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

SUNOPTA (KETTLE VALLEY DRIED FRUIT)[1]

Employer

and Case 19-RC-15335

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1439, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

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[2] in this proceeding, the undersigned makes the following findings and conclusions.[3]

I. SUMMARY

SunOpta Healthy Fruit Snacks, Omak Production Facility ("the Employer") is engaged in the business of manufacturing organic and natural fruit snacks at its facility in Omak, Washington ("facility"). United Food and Commercial Workers, Local 1439, affiliated with United Food and Commercial Workers International Union ("Petitioner") filed the instant petition seeking to represent a unit of all full-time and regular part-time employees employed by the Employer at its facility; excluding truck drivers, office clericals, guards, managers, and supervisors as defined in the Act.

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[1] At the hearing, the Employer indicated the petition incorrectly named the Employer and offered a name of which it was not sure as being correct. Consequently, the Employer's name remains as petitioned.
[2] The Employer and the Petitioner timely filed briefs, which were duly considered.
[3] 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.

The Petitioner contends that the wall-to-wall unit of employees that it seeks is an appropriate unit. The proposed unit consists of approximately 150 employees.[4]

By contrast, the Employer asserts that the petitioned-for unit is not appropriate because it includes several categories of employees who are either statutorily excluded from bargaining units or employees who do not share a community of interest with the other bargaining unit employees. Specifically, the Employer's position is that its 13 leads should be excluded from the unit as they are supervisors as defined by Section 2(11) of the Act.[5] The Employer contends that its six quality control (QC) employees and two quality assurance (QA) technicians should not be included in the petitioned for bargaining unit because they do not share a community of interest with the Employer's production and maintenance employees. The Employer also asserts that the Employer's two production and planning clerks should be excluded from the unit as they are office clericals, rather than plant clericals. The Employer further argues that its safety training coordinator should be excluded from the unit as she is a confidential employee, manager and supervisor as defined by the Act and that she does not share a community of interest with the petitioned-for employees. Finally, the Employer contends that its four on-call employees should be excluded from the unit as they are casual employees who do not work enough hours to qualify as unit members.[6]

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[4] At hearing, the parties stipulated and I therefore find that the following positions are appropriately included in the petitioned-for unit: bar line flow wrapper, carton operator, cartoner operator, cartoner operator BCH, dryer, drying, evaporator operator, flow wrapper operator, general labor, janitorial FT, maintenance tech, material handler, mixer assistant, mixer assistant-in-training, mixer lead, mixer pilot, order builder, pilot flow wrapper, production expediter, receiving clerk, sanitation, and shipping clerk.

[5] Specifically, the Employer contends that its 11 production leads, and it warehouse lead and its sanitation lead should be excluded from the petitioned-for unit as they are statutory supervisors. As set forth below, the Employer failed to provide evidence regarding the warehouse lead and the sanitation lead to support its contention that these two leads are statutory supervisors. Therefore, as the Employer failed to meet its burden of demonstrating that these leads are statutory supervisors under the Act, both of these leads are included in the petitioned-for unit. The issue of the remaining 11 production leads will be discussed below.

[6] At hearing, the parties stipulated that the following employees be excluded from the petitioned-for bargaining unit as they are managers and/or supervisors under the Act: Production Supervisors Sean Jones, Robert Gunn and Jason Hinger; Facility Engineer Scott Campbell; HR Director Synthia Edwards; Research and Development Manager Esteban Mejia; Special Projects Manager Terry Llewellyn; Raw Materials Manager Peggy Liley; QA Manager Emily Johnson; Food Technologist Amelie Dube; Warehouse Manager Jason Robeck; Maintenance Manager Jay Smith; Logistics and Planning Manager Bruce Varchol; Research and Development Lab Technician (position currently not filled); and Sanitation Manager Kevin Hall. Although these stipulations are unsupported by any acknowledgment of specific 2(11) authority, Employer's Exhibit 5 provides support for the assertion that these employees are either managers or supervisors as defined by the Act. Accordingly, in accordance with the parties' stipulation, I shall exclude the aforementioned employees as managers and/or supervisors under the Act. The parties also stipulated that receptionist and Human Resources employee Teresa Super is an office clerical and confidential employee who should be excluded from the petitioned-for unit. Super has access to confidential employees files in her role as Human Resources assistant. In light of the above and the record as a whole, I shall exclude Super's position from the unit found appropriate and described below. The parties also stipulated that part-time employee Terri Gilliland should be excluded from the unit due to his lack of community of interest with the other production employees as a result of his unique employment arrangement with the Employer. As it appears that Gilliland does perform unit work and the

I have carefully reviewed and considered the record evidence, and the arguments of the parties at the hearing and in their post-hearing briefs. Based on the record evidence and the appropriate case law, I find that the petitioned-for unit of wall-to-wall employees is an appropriate unit. Accordingly, I am directing an election in that unit.

