

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21**

**AMERICAN PRESIDENT LINES, LLC**

**Employer**

**and**

**Case 21-RC-337981**

**INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION**

**Petitioner**

**DECISION AND ORDER**

On March 14, 2024, International Longshore and Warehouse Union (Petitioner) filed a petition with the National Labor Relations Board (Board) seeking an election in a bargaining unit consisting of cargo flow supervisors, regional collections managers, and “DDSM” managers employed by American President Lines, LLC (Employer or APL) at its facility in Long Beach, California. At the hearing, the parties clarified that the petitioned-for unit consists of the following four classifications: Detention Demurrage Storage and Monitoring Manager (DDSMM); Regional Collections Manager (RCM); Cargo Flow Supervisors (CFS); and Cargo Flow Managers (CFM) (herein collectively called the Supervisors). There are eight individuals in the petitioned-for unit. One is the DDSMM, one is the RCM, four are CFSs, and two are CFMs.

The Employer contends that the petitioned-for unit is improper because it consists of supervisors within the meaning of Section 2(11) of the National Labor Relations Act (Act) subject to exclusion from the protections of the Act. The Employer further asserts that the DDSMM and RCM are confidential employees and that the CFMs are managerial employees.

A hearing officer of the Board held a 13-day hearing in this matter that commenced on March 28, 2024, and concluded on April 24, 2024. At the conclusion of the hearing, the parties presented both oral and written arguments in support of their respective positions. As explained further below, based on the record and relevant Board law, I find that the Employer has met its burden of showing that the petitioned-for Supervisors are supervisors under Section 2(11) of the Act. Accordingly, I dismiss the petition.

**I. The Employer’s Operations**

The Employer is engaged in the business of container transportation through an international shipping network to support U.S. flag ocean vessel fleet. This case involves the Employer’s Long Beach, California facility (Long Beach facility). This facility consists of two

departments - Finance and Operations. The DDSMM and the RCM work in Finance. The CFSs and CFMs work in Operations.

For many years, International Longshore and Warehouse Union, Local 63 (Local 63) has represented a bargaining unit of about 45 clerks employed by APL at the Long Beach facility. This unit is known as the Office Clerical Unit (OCU). The Employer and Local 63 are parties to a collective-bargaining agreement (CBA) covering the OCU clerks (clerks). The most recent CBA was signed by the Employer and Local 63 on about February 26, 2024, and is effective from July 1, 2023, through June 30, 2030. The individuals in the petitioned-for unit are the immediate supervisors of the clerks.

The Employer asserts that all individuals in the petitioned-for unit are statutory supervisors because they: assign work; responsibly direct the work of clerks; adjust grievances; and effectively recommend candidates for hire. The Employer further avers that secondary indicia supports finding that these individuals are statutory supervisors. As further discussed below, I conclude that the Supervisors are supervisors under the Act because they responsibly direct the work of the clerks, have authority to adjust grievances, and effectively recommend hiring. Secondary indicia also supports this finding.

## **II. DDSMM and RCM**

The DDSMM and RCM work in the Finance Department (Finance). Both report to Director of Finance Zaynoora Khan (Khan).

### *DDSMM involvement in assignment and direction of work*

The DDSMM has about six clerks directly reporting to her. These clerks' job titles are DDSMM Dispute Clerk, Inbound Demurrage Clerk, and Accounts Payable Clerk. The clerks' job descriptions are part of the CBA. Containers get free storage at the terminal for a certain number of days. Storage fees may subsequently be incurred. Customers email disputes or questions about their invoices to a shared inbox accessible to Khan, the DDSMM, and the clerks. The DDSMM may assign customer billing disputes to clerks and assists them with escalations. Each clerk on the DDSMM's team has certain designated duties. Two clerks handle incoming disputes from the shared inbox. One clerk handles disputes from a priority dispute report.<sup>1</sup> Other clerks handle a specific category of disputes. The Accounts Payable Clerk processes invoices from vendors who email invoices to a shared inbox. The Inbound Demurrage Clerk works off a log to secure or extend storage time for customers.

The DDSMM is responsible for ensuring that clerks are working on customer disputes. Examples of instructions from the DDSMM to some clerks include: asking a clerk to handle a particular dispute involving an unhappy customer; asking a clerk to review an urgent customer dispute; telling an accounts payable clerk to proactively start inquiring about invoices involving

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<sup>1</sup> The DDSMM prepares the priority dispute report every other week. She prioritizes disputes based on factors such as age of the dispute, whether a customer is upset, whether negotiations with a customer are ongoing, monetary amount involved, and customers with the most disputes.

statements that are past-due 45 days or more; and asking a clerk to focus her attention on mitigations and adjustments. The DDSMM<sup>2</sup> testified that most of the time, she does not ask a specific clerk to handle an escalation and lets the clerks decide amongst themselves who will handle it. The DDSMM also creates a list of disputes that need to be prioritized for a finance floater. Finance floaters fill in when finance clerks are absent.

The DDSMM also testified that her duties include approving time off and reviewing time sheets. The DDSMM can grant clerks' time-off requests of one week or less and if no other clerks on the DDSMM's team are off on the same day(s). The DDSMM is required to grant those requests. If another clerk already has time off, the DDSMM would seek Khan's guidance on whether to approve the request.

