

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**KOHL'S DEPARTMENT STORES, INC.**

**(Patterson, California)**

**Employer<sup>1</sup>**

**and**

**TEAMSTERS LOCAL 386,  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS**

**Case 32-RC-5610**

**Petitioner**

**REGIONAL DIRECTOR'S DECISION  
AND DIRECTION OF ELECTION**

Kohl's Department Stores, Inc., herein called the Employer, is a Delaware corporation that is engaged in the retail sale of clothing, furniture, and other household items. The Employer operates a warehouse/distribution facility and office located in Patterson, California that is the subject of this petition. Teamsters Local 386, International Brotherhood of Teamsters, herein called the Petitioner or the Union, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time material handlers and order control plant clerical employees employed by the Employer at its warehouse facility located at 2065 Keystone Pacific Parkway, Patterson, California; excluding all managerial

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<sup>1</sup>The name of the Employer appears as corrected at the hearing.

and administrative employees, sales persons, office clerical employees, all seasonal employees, guards (a.k.a. loss prevention employees) and supervisors as defined in the Act.<sup>2</sup>

A hearing officer of the Board held a hearing on January 26, 27, and 28, 2009, and the parties filed post-hearing briefs with me, which I have duly considered.

As evidenced at the hearing and in their briefs, the parties disagree over the issue of whether the Employer's ten assistant supervisors and one temporary assistant supervisor are supervisors within the meaning of Section 2(11) of the Act. Both the Petitioner and the Employer agree that the assistant supervisors do not have any authority to hire, permanently transfer, suspend, layoff, recall, promote, discharge, adjust grievances, or to effectively recommend such actions. However, the Petitioner contends that the assistant supervisors are statutory supervisors because they possess the authority to discipline or reward employees, or to effectively recommend such actions, and/or because they assign work and responsibly direct employees using independent judgment. By contrast, the Employer contends that all of the assistant supervisors are statutory employees because they do not possess any of the Section 2(11) indicia.

I have carefully considered the evidence and the arguments presented by both parties on this issue. As set forth below, I have concluded, in agreement with the Employer, that the eleven assistant supervisors are not statutory supervisors. Accordingly, I will include them in the unit of employees eligible to

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<sup>2</sup> The unit description appears as stipulated by the parties at the hearing.

vote in the election I am directing herein. There are approximately 83 employees in the unit.

## **THE FACTS**

### **1. Background**

The Employer's Patterson, California facility is a flow-through distribution center. In simple terms, trucks come to the facility loaded with merchandise from various vendor suppliers. The trucks are backed up to one of the doors to the Receiving Department, a conveyor belt is pulled into the back of the truck, and a material handler from the Receiving Department unloads the cartons from the truck onto the conveyor belt. The boxes then go down the conveyor belt about 30 to 50 feet, at which point another material handler from the Receiving Department scans the cartons into the Employer's computer system. The initial scanning process includes a computerized audit of the materials to determine whether they are in compliance with what was ordered from the vendor. If the computer software indicates that the carton does not need any further auditing, it is sent down the conveyor line. However, if the computer software indicates that the carton is to be audited further, it is kicked off the conveyor onto an audit line. The carton is then cut open and another material handler scans all of the contents of the carton using a scanning gun.

If the carton passes the audit, it is taped back up and returned to the conveyor belt. However, if the carton does not pass the audit, it is placed onto an adjacent line where it can be worked on by a material handler from the Employer's Flat Department. The Flat Department employees do a more

extensive audit of every unit in every carton from that particular purchase order and input the data into the Employer's computer system. The cartons are then placed back on the conveyor belt. If an audit shows that the incoming shipment does not comply with the order that the Employer placed with the vendor, then the cartons are sent to the three material handlers in the Vendor Compliance Department, where the cartons are extensively audited, photos of the documents are taken and scanned into the computer, and e-mails are prepared to document the discrepancies so that the Employer's corporate office can contact the vendors to seek reimbursement or resolution regarding the errors. Finally, all of the employees in the Receiving, Flat, and Vendor Compliance Departments perform systematic updates of the computer system, which entails entering data about the incoming shipments into the Employer's computer system.

There are three potential destinations for the cartons once they leave the Receiving Department - the Jewelry Department, the Pack-To-Lite Department, or the Shipping Department. If an entire carton is destined for one store, it is sent directly to the Shipping Department. However, if the carton contains items for several stores, it is sent to the Jewelry or the Pack-To-Lite Departments, where the carton is opened and the contents placed in separate boxes destined for different stores. When these separate boxes are full, the material handlers seal them up and send them to the Shipping Department. In the Shipping Department, each shipping door is assigned to a separate store. The conveyor system routes the cartons destined for a particular store to the correct door,

where they are taken off the conveyor by a material handler and “brick loaded” into a truck.

