

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

PRO-TEC FIRE SERVICES, LTD.

Employer

and

Case 36-RC-6452

TEAMSTERS LOCAL UNION NO. 62

Petitioner

DECISION AND DIRECTION OF ELECTION

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

I. SUMMARY

Pro-Tec Fire Services, Ltd. (Employer) provides aircraft rescue fire fighting (“ARFF”) services at the Rogue Valley International Airport in Medford, Oregon. Teamsters Local Union No. 62 (Petitioner) seeks to represent a unit of seven full-time and regular part-time fire captains and engineers² employed by the Employer at the Medford location, excluding guards and supervisors as defined in the National Labor Relations Act (Act).

At issue in this proceeding is the supervisory status of three captains, and whether the part-time engineer works sufficient hours to share a community of interest with the petitioned-for employees to be included in the unit. The Employer asserts that the three captains are supervisors under Section 2(11) of the Act, and

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

² Although the petition reveals that the Petitioner also seeks to represent the Employer's EMTs/firefighters, the record evidence established that the Employer does not employ anyone with those classifications at its Medford location. Accordingly, that classification is not set forth in the Unit description found appropriate herein.

therefore are properly excluded from the unit. Specifically, the Employer asserts that the captains assign and responsibly direct employees consistent with the supervisory criteria in the Board's Decision in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and make recommendations regarding discipline of engineers. The Employer also contends that the hours worked by the part-time engineer are so erratic and sporadic that he should be excluded from the unit as a casual employee. On the other hand, the Petitioner asserts that the three fire captains are not supervisors and that the part-time engineer works sufficient hours to share a community of interest with the other unit employees. Accordingly, the Petitioner asserts that these four employees are properly included in the petitioned-for bargaining unit.

I have carefully reviewed and considered the record evidence and the arguments of the parties, both at hearing and in post-hearing briefs.³ For the reasons expressed below, I have concluded that the Employer has failed to meet its burden that the three captains constitute supervisors under the Act. I further find that the evidence is insufficient for me to determine whether the part-time engineer works sufficient hours to be included in the unit as a part-time employee and shall direct that he vote subject to challenge.

Below, I have set forth the relevant evidence contained in the record, as well as the legal standard utilized by the Board in regard to supervisory and on-call employee determinations. Following that portion of the Decision, I have applied those standards to the evidence and articulated the rationale for my determination. In conclusion, I have set forth the details of the directed election and the procedures for requesting review of this decision.

II. RECORD EVIDENCE⁴

A. The Employer's Operations

The Employer provides ARRF services at several airports in the United States and Canada, including the Rogue Valley International Airport ("Airport") in Medford, Oregon, the location at issue in this proceeding. These core ARRF services include emergency responses for aircraft that crash, become damaged, and/or catch on fire. In addition, the Employer also inspects fuel storage areas; inspects air operations areas (including runways, lighting systems, and pavement markings); reports security issues to security agencies; conducts friction measurement testing of the runways to inform airlines of how slippery the runways are; manages defibrillator units; and provides instruction on first aid. Services provided by the Employer at the Airport are pursuant to a written contract between the Employer and Jackson County ("County"), Oregon, the owner of the Airport. Pursuant to the contract, the Employer provides the trained personnel and administrative expertise, whereas the County provides the emergency response

³ The Employer submitted a post-hearing brief, which I have carefully considered. The Petitioner submitted an untimely brief.

⁴ The Employer presented the following witnesses at the hearing: Corporate Fire Chief Jerry Rynerson; Fire Chief Mark Thompson; Captain Derek Matchett; and Engineer Eric Trygstad. Petitioner did not call any witnesses.

vehicles and the facilities where the Employer's employees work. The Employer provides services at the Airport 365 days per year and 24 hours per day.

There are eight individuals whom the Employer employs at the Airport. The individual who heads the Employer's Airport operation is the Fire Chief, Mark Thompson.⁵ Thompson has held that position since October 27, 2008. The other seven individuals comprising the Employer's employee complement are three captains, three full-time engineers,⁶ and one part-time engineer. The employees are housed in a fire station at the Airport while they are on duty.