Below, I have provided a section setting forth the evidence, as revealed by the record in this matter and relating to background information about the Employer's operations, relevant supervisory status, and community-of-interest factors. Following the evidence section is my analysis of the legal principles that the Board utilizes in determining supervisory status as well as the appropriateness of the unit sought in a petition. I have also included in separate sections below, details of the directed election and the procedures for requesting review of this decision.

II. RECORD EVIDENCE[7]

A. The Employer's Operations

The Employer is engaged in the business of manufacturing organic and natural fruit snacks at its facility located in Omak, Washington. The Employer has run this facility since 2003.

The Employer produces several different natural fruit snacks at its Omak facility. There are four basic areas in the Employer's production facility: the drying area, the bar line, the BCH line and the pilot line. The Employer's production department turns raw apple product into various fruit snacks, including fruit bars, fruit twists and fruit jerky. Initially, the Employer's production department receives raw apple and turns it into puree. After that, it dries the puree into apple chips. Then on the various production lines in the facility, the Employer evaporates the moisture from the apple puree and apple juice concentrate and forms them into either a fruit twist or a fruit bar that is then packaged and cased on that line. On the fruit jerky line, the Employer takes raw apple material, mixes it with natural colors and flavors and produce slabs which are in turn cut into bars. These bars are cased and packaged on that line as well.

B. Supervisory Issue: Production Department Leads

Operations Manager Wayne Warner is in charge of the Employer's Production Department. Reporting directly to Warner are three Production Supervisors, each of whom covers one of three shifts. The first production shift runs from 8:00 a.m. to 4:30 p.m. The second shift runs from 4:00 p.m. to 12:30 a.m. The third shift runs from 12:00 a.m. to 8:30 a.m. There is a half hour overlap between all the shifts. The Employer's production lines run 24 hours a day, 5 days a week. During each shift, the Employer

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record stipulation by the parties does not establish a clear lack of community of interest with the petitioned-for employees, I will allow Gilliland to vote subject to challenge.

[7] The Employer presented testimony from a production lead, the Operations Manager, and the HR Director. Petitioner presented testimony from a QA technician, a production lead, and an evaporator operator.

runs two to three production lines. These lines consist of 10 to 12 production employees.

Each production line is run by a lead, who reports directly to the Production Supervisor assigned to their shift. The leads' central function is to make sure that their production line runs smoothly. The production lines vary by what they are producing with some requiring as few as 10 employees and others requiring as many as 12 depending on what the line is producing.

At the beginning of each shift, the Production Supervisor will have a stand up meeting. During the meeting, the Supervisor will go over whether the lines met their production goals the previous day and/or what problems occurred during the previous day's shift. The meeting ends with company-wide reminders and a description of what the lines will be working on that day. Generally, the lines are predictable and repetitive and the employees know what to expect each shift.

1. Assignment and Direction

After the stand up meeting, the production line starts running and it is the lead's job is to ensure that each employee on their line has arrived and that they are in their correct position. The leads do not set the employees' schedules, assign them to a particular shift, or assign them to a particular line.

The operations employees break down into roughly seven categories. These include leads, mixers, evaporator operators, flow wrap operators, cartoner, case operators, and general laborers. General laborers can be assigned to such positions as a stuffer, lug setter, or seal checker. Each employee knows which position to assume, unless he or she is a new general laborer. If there is a new employee on the line, the lead will place that employee in one of the general laborer positions and will explain to the new employee what their job function is and how to perform that function. The record reveals no special training or background is required of the line workers prior to hire. Regardless of their position on the line, all general laborers receive the same wage rate.

Leads will coach a new employee regarding how to best perform their function if the employee does not seem to be "getting the hang" of the function. At times, it may become necessary for a lead to switch an employee from one position on the line to another. The record revealed that this can take place when an employee does not seem able to work fast enough even after coaching. Several of the line positions also have the potential to cause an employee to become motion sick.[8] If a lead sees that an employee is not handling the motion of the machines well, he will switch that employee into another more stable position on the same line.

If the line is short a person, the lead can ask a lead working a different line, if he or she can spare an employee. The leads can arrange to fill an empty spot in this way.

[8] The positions of stuffer, lug setter and seal checkers, in particular, can make employees motion sick.

Other than filling an empty spot, however, it appears that leads do not have the authority to switch employees from one line to another on a permanent basis, without consulting the Production Supervisor. In particular, leads can not choose which employees work on their line versus another lead's line. Those decisions are left to the Production Supervisors and management.

When there is not enough work to be done for an entire shift, it appears that leads have the authority to choose which employees will stay and which employees will go home early. The lead will choose the fastest and most accurate employees to stay, while sending the other employees home. It appears from the record that sending employees home for lack of work is a rare occurrence as there was evidence of this only occurring two times. Leads also let employees go home if the employee is sick. If the employee is motion sick, the lead does not need to check in with anyone before allowing that employee to go home. Operations Manager Wayne Warner also testified that he had heard that a lead named Jason Haner sent an employee home who was being blatantly disrespectful. However, Warner did not detail how he heard about the incident, what exactly happened, how Haner made the decision to send the employee home, or whether Haner consulted with his Supervisor or other Employer managers prior to sending that employee home. Haner did not testify at the hearing.