Finally, there are three separate smaller work areas at the facility. Thus, in the Transportation Department, two assistant supervisors are assigned to perform data entry functions on a computer, communicate with stores about incoming deliveries, and reconcile all of the trailers that are physically in the yard with a computerized report. In the Tower there are two material handlers assigned to monitor the physical carton flow through the facility either visually or through using a computer terminal, and they are responsible for notifying management if there are any problems with the carton flow. Lastly, in the office area there are two order control clerks who perform data entry functions at computer terminals.<sup>3</sup>

## **2. The Employer’s Supervisory Hierarchy**

Director Mike Gordon is the highest ranking management person at the Patterson facility. He has overall responsibility for all of the operations at the distribution center, including human resources, training and development, budgetary responsibility, quality control, and finances. Directly under Gordon are Manager of Operations Paige Curlis and Outbound Manager of Operations Eric

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<sup>3</sup> There are currently ten material handlers and one assistant supervisor in the Receiving Department; six material handlers and one assistant supervisor in the Flat Department; three material handlers in Vendor Compliance; 16 material handlers, one assistant supervisor, and one temporary assistant supervisor in the Pack-To-Lite Department; one material handler and one assistant supervisor in the Jewelry Department; two assistant supervisors in the Transportation Department; two material handlers in the Tower; 13 material handlers and two assistant supervisors in the Shipping Department; and two order control clerks in the Transportation Department. There are also seven additional material handlers who are off work on leaves of absence.

Skeen.<sup>4</sup> Curlis is in overall charge of the Receiving, Flat Receiving, and Vendor Compliance areas. Under her is Supervisor of Flat Receiving Will Nelson, who is also in charge of Vendor Compliance, and Supervisor of Receiving Stacy Marks. Skeen is in overall charge of the Jewelry, Pack-To-Lite, Transportation, and Shipping Departments. Under Skeen are Supervisor of Pack-To-Lite and Jewelry Glenn Ecalne, Supervisor of Shipping Jamey Morris, who oversees the Tower; and the Supervisor of Transportation, which position is currently vacant. There is no dispute that all of the above-named individuals are supervisors within the meaning of Section 2(11) of the Act and are ineligible to vote in the election.

### **3. The Eleven Assistant Supervisors**

Directly reporting to these admitted supervisors come the eleven assistant supervisors. The duties of these eleven assistant supervisors vary somewhat by department. In the Receiving and Shipping Departments, at the start of each workday a shop floor meeting is held that is attended by the supervisor, the assistant supervisors, and the material handlers assigned to that department. Based upon computer reports setting forth the incoming or outgoing shipments that are expected that day, the supervisor and the assistant supervisors assign the material handlers to sets of shipping doors where they will spend their day unloading or loading trucks. After the door assignments are given out, the assistant supervisors work side by side with the material handlers for a few minutes to help get the workload flowing. Once everything is running smoothly, the assistant supervisors in the Shipping and Receiving Departments spend the

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<sup>4</sup> Gordon, Curlis, Skeen, and the Human Resources Manager comprise a group that the Employer designates as its "Senior Leadership Team."

bulk of their day performing clerical functions related to production, such as scanning cartons, using the computer to look up various purchase orders that the scanner does not initially recognize, and doing clerical data entry work on the computer. Throughout the day the assistant supervisors also answer work related questions from the material handlers, reassign material handlers from one door to another based on the workload, and, pursuant to orders from the supervisor, temporarily reassign material handlers to another department where extra help is needed. Finally, the assistant supervisors spend about an hour a day performing “P4 coaching and training.” This training consists of observing a material handler’s work for about fifteen minutes, filling out a “P4 coaching and training form” regarding their observations of that employee, discussing with the employee the results of the observation, and then training the employee regarding any deficiencies noted during that observation. The assistant supervisors in these departments perform P4 coachings on two different employees each day. One of these two employees is always an employee who has been designated for a coaching by management because they are performing below an acceptable level. Management determines who these employees are by reviewing the P4 computer printout that tracks each material handler’s productivity on a daily basis. The other coaching is done on an employee who has been performing satisfactorily. The assistant supervisor is required to perform a P4 coaching on every material handler in his department, so he essentially rotates through the list to make sure he has coached everyone at least once before the cycle starts over again.

The duties of the assistant supervisors in the Flat Department, Flat Receiving, and Pack-To-Lite are similar to those of the assistant supervisors in Shipping and Receiving, except that they do not assign material handlers to shipping doors. Essentially, they spend their workdays pitching in as needed, working side-by-side with the material handlers in their respective departments; they perform data entry functions on the computer; and they spend about an hour a day performing P4 coachings. In the Pack-To-Lite Department, one of the assistant supervisors is a temporary assistant supervisor. This employee is a material handler who has been temporarily promoted to this position until newly appointed Supervisor Glenn Ecalne has mastered all of his responsibilities. Once that occurs, the temporary assistant supervisor will be returned to his former position of material handler.<sup>5</sup>

The assistant supervisor in the Jewelry Department spends about 80-90% of his workday doing the exact same work as the lone material handler assigned to that department – auditing incoming deliveries and separating the items into boxes designated for shipping to different retail stores. The bulk of this assistant supervisors' remaining work time is spent doing data entry into the computer to update the inventory. Finally, the assistant supervisor in Jewelry spends about a half hour a week doing a P4 coaching on the Jewelry Department material handler.

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<sup>5</sup> An employee who is temporarily substituting for a statutory supervisor due to extraordinary circumstances that are not likely to recur is eligible to vote. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). In any event, since I have found herein that the ten permanent assistant supervisors are eligible to vote, it follows as a matter of course that the temporary assistant supervisor is a fortiori also eligible.

Finally, the Employer employs two assistant supervisors in the Transportation Department. They are responsible for entering production report data into the computer, communicating with the retail stores regarding the timing of deliveries, performing yard checks to validate which trailers are in the yard, and reviewing bills of lading to ensure that all outbound trailers have the correct items on them and are routed to the correct stores. Because there are no material handlers or other unit employees in the Transportation Department, the two assistant supervisors in that department do not assign work to or supervise any employees. However, during the Employer's August through December busy season, they assist the assistant supervisors in other departments by performing P4 coachings on some of the new hires in those departments.<sup>6</sup>

**ANALYSIS: ARE THE ASSISTANT SUPERVISORS  
SECTION 2(11) SUPERVISORS?**

**1. Overview Of The Case Law**

Section 2(11) of the Act defines a supervisor as one who possesses "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 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."