*RCM involvement in assignment and direction of work*

The RCM has eight collections clerks (collectors) and a finance floater that directly report to her. Collectors collect on past-due balances for OCU assigned accounts/customers. Each collector manages a set of past-due accounts. They follow up with customers on past-due invoices and ensure payments are reflected on customer accounts. They use a collections system that generates tasks/strategies for specific accounts. Collectors tend to work on the same types of tasks each day, such as sending emails, making phone calls, and sending final demands. Each collector has about 200 to 300 accounts. The current RCM did not determine the set of accounts assigned to each collector. Khan testified that accounts may be reassigned by the RCM. On the other hand, the RCM testified that she has no authority to reassign accounts to the collectors.

The RCM instructs collectors to follow up on overdue accounts and to establish deadlines for this task. The RCM is responsible for ensuring that the collectors complete the task by the deadline. Examples of instructions that the RCM gives to collectors include: asking that an account be prioritized and that a meeting with a customer be set up; asking a collector to handle an account when another collector was absent;<sup>3</sup> assigning tasks to a temporary clerk (temp) hired from the hiring hall; asking a temp to follow up with a customer on a past-due balance; and reminding collectors to complete the call campaign. A call campaign takes place monthly and involves following up with customers in a system-generated list of past-due accounts. The RCM makes changes to the report and edits it. When the RCM asks collectors to follow up on an escalation, she typically assigns it to the collector that handles the account involved in the escalation.

When collectors have exhausted all options to collect on an unpaid account, the account is sent to a third party for collections. The RCM is responsible for final approval indicating that collectors did everything possible before the account is sent to a third party.

Before company-wide finance floaters were available, the RCM would use temps from Local 63's dispatch hall to cover when clerks from her team were absent. Sometimes, the RCM

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<sup>2</sup> Various Supervisors testified for the Petitioner at the hearing.

<sup>3</sup> The RCM testified that Khan suggested that the RCM give this task to that particular collector.

requested specific temps from the hiring hall. The RCM testified that she requested these temps based on input provided by the collectors. According to the RCM, around the end of February 2024, Khan suggested that it was better not to request temps by name.

In her written performance review, the RCM is evaluated on metrics such as: staff management; ensuring issues are timely resolved by her team; the prioritization of collections accounts (including identifying roots/causes/issues and implementing corrections/actions/resolutions); team leadership; daily supervision; and even distribution of workload for OCU staff.

The RCM is also evaluated on the ability to implement efficient tools to boost production and reduce errors in the collections process. Per her performance review, the RCM is expected to conduct monthly portfolio meetings with each collector to set expectations, address issues, and ensure timely solutions. The RCM is also expected to monitor disputes biweekly using the dispute priority list. In her performance review, the RCM wrote that, “This year, I was able to improve communication with OCU Team, working on keep [sic] their productivity up by setting tasks and reviewing them Monthly in department meetings and Action Plan for collections and weekly progress with their portfolio.” In the same performance review, the RCM’s manager, Khan, wrote, “[the RCM’s] work ethic and ability to adapt to challenges have contributed to the team’s success.” Khan testified that negative performance evaluations could affect merit pay increases for the RCM and DDSMM or subject them to possible write-ups.

#### *DDSMM and RCM involvement in Grievance Adjustment*

The first step of the grievance procedure in the CBA is for the issue to be discussed with the employee’s immediate supervisor. Specifically, Section 2 of the Grievance Procedure in Article XIV of the CBA states that “[i]f any differences arise between any employee, or the Union, and the Company involving the meaning or application of the terms of the [CBA]...such difference shall be discussed with the **immediate supervisor** within thirty (30) days upon knowledge of the incident. ... Thereafter, the supervisor and steward shall make a bona fide effort to amicably settle such difference.” (emphasis added). If the issue is not resolved, then the grievance is presented to the local Labor Relations Committee. Thereafter, it may be presented to an arbitrator.

Article VI of the CBA prohibits non-bargaining unit employees, including supervisors, from performing bargaining-unit work. The DDSMM and the RCM are involved in processing a specific type of grievance alleging that non-bargaining unit individuals performed bargaining-unit work belonging to the clerks. The parties call this type of grievance “time-in-lieu” (TIL).

Under the CBA, the clerk who would have performed the work is to be paid four hours of pay at one and a half times the clerk’s regular wage rate for each offense. Since multiple TILs are often filed for the same alleged offense (e.g. repeated instances of non-unit individuals performing unit work involving the same customer issue), the payment due can be substantial. The CBA requires Local 63 to “make a good faith effort to mitigate the total number of TILs for the same offence.”

Clerks in the Finance department submit TILs to their immediate supervisor (either the DDSMM or the RCM) via email. Khan is typically cc'ed in those emails. The DDSMM or RCM then investigate the TIL and determine whether it is valid or not. The RCM's written performance review shows that one of her objectives is to "Track/review/validate/resolve TIL to ensure violations are addressed, tracked, validated and processed appropriately."

Investigating a TIL involves reviewing the documentation submitted by the clerks in support of the TIL, and researching the work at issue (e.g. if a report was run by a non-unit individual and the purpose of running that report) and the dates of events. To assess the TIL's validity, the DDSMM and RCM need to review and understand the clerks' job descriptions which are part of the CBA. Many TILs are clear cut, but some are not.<sup>4</sup>

After completion of the TIL investigation, the DDSMM or RCM email the clerk letting them know which TILs they determined were valid, which ones were denied, and identifying TILs where mitigation is requested.<sup>5</sup> In some instances, the DDSMM or RCM, together with Khan, have met with the clerk and the OCU shop steward to convey the TIL determinations. Khan often asks to mitigate further to reduce costs for the Employer.