As the Employer is required to be ready to provide emergency services at all times, employees below the Fire Chief work 24-hour shifts. The Employer pairs a captain with an engineer for each 24-hour shift with three pairs designated as shifts A, B, and C. Each pair works a schedule of 1 day on, 1 day off, 1 day on, and 4 days off. By contrast, Fire Chief Thompson is scheduled to work from 8 a.m. to 5 p.m. on Mondays through Fridays. Thompson's schedule reflects the fact that he engages primarily in administrative duties and interacts with Airport administration, other safety agencies, and the Employer's corporate personnel. Thompson testified that he is on call whenever he is needed by the Employer's personnel, and will sometimes work a number of odd hours, including Saturdays. He also interacts with both the captains and the engineers. For example, Engineer Trygstad testified that the Fire Chief had contacted him directly the day before the hearing in this matter to ask whether Trygstad wanted to earn overtime by covering another employee's shift. When the Fire Chief is absent from the Airport, the captain on duty takes command and is responsible for performing the duties of the Fire Chief. Captain Matchett testified, however, that he did not believe that he could exercise the Fire Chief's full authority in that situation by, for example, granting overtime to other employees.

Captains receive a higher wage rate than engineers. The wage range for the three captains varies between \$11.33 and \$11.65 per hour, whereas three engineers (one of whom is the part-time engineer) receive \$10.04 per hour and the fourth receives \$9.54 per hour. The captains and the full-time engineers both receive the same benefits, such as vacation and health benefits. Captains will normally replace other captains when they go on vacation, but the Employer has also trained one engineer to fill in as captain in those circumstances. Both captains and engineers are provided with uniforms and badges by the Employer. The uniforms differ only to the extent that the captain's uniform has a bugle insignia on the side, whereas the badges differ to the extent that they identify one as a captain and the other as an engineer.

⁵ The parties stipulated that the Employer's Fire Chief possesses and exercises the authority to hire, fire, direct and discipline employees and should be excluded from the unit on the basis that he is a supervisor pursuant to Section 2(11) of the Act. Accordingly, I have excluded the Fire Chief from the Unit.

⁶ The parties stipulated that the full-time engineers share a community interest with respect to wages, hours, and other conditions of employment so that they should be included in any unit found appropriate.

B. The Captains' Duties

1. Assign, Responsibly Direct

There are a number of responsibilities that the Employer undertakes in order to successfully accomplish the ARRF and other services that it provides. These responsibilities include, for example, various types of inspections, testing, training, and equipment maintenance. The Employer has grouped these responsibilities into three general categories: training, prevention, and maintenance. Each of the three captains is assigned to oversee and coordinate the duties that fall under one of these three categories. The Employer introduced into evidence a position description setting forth the duties of the captains. General testimony elicited from the Employer's witnesses revealed that the description accurately reflects the duties that captains are expected to undertake.

Rynerson testified that the captain spends 70% to 75% of his time insuring that the tasks that he oversees are accomplished. The record, however, contains sparse evidence as to how the tasks are accomplished. Fire Chief Thompson testified that the captains will assign the outlined duties, but provided little evidence as to how the assignments are made. Engineer Trygstad testified that tasks are accomplished between the captain and the engineer as the result of a consensus reached between the two of them regarding which tasks must be done that day or month. Trygstad and Captain Matchett provided one example in which the captain had delegated to Trygstad the responsibility for conducting the research in order to draft a prefire plan for a particular aircraft.⁷

In response to questions from Employer counsel, Rynerson, Thompson, and Matchett all testified that the captain is held accountable for insuring that the specified tasks are accomplished. Despite this general testimony, no records were introduced showing how and if captains have been held accountable because tasks were not completed or were completed improperly. Although Fire Chief Thompson testified that the captain would suffer negative consequences if tasks were not completed, he provided little insight as to what negative consequences would occur or how the Employer would determine that the captain had failed in carrying out his responsibilities. Thompson testified merely that he would call the captain in, would ask whether certain things had been done, and if necessary, discipline. Moreover, it was not clear from Thompson's limited testimony in this regard as to whom discipline would be issued and as to why discipline was issued. That is, it is not clear whether the captain would be disciplined for failing to see that the engineer did not perform his work or whether the engineer would be disciplined because the captain had reported the engineer's failure to perform certain work to the Fire Chief.