The burden of proving that an employee is a statutory supervisor is on the

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<sup>6</sup> The record is silent as to how frequently this occurs and as to how much time they spend on this function during those occasions. Under these circumstances, since the bulk of Petitioner's evidence regarding the assistant supervisors' authority to discipline, reward, and/or assign work does not apply to the two assistant supervisors in the Transportation Department, I find that Petitioner has failed to meet its burden of proving that these two employees are statutory supervisors.

party alleging such status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). There is a three-part test for establishing supervisory status. Employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires use of independent judgment; and (3) their authority is held in the interest of the employer. *Kentucky River*, supra. In its recent decision in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006),<sup>7</sup> the Board clarified the meaning of the Section 2(11) criteria “assign,” “responsibility to direct,” and “independent judgment.” The Board held that to “assign” means to designate significant overall duties to an employee, and not simply to give an employee ad hoc instructions to perform a particular task. *Id.* slip op. at 4. “Responsibility to direct” is defined as having the authority to decide what task shall be done next or who shall do it, under circumstances where the putative supervisor is held responsible for the performance of the task. *Id.* slip op. at 6-7. To exercise “independent judgment,” a putative supervisor “must, at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* slip op. at 8. However, “a judgment is not independent if it is dictated or controlled by detailed instructions...” *Id.* Moreover, the Board has long held that the exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner or through giving some instructions or minor orders to other employees does not confer

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<sup>7</sup> See also the Board’s two companion decisions that issued the same day - *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). Finally, the Board is careful not to construe supervisory status too broadly because a worker who is found to be a supervisor loses his organizational rights. *Bay Area-Los Angeles Express*, 275 NLRB 1063 (1985); *McDonnell Douglas Corp v. NLRB*, 655 F.2d 932 (9<sup>th</sup> Cir. 1981).

## **2. The Issues**

It is undisputed that assistant supervisors lack the authority to hire, permanently transfer, suspend, layoff, recall, promote, discharge, adjust grievances, or to effectively recommend such actions.<sup>8</sup> Nevertheless, the Petitioner contends that the assistant supervisors are statutory supervisors because they possess the authority to discipline or reward employees, or to effectively recommend such actions, and/or because they assign work and responsibly direct employees using independent judgment. By contrast, the Employer contends that all of the assistant supervisors are statutory employees because they do not possess any of these Section 2(11) indicia. I will discuss each of the disputed 2(11) indicia in turn, below.

### **a. The Assistant Supervisor's Role In The Disciplinary Process**

The Employer has four types of discipline that it administers to unit employees. The first type is attendance-based discipline. This discipline is

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<sup>8</sup>Petitioner did proffer testimony that on one occasion an assistant supervisor recommended that a temporary employee be hired as a regular employee, and that employee was subsequently hired. But Petitioner failed to offer any testimony regarding whether this recommendation was "effective," as opposed to whether this applicant was independently evaluated by management before being offered a job. Furthermore, the record reflects that other temporary employees that were not recommended for hire by this same assistant supervisor were subsequently hired. Under these circumstances, I do not find that the Petitioner's evidence regarding this one isolated incident is sufficient to meet its burden of establishing that the assistant supervisors have the authority to effectively recommend that applicants be hired.

based upon a point system which is monitored and administered by the Human Resources Department. The actual disciplinary warnings are given to the unit employees by their supervisor. It is undisputed that the assistant supervisors play no role in this type of discipline.

The second type of discipline issued by the Employer is behavioral-related discipline. As part of their job duties, assistant supervisors monitor employee conduct on a daily basis, they make sure that employees are working diligently, and they are responsible for enforcing certain Employer rules such as the dress code. According to Petitioner witness Ian Vines, when he was an assistant supervisor he had the authority to verbally warn employees if they were engaged in behavioral-related misconduct. Vines stated that if the problem continued even after repeated verbal warnings were given, the assistant supervisors were required to notify the supervisor, usually via an e-mail, to document the problem. Copies of these e-mails would be placed in employees' personnel files. However, Vines admitted that these e-mails were not sent to the employees at issue and Petitioner has no evidence that these e-mails have any impact on an employee's job tenure or benefits.

By contrast, the Employer's witnesses testified that assistant supervisors were not given the authority to verbally warn employees. Moreover, while the Employer agreed that assistant supervisors were required to send e-mails to their supervisor to document employee misconduct, the Employer contends that these e-mails are not considered to be discipline and they are not taken into account during the employee's annual performance review. Rather, according to

unrebutted testimony from the Employer's witnesses, before any written discipline is issued to any employee for behavioral-related misconduct, an independent investigation is always conducted by the employee's immediate supervisor and the Employer's Senior Leadership Team. Once the investigation is complete, the decision to issue written discipline is made by the Senior Leadership Team. The Human Resources Department then prepares the disciplinary warning and the supervisor signs it and issues it to the employee. A copy of the warning is then put in the employee's personnel file. It is undisputed that after the assistant supervisor sends the e-mail reporting the misconduct, he does not conduct the investigation; he does not participate in the decision making process; he does not sign the warning; he does not attend the meeting where the warning is issued to the employee; and he has no access to the employee's personnel file where the warning is maintained.