The DDSMM testified that she has to get Khan's approval on the Employer's position regarding the TILs before meeting with clerks and informing them of TILs determinations. The record shows that Khan has access to the spreadsheets showing the DDSMM's and RCM's TILs determinations before the determinations are sent to the clerks. Khan denies reviewing the spreadsheets for purposes of determining the TILs' validity. She testified that the spreadsheets are sent to her for mitigation purposes.

The DDSMM also testified that she and the RCM meet with Khan to discuss TILs before meeting with the clerks and the shop steward. The DDSMM testified that they review the TILs to make sure Khan agrees with the DDSMM's and RCM's assessment of the TIL. Initially, the DDSMM testified that she and Khan go through the TIL spreadsheet line by line. Later, she testified that they do not necessarily go through every TIL one by one. Regarding her TIL assessments from August to September 2023, the DDSMM testified that she did not recall whether she reviewed them with Khan line by line. The RCM testified that when she meets with Khan to go over TILs, they look at the spreadsheet together and Khan will give the RCM a recommendation for mitigation.

Khan testified that the DDSMM or RCM may escalate certain TILs to Khan if they have some uncertainties regarding the TIL or need more clarity. Khan testified that since the DDSMM

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<sup>4</sup> Local 63 and the Employer have agreed to put certain types of TILs in a group to be arbitrated and agree that the cancellation or rebill of invoices stemming from a customer dispute constitutes OCU work. However, they have a dispute regarding whether cancellations and rebills that do not stem from a customer dispute constitute OCU work. Therefore, TILs that fall in that category are placed aside for arbitration. The DDSMM and RCM are not involved in the arbitration process.

<sup>5</sup> Requesting mitigation means asking the clerk to waive payment for the TIL violation. The record shows that Khan often asks the DDSMM and RCM to engage in further mitigation efforts. The clerk may or may not accept mitigation. If mitigation is not accepted, the Employer is required to pay the penalty.

started her current role in May 2023, they have had about three meetings regarding TILs. Khan testified that the purpose of the meeting was for the DDSMM and RCM to present any escalations. Khan further testified that she does not independently investigate the DDSMM's or RCM's TIL determination unless the TIL is escalated to her. Khan also testified that the DDSMM does not need her approval before advising the clerk about the TIL determination.

If a TIL remains unresolved or denied after involvement by the DDSMM, RCM, or Khan, it may then be presented to the Labor Relations Committee (LRC). Thereafter, it may be set for arbitration. The DDSMM and RCM are not involved in the LRC meeting or arbitration.

Once the TILs are resolved and agreement on mitigation is reached, the TILs need to be submitted to payroll to issue payments. Khan provides approval for the release of payment. If the payment exceeds a certain amount (possibly \$200,000 or \$300,000), CFO approval is needed for the release of payment. Khan testified that the CFO does not review the TILs' validity.<sup>6</sup>

*Other evidence regarding the DDSMM and RCM*

The DDSMM, RCM, and the Director of Credit Management attend management meetings known as Team Focus Meetings to discuss what the teams are working on, updates, and other matters. Clerks do not attend these meetings. These meetings are scheduled every other week. They discuss their agenda, information from the Employer, and areas that Khan wants to focus on. The DDSMM testified that the meetings are to ensure that the management team is on the same page and completing tasks.

Some evidence indicates that collectors view the RCM as their supervisor. For example, an email from a collector to a customer states, in part, "if you have any urgent questions or concerns you can reach out to my boss [the RCM]."

*Alleged confidential status of DDSMM and RCM*

During the most recent contract negotiations, in preparation for a potential work stoppage among the clerks, Khan had discussions with the DDSMM and RCM regarding continuity plans for the business and asked the RCM to put together a plan on how collections accounts could be assigned to four individuals in the event of a strike. Furthermore, the DDSMM and RCM have access to the TILs investigations. Khan testified that the Employer relied on this information to settle the TILs towards the end of contract negotiations. The DDSMM and RCM also have access to all North American customers, not just OCU accounts.

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<sup>6</sup> In early 2024, as part of their contract negotiations, Local 63 and the Employer reached a grievance settlement where they agreed to lump together pending TILs (not including so-called jurisdictional dispute grievances) and pay them in a lump sum.

### III. CFSs and CFMs

The CFSs and CFMs work in the Operations Department (Operations). There are four CFSs and two CFMs in the petitioned-for unit. Three CFSs report to Senior Manager Leilani Gardaya (Gardaya). One CFS and the two CFMs report to Senior Manager Jon Pakzad (Pakzad). Gardaya and Pakzad report to Director of Operations Edna Hogue (Hogue).

There are about 24 clerks in Operations. Each CFS and CFM supervises between five and nine clerks. The Operations department is responsible for facilitating the movement of thousands of containers from vessels to the terminal and those going in the opposite direction. This includes containers being transported by truck from the rail to a vessel. Hogue's job is to ensure that the containers are delivered in a timely manner.

#### *CFSs' involvement in assignment or direction of work*

CFSs have different functions.