The Employer submitted leave forms which appear to have been signed by leads for production employees. There was no direct evidence offered, however, regarding how these forms are submitted, who approves them, or the decision-making process used by the leads when they sign off on and submit these forms to Human Resources. Thus, concrete evidence or examples regarding how these forms are approved is not in the record.

Generally supervisors or managers will dictate when overtime is needed. Occasionally, leads can also have employees stay over their shift when certain specific tasks have not been completed by the regular shift end time. The record revealed that this was an infrequent occurrence and that overtime was authorized only under very limited circumstances. For example, lead Annette Anderson testified that the only time she was allowed to ask employees to stay and work overtime is when her line has a "kick-offs"[9] at the end of the shift, as those "kick-offs" need to be finished and put away at the end of the shift.

Depending on what product the line is working, the Employer sets different hourly quotas that the line should be producing. One of the leads' jobs is to record the lines' hourly production. If a line is not meeting its hourly quota, the Production Supervisor will ask the lead why that is happening. Although the Employer asserts that leads could be disciplined if quotas are not met, there is no evidence on the record that any lead has ever actually been disciplined for not meeting their quotas or rewarded for meeting them. Moreover, there is no record evidence demonstrating that leads have ever actually been informed that they could or would be disciplined if these quotas were not met. Additionally, there is no documentary evidence, notwithstanding the Employer

[9] There was no indication from the record regarding what exactly a "kick-off" is.

operating the facility for approximately 7 years, establishing that the leads are held accountable for their respective lines via evaluations and/or rewards.

On occasion, leads perform work on the production line. This will happen if a line is short a person. In that circumstance, the lead will step in until an appropriate replacement is found. This also happens on one of the lines referred to as the pilot line, where the lead will step into a position in order to allow each employee on the line to take a 15 minute break. This substitution pattern is specific to the pilot line, because that line does not stop, but runs continuously through the entire shift.

2. Discipline

Although the record evidence reveals that leads may recommend that a line employee be disciplined, nothing in the record demonstrates that a lead could independently write up or terminate an employee or even effectively recommend such action. Leads are sometimes involved in disciplinary meetings with employees and occasionally sign disciplinary actions. Although the Employer introduced some disciplinary actions which had been signed by leads, most of those disciplinary actions had also been signed by an uncontested supervisor or manager and there was no direct testimony about the decision making process for these disciplinary actions which were introduced through the Plant Manager even though the HR Director (who had signed some of these disciplinary actions) also testified at the hearing.

One lead, presented by the Employer, testified that he was involved in issuing an attendance contract and eventual termination of an employee for attendance issues. However, the lead's testimony revealed that lead consulted his Production Supervisor regarding the employees' attendance issue and that it was, in fact, the Production Supervisor who wrote up and signed the attendance contract as well as the final disciplinary action. The lead also admitted that his Production Supervisor would perform due diligence by independently investigating the attendance issues, before the lead's recommendation on attendance was followed. In this case, the Production Supervisor reviewed the employee's attendance record himself before signing off on the disciplinary action.

3. Evaluation

There was some evidence that leads are involved in the evaluation process of the employees on their line. The Employer, through Operations Manager Wayne Warner, introduced some line employee evaluations. Although Warner testified that the leads fill out these evaluations, Warner also signs off on these evaluations and there was no evidence submitted as to how much input the lead provides and whether Warner independently reviews evaluations. Moreover, contrary to the Employer's claim that these evaluations directly affect the employee's raises, the record evidence shows that wage increases are, in fact, formulated through a separate process and the evaluation is only one part of that process.

4. Hire

Evidence was introduced that leads are sometimes present when new employees are being interviewed. However, the record does not demonstrate, through concrete examples, that leads make hiring decisions or effectively recommend hiring employees.

5. Secondary Indicia

Leads clock in and out just like the other unit employees and are paid on an hourly basis. They receive the same benefits as the other production employees. Leads are paid anywhere from $10.47 to $13.98 an hour, depending on which line they are running. Other production employees' wages range from $8.55 to $13.98 an hour depending on their position on the production line. Leads appear to have the authority to review time cards, review and verify production related paperwork and ensure that line employees take their breaks.

C. Other Categories of Employees

1. Quality Control employees and Quality Assurance Technicians

The Employer employs six quality control (QC) employees and two quality assurance (QA) technicians. These employees report directly to Quality Assurance Manager Emily Johnson.[10] The QC and QA employees punch the same time clock as the other production employees, are paid an hourly rate, and receive the same benefits as the other production employees. These employees also share a common break room with the production employees in the plant.

The Employer's six quality control employees work the same shifts as the production employees and spend nearly 100% of their time on the production floor. One quality control employee is stationed at each production line and it is their job to periodically check the product on the line and make sure that it meets the customer's standards.[11] QC employees check the quantity and quality of the product before it is shipped directly to the customer. QC employees interact with the production employees throughout the QC employees' shifts as they perform product checks throughout their shift. The record revealed that at least one and perhaps two of the Employer's current QCs transferred into that position from the production floor. QC employees make $10.47 an hour.