Besides the above tasks, the record contains evidence of other duties assumed by the captains. For instance, captains can, and have, assumed the position of incident commander. The Employer is charged with providing the initial

⁷ Matchett explained that a prefire plan is a general schematic of an aircraft that sets forth information such as the size and dimensions of the aircraft, the number of passengers that the aircraft would typically carry, and the location of the aircraft's emergency systems.

response to address emergencies, or incidents, at the Airport with the Medford Fire Department acting as the backup. When an incident arises, the Employer's incident command system takes effect. Under that system, the highest ranking officer who arrives takes charge of the scene and is known as the incident commander. The highest ranking officer of the Employer's personnel is the Fire Chief, followed by the captain, and then the engineer. The incident commander is responsible for determining what is needed to respond (such as vehicle positioning and chemical agents to use) to address the incident. The incident commander formulates a plan or overall strategy to mitigate the situation. Based on the strategy selected, the engineer who is at the scene applies the tactics he has been trained to use to carry out that strategy.

Captain Matchett testified that approximately 3 to 4 weeks before the hearing, he assumed the role of incident commander to address an in-flight emergency where an approaching aircraft's engine was malfunctioning. Matchett testified that he determined the initial positioning of the emergency vehicles at the scene and maintained a standby position based on guidelines established to address particular problems. Although he contacted Fire Chief Thompson by radio during the incident, he determined based on standing protocols that the Fire Chief need not come to the scene to deal with the existing incident. As it turned out, the plane landed safely and Matchett was not required to adjust the standby position.

2. Discipline

With regard to discipline, the role of the captains appears limited to notifying the Fire Chief of instances where engineers have engaged in inappropriate conduct. Thus, Fire Chief Thompson stated that while the captain was his "eyes" and should provide him with a written statement concerning inappropriate conduct, Thompson then conducts an independent investigation, contacts corporate human resources with his findings, and the human resources department then makes the decision regarding whether to discipline and/or the level of discipline. The record does not reveal the nature and extent of the human resources department's role once the matter is referred to it by the Fire Chief.

Captain Matchett provided similar testimony. Matchett testified that if he observed conduct that was inappropriate under guidelines set by the Fire Chief, he would report the conduct to the Fire Chief and recommend that he conduct an investigation and take any appropriate action. Matchett also testified that he had never disciplined or recommended discipline of any employee. Engineer Trygstad testified that the former Fire Chief had disciplined him. Although the captain did intervene later, it was to ask the corporate Fire Chief to review the discipline that the Fire Chief had issued to Trygstad. Rynerson testified that he could not cite any instance in which a captain had issued corrective action against any employee. Indeed, the record does not reveal any instances whereby captains hired or fired employees, or made effective recommendations to do so.

3. Evaluations

The captains have performed engineers' performance evaluations. Evaluations are usually performed on the 6-month and 1-year hiring anniversary dates for employees. Testimony and documentary evidence establish that the captain fills out the evaluation form by ranking the engineer's ability in several categories, writing comments, writing an overall summary of the engineer's performance, and selecting an overall ranking of the engineer's performance. After the captain completes the evaluation, he sends it to the Fire Chief for his review and approval. The evidence suggests that the Fire Chief summarily accepts the evaluation in the absence of any complaint by the engineer about the evaluation.⁸ The Fire Chief then sends the evaluation to the corporate human resources department. There is no evidence in the record concerning what the human resources department then does with the evaluation.

With regard to the Employer's use of evaluations, Fire Chief Thompson agreed with Employer counsel's statement that the Employer relies on the performance evaluation "to determine whether the employment of that engineer continues without any action." Otherwise, the record is silent concerning what impact, if any, the evaluation has on an engineer's job status and/or whether human resources is involved in that determination.

C. The Part-time Engineer

The part-time engineer does not work a set schedule. Rather, he is the first one called in to replace an engineer who is absent for vacation, illness, or any other reason. When called in to work, the part-time engineer is expected to perform and does perform the same duties as the full-time engineers. He receives the same wage rate as two of the full-time engineers, and receives a higher wage rate than the third. The part-time engineer does not earn vacation, and is not eligible for health benefits because he does not meet the Employer's threshold of working at least 32 hours per week on a regular basis.

Like full-time engineers, the part-time engineer must undergo training on a monthly basis. The part-time engineer receives the same training on topics required by the FAA that the full-time engineers receive, and must train a minimum of 8 hours per month. When undergoing training, the part-time engineer is paid at his regular hourly wage rate.