*CFSs Edgardo Buitrago (Buitrago) and Ian Torres (Torres):* Buitrago and Torres handle the processing of inbound vessels. This involves routing containers leaving a vessel. Some containers are routed by rail and others by truck. Some containers carry hazardous materials or special commodities. Buitrago and Torres separate this information in a report for execution. The inbound logistics clerks reporting to them perform the execution. Four clerks report to Buitrago and four clerks report to Torres.

Inbound logistics clerks provide clerical support for cargo arriving into the harbor. Their job description is part of the CBA. Their duties include ensuring that the containers are dispatched to get loaded onto the rail. They are responsible for updating the container routing in terminal systems for incoming vessels, as directed by management. They handle customs-related issues. They do data entry and answer emails, and perform a lot of repetitive tasks. Hogue testified that these clerks generally know what they are supposed to do when they receive their report.

When issues get escalated, Buitrago or Torres direct clerks to perform specific functions. Each inbound logistics clerk is assigned a "service" or a particular transit or vessel schedule. Buitrago and Torres decide which clerk will handle an escalation depending on what service is involved. Buitrago and Torres may assign a clerk to handle an additional "service" to cover for other clerks when they are absent. Buitrago and Torres testified that these assignments are discussed with Gardaya during their morning meeting and that she has final approval on any reassignment of services. Buitrago and Torres communicate with the clerks on a daily basis, asking them to perform certain tasks related to updates and escalations for the services assigned to them.

*CFS Marilyn Jackson (Jackson):* Jackson is the equipment supervisor. She ensures that truckers are informed about where to terminate empty containers returning from import, and where to pick up empty containers for export. Jackson ensures that computer sequences are

updated correctly. Five clerks report to her. Three of her clerks are equipment clerks and two are general order clerks. The clerks' job descriptions are part of the CBA. The clerks get emails from truckers regarding container issues. Jackson assigns clerks to handle trucker emails that have not been responded to in a timely manner. She handles system-sequence issues that have not been resolved so that the next sequence of steps can be recorded in the system. Jackson may assign her clerks to lease or "off lease" containers. Jackson is copied on emails that the clerks receive. Jackson reviews the emails to see what the clerks are doing and ensure there are no errors. If she notices any errors, she brings it to the clerk's attention to have them correct it. The clerks generally know their assignments and Jackson does not need to give them specific instructions on what to do. There is a company-wide system that indicates the status of containers (e.g. loaded on the ship, empty in a terminal, or with a customer). When this system is not in sync with the terminal system, it creates a discrepancy that needs to be fixed. Jackson ensures that the clerks fix the discrepancies.

*CFS John Ashley (Ashley):* Ashley is the CFS for the export department, which handles cargo from the rails to the ports. He is responsible for ensuring that containers arriving from the rail make it to the terminal on time to get on the ship. About 11 clerks report to Ashley.<sup>7</sup> They consist of a bridge clerk and about nine or ten floater clerks. The bridge clerk sends dispatches to the truckers to pick up containers to be transported to the terminal. The bridge clerk's job description is part of the CBA. Floater clerks fill in for other clerks who are absent. There are 10 floaters in the Long Beach facility. Four of them are company-wide, meaning that they can float between Operations and Finance. CFS Ashley is involved in determining which floater will work in which department on a given day. Floaters are typically used to cover for other clerks who are off work. Ashley testified that floaters are on a rotating schedule.

The Employer's system generates a so-called export daily game plan. It shows the arrival of containers. Ashley separates certain data in the report needed to perform the work. He looks for containers that have arrived or will arrive within a day. Once arrived, Ashley's team has two days to move that container before the Employer is charged storage fees. Occasionally, certain containers need to be moved right away to meet the cutoff. Hogue testified that the CFS is held accountable if the Employer incurs excessive storage fees. Likewise, minimizing storage fees would reflect positively on the CFS. The Employer may incur storage fees amounting to millions of dollars in a given year. The CFS's ability to successfully or unsuccessfully manage storage fees is reflected on their performance evaluation.

Examples of instructions from Ashley to clerks include: asking a clerk to check if there is a late gate for a container that was past the cutoff; asking a clerk to send a container transport order to a trucker; assigning clerks to handle planned moves of certain containers; assigning a clerk to handle dispatch orders going to truckers letting them know they need to move a container; directing a clerk to advise truckers of containers available to be moved; instructing clerks to work at least an hour a day on a platform called "BLUME," where truckers submit extra charges not covered on the original order; and instructing a clerk to cancel a transport order with a trucking company and find someone else to get the container.

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<sup>7</sup> Prior to March 27, 2024, Ashley had two clerks on his team.

Hogue testified that Ashley spends about 50 percent of his time determining which work the clerks will do and every day he sends “game plan” emails to clerks with instructions on what to do. However, Ashley denied spending that much time on determining what clerks will do. He testified that he spends about five to ten percent of his time determining what work clerks will do. Ashley further testified that he typically does not need to send a daily email to tell clerks what to do and that it has not been necessary to send a game plan in the last couple of years.

CFSs receive performance evaluations which are a basis for merit increases. Ashley’s 2023 annual performance evaluation shows that he was rated as “exceeded” in the metric measuring whether he was successful at managing the storage fees. His manager commented, “Your strategic process changes have notably impacted our team’s ability to maintain low storage costs, demonstrating your proactive approach and effective decision-making.” Under a metric titled “Drive for results,” Ashley commented that he “[pushed] both our carriers and our clerks to strive for better results. [K]eeping cargo flowing timely to limit any cost exposure to the company.” Ashley’s evaluation also shows that he is responsible for managing his team’s attendance, punctuality, and any extended time off. In this regard, his manager commented, “You’ve done a great job keeping track and proactively planning for any staffing matters. Continue reconciling their time cards every two weeks.” Another metric on Ashley’s evaluation is team development and “provid[ing] perspectives, guidance and support. Encourages reflection to maximize performance and realize potential.”