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[10] Johnson also manages the Employer's two sanitation employees. One is a stipulated statutory supervisor and the other is a lead who is included in the petitioned-for unit. Although the sanitation lead is one of the leads whom the Employer asserts is a statutory supervisor, there is no record evidence regarding this petitioned-for lead's duties. Under the circumstances, and based on the evidence regarding the other leads, the Employer has failed to meet its burden of showing that the sanitation lead is a statutory supervisor. In light of the above and the record as a whole, I find that the sanitation lead position is properly included in the petitioned-for unit.

[11] These checks take place at least every 30 minutes.

The quality assurance technicians work the same basic shifts as the production employees.[12] One QA technician works the day shift and the other works the evening shift. These employees complete production paperwork, check to make sure that the QCs are accurately filling out their paperwork, and spend time out on the floor inspecting product quality in terms of flavor, odor, or issues with packaging. There was varying testimony regarding how much time the QA technicians actually spend out on the work floor but it appears that they spend at least 25% of their time out on the floor. The QA technicians interact with QC employees as well as production employees on a daily basis. When a quality control issue arises, the QA technician will be called out onto the floor to assess the situation. Moreover, QC employees will seek out advice from QA technicians on a daily basis.

QA technicians also spend a significant part of their day in an office at a desk located in the main office. The production and planning clerks, Chris Thue and Amy Charles, and office clericals, such as the receptionists, also work in the main office area. Production employees come into this office area to get forms for their paperwork and for formulas for mixing batches and pallet tags. QAs will also perform QC line work, when the facility is busy or when a QC calls in sick or goes on vacation. One QA tech testified that she will work on the line up to several nights in a week, when the facility is busy. She also testified that she assists production when needed which averages out to about 5% of her shift. Production employees generally do not fill in for QAs. QAs are called upon to work overtime frequently. QA techs are paid $12.38 an hour.

2. Production and Planning Clerks

Production and planning clerks Amy Charles and Chris Thue report directly to Logistics and Planning Manager Bruce Varchol. The clerks are located in the front office with the other administrative staff, including Human Resources Director Synthia Edwards and Safety Training Specialist Amanda Chile. The production and planning clerks take data that is captured off the floor and enter it into and execute computer reports on inventory. These clerks produce yield, labor, variance, and customer reports. Variance reports show if the Employer overused or underused any materials and show if any finished goods were overbilled. These two clerks do not answer phones or open mail. They do not work on payroll and their immediate supervisor, the Planning and Logistics Manager, also oversees the warehouse employees.[13] Charles, who previously worked in the warehouse, spends about 60% of her time on the floor and interacts with production employees during that time while Thue spends most of his time in an office working on reports.

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[12] The QAs start and end their shifts 2 hours earlier than the production employees, so there is some overlap.

[13] It is undisputed that warehouse employees are also included in the petitioned-for wall-to-wall unit. There is one warehouse lead, whom the Employer asserts is a statutory supervisor. As with the sanitation lead, there is no record evidence regarding the warehouse lead's duties and/or responsibilities. Therefore, the Employer has failed to meet its burden of showing that the warehouse lead is a statutory supervisor. Based on the foregoing and the record as a whole, I find the warehouse lead position is properly included in the petitioned-for unit.

3. Safety Training Specialist

Safety Training Specialist Amanda Chiles has an office in the same area as the administrative staff. She reports directly to Human Resources Manager Synthia Edwards. Chiles is in charge of training, which includes new hire orientation and good manufacturing practices, maintains all of the training records, and conducts all of the Employer's monthly safety trainings. She is also in charge of maintaining the Employer's accident prevention program and tests employees for possible hearing loss.

Chiles also investigates safety issues, works on plans to improve safety at the facility, and makes sure the safety committee runs smoothly. Chiles works with employees to figure out what, if any, work restrictions that an employee may have after suffering a workplace injury. She also deals with any Washington State Labor and Industries reporting issues. In that role, it appears that Chiles would have access to confidential employee health files that deal with medications and restrictions. She interfaces with Labor and Industries if there is a complaint or if a State inspection is coming up.

The Employer produced a disciplinary action dated January 18, 2010, which was issued to an employee for making false statements about a medical appointment that he, in fact, did not attend. The Employer asserts that this disciplinary action was issued by Amanda Chiles, thereby supporting its contention that she is a statutory supervisor who has the authority to discipline employees. The document, which details that the employee in question lied to Chiles about a medical appointment, is signed by the employee, Chiles, and Human Resources Director Synthia Edwards. Chiles did not testify at the hearing and this document was introduced through Operations Manager Wayne Warner, rather than through Chiles or Edwards. Although Warner testified that Chiles discussed the disciplinary action with him as well as with Edwards, Warner does not describe in any detail the decision making process for the discipline. Indeed, there is no record evidence as to whether there was an independent investigation for this incident, who conducted the investigation, whether Chiles signed the discipline as a witness or whether she even recommended the discipline.