The third type of discipline issued to unit employees is P4 performance related discipline. As described above, the Employer's computer system continually tracks the productivity of all of the material handlers who work in the Shipping, Pack-To-Lite, Flat, and Receiving Departments and it generates a productivity rating (a P4 score) for each employee in those departments. At the end of each week, the Senior Leadership Team reviews a computer printout which contains the P4 score of each unit employee. For each such employee who received a negative P4 score, the Senior Leadership Team verifies that the employee worked the minimum number of hours to be liable for receiving performance based discipline, and then checks the file where the P4 coaching

forms are kept to see if the employee had received at least one P4 coaching by an assistant supervisor or supervisor in the recent past. If both of these factors are present, the Senior Leadership Team sends the employee a letter telling them they need to improve their P4 performance.<sup>9</sup> This letter constitutes a written warning, the first step on the disciplinary ladder. The Senior Leadership Team continues to track every employee's status monthly, and to issue additional warning letters if the performance related problem continues. If an employee receives four written performance warnings in any 12 month period, the employee is terminated. It is undisputed that, other than by giving employees a P4 coaching and training, the assistant supervisor does not play any role in the issuance of P4 performance related discipline. It is also undisputed that a P4 coaching itself does not constitute discipline.

The final category of performance related discipline concerns the activity cards that employees fill out on a daily basis to record periods of time when they are working on activities that are not registered by the P4 system as productive time. An example of such time would be if the conveyor belt system stopped working and that prevented a material handler from performing his normal work. When this occurs, the material handler is responsible for filling out an activity card listing the amount and the reason for this non-productive time. These cards are turned in at the end of the day either to the assistant supervisor or the

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<sup>9</sup> If the files indicate that the employee has not received the requisite number of P4 coachings in the recent past, the Senior Leadership Team directs the appropriate supervisor and/or assistant supervisor to perform a P4 coaching. No discipline is issued in this situation.

supervisor, who need to sign off on them to verify that they are accurate.<sup>10</sup> If an employee forgets to fill out an activity card, the supervisor or assistant supervisor fills out a “no activity” card to document this failure. If an employee gets four “no activity” cards in a six month period, the Senior Leadership Team reviews the facts to see if a formal counseling from the supervisor is warranted. The assistant supervisors’ role in this process is limited to monitoring and reporting whether or not employees have filled out their activity cards. They do not provide any input to the Senior Leadership Team as to whether formal counseling is warranted or if there was a valid excuse for not filling out the activity card.

Based upon the testimony of Vines, the Union first contends that the assistant supervisors have the authority to issue verbal warnings to unit employees. The Employer disputes this conclusion, arguing that assistant supervisors have never been given the authority to issue verbal warnings. However, even if I credit Vines’ testimony to this effect, this evidence is insufficient to meet the Union’s burden of proving that the assistant supervisors have the authority to discipline or to effectively recommend discipline as set forth in Section 2(11) of the Act. In this regard, it is well-established that, absent some showing of an impact on an employee’s job status, “verbal reprimands do not constitute discipline within the meaning of Section 2(11) of the Act.” *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981). See also, *Win. P. McDonald Corporation*, 97 NLRB 1471, 1472 fn. 4 (1952). In the instant case, the Union

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<sup>10</sup> Board law is clear that the authority to sign off on timecards to verify that an employee worked the number of hours reflected on the card is not sufficient, by itself, to constitute supervisory authority. *Necedah Screw Machine Products, Inc.*, 323 NLRB 574 (1997); *Los Angeles Water & Power Employees Assn.*, 340 NLRB 1232 (2003).

has presented no evidence that the verbal reprimands ostensibly issued by Vines or any other assistant supervisor had any impact on an employee's job status. Under almost identical facts, in *Board of Social Ministry*, 327 NLRB 257 (1998), the Board concluded that the verbal warnings issued by an alleged supervisor had no clear connection to any kind of other disciplinary measures. The Board then quoted the 8<sup>th</sup> Circuit's reasoning in *Linwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F. 3d 1042, 1046 (8<sup>th</sup> Cir. 1998), that "the mere authority to effectively recommend warnings that 'have no tangible effect on [an employee's] job status ... is not sufficient for supervisory status.'" Along these same lines, in *Chicago Metallic Corporation*, 273 NLRB 1677 (1985), and *Hydro Conduit, supra*, the Board affirmed the decision of an administrative law judge who reasoned that the authority to verbally admonish employees for performing incorrect or unsafe work does not reflect the kind of discretion indicative of supervisory status. See also, *Brown & Root, Inc.*, 314 NLRB 19, 21 fn. 6 (1994) (quality control work inspecting and reporting the work of others is not supervisory authority).

Finally, the Union contends that the assistant supervisors have the authority to issue written warnings to employees and/or to effectively recommend that such discipline be issued because the assistant supervisors send e-mails to the supervisors documenting misconduct or performance related problems and because they prepare "no-activity" cards documenting occasions where the associates fail to fill out their activity cards. However, as detailed above, the record reflects that before any written discipline is issued based either on e-mails

or “no-activity” cards from the assistant supervisor, the supervisors and the Senior Leadership Team always conduct an independent investigation of the facts and they reach an independent conclusion as to whether written discipline is warranted. As a result, the role of the assistant supervisor is limited to relaying complaints and reports to higher management. The possession of such limited authority is insufficient to support a finding that the assistant supervisors are statutory supervisors. *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965). See also, *Hawaiian Telephone Co.*, 86 NLRB 1 (1970) (recommendations concerning discipline and reward not “effective” because higher management conducted independent investigations).