Other evidence regarding CFSs

CFSs handle clerk staffing on holidays. They determine staffing based on factors such as the volume of container movements that need to get done and vessel cutoffs. Under the CBA, clerks receive higher pay for working on holidays. Determining which specific clerks will work on holidays is based on the seniority provisions of the CBA. CFSs can go outside of the seniority system if the work requires a specific skill set.

CFS Buitrago testified that the inbound department minimum staffing levels for holidays is two clerks. CFS Buitrago had no role in creating this rule. Per the CBA, the clerks are chosen based on seniority. The CFS has no authority to have more than two clerks work on a holiday on his own. According to Buitrago, if more than two clerks are needed, this decision is made by upper management. The inbound department also has a policy that only two clerks can be off at a time. Buitrago and Torres had no role in deciding this policy. They have no discretion to deviate from this policy.

CFMs’ involvement in assignment or direction of work

The two CFMs are Laura Harder and Yvette Hawkins. Both are paid salaries, and they report to Senior Manager Pakzad.

*Laura Harder (Harder)*: Harder manages a team of five store door clerks. Their job description is part of the CBA. The clerks dispatch containers to the truckers, monitor emails

from the truckers, and handle payment issues that arise. Dispatch involves inputting transport orders into the system and assigning them to motor carriers. Harder is responsible for ensuring that containers are delivered from the terminal to the rail or to their final destination. The store door delivery team handles the delivery of containers to a customer-preferred location, which is usually a warehouse. Harder assigns work to the store door delivery clerks to ensure that the container gets to its intended destination. She asks them to follow up on certain things. For instance, if cargo that needed to be moved had not moved yet, Harder will follow up with the clerks about it. Usually, this assignment is based on their job functions or areas of focus. Each clerk focuses on a particular geographical area. This structure was in place before Harder became their manager. The clerks generally work independently and perform the same tasks. The store door clerks open an email box and answer emails in the order in which they were received. Those who handle dispatch, open a report they receive and begin dispatching. Hogue testified that Harder runs her department with minimal supervision from Hogue.

*Yvette Hawkins (Hawkins)*: Hawkins is the CFM for the import department, which handles all import cargo from the ports. Hawkins oversees five or six bridge clerks. Bridge clerks are responsible for the movement of containers from vessels to the rail and from the rail to the vessels. The clerks have certain areas of focus that include handling the dispatch desk, handling three-day reports and emails, and ensuring that truckers' invoices are paid. Hawkins did not assign these areas of focus to specific clerks, but in recent times she requested her clerks to start cross-training. Clerks on Hawkins' team generally know what work they need to do by generating their own reports. Hawkins reviews tracking-and-tracing reports and ensures that containers are moving within a set time frame to reduce storage time. The bridge clerks are responsible for executing the movement of the containers by dispatching them to the truckers and communicating with them. Hawkins has requested clerks to check the status of certain containers, to secure appointments for some containers to evacuate from their location, and follows up with clerks to find out why appointments were missed. CFMs are accountable in their performance reviews for missed appointments that result in storage fees.

Clerks go to CFMs and CFSs for approval or denial of dry runs. Dry runs refer to situations where a motor carrier is dispatched to pick up or deliver a container but is unable to execute the move. If the Employer caused the situation, then it may incur a dry run charge in the amount up to \$150 or \$300 per container. CFMs also approve extra charges that occur when a container is misdelivered and arrangements need to be made to deliver it to the correct terminal. The CFM may direct clerks to look up the location of containers and arrange to have misdelivered containers delivered to the correct terminal.

Hogue testified that Harder and Hawkins send a game plan to the clerks with assignments that include reading emails, dispatching for certain geographical regions, approvals in a third-party platform, and researching proof of deliveries. Truckers may be paid extra charges and the clerks also handle payment disputes from the trucking companies. Harder testified that she stopped updating game plans about a year ago. Harder testified that her clerks work independently and she typically does not give them detailed instructions. She testified that she assigns tasks based on their job functions and areas of focus.

The Employer relies on CFMs' performance evaluations for promotions and merit increases. Harder's 2023 performance evaluation shows that she is rated on the ability to process transport orders (dispatch sheets) to motor carriers within 24 hours. She is responsible for making sure that the transport order is given to the trucker within 24 hours. Harder's performance review shows that she ensures that her team checks twice daily to make sure that all containers available to be moved are captured and by having her clerks pre-generate transport orders up to two weeks ahead of vessel arrival. Storage charges or delivery delays could occur if not all containers are captured. Harder testified that the practice of checking containers twice daily and of pre-generating transport orders was in place before she became a CFM.