No time sheets or records were offered into evidence to establish the number of hours that the part-time engineer works as compared to the full-time engineers. Corporate Fire Chief Jerry Rynerson testified that during 2008, the part-time engineer worked 525 hours or "somewhere in that neighborhood." Rynerson also estimated that the full-time engineers worked approximately 2880 hours during the same time period.

⁸ Fire Chief Thompson testified that although he would like to meet independently with the employee who is evaluated, there has been insufficient time to do so and that he has therefore accepted the captain's evaluation "as fact."

Rynerson also testified that at the Employer's three unionized locations in the United States, part-time employees were not included in the bargaining units. However, no evidence was offered to reveal whether the part-time employees at those locations were excluded by agreement of the parties or as the result of a determination by an independent entity such as the Board. Nor was any evidence offered regarding the number of hours worked annually by such part-time employees at these other locations.

Fire Chief Thompson testified that during his initial month on the job, he was not aware that the Employer had a part-time engineer. Thompson was also not aware of any time during the prior 3 months that the part-time engineer had worked a 24-hour shift. Although he did recall calling the part-time engineer in once during that period for the opening of a new terminal building, he did not specify how many hours the engineer worked on that occasion.

III. LEGAL ANALYSIS

A. The Captains

1. Section 2(11) and the Relevant Supervisory Criteria

The Employer asserts that the three shift captains should be excluded from the unit sought because they are supervisors under 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.

Citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), the Board in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) set forth its three-part test to determine whether individuals are statutory supervisors. Under that test the individuals are supervisors under Section 2(11) if:

(1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" or "responsibly to direct") listed in Section 2(11);

(2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and

(3) their authority is held "in the interest of the employer."

The Board has cautioned that it must be careful "not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *East Buffet & Restaurant, Inc.*, 352

NLRB 975, 991 (2008), quoting *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Accordingly, the Board places the burden to prove supervisory authority on the party asserting it, and requires that it be proven by a preponderance of the evidence. *Croft Metals, Inc.*, 348 NLRB 717, 721. (2006). See also *Loyalhanna Care Center*, 352 NLRB 863(2008). "Purely conclusory" evidence is not sufficient to establish supervisory status; a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Accord *Lynwood Manor*, 350 NLRB 489, 490 (2007). Moreover, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). To qualify as a supervisor, it is not necessary that an individual possess all of the criteria specified in Section 2(11). Rather, possession of any one of them is sufficient to confer supervisory status. *Lakeview Health Center*, 308 NLRB 75, 78 (1992).

In the instant case, the Employer asserts that the three captains are supervisors because they assign and responsibly direct engineers while exercising independent judgment. In the following sections I address the assignment and responsible direction standards in more detail, with an analysis of the captains' job duties in regard to each. I then address the Employer's contention that the captains are supervisors allegedly based on other indicia.

2. Assignment

"Assignment" is defined as the "giving [of] significant overall duties, i.e., tasks, to an employee," as well as "designating an employee to a place (such as a location, department, or wing), [and] appointing an employee to a time (such as a shift or overtime period)." *Oakwood Healthcare*, 348 NLRB at 689. However, every instruction in the workplace is not an assignment; "significant overall duties" do not include "ad hoc instructions to perform discrete tasks;" these instructions are considered "direction" of a non-supervisory nature. *Id.* Similarly, working assignments made to equalize work among employee's skills, when the differences in skills are well known, are routine functions that do not require the exercise of independent judgment. *Providence Hospital*, 320 NLRB 717, 727, 731 (1996), overruled in unrelated part by *Oakwood Healthcare*, 348 NLRB at 686, fn.29.

In the present case, the record contains insufficient evidence to establish that the captains assign significant overall duties to the engineers for two reasons. First, the evidence of actual assignments made by the captains is virtually nonexistent and is more conclusory in nature. Second, the assignment that is referred to in the record appears merely to constitute "ad hoc instructions to perform discrete tasks."

In regard to the first point, both Corporate Fire Chief Rynerson and Fire Chief Thompson testified on several occasions that captains are responsible for insuring that duties are performed, but provided little evidence of assignments. Thus, Rynerson stated that the captains spend 70-75% of their time insuring that things get done and that the Employer expects that the captains will assign duties as set forth in the captain's position description. However, Rynerson provided no examples of

assignments made by the captains at the Airport. Similarly, Fire Chief Thompson testified that he expects that the captains will assign duties as set forth in the captain's position description. Thompson, however, did not provide any concrete examples where a captain has assigned engineers significant overall tasks, or where a captain has designated an engineer to a specific place or time to accomplish these tasks. Such conclusory testimony regarding captains' authority to assign work is insufficient to confer supervisory status. *Lynwood Manor*, 350 NLRB 489, 490 (2007).