In addition, the Employer submitted a disciplinary action which appears to have Chiles' initials on it. The employee in that instance apparently was disciplined for failing to wear safety equipment. This document was also introduced through Warner. Warner's only testimony regarding this document was that the lead worked on this disciplinary action with Chiles. It is unclear from the record how this disciplinary action was issued, who had the authority to issue it, and the decision making process for issuing this disciplinary action. Specifically, there was no record evidence regarding whether any independent judgment is exercised when it is discovered that an employee fails to wear safety equipment.

D. Eligibility Issue: On-Call Employees

The Employer's "on-call employees" are primarily used to fill in as needed when an employee calls in sick or goes on vacation. The Employer will call an on-call

employee to see if they are available to come in and work that shift if someone is needed. There are only four on-call employees on the Employer's current on-call list. At least two of these employees are college students. The Human Resources Director testified that three of these employees had only been on the Employer's on-call list for about 2 weeks prior to the hearing. Record evidence also demonstrated that this is the Employer's main method of finding new permanent employees to hire. Neither party contends that the on-call employment is seasonal in nature or that a special eligibility formula is appropriate in these circumstances.

III. LEGAL ANALYSIS

A. Supervisory Issue

1. General Legal Standards

The Employer contends that its leads possess indicia of supervisory authority, as they have the authority to assign, responsibly direct, evaluate, discipline and/or to effectively recommend discipline or discharge, and hire employees as defined in Section 2(11) of the Act. Accordingly, the team leaders should be excluded from the unit. Petitioner argues that the leads do not possess such authority and are appropriately included in the petitioned-for unit.

Section 2(11) of the Act defines a supervisor as:

> [A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly 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.

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status as long as the performance of the function is not routine or clerical in nature but, rather, requires a significant degree of independent judgment. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Oakwood Health Care, Inc.*, 348 NLRB 686 (2006). In addition, the burden of proving supervisory status is on the party alleging that such status exists. *Dean & DeLuca of New York, Inc.*, 338 NLRB 1046, 1047 (2003). Here, that burden falls on the Employer. As a general principle, the Board has exercised caution 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. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

The Board has defined the statutory term independent judgment in relation to two concepts. As initial matter, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently independent under the Act. The Board further found that the degree of discretion exercised must rise above the routine or clerical in order to constitute

independent judgment under the Act. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

2. Assign

The Board has defined assign as the act of designating 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, *i.e.* tasks, to an employee. Further, to assign for purposes of the Act, refers to the designation of significant overall duties to an employee, not the ad hoc instruction that the employee perform a discrete task. *Oakwood Healthcare, Inc.* 348 NLRB 686, 689 (2006).

Here, the record establishes that leads do not appoint production employees to their regular shifts, lines, or to their overall duties. Instead, such terms are largely at a higher level and are relatively fixed. However, the Employer asserts that leads assign employees' breaks. While the record reveals that the team leaders play a role in such matters, it does not establish that the leads actually choose the order of the breaks or even the timing of the breaks, but rather, only establishes that the lead on the pilot line will take over for line employees so that they can take the state required 15 minute break.

The Employer asserts that the leads use independent judgment to grant employees overtime. However, the record reveals that any overtime assigned by leads is dictated by very specific circumstances, such as when there are kick-offs that must be completed before the end of a shift. As set forth in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently independent under the Act. The Board also holds that that the degree of discretion exercised must rise above the routine or clerical in order to constitute independent judgment under the Act. *Id.* Here, evidence regarding overtime assignment shows that in very limited situations where specific tasks have not been completed on the shift, leads must keep the employees after their regularly scheduled shift in order to get those tasks completed. Under such circumstances, any judgment exercised by the leads in this regard, is merely routine as contemplated in the Board's *Oakwood* decision.

As for sending employees home early due to lack of work, again, these determinations are dictated by whether there is work available. Simply put, when the Employer has no product to run through the lines, the employees will be sent home. While the Employer asserts that the team leaders use independent judgment when deciding who goes home early and who stays and continues to work, the reality is that the work performed is routine in nature and that employees' skills are fairly fungible. The leads simply pick those employees who perform the work quickly and accurately. It can not be contended that determining which employee is counting bars in a box faster is a use of that lead's independent judgment. As there is no indication on the record that the production employees need specialized skills or training to perform their functions, the leads do not need to use independent judgment in determining which

production employee works most efficiently.

Similarly, the Employer contends that the leads have the authority to send employees home when they are sick. The two instances detailed in the record were of employees who were sent home because they became nauseated. While the lead did have the authority to allow those employees to go home in those circumstances, there is nothing in the record to reveal whether the lead actually used any discretion in sending home an employee who is sick.

In light of all of the above, I find that the Employer failed to meet its burden of establishing that the leads possess the authority to assign or use independent judgment when they assign employees.

