, Walsh, Swafford, and Stack have a separate meeting, which neither LIn nor the other bargaining and non-bargaining unit employees attend. With regard to the bibliographic database group, it is particularly telling that Walsh drafted the return on investment for the group, rather than Lin. The Board has held that evaluation of expenditures, such as preparing a return on investment, involves the kind of judgment evidencing managerial status. *See General Dynamics Corp.*, 213 NLRB at 860.

The Employer also relies on the Board's decision in *Washington Post Co.*, 254 NLRB 168, 199 (1981) in support of its assertion that Lin is a managerial employee. In that case, the Board found that two research consultants in the advanced systems research department were managerial employees. The other remaining six employees in the advanced systems research department were clearly managers and their status was not in dispute. All eight department employees were involved in long-term planning projects for the employer, including identifying, defining, formulating, and evaluating systems projects for the employer.

I find *Washington Post Co.*, supra, distinguishable from Lin's position with the Employer for three reasons. First, the disputed employees were in a department composed entirely of managerial

[21] Although the Employer presented evidence that there is a longer document, the Employer did not introduce that document in to the record.

employees. Here Lin, who is five levels from the Employer's president, is included in a group of 19 bargaining unit employees and only 3 non-bargaining unit employees. Second, the record evidence fails to demonstrate that Lin is primarily tasked with conducting long-term planning projects for the Employer, as more fully explained below. Third, Lin's role in the Employer's computer support department is not primarily to identify, define, formulate and evaluate projects with a significant impact on the Employer's operations and on the jobs of the Employer's approximately 420 employees. Rather, Lin's projects were identified and formulated prior to his employment. With regard to data warehousing, the evidence suggests that Lin has had a greater role in formulating that particular project; however, the evidence also demonstrates that his proposals in this regard are subject to management approval and, indeed, have been rejected due to expense and failing to meet the Employer's needs. In sum, the evidence demonstrates that the Employer relies on Lin, in a manner similar to an in-house counsel or accountant, to complete certain discrete tasks that require his specialized training.

In light of the above, the record as a whole and the parties' respective briefs, I find that Lin is not a managerial employee.

B. <u>Supervisory Authority</u>

In addition to managerial authority, the Employer asserts that Lin is a supervisor within the meaning of Section 2(11) of the Act. Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of 'employee.'" Section 2(11) of the Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *NLRB v. Kentucky River Community Care Inc*., 532 US 706 (2001). The legislative history of Sec. 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). For this reason, the Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Thus, the burden of proving supervisory status is on the party alleging that such status exists. *Kentucky River*, 532 US at 711.

The Employer bases its assertion that the data administrator is a supervisor on Lin's alleged authority to discipline, evaluate, assign and to direct employees. The Board has found that the authority to "evaluate" is not one of the indicia of supervisory status set out in Section 2(11) of the Act. *See Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Accordingly, when an evaluation does not, by itself, affect the 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. *See Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000); *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001). The only record evidence that Lin possesses the authority to evaluate employees is Stack's testimony that she may solicit Lin's input when evaluating employees. There is no additional record evidence that Lin has the specific authority to evaluate employee's performance. There is also no evidence that Lin's involvement in the evaluation would be anything other than mere feedback. The Board has held that mere feedback is insufficient to establish supervisory status. See *Franklin Home Health Agency*, 337 NLRB 826 (2002);

The only record evidence that Lin possesses the authority to discipline employees is testimony that if employees do not follow his procedures document, there will be ramifications and/or that Lin would report the incident to the employee's supervisor. There is also no record evidence regarding the type and/or scope of Lin's authority to discipline. Stack testified that as of the date of the hearing, Lin had not disciplined an employee and there is no reference to any such authority in Lin's job description. Moreover, reporting incidents for possible discipline does not establish supervisory authority. *See Ohio Masonic Home*, 295 NLRB 390 (1989); *Waverly-Cedar Falls Health Care Center*, 297 NLRB 390, 392 (1989), *enfd*. 933 F.2d 626 (8th Cir. 1991). Additionally, the Board has stated the absence of evidence is construed against the party asserting supervisory status. *Freeman Decorating Co.,* 330 NLRB 1143 (2000). Whenever evidence is inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989). In sum, I find that the Employer has failed to meet its burden demonstrating that Lin possesses the authority to discipline or evaluate employees.