The testimony of Captain Matchett and Engineer Rygstad reveal one example of an assignment made by Matchett. Thus, they testified that Matchett delegated the responsibility of conducting research to develop a prefire plan for a specific type of aircraft to Trygstad. In the absence of further evidence, it appears that this delegation of responsibility constitutes merely an ad hoc instruction to perform a discrete task. Moreover, the Employer has failed to direct me to any examples where the captains have made assignments by designating engineers to a certain place or time so as to establish supervisory authority.

Furthermore, there is no evidence to suggest that a captain uses independent judgment in making assignments. As stated by the Board in *Oakwood*, "to exercise independent judgment an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data." *Id.* at 692. Here, the evidence suggests otherwise. Engineer Rygstad testified that when dealing with duties that need to get done, he and his captain discuss what has to be done that day or that month and then reach a consensus as to how and when to accomplish them. Thus, rather than being free from the control of others, the captain actively seeks the engineer's input and agreement as to performance of the task. Where the assignment is made through a consensus between the employee and putative supervisor, the putative supervisor is not exercising independent judgment. See *Hospital General Menonita v. N.L.R.B.*, 393 F.3d 263, 267 (1st Cir. 2004); *Edward St. Daycare*, 189 F.3d 40, 48 (1st Cir. 1999) (assignment of work through a consensus of those that will be affected by the assignment does not establish the requisite independent judgment on the alleged supervisor's part). Moreover, assigning work to the only employee on the shift, in the circumstances of this case, fails to establish that captains assign within the meaning of Section 2(11).

As the party asserting supervisory status, it is the Employer's obligation to provide concrete examples of assignments of significant overall duties, or assignment of an employee to a place or time. The record does not contain examples; rather, it contains assertions. Thus, I conclude that the Employer has failed to establish that the captains are supervisors based on their assignment of duties.

2. Responsible Direction

In *Oakwood Health Care*, the Board also addressed the standard to evaluate the language "responsibly to direct" found in Section 2(11). The Board interpreted that language initially as follows: "If a person on the shop floor has men under him,

and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' (as explained below) and carried out with independent judgment." 348 NLRB at 691 (internal quotations omitted). The Board then stated that for direction to be "responsible," the putative supervisor "must be accountable for the performance of the task by the other, such that some adverse consequence may befall [the putative supervisor] if the tasks performed by the employee are not performed properly." *Id.* at 691-692. In order to establish accountability, it must be shown that 1) the employer delegated to the putative supervisor the authority to direct the work and to take corrective action, if necessary; and 2) that the putative supervisor is subject to adverse consequences for failures in performance by the directed employees. *Id.* at 692.

The requisite showing of accountability is not present where the putative supervisor is disciplined because of his or her own inadequate performance. Rather, the requisite showing is present only when the putative supervisor satisfactorily performed his or her own duties, but nevertheless is disciplined because the staff failed to properly perform their tasks. For example, lead persons in a manufacturing setting were held accountable where they received written warnings because their crews failed to meet production goals. *Croft Metals*, 348 NLRB at 722. On the other hand, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. *Oakwood Healthcare*, 348 NLRB at 695.

Based upon my review of the record, I cannot conclude that the captains responsibly direct engineers because the Employer has failed to establish that the captains are held accountable as required by the Board. In order to establish accountability, the Board will not accept mere assertions that the putative supervisor is held accountable for the performance mistakes or nonperformance by the employee he directs. Rather, the Board requires that a party present specific evidence that the putative supervisor may be disciplined, receive a poor performance rating, or suffer other adverse consequences with respect to their terms and conditions of employment due to the directed employee's failure to perform tasks properly or not at all. *Lynwood Manor*, 350 NLRB 489, 490-491 (2007). Here, the record reveals mere assertions of accountability rather than specific evidence.