3. Responsibly Direct

The Employer also asserts that the team leaders "responsibly direct" as that term is defined in Section 2(11) of the Act. The Board defined the statutory term responsibly to direct 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 . . . and carried out with independent judgment." *Oakwood Healthcare, Inc.*, 348 NLRB at 692. Further, with responsible direction, the Board said, "We agree with the circuit courts that have considered the issue and find that for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one performing the oversight if the tasks performed by the employee are not performed properly." *Oakwood Healthcare, Inc.*, 348 NLRB at 692.

The record here reveals that the production employees' work is fairly routine and predictable in light of the repetitive nature of the work. Although leads can move new line employees from one position on the line to another, these decisions are based on factors such as whether an employee is too slow or is feeling motion sickness because of the nature of the work.

The Employer cites the fact that employees "are responsible" for the line and for making sure that their production line hits hourly quotas. However, there was simply no evidence presented to demonstrate that the leads are in any way held accountable for failing to meet the hourly quotas, whether in disciplinary actions, evaluations, or in any other form. Indeed, the Employer has been operating its Omak facility for approximately 7 years. Notwithstanding this length of time, the Employer failed to produce documentary evidence to support its contention that it has held the leads accountable for the direction of their respective lines.

In light of the above and the record as a whole, I find that the team leaders do not possess the authority to "responsibly direct" employees. *See Dean & Deluca New York, Inc.*, 338 NLRB 1046, fn. 15, *citing Jordan Marsh Stores Corp.*, 317 NLRB 460,

467 (1995).

4. Discipline

The Employer further argues that the team leaders possess the authority to discipline employees. In support of this contention, the Employer cites a lead's involvement in issuing an attendance contract and eventual termination of an employee for attendance issues. However, the record revealed that the lead did not independently issue these actions, but rather that he and his Production Supervisor were involved in the issuance of these two disciplinary actions together. Moreover, both the attendance contract and the termination were drafted and signed by the Production Supervisor. The Employer also introduced disciplinary actions which it asserted were issued by the leads. However, most of these disciplinary actions also were signed by statutory supervisors and the Employer failed to present evidence that it was the leads who initiated, decided, and/or effectively recommended those disciplinary actions. *Necedah Screw Machine Products*, 323 NLRB 574, 577 (1997) (finding that mere signatures on disciplinary warnings do not necessarily equal effective recommendation). Under these circumstances, the Employer failed to produce evidence that the leads could issue discipline independently or that they effectively recommend discipline. A lack of such concrete evidence is properly construed against the party asserting supervisory status. *See Elmhurst Extended Care Facilities*, 339 NLRB 535 fn. 8 (1999).

5. Evaluate

The Employer contends that the leads possess supervisory authority as they are involved in completing production employees' evaluations. Although it does appear from the record that leads complete evaluations for employees, the record does not establish that these evaluations or the rankings on these evaluations directly effect the employees' terms and conditions of employment. Rather, the Board has found that the authority to "evaluate" is not one of the indicia of supervisory status set out in Section 2(11) of the Act. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Accordingly, "when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." *Id.* Providing input alone is merely a reportorial function. Here, the Employer failed to provide evidence that leads' evaluations affected the wages and/or job status of the evaluated employee. At the most, the Employer presented some evidence showing that evaluations are considered when granting raises, but the nature and extent of such consideration was not detailed in the record. Thus, there is insufficient evidence showing that the team leaders' role in evaluations had any direct effect on the evaluated employees' status or tenure.

6. Secondary Indicia

The Employer raises secondary indicia as a factor to be considered in making this determination. However, while secondary indicia may be relevant to supervisory status determinations, such indicia are not dispositive in the absence of a showing of one of the enumerated Section 2(11) criteria. *Training School of Vineland*, 332 NLRB

1412 (2000). Because I have determined here that the team leaders do not possess any of the enumerated indicia of supervisory authority as that term is defined in Section 2(11) of the Act, the existence of secondary indicia is not dispositive of the issue.

7. Conclusion

As the Employer failed to meet its burden to establish that the leads possess any of the supervisory authority as enumerated in the Act, I find that the Employer's leads are not statutory supervisors and therefore are appropriately included in the petitioned-for unit.

B. Appropriate Unit - Community of Interest Factors

1. General Legal Standard

Section 9(b) of the Act does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act only requires that the unit be "appropriate." *Overnite Transportation Co.,* 322 NLRB 723 (1996); *Parsons Investment Co.*, 152 NLRB 192 fn. 1 (1965); *Morand Bros. Beverage Co.,* 91 NLRB 409 (1950), enf'd. 190 F.2d 576 (7th Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores, Inc.*, 160 NLRB 651 (1966). Thus, there is ordinarily more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB,* 319 F.2d 420, 422-3 (4th Cir. 1962), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F. 2d 478, 480 (10th Cir. 1962).