Therefore, the evidence presented by the Union is insufficient to meet its burden of proving that the assistant supervisors have the authority to discipline or effectively recommend the discipline of unit employees.

**b. The Assistant Supervisor’s Role In Evaluating And Rewarding Employees**

The Union’s second contention is that the assistant supervisors have the authority to “reward” employees based upon their participation in the evaluation process, and/or to effectively recommend that employees receive such rewards.

The record reflects that all newly hired employees get evaluated on their 90<sup>th</sup> and 120<sup>th</sup> days of employment, and all employees get an annual evaluation. Based on the results of the annual evaluation, employees can receive a merit pay increase. The employee’s immediate supervisor is the one who prepares the evaluation form. On this form, employees are rated on a number of objective factors like “units per hour building,” “units per hour department,” “units per hour

shift;” “safety (shift);” and “building accuracy (shift).” These ratings are building-wide, department-wide, or shift-wide scores that are the same for all employees in that respective category. The underlying statistics used to compile these scores come from Employer’s computer system. They are not generated by the assistant supervisors. The associates are also evaluated on their individual performance. The objective factors examined are the employee’s individual P4 score, the number of accidents the employee has had, and the employee’s attendance. All of the data for these individual objective factors are generated by the computer system, without any input from the assistant supervisor.

The only subjective criteria that are used to evaluate an associate are the boxes where the supervisor filling out the evaluation rates the employee on “performance strengths,” “performance opportunities,” and “contributions to department and working relationships.” The record reflects that while the supervisor may solicit the assistant supervisor’s opinion of a particular employee’s work before they fill out these boxes, the supervisor and assistant supervisor do not meet to go over the form categories, the assistant supervisor does not provide any written report or evaluation to the supervisor, the supervisor prepares the evaluation form himself, and the supervisor does not review a draft or final version with the assistant supervisor. Significantly, there is no evidence that any of the P4 coaching forms or other written employee observations that the assistant supervisors prepare are examined, let alone relied upon, when the supervisor fills out this portion of the evaluation.

After the supervisor fills out the evaluation form, the Operations Manager reviews it and must approve it before it is presented to the employee. After it is approved, the supervisor meets with the employee to discuss it and informs the employee if they are to receive a raise. The assistant supervisors do not participate in this meeting and their input is not sought regarding whether an associate should receive a raise.

On these facts, I find that the assistant supervisors' role in the evaluation process is insufficient to demonstrate that they have the authority to reward employees or to effectively recommend such rewards. Just as with discipline, while assistant supervisors generate P4 coaching and training forms that may be looked at by supervisors when they prepare the annual evaluations of associates, and while supervisors may solicit opinions from assistant supervisors about the work of various associates, the record reflects that the supervisors use both objective performance data and their own observations of associate's work to independently evaluate them and determine whether a merit increase is warranted. The authority to evaluate employees is not supervisory indicia absent evidence that the evaluation affects job status or tenure. No such evidence has been presented here. *Volair Contractors, Inc.*, 341 NLRB 673 (2004); *Willamette Industries*, 336 NLRB 743 (2001). Therefore, I find that the Union has presented insufficient evidence to meet its burden of proving that the assistant supervisors have the authority to "reward" or effectively recommend that associates be "rewarded" within the meaning of Section 2(11).

**c. Assignment and Responsible Direction Of Work**

Petitioner's third (and most compelling) supervisory status argument is that the assistant supervisors have the authority to assign and/or responsibly direct the work of associates, using independent judgment. In support of this conclusion, Petitioner relies on the assistant supervisors' authority to determine which employees will be temporarily transferred out of their department; their authority to assign work, i.e. placement of an employee at a particular shipping door, to associates in the Shipping and Receiving Departments; and their authority to assign other work-related tasks to employees.

In *Oakwood Healthcare, supra*, the Board clarified the meaning of the Section 2(11) criteria "assign," "responsibility to direct," and "independent judgment." The Board first held that to "assign" means to designate an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties to an employee, and not simply to give an employee ad hoc instructions to perform a particular task. *Id.* slip op. at 4.

Applying this test to the facts before me, I first note that it is the Senior Leadership Team and the supervisors, rather than the assistant supervisors, who decide on a permanent basis how many total employees are needed in the distribution center, which departments they should work in, which shifts they should work on, and what job classification they should be assigned to. I also note that, on a daily basis, it is this same Senior Leadership Team and supervisors who decide, depending on the amount of incoming and outgoing

shipments, whether it will be necessary to temporarily transfer employees between departments and job classifications; which departments need additional staffing; which departments can afford to have employees temporarily transferred out; and how many such employees should be transferred. The record reflects that assistant supervisors do not play any role in making any of these decisions.

Nevertheless, the Union argues that the assistant supervisors assign work using independent judgment because, once higher management decides that a certain number of employees can be temporarily transferred out of a particular department, the assistant supervisors in that department have the authority, using independent judgment, to decide which particular employees they can afford to do without that day. In support of this conclusion, the Union proffered testimony from former assistant supervisor Ian Vines, who stated that when he was an assistant supervisor, he selected the weakest and slowest workers from his department to be transferred, based upon his subjective assessment of their work abilities. By contrast, Employer witness Paige Curlis testified that the selection of which employee could be transferred out of a department should be based on workload (i.e. who is the least busy), and that it would be inappropriate for an assistant supervisor to use another selection criteria (such as dumping his weakest workers on another department). Curlis also testified that temporary transfers were supposed to be made on a rotating basis if the workload was equal.