Harder's clerks also handle truckers' accessorial charges, which are extra charges not covered by the initial transport order. Harder's manager wrote the following on her performance evaluation, "Your team's efficiency in accessorial processing . . . [has] been invaluable, showcasing your dedication." Harder's evaluation further shows that she is rated on her ability to manage her team's attendance and punctuality. Harder wrote the following on her evaluation, "I track arrivals, departures, breaks, lunches, doctor appointments, holidays, sick time and vacation for 5 clerks. Every two weeks, I reconcile their timecards. . . . When clerks are out, I order temps from the hall to fill in and monitor their time."<sup>8</sup>

Harder's evaluation also shows that she is rated on reducing rail storage costs. Once a container reaches its destination, containers need to be dispatched to exit the location by a certain time period to avoid storage costs which cannot be passed on to the customer. Harder ensures that her clerks are doing their job to get the containers moving. She received a rating of "exceeded" for reducing rail storage costs. Another metric in her performance evaluation is "Host team meetings and align the department." Under this metric, Harder wrote, "The seating arrangement of [the team] in our new office allows me to have daily floor meetings/discussions with the team. We review new information and existing issues. We discuss all topics that are important to the team to improve their work."

Harder further commented on her 2023 evaluation that, "In order to achieve [our team] goals and move freight efficiently, I communicate all day, every day with my team on the multitude of issues that arise...I participate in motor carrier onboarding calls in conjunction with the Procurement team to lay out [the team's] expectations and contacts." The next metric on Harder's evaluation is team development. This section reads, "Provides perspectives, guidance and support. Encourages reflection to maximize performance and realize potential." Under this metric, Harder wrote, "I have promoted cross-training for the 5 clerks [on the team] and encourage them to support each other as backups on their various assigned tasks. They are able to complete the work and train temps when full-time employees are out."

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<sup>8</sup> CFSs and CFMs request temps from the hiring hall when clerks are absent and no floaters are available. Harder and Hawkins have requested temps by name. In early 2024, Hogue instructed that CFSs and CFMs should no longer request temps by name. Hogue testified that she gave this directive to give other temps the opportunity to work at the Employer. Hogue further testified that since giving this directive, some CFSs or CFMs continue to request specific clerks from the dispatch list.

Other sections of Harder's evaluation further show that clerks' work is taken into account when rating the CFM. For example, Harder's comments on the evaluation read, "Over the past year, [Harder's team] has accomplished many goals including getting current on invoicing and outstanding TO discrepancies after several years of record volumes. The team has cross-trained and documented processes. The Team's success in 2023 is due in large part to our collaboration on daily issues while I set expectations for them to achieve departmental and company goals."

CFM Hawkins' performance review is not in the record. Hogue testified that the Employer has the same expectations of CFM Hawkins.

Other evidence regarding CFMs and CFSs

On direct-examination, Hogue testified that CFMs have authority to establish Employer policy for taking time off. For example, Hogue testified that CFSs or CFMs created guidelines that only two persons could be off at a time in the eastbound department (Torres and Buitrago's team), only one person could be off at a time in the equipment department (Jackson's team), and only four persons could be off in the transportation department (Harder's team; Ashley's team; and Hawkins' team). However, on cross-examination, Hogue testified that she assumed that the CFSs and CFMs created those guidelines and acknowledged that she does not actually know who did so.

Ashley testified that he had no role in establishing the policy that only four clerks could be off at a time. Jackson and Harder likewise testified that they had no role in creating guidelines stating how many clerks could be off at any given time.

CFMs can grant clerks' time off requests within the Employer's guidelines (e.g. one person off at a time). For example, Jackson testified that for the equipment group, only one person can be off at any given time. If more than one request is made for the same day off, whoever submitted their request first gets the day off, and Jackson would have to decline the other person's request.

CFSs' and CFMs' involvement in grievance adjustment

CFSs and CFMs are involved in processing TILs. The procedure is similar to the one in Finance, discussed above.

Clerks submit TILs via email to the CFS/CFM that supervises the work at issue. The senior manager may be cc'ed. The CFS/CFM investigates the TIL and determines whether it is valid or not. Investigating the TIL involves reviewing the clerk's job description in the CBA, what work was performed, and who performed it. The determination is then submitted to the senior manager (Gardaya or Pakzad) for review. CFSs Buitrago, Torres, and Jackson testified that they meet with their senior manager, Gardaya, about once a month to go over all the pending

TILs.<sup>9</sup> The meeting lasts about an hour or an hour and a half. They might review up to 100 or more TILs at the meeting. Thereafter, the CFS and Gardaya meet with the shop steward and the clerk who filed the TIL(s) to go over the determinations. The senior manager handles mitigation or they can allow the CFS to handle it.

Once mitigation is agreed upon, a request for payment approval is sent to Hogue or to Hogue's boss, the Senior Director of Operations.<sup>10</sup> Hogue testified that she does not conduct an independent review of the TIL.<sup>11</sup> Hogue testified that payment approval is to provide oversight when the release of payment is involved to prevent fraud. Once payment is approved, the CFS/CFM sends the grievance packet to payroll to issue payment.

Hogue also testified that if the TIL is denied after the investigation, it does not proceed to the next step, which is review by the senior manager. However, CFS Buitrago testified that all TILs, including those that are denied, are discussed with their senior manager, Gardaya.<sup>12</sup> Hogue further testified that she was not aware of any instances where the senior manager did not accept the CFS' recommendation regarding a TIL.

If the TIL ends up being unresolved, a formal grievance may be submitted to the LRC. CFSs and CFMs are not involved in the process once it goes to the LRC.