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for-unit. The burden is on the party challenging the unit to show that the petitioned-for bargaining unit is inappropriate; if the unit sought by the petitioning labor organization is appropriate, the inquiry ends. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988); *Bartlett Collins Co.*, 334 NLRB 484 (2001). In determining whether a petitioned-for-unit is appropriate, the Board examines such factors as mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees, and functional integration. *Brand Precision Svcs.*, 313 NLRB 657 (1994); *The Boeing Company*, 337 NLRB 152 (2001). The Board generally looks to the totality of the circumstances or the overall community of interest in making unit determinations. *Johnson Controls, Inc.*, 322 NLRB 669 (1996). A petitioned-for plant wide unit is presumptively appropriate under the Act. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962). Petitioner here seeks such a plant-wide unit.

2. QC and QA employees

The Employer contends that the petitioned-for QC and QA technicians do not share a sufficient community of interest with the other employees in the petitioned for unit. As set forth above, a wall-to-wall production and maintenance unit is presumptively appropriate; therefore it is the Employer's burden to demonstrate that the

QC and QA techs do not share a sufficient community of interest to be included with the production and maintenance employees.[14] Moreover, quality control and quality assurance employees are generally included with production and maintenance employees based on traditional community of interest standards. *See Blue Grass Industries*, 287 NLRB 274 , 276-77 fn.11 (1987).

Here, although the quality control and quality assurance employees are separately supervised, they share common wages, hours, holidays, and other benefits with unit employees. They also work the same basic shifts as the production employees and the QC employees are out on the production floor interacting with the production employees throughout their entire shift. The QC and production employees are all working on a common production process and the QC and QA employees are functionally integrated with the production employees as they are all working toward producing quality fruit snacks for the Employer's customers. Although the evidence regarding how much time the QA technicians are actually out on the production floor interacting with unit production line employees during a normal shift is a bit ambiguous, the reality that QAs take over the QC line positions, QAs normally spend at least 25% of their time on the production floor, and that the QCs and the QAs work closely together in working on the common goal of production, demonstrates the QA techs' functional integration with unit employees.

Thus, based on the entire record and the factors set forth above, I find that the Employer's quality control and quality assurance employees share a community of interest with the production employees. See *Blue Grass Industries*, 287 NLRB 274 , 276-77 fn.11; 299 (1987), (finding QC employees to be appropriately included in a production and maintenance unit even though they were separately supervised as their duties were functionally integrated with the other unit employees, their pay and benefits were similar, and there was significant interaction between the two groups of employees). Compare *Lundy Packing Co.*, 314 NLRB 1042 (1994) where the quality control employees were not petitioned-for, were paid differently and had insubstantial, and irregular contact with the production employees.

3. Production and Planning Clerks

The Employer asserts that its production and planning clerks, Amy Charles and Chris Thue, are office clericals rather than plant clericals and therefore should be excluded from the bargaining unit. Plant clericals are customarily included in a production and maintenance unit because they generally share a community of interest with the employees in the plant wide unit. *Kroger Co.*, 342 NLRB 202 (2004); *Caesars Tahoe*, 337 NLRB 1096 (2002). Typical office clericals' duties are billing, payroll, phone and mail. *Dunham's Athleisure Corp.*, 311 NLRB 175 (1993). In contrast, typical plant clerical duties are directly related to facilitating the production process such as maintenance of inventories, transcription of sales orders, and ordering supplies. *Kroger Co.*, 342 NLRB 202 (2004).

[14] The Employer does not dispute the inclusion of production and maintenance employees in the unit.

Here, the record reveals that the Employer's production and planning clerks take data that is captured off the floor and enter it into and execute computer reports on inventory as well as customer reports and variance reports. The record is clear that these employees do not answer phones, open mail, or perform payroll duties. In consideration of the record evidence presented in this case and the Board's well-established case law, as set forth above, I find that the Employer's production and planning clerks are plant clericals and should be included in the petitioned-for production and maintenance unit.

4. Safety Training Specialist

At hearing, the Employer stated that Safety Training Specialist Amanda Chiles should be excluded from the petitioned-for bargaining unit because she is a confidential employee, a manager, and a statutory supervisor. In its post hearing brief, the Employer asserted that Chiles should be excluded because she is a confidential employee and a manager and she does not share a sufficient community of interest with the petitioned-for employees to be included in the petitioned-for unit. I find that the record does not support the Employer's contentions that Chiles is a confidential employee, a manager, or a statutory supervisor. I further find that Chiles does share a sufficient community of interest with the petitioned-for employees for the reasons set forth below.

Confidential employees are defined as employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties. Under Board policy, they are excluded from the bargaining unit. *Waste Management De Puerto Rico*, 339 NLRB 262 (2003). The record is devoid of any evidence that Chiles assists or acts in any confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations. The evidence set forth by the Employer in support of its claim that Chiles is a confidential employee appears to be the fact that Chiles has access to confidential employee medical records. However, access to confidential health files, which have nothing to do with labor policy, does not qualify Chiles as a confidential employee under the Board definition. Thus, I find that Chiles is not a confidential employee, under the Board's policy.