Even if I were to credit Vines, I would not find that the assistant supervisors' authority to make these temporary transfer decisions is sufficient to

confer supervisory status. In this regard, I first note that these temporary transfers have no ongoing impact on an employee's overall duties but are more akin to the types of changes in discrete and routine tasks that the Board found non-supervisory in *Oakwood*.

Moreover, to find that the authority to select employees for temporary transfers establishes supervisory authority, I must find that the putative supervisor uses independent judgment when making such assignments. This means that the assistant supervisors must exercise authority that is free from the control of others, and make a judgment that requires forming an opinion or evaluation by discerning and comparing data. The touchstone is the degree of discretion exercised by the purported supervisor, not whether the discretion involves technical or professional judgment. In *Oakwood*, the Board recognized the spectrum between situations involving little discretion where there are detailed instructions for the actor to follow from situations where the actor is wholly free from constraints. While judgment is not independent if it is dictated or controlled by detailed instructions, it is independent where the policy allows for discretionary choices. Additionally, the judgment must "rise above the merely routine or clerical" for it to be truly supervisory, even if it is made free of control of others and involves forming an opinion by discerning and comparing data. *Id.*, at 693.

Applying this framework, it is clear that the assistant supervisors' authority to make transfer decisions based upon an evaluation of which workers are bigger, stronger, and faster does not constitute the kind of independent judgment

contemplated by Section 2(11) of the Act. Rather, I find this to be the type of evaluation of employee skills that is routine in nature and typical of a non-supervisory leadman. See, e.g., *Croft Metals*, supra; *Central Plumbing Specialties*, 337 NLRB 973 (2002); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996). Board law is clear that making work assignments that are routine and based on nothing more than common knowledge in the shop of which employees have particular skills and who gets along with whom does not constitute the use of independent judgment. *Armstrong Machine Co.*, 343 NLRB 1149 (2004); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998).

In a similar vein, Petitioner next argues that the assistant supervisors in the Shipping and Receiving Departments in particular possess Section 2(11) authority to assign work because they have the authority to assign employees to particular work stations (doors) utilizing independent judgment.<sup>11</sup> In these departments, the record reflects that supervisors and assistant supervisors are responsible on a daily basis for assigning material handlers to particular receiving and shipping doors. Petitioner witness Vines testified that in making these door assignments, he took into account how strong and fast different workers were, and he tried to accommodate individual employee preferences for who they wanted to work with and which doors they did not like working on. Relying on

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<sup>11</sup>In contrast to the Shipping and Receiving Departments, the record reflects that in the Jewelry, Flat, Vendor Compliance, Tower, and Order Control Departments the associates have fixed work stations that they report to each day. In the Pack-To-Lite Department it is true that there are 12 different workstations or modules that material handlers can be assigned to by the assistant supervisors. However, the record reflects that the assistant supervisors make these assignments on a daily basis by simply following Employer policy to rotate the material handlers through each of these 12 stations to give them a bit of variety in their work. Based on these facts, I find that there is no evidence that the assistant supervisors in the above-listed departments have the authority to assign workstations to the employees using independent judgment.

Vines' testimony, Petitioner argues that the assistant supervisors in these two departments have the authority to assign work using independent judgment.

However, just as with their purported authority to select employees for transfer, I find that the evidence Petitioner has presented is insufficient to prove that the assistant supervisors in the Shipping and Receiving Departments possess Section 2(11) authority. In this regard, I first note that the Employer takes steps to ensure that the workload for each Shipping and Receiving Department employee is substantially the same. Thus, although the Employer admittedly generates a daily printout which designates each door that day as being "low, medium, or high" in volume, the Employer tries to minimize the disparity in workload between employees assigned to these doors by assigning as many as six doors to employees with doors designated as "slow." In fact, an important goal of the Employer's P4 computer system is to ensure that each material handler has roughly 2800 cartons to handle each day, regardless of whether their primary doors are designated as "low, medium, or high." Moreover, the work of the material handlers in the Shipping and Receiving Departments is largely repetitive and routine work that does not involve a great deal of expertise or skill, so there is little discretion or independent judgment involved in making these door assignments. See, e.g., *Croft Metals*, supra; *Armstrong Machine*, supra. I also note that it is undisputed that the assignments of material handlers to different doors each day have no impact on their wages, since the associates are all paid on an hourly basis regardless of how busy they are on any particular day, or to which doors they are assigned. Finally, just as

with their authority to select employees for temporary transfers, I find that the authority to make door assignments does not involve the use of independent judgment.

Petitioner's final assertion regarding the assistant supervisors' authority to assign work is that they are responsible on a daily basis for making sure all of the associates in their department have enough work to do. What this means is that the assistant supervisors monitor the workload and shift employees from one task or workstation to another as they finish each task, and they tell associates to get back to work if they are inattentive to their work. Assistant supervisors also give orders to associates like "work on this PO and not that PO;" "let vendor compliance know how full a trailer is;" or "stop working on that order and work on this order."