The record shows an instance where a set of a few hundred TILs was escalated to Hogue to help with mitigation after CFS Torres researched the TILs, found them to be valid, and Senior Manager Gardaya agreed. No agreement on mitigation was reached. Thereafter a formal grievance was filed and was discussed at an LRC meeting. The CFS was not involved at that stage of the process. The grievance was ultimately resolved and it was mitigated down to 50 TILs for payment. CFS Torres was then advised of this resolution and he prepared a form for a payment of \$16,791. During the LRC meeting, the CFS's determination that the TILs were valid was not challenged.

CFM Harder testified that the last time she attended a meeting with management officials or with clerks to discuss TILs was in February 2023. Harder brought a log of TILs for each clerk and described her role at that meeting as that of a notetaker. A few hundred TILs were reviewed at that meeting. Harder, Gardaya, and Misty Jeffreys (former Senior Director of Operations) met with the clerk, shop stewards, and a Local 63 representative. At the meeting, Jeffreys attempted to mitigate the TILs. Harder testified that during this process, Jeffreys did not dispute Harder's determination on the validity of any of the TILs.

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<sup>9</sup> Some CFSs get 40 to 60 TILs per month. Others get less such as 20 per year. Buitrago and Torres testified that when Gardaya disagrees with their determination, Gardaya has the final say. However, they provided no specific examples of this situation.

<sup>10</sup> Hogue testified that in an 18-month period, she recalls declining only one or two out of about 700-800 TILs filed in Operations. The record has an example of a situation in January 2024, where a TIL had been approved at an earlier stage, but Hogue later indicated that it was not approved because it involved a jurisdictional disputed item.

<sup>11</sup> Hogue testified that in order to train herself on TIL processing and to clarify the process for Operations, she became more heavily involved in TIL processing during a six-month period from about April 2024 to September or October 2023. Hogue then put forth an outline for processing TILs in her department.

<sup>12</sup> Gardaya did not testify at the hearing.

That particular meeting ended with some TILs to be processed for payment and some tabled for further discussion. At that meeting, a clerk asked for further review of certain TILs that had been denied. After further review, Harder emailed the clerk confirming that those particular TILs were still denied and she provided the clerk with documentation showing that the work at issue was performed by an OCU clerk. Harder testified that the initial decision to decline these TILs was possibly made when Harder logged them on her spreadsheet.

Harder's 2022 performance evaluation shows that that one of her objectives involves the TIL review/validation process "to ensure violations are addressed, tracked, validated and processed appropriately." Her manager commented the following on her 2021-2022 evaluation, "[Harder] has improved with the processing of TILs timely and continues to work towards a reduction for expenditures monthly. I look forward to her progress in this category as she establishes and implements more efficient tools/processes to boost production, reduce errors and improve daily duties/communication/processing."

#### **IV. Supervisors' Involvement in Recommending Hiring**

On February 28, 2024, the Employer and Local 63 executed a successor CBA covering the OCU. During bargaining, the Employer agreed to hire 10 new clerks into the OCU. Throughout bargaining, Local 63's position was that the Employer should hire individuals from the hiring hall's Class A list. The Employer's position was that it would give priority to Class A individuals, but that it would not be limited to Class A applicants. The Employer insisted that in the event there were not enough qualified candidates from the A-list, applicants from the B-list would be considered. Local 63 and the Employer ultimately entered into a Memorandum of Understanding (MOU) detailing the procedures for the filling of the 10 new clerk positions.

The procedure required the Employer to post the positions within two business days after the CBA was signed. The MOU reads, in relevant part, that per Article XIII, Section 4 of the CBA, after an internal bidding process for the 10 positions concluded, the remaining 10 open positions "will be filled with external candidates selected by the Company with priority given to the Union's Class A list as defined in the CBA, and the Company will use its best efforts to extend offers of employment to its preferred candidates with a start date that is within 10 calendar days, and that in no event is more than 27 calendar days after the CBA is signed." The MOU was executed on February 29, 2024.

The hiring process was underway when around the week of March 11, 2024, a Petitioner representative and a group of the Supervisors presented the Employer with a signed petition expressing interest in union representation.

Director of Human Resources Heather Hillaert (Hillaert) led the recruitment and onboarding process for the hiring. By the week of March 11, 2024, Hillaert was receiving resumes from applicants. She received applications from candidates belonging to all lists—Class A, B, and C. By email on March 28, 2024, Hillaert informed the Supervisors that they would be interviewing the candidates. Hillaert testified that across the Employer's locations, supervisors

are part of the interview process. Some Supervisors in the petitioned-for unit had interviewed candidates for the Long Beach facility in prior years.

As part of the hiring process, Local 63 submitted to the Employer its list of Class A members. It consisted of 17 names, but four individual who were not interested in the open positions had been crossed out by Local 63. Hillaert proceeded to contact individuals on the list to inquire if they were interested since not all of them had applied. In that process, Hillaert identified an individual who had previously worked for the Employer and had been terminated for cause. As such, that person was removed from the list as ineligible. After calling the remainder of the individuals, all, except two, expressed interest in being considered for the new job openings. Thus, coincidentally, 10 Class A members remained on the list to be considered for the 10 open positions.