Next, the Employer asserts that Chiles is a managerial employee and thus should be excluded from the bargaining unit. Managerial employees are excluded from coverage under the Act because their functions and interests are more closely aligned with management than with unit employees. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 286 (1974). In *General Dynamics Corp.*, 213 NLRB 851, 857 (1974), the Board defined managerial employees as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." Again, the Employer has presented no evidence that Chiles is engaged in anything other than *maintaining* the Employer's policies. Nothing on the record indicates that Chiles is engaged in actually formulating or effectuating the

Employer's policies. Thus, I find that Amanda Chiles is not a managerial employee as defined by the Board.

Finally, the Employer asserts that Chiles is a statutory supervisor as she has the authority to issue discipline to employees. In support of this contention, the Employer introduced a disciplinary action which was signed by Chiles and another disciplinary action with what appears to have Chiles' initials on it. Chiles did not testify at the hearing and these documents were introduced not through Chiles herself, but through Plant Manager Wayne Warner. As set forth above, the details underlying how these documents were issued and the decision making process for issuing these disciplinary actions is lacking in the record. As such, it is impossible to tell from the record evidence what authority or role Chiles plays in issuing discipline to employees. In light of the sparse record evidence and as the burden of proving supervisory status lies with the party asserting such status, I find that the record does not support the Employer's contention that Amanda Chiles possesses supervisory authority as that term is defined in §2(11) of the Act.

The record evidence shows that Chiles is paid hourly, receives the same benefits and paid holidays as the petitioned-for employees. She also shares the same break room with the petitioned-for employees and works in the office area with several other bargaining unit employees, including the Production and Planning Clerks and the QA Technicians. Moreover, Chiles' job functions put her in frequent contact with the other bargaining unit members. In light of the record evidence and supporting documentary evidence, I find that Chiles shares a sufficient community of interest with the bargaining unit employees to be included in the bargaining unit.

As I have found that the Employer failed to establish that Chiles is a confidential employee, a manager or a supervisor as defined by the Act, I find further that she should be included in the petitioned-for bargaining unit.

5. On-Call Employees

The Employer asserts that its four on-call employees should not be eligible to vote because they do not have a substantial working history with the Employer or a substantial probability of employment or regular hiring. The Board's standard formula for determining these factors in finding the eligibility of part-time and on-call employees is the *Davison-Paxon* formula. *Steppenwolf Theatre Co.*, 342 NLRB 69, 71 (2004). Under *Davison-Paxon*, "an employee is deemed to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date." *Id.* citing *Davison-Paxon Company*, 185 NLRB 21, 23024 (1970). Neither party claims that the Employer is seasonal or requires a different specialized formula due to the nature of the Employer's operations. Thus, it appears that the Employer here is requesting that I find that its on-call employees are not eligible to vote, when critical time-period for the *Davison-Paxon* formula is set based on the issuance of the Direction of Election set forth below. Thus, the Employer's request to exclude as of the hearing date, is premature and inappropriate.

In light of the above and the record as a whole, I find that application of the *Davison-Paxon* formula is appropriate here for the Employer's four on-call employees. That formula will be applied to any on-call employees, including the four at issue for the appropriate time period, as set forth below in my Direction of Election.

IV. CONCLUSION

Based on the foregoing and the record as a whole, I find the Employer's eleven production leads, one sanitation lead, and one warehouse lead are not statutory supervisors and that therefore these employees are properly included in the petitioned-for unit. I further find that the Employers six quality control (QC) employees, two quality assurance (QA) technicians, and two production and planning clerks to be properly included in the petitioned-for bargaining unit as they share a sufficient community of interest with the Employer's production and maintenance employees. I also find that the Employer's Safety Training Specialist should be included in the unit as she is not a confidential employee, a manager, or a supervisor as defined by the Act. Moreover, I find that the Safety Training Specialist shares a sufficient community of interest with the petitioned-for employees. I also find that the *Davison-Paxon* formula is appropriate for determining the eligibility of the Employer's four on-call employees.

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 employees employed by the Employer at its facility located in Omak, Washington; excluding all truck drivers, office clericals, managers, guards, and supervisors as defined in the Act.

There are approximately 150 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 found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also included are any employees who regularly averaged 4 or more hours per week for the last quarter immediately preceding the issuance of this decision. 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 UNITED FOOD AND COMMERCIAL WORKERS,LOCAL 1439, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION.

A. List of Voters

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

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before **August 31, 2010.** No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of four copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

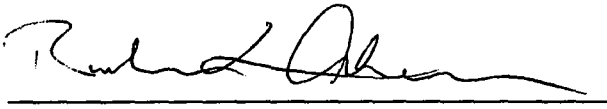
B. Notice Posting Obligations

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 **September 7, 2010**. The request may be filed through E-Gov on the Board's web site, www.nlrb.gov, but may not be filed by facsimile.[15]

DATED at Seattle, Washington, this 24th day of August, 2010.



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

[15] To file a request for review electronically, go to www.nlrb.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.nlrb.gov.