In particular, Corporate Fire Chief Rynerson testified that captains are accountable to the Chief if something is not done and that the captain has the authority to take corrective action if an engineer does not perform properly. Rynerson failed to present any specific evidence, however, showing what adverse consequences a captain is subject to or has suffered, and failed to present any instances where captains have taken such corrective action. Thompson testified that there would be negative consequences for the captain if duties were not performed. However, he did not provide specific evidence concerning such negative consequences beyond stating that he would call the captain in for an explanation of what had occurred and "if necessary, discipline." I find that such testimony is insufficient and too vague to establish specific evidence of accountability. Matchett also testified that he understood that he was accountable to the Chief to insure that the objectives of a shift were accomplished and that tasks were properly completed,

but provided no evidence concerning any adverse consequences that he was subject to or might have suffered.

In sum, the Employer has proffered only mere assertions of accountability on the captains' part. Such conclusory evidence is insufficient to meet the Employer's burden. *Lynwood Manor*, 350 NLRB 489, 490-491 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Accordingly, I do not find that the captains assign or responsibly direct employees or that the captains do so with independent judgment so as to confer supervisory status on them.

I also reject the Employer's further contentions that there are other indicia of supervisory status revealed by the record. Although the Employer refers to language in the position descriptions of the engineer and captain and general testimony to support its contention that the captains are supervisors, the Employer's heavy reliance on those position descriptions is misplaced. As the Board has stated, "employer-prepared job descriptions are not controlling [to establish supervisory status]; what matters are the authority that an individual actually possesses and the work that the individual actually performs." *Loyalhanna Care Center*, 352 NLRB 863, 864 (2008), citing to *Oakwood Healthcare*, 348 NLRB at 690 fn. 24.

There is also no merit to the Employer's assertion that the captains recommend discipline. As noted above, the record demonstrates only that the captains notify the Fire Chief of an engineer's conduct that appears to violate the Employer's policy and the Fire Chief then conducts an independent investigation and forwards his findings to the corporate human resources department. The testimony of Fire Chief Thompson that the Employer cites in its brief to establish that captains recommend discipline does not support its argument. A review of that testimony reveals that in response to Employer counsel's leading question whether Thompson expects captains to recommend discipline, Thompson replied that captains were his "eyes," which Thompson then explained meant that he expected the captain to provide a written statement to him of the alleged misconduct so that Thompson could conduct an independent investigation. An individual's mere reporting of misconduct without any recommendation of discipline that is followed does not constitute effective recommendation of discipline that Section 2(11) requires to establish supervisory status. See, e.g., *Lakeview Health Center*, 308 NLRB 75, 78-79 (1992), citing *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Passavant Health Center*, 284 NLRB 887, 891 (1987). The record evidence simply does not reveal any instances where a captain has disciplined or effectively recommended discipline of any employee.

Although the Employer also refers in its brief to the fact that the captains perform evaluations of the engineers, the performance of those evaluations is insufficient to demonstrate that the captains are supervisors. Here, the Employer failed to provide any evidence as to what impact, if any, the evaluations had on an

engineer's terms and conditions of employment.⁹ Section 2(11) does not include "evaluate" in its enumeration of supervisory functions. As a result, in the absence of evidence that the evaluation is used to affect an employee's job status such as a promotion, wage increase, or discipline, the individual who performs the evaluation will not be found to be a supervisor. See generally *Harborside Healthcare, Inc*, 330 NLRB 1334 (2000). In light of the fact that the Employer has failed to establish that the performance evaluations are used to affect engineers' terms of employment, it has not met its burden of establishing that the captains are supervisors on that basis. *Mancon*, 349 NLRB 249, 259 (2007) (the ability to evaluate must have an impact on employee wages or terms of employment before it can be considered a supervisory attribute); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989) (where evaluations are placed in an employee's personnel folder without any apparent effect on the employee's terms and conditions of employment, the absence of any such effect is fatal to the claim that the performance of an evaluation constitutes evidence of supervisory status).

Finally, I note that were I to accept the Employer's argument to exclude the captains as supervisors, and to exclude the part-time engineer, from the unit, there would be more supervisors (4) than employees (3) to supervise at the Medford location. Although the Employer argues that a low ratio of supervisors to subordinates is justified based on its paramilitary organizational structure, and cites *Burns Security International*, 278 NLRB 565 (1986) as support for that proposition, I find that case to be inapposite. *Burns Security* primarily concerned a unit of guards providing security at a nuclear power plant regulated by the Nuclear Regulatory Commission (NRC). The Board found that the 2 to 1 ratio of supervisors to guards was justified by the strict security requirements at a nuclear power plant and the fact that sergeants (who were part of the employer's security contingency force and were found to be supervisors) could not be part of the security contingency force under NRC regulations if they were found to be unit employees. By contrast, the ratio that the Employer seeks here is 1 supervisor to 1 employee, rather 2 to 1, and the Employer has not shown that captains' duties would be affected in any way if captains are found to be unit employees. I also note that the Employer, unlike *Burns Security*, that is not responsible for security at the Airport.