However, I do not find that the possession of any of this authority is sufficient to confer supervisory status upon the assistant supervisors. First, as set forth above, the assistant supervisors' authority to assign tasks and to assign employees new tasks when they have finished the old ones is not sufficient to confer 2(11) status upon them since the work is largely repetitive and routine and does not involve a great deal of expertise or skill, so there is little discretion or independent judgment involved in making these assignments. See, e.g., *Croft Metals*, supra; *Armstrong Machine*, supra. Second, the assistant supervisors authority to determine which tasks are performed and in what order is severely restricted by factors outside of the assistant supervisor's control, such as whether the computer system designates that a particular incoming delivery

needs to be audited and the fact that the priority of each order is determined by a list prepared by higher management. Moreover, even where an explicit priority is not set, the assistant supervisor is required to follow the Employer's general policy that the oldest orders have to be processed first. Similarly, where there is a "hot PO" that needs to be completed out of order, it is higher management that sends that instruction to the assistant supervisor, who merely relays this order to the employees.

Under these circumstances, Board law is clear that the mere ability to make sure that employees perform their duties and to call employee's attention to tasks that have not been performed correctly does not require independent judgment, especially where the work being performed is repetitive and routine in nature and/or where the putative supervisor's use of discretion is limited by established Employer policies. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001); *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002); *Oakwood*, supra, at 692-694. See also, *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047-48 fn. 15 (2003) (assigning work pursuant to plans and schedules developed by another fails to establish supervisory status); *Third Coast Emergency Physicians, P.A.*, 330 NLRB 756 (2000) (balancing work assignments or using other equitable methods does not make one a statutory supervisor).<sup>12</sup>

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<sup>12</sup> Petitioner also points to the fact that assistant supervisors are responsible for conducting daily P4 coachings and trainings for the associates. However, the authority to train employees and to correct their work errors is insufficient to confer supervisory status upon an employee, absent evidence that these corrections have any impact on the employee's job tenure or benefits. No such evidence has been presented herein. Parenthetically, I also note that the primary way that new hires are trained is by assigning them to work side-by-side with an experienced material handler.

**d. Responsible Direction of the Work**

The final factor that must be analyzed in determining whether the assistant supervisors are statutory supervisors is whether they “responsibly direct” the work of production employees. In *Oakwood*, the Board explained that the authority to instruct employees on what work needs to be done and who will do it is not supervisory unless it is also done “responsibly,” i.e., if the putative supervisor is held accountable for the performance of other employees. To establish accountability, the party asserting supervisory status has to show both that the putative supervisor has “the authority to take corrective action” and can potentially receive “adverse consequences” for the performance errors of other employees. *Oakwood*, supra, at 691-692. For the adverse consequences to establish “responsible direction,” the consequences must flow from the other employees’ performance failures, not from the purported supervisor’s own performance failure. Finally, the purported supervisor must also exercise independent judgment in responsibly directing the work of the employees under him.

As discussed above, the authority of the assistant supervisors to take “corrective action” when they observe employees performance or behavioral problems is limited to verbally correcting employees and then, if the problems continue, reporting it to the supervisor. It is only the supervisor and the Senior Leadership Team that can issue necessary discipline to the employees.

On the other hand, however, there is some record evidence that the assistant supervisors are held accountable for the work of the associates under

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them. Thus, in their annual evaluations the assistant supervisors are rated based on how well they ensure that “best practices are followed in the department” and how well they “follow up on work assigned and knows the status of issues.” Specific examples of these responsibilities include making sure that the material handlers in their department are working and not idle; making sure the dress code is enforced; training associates; and answering work-related questions from associates. The record reflects that if the assistant supervisor fails to carry out these duties, the assistant supervisor can be marked down in his own evaluation and can even receive a disciplinary writeup. Another example is that assistant supervisors are supposed to train material handlers in shipping to build high and tight walls of boxes in the trailers they are loading and, if supervisors observe that the associates are not, in fact, doing this properly, the assistant supervisor can be written up and disciplined. Finally, assistant supervisors are evaluated on how well they keep their supervisor informed of issues. Examples of this include updating the supervisor on the status of production and advising the supervisor if a material handler took an extended break or left their work area during working time.<sup>13</sup>

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<sup>13</sup> The assistant supervisor evaluation form also rates them on criteria like “Conducts effective meetings” and “assists in department reviews and observes the Supervisor delivering counselings.” Similarly, the assistant supervisor job description states that they “conduct interviews and make recommendations on associate hires” and “assist Department Supervisor and/or Manager in administering progressive discipline procedures.” However, the record reflects that, in practice, while they prepare P4 counseling and training forms and document performance and behavior related disciplinary incidents through e-mails sent to their supervisor, the assistant supervisors do not conduct interviews, make recommendations on hires, or assist in administering progressive discipline procedures. Although possession of supervisory authority – even without its actual exercise – is sufficient to show supervisory status, “the evidence must suffice to show that such authority actually exists.” *Avante at Wilson*, 348 NLRB No. 71, slip op. at 2 (2006). A paper showing alone - such as job titles or job descriptions - is insufficient. *Golden Crest*, supra at 730 fn. 9 (2006).

However, a distinction must be drawn between situations where a putative supervisor is held responsible for the work of employees under his direction, and those where the putative supervisor is merely held responsible for their own performance. Thus, if an assistant supervisor is written up for failing to enforce the dress code, failing to properly train employees how to load a trailer, failing to correct employees who make mistakes in their work, or failing to make sure employees return on time from their breaks, this is nothing more than the assistant supervisor being held accountable for his own poor performance. Responsible direction is not established on such facts. *Oakwood*, supra at 694. That is exactly what is occurring here. Thus, the record is bereft of any evidence that assistant supervisors receive discipline for the failure of material handlers and associates to perform their work in accordance with the Employer's expectations.