With regard to assignment and direction, the Employer relies on several isolated incidents in which Lin assigned and/or directed other employees to do specific tasks. It appears from the record that some of these specific tasks, such as changing the backup procedures or moving the server to a secure location, were routine and perfunctory. Such routine or perfunctory assignments do not demonstrate supervisory status. *See Delta Mills, Inc.*, 287 NLRB 367, 370-71. Additionally with regard to the assignment of these and other tasks, such as the assignments Lin made as the head of the bibliographic database group, the Employer presented no evidence regarding how Lin made the assignments. Specifically, there is no evidence that Lin took into account a particular individual's skills and there is no evidence regarding why Lin selected one particular employee over another employee or whether Lin had a choice of employees. The Board and federal courts "typically consider assignment based on assessment of a worker's skills to require independent judgment and, therefore, to be supervisory," except where the "matching of skills to requirements [is] essentially routine." *Brusco Tug & Barge Co*., 247 F.3d 273, at 278 (D.C. Cir. 2001), citing *Hilliard Development Corp*., 187 F. 3d 133, 146 (1st Cir. 1999). Additionally, assignment and direction must be based on independent judgment and the proof of independent judgment entails the submission of concrete evidence showing how such decisions are made. *See Harborside Healthcare, Inc*., 330 NLRB at 1336; *Crittenton Hospital*, 328 NLRB 879 (1999); *Franklin Home Health Agency*, 337 NLRB 826 (2002). Here, there is an absence of detailed evidence showing how Lin made his decisions regarding assignments and/or directions. In light of the record before me, I find that the Employer has failed to meet its burden of establishing that Lin has the authority to assign and/or direct employees based on independent judgment.[22]

The Employer also relies on secondary indicia to support its position that Lin is a supervisory and/or managerial employee. For example, the Employer presented evidence that Lin participates in the IT management working group, attends the data administrators management association meetings on behalf of the Employer, and leads the bibliographic database group. Also, Lin is a salaried employee, has an office, which he shares with Stack, and has attended leadership and collective-bargaining agreement training or classes reserved for non-bargaining unit employees. Additionally, the Employer presented evidence that Lin could assist the Employer during grievance processing and/or collective bargaining negotiations by obtaining information related to grievances and/or collective bargaining. However, the Board has held that secondary indicia alone will not support a finding of supervisory and/or managerial status in the absence of evidence establishing

[22] Additionally, I further find that the record contains no evidence that Lin is held responsible or accountable (i.e. has been disciplined and/or evaluated) based on the performance and work product of other employees. Yet, the Board has held that proof of "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." *See Franklin Hospital Medical Cent.*, 337 NLRB 826, 831 (2002), citing *Schnurmacher Nursing Home*, 214 NLRB F.3d 260, 267 (2nd Cir. 2000).

the possession primary indicia. *See Property Markets Group, Inc.*, 339 NLRB No. 32, slip op. at 11 (2003). *See also Case Corp.*, 304 NLRB 939 (1991).

Based on the foregoing, the record as a whole and the parties' respective briefs, I find that the Employer has failed to meet its burden of establishing that Lin possesses indicia of supervisory authority as that term is defined in Section 2(11) of the Act.

IV. CONCLUSION

In light of the above, I shall grant Petitioner's request to include the data administrator position in the unit currently represented by Petitioner. Accordingly, I shall order that the data administrator position be included within the bargaining unit.

V. ORDER

The data administrator position is hereby included in the existing bargaining unit represented by Petitioner.

VI. 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. 20570-0001. This request must be received by the Board in Washington, D.C. by **5 p.m., EDST on August 23, 2005.** The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

DATED at Seattle, Washington this 9th day of August 2005.

_____/s/ Richard L. Ahearn_ _____
Richard L. Ahearn, Regional Director
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