B. The Part-Time Engineer

The Employer contends that I should exclude the part-time engineer from the unit as a casual employee because he does not work a regular shift or sufficient hours to share a community of interest with the other employees. The Petitioner contends that I should include him in the unit as a part-time employee because he works and trains a sufficient number of hours to share a community of interest with the other engineers who are included in the unit.

⁹ Although Thompson agreed with Employer's counsel statement that the employee would continue on without further action as a result of the evaluation, no evidence was provided to explain what that meant and what impact, if any, the Employer gave to the evaluation in that situation. Indeed, the record is silent concerning what the Employer does with the evaluation after the corporate human resources department receives it.

In order to address the eligibility of on-call or part-time employees, the Board developed an eligibility formula in *Davison-Paxson Co.*, 185 NLRB 21 (1970). Under that formula, an employee is eligible to vote "if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date." *Id.* at 23-24. This longstanding formula should be followed absent a showing of special circumstances. *Columbus Symphony Orchestra*, 350 NLRB 523, 524 (2007). Here, neither party has made a showing of special circumstances that would require me to disregard the formula here.

Applying the above formula, I find that the record evidence is insufficient to determine whether the part-time engineer has worked the requisite number of hours to establish a community of interest with the other employees. The Employer argues that the part-time engineer has not worked the requisite hours during the relevant time period based on Thompson's testimony that he was not aware of the part-time engineer having worked any 24-hour shift since the end of October 2008. Although I have no reason to discredit Thompson, I find that his testimony is at odds with the testimony of Corporate Fire Chief Rynerson. Rynerson's testimony that the part-time engineer worked 525 hours during 2008 suggests that the part-time engineer worked an average of 44 hours per month during 2008. I find it highly unlikely that the part-time engineer amassed nearly all of the 525 hours during the first 10 months of the year and thereafter worked virtually no hours in addition to the 8 hours of training that he and the other three engineers are required to go through each month. Thus, I am unwilling to conclude that the part-time engineer did not work at least 4 hours per week during the previous 3 months solely on the basis of Thompson's testimony.

Unfortunately, time records reflecting actual hours worked by the part-time engineer in recent months were not offered into the record. In the absence of such evidence, I am unable to reconcile the inconsistency in the testimony of Thompson and Rynerson, and am unable to apply the *Davis-Paxson* formula in a meaningful way to determine whether the part-time engineer regularly averaged at least 4 hours of work per week during the previous 3 months. Thus, the record is insufficient to determine whether the part-time employee should be included in the unit as a part-time employee, or excluded from the unit as a casual employee. Accordingly, I have determined that the best way to resolve this uncertainty is to have the part-time engineer vote subject to challenge.

IV. CONCLUSION

Based on the above and the record as a whole, I conclude that the three captains are not statutory supervisors, and should be included in the unit. I further find that the record evidence is insufficient to determine whether the part-time engineer regularly worked an average of 4 or more hours per week during the previous 3 months and should be included in the unit as a part-time employee; therefore, he shall vote subject to challenge.

For these reasons, and in view of the record evidence, I shall direct an election in the following appropriate Unit:

All full-time and regular part-time engineers and captains employed by the Employer at the Rogue Valley International Airport in Medford, Oregon; excluding all other employees, the Fire Chief, guards and supervisors as defined in the Act.

There are approximately 6 or 7 employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by TEAMSTERS LOCAL UNION NO. 962.

A. List of Voters

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

In order to be timely filed, such list must be received in SubRegion 36 of the National Labor Relations Board, 601 SW Second Avenue, Suite 1910, Portland, Oregon, 97204-3170 on or before **February 20, 2009**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. Right to Request Review

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

Washington by **February 27, 2009**. The request may be filed through E-Gov on the Board's web site, www.nlr.gov, but may not be filed by facsimile.¹⁰

DATED at Seattle, Washington, this 13th day of February 2009.

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

¹⁰ To file a request for review electronically, go to 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 the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File 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 original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.