Accordingly, for the above-reasons, I find that the assistant supervisors do not assign or responsibly direct the work of employees using independent judgment.

**d. Secondary Indicia of Supervisory Status**

Nonstatutory indicia can be used as background evidence on the question of supervisory status, but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one or more of the primary indicia. See, *Training School of Vineland*, 332 NLRB 1412 (2000). Because I have concluded, supra, that the assistant supervisors do not possess any of the Section 2(11) indicia, an analysis of these secondary indicia is scarcely

necessary. Nevertheless, an examination of these secondary indicia provides further support for my finding that the assistant supervisors are not statutory supervisors.

Concerning their benefits, the record reflects that assistant supervisors receive the same healthcare and 401(k) benefits as the associates; they both are paid hourly and receive overtime for work in excess of 8 hours in a day or 40 hours in a week; and they receive the same vacation and paid time off benefits. By contrast, while supervisors get the same healthcare and 401(k) benefits, they are paid on salary, they do not receive overtime, and they have different time-off benefits. Regarding their wage rates, during their first year of employment, the material handlers pay scale ranges from \$11.00 to \$12.75 an hour; order control clerks range from \$12.00 to \$13.75 an hour; and the assistant supervisors range from \$13.00 to \$14.75 an hour. The record does not reflect what the salary of the supervisors is. This limited evidence does not demonstrate a significant disparity between the pay rates of the unit employees and the assistant supervisors. In fact, some order control clerks earn more than some assistant supervisors.

The record also shows that all of the associates, assistant supervisors, and supervisors use the same employee parking lots and cafeteria. All employees are subject to the same dress code which precludes them from wearing items like mini skirts or hoodies. However, supervisors are subject to an additional dress code requiring them to wear a collared shirt. The record reflects

that the assistant supervisors do not attend any supervisor or management meetings.

Finally, the ratio of supervisors to non-supervisors supports my conclusion that the assistant supervisors are not 2(11) supervisors. In this regard, the Employer employs about 8 admitted supervisors and managers, 11 assistant supervisors, and 72 associates. The ratio of supervisors to nonsupervisors would be about 1:10 if the assistant supervisors are found to be statutory employees, but about 1:4 if they are found to be supervisors. Given that the work of the unit employees is largely routine and repetitive, a ratio of one supervisor to four unit employees would be excessive supervisory coverage.

Therefore, an analysis of the secondary indicia bolsters my conclusion that the assistant supervisors are not statutory supervisors.

### **CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.<sup>14</sup>

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<sup>14</sup> At the hearing, the Employer objected when the Petitioner attempted to introduce evidence concerning the seven material handlers who are currently off work on leaves of absence, asserting that voter eligibility is not litigated in representation case hearings. The hearing officer sustained this objection, and the record is silent regarding whether any of these seven employees have resigned or been discharged since going out on leave. It is well-settled that employees on leaves of absence generally continue to be regarded as employees unless it can be established by overt action or objective evidence that the employment relationship has been severed. See *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Air Liquide America Corp.*, 324 NLRB 661, 663 (1997). Under these circumstances, I am directing the Employer to place the names of these seven employees on the *Excelsior* list. Either party is free to challenge the votes of any of these seven material handlers who attempt to cast a ballot at the election. If necessary, the eligibility of these voters can then be resolved in a post-election challenge procedure.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union 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.

4. The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time material handlers, order control (plant) clerical employees, and assistant supervisors employed by the Employer at its warehouse facility located at 2065 Keystone Pacific Parkway, Patterson, California; excluding all managerial and administrative employees, salespersons, office clerical employees, all seasonal employees, guards (a.k.a. loss prevention employees), and supervisors as defined in the Act.<sup>15</sup>

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<sup>15</sup> At the hearing, the Petitioner proposed to add the phrase “all warehouse employees including” to the beginning of the description of the list of eligible voters. The Employer refused to agree to this proposed stipulation. The Employer proposed to add the phrase “all other employees” to the list of exclusions. The Petitioner refused to agree to this language. Under these circumstances, because the parties were unable to reach a stipulation, I will not adopt either party’s position. Should an employee employed in a job classification not specifically listed in either the inclusions or the exclusions attempt to vote in the election, that voter can be challenged and their eligibility determined, if necessary, in a post-election challenge procedure.

## **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above.<sup>16</sup> The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local 386, International Brotherhood of Teamsters. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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<sup>16</sup> At the hearing, Petitioner stated that if I found that the assistant supervisors should be included in the unit, it was willing to proceed to an election in this alternate unit.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **Employer to Submit List of Eligible Voters**

To ensure 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, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). As set forth above, this list should include the full names and address of the seven material handlers currently off work on leave of absence. This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to the Petitioner.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N,

Oakland, California 94612-5211, on or before **February 19, 2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov)<sup>17</sup>, by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of the list will continue to be placed upon the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

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<sup>17</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, [www.nlr.gov](http://www.nlr.gov).

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) 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.

## 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 by 5 p.m., EST on **February 26, 2009**. The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov)<sup>18</sup>, but may **not** be filed by facsimile.

Dated: February 12, 2009

/s/ Alan B. Reichard  
Alan B. Reichard, Regional Director  
National Labor Relations Board  
Region 32  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5211

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<sup>18</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, [www.nlr.gov](http://www.nlr.gov).