The interview panel for the 10 candidates consisted of the Supervisors (DDSMM, RCM, CFSs, and a CFM).<sup>13</sup> Nobody else participated in the interviews. The Supervisors were divided into two interview panels. They were supplied with the candidates' resumes. The Employer also provided rating sheets for the Supervisors to fill out for each individual and provided interview questions to ask the candidates. Hogue testified that this procedure is based on past-practice, and that the interview questions have been in the archives for years. The Supervisors interviewed the candidates, completed the rating sheets, and submitted them to Hillaert.

After the interviews, the Supervisors met with Hillaert, Khan, and Hogue. They discussed the Supervisors' assessment of the candidates. For a few of the candidates, they discussed the Supervisors' views on where the candidates could best fit within the departments. The Supervisors recommended that the candidates be hired. One Supervisor expressed concerns about a candidate's experience, and ultimately the group determined that the candidate was trainable.

All 10 individuals who were interviewed ended up being hired. Certain Supervisors who testified for the Petitioner at the hearing, such as Buitrago, Torres, and the DDSMM, described the interview process as a formality; that the candidates came from a list preapproved by Local 63. For instance, the DDSMM testified that she felt the process was a formality because of pressure from upper management to quickly get through the process.

Local 63 OCU President John Fageaux (Fageaux) testified that at the bargaining table, the Employer agreed to hire the Class A individuals referred by Local 63, but provided no details as to when, where, or who was present when this agreement was reached. Fageaux further testified that when Local 63 and the Employer signed the MOU, his understanding of the agreement was that the Employer would hire from the Class A list. The Employer's Vice President of Labor Relations Bill Candella (Candella) testified that there was no agreement that the Employer was limited to hiring from the A-list; the Employer only agreed that priority would be given to the A-list. Indeed, Candella explicitly put forth this position in a February 21, 2024 email to Fageaux and Employer attorney Stephen Berry, which reads, in relevant part, "we will give A's priority –

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<sup>13</sup> One CFM did not participate in the interviews due to illness.

but in the event they are not enough qualified candidates then B's can be considered. We do not want to close the opportunity to interview.”

OCU clerks are not hired frequently; clerks' attrition is very low. Thus, record evidence regarding prior hirings is limited. In 2018, an OCU clerk was hired. Khan was a frontline manager at that time. In that capacity, Khan filled out a rating sheet on whether the clerk should be hired. In August 2021, two CFSs (Torres and Ashley) interviewed about two candidates for a clerk position. An audio recording of one of the interviews is in the record. They assessed the candidate's organizational skills, technical skills, and teamwork, among other skills, and recommended that the candidate be hired. The candidate was hired as a clerk. This particular clerk testified that in 2021, she was also interviewed by someone named Russell Fox and either Jack Bell or Adrian Diaz. Their exact titles are unknown. The clerk identified those individuals as managers at the terminal, but also indicated that she was unsure if Jack Bell is an APL employee. The Employer asserts that none of them worked at APL at the time of the alleged interview. CFM Harder testified that she was involved in interviewing candidates in 2021, and that she was disappointed that one of the candidates was not hired.

## **V. Supervisory status of DDSMM, RCM, CFSs, and CFMs**

### **A. Board law**

The Act expressly excludes supervisors from its definition of employee. Section 2(11) of the Act defines supervisors as:

[A]ny 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.

The party asserting supervisory status must show that the individuals in question:

- (1) have authority to engage in any one of the twelve enumerated supervisory functions; and
- (2) exercise such authority in not “a merely routine or clerical nature, but [with] the use of independent judgment”; and (3) exercise their authority “in the interest of the employer.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). A party can prove the requisite authority either by demonstrating that the individuals themselves exercise a supervisory function or by showing that the individuals effectively recommend the exercise of a supervisory function. *Id.* at 688. Where “putative supervisors are not shown to possess any of the primary indicia of supervisory status enumerated in Section 2(11), secondary indicia are insufficient

to establish supervisory status.” *Golden Crest Healthcare Center*, 348 NLRB 727, 730, fn. 10 (2006).

Indicia other than those enumerated in Section 2(11) of the Act are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

Secondary indicia of supervisory status include, but are not limited to, the individual’s: designation as a supervisor; attendance at supervisory meetings; receipt of management memos; responsibility for a shift or phase of the employer’s operation; authority to grant time off to other employees; responsibility for inspecting the work of others; responsibility for reporting rule infractions; receipt of privileges exclusive to members of management; and compensation at a rate higher than the employees supervised. The ratio of supervisors to employees is also a secondary indicator of supervisory status. See *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007); *Flexi-Van Service Center*, 228 NLRB 956, 960 (1977).

The party asserting supervisory authority has the burden of proof. *NLRB v. Ky. River Cmt’y Care, Inc.*, 532 U.S. 706, 713 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003). And “whenever the evidence is in conflict or otherwise inconclusive on a 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 Cmt’y Med. Ctr.*, 295 NLRB 486, 490 (1989); see also *Brusco Tug & Barge, Inc.*, 359 NLRB No. 43 (2012). Purely conclusory evidence does not establish supervisory status; rather, a party asserting the exclusion must “present evidence that the employee actually possesses the Section 2(11) authority at issue.” *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 (2012) (“[M]ere inferences or conclusory statements, without detailed, specific evidence are insufficient to establish supervisory authority.”).

The Employer contends that the Supervisors are statutory supervisors under Section 2(11) because they: (1) assign; (2) responsibly direct; (3) adjust grievances; and (4) effectively recommend hiring. Additionally, the Employer argues that there are secondary indicia that militate in favor of finding supervisory status.

## **B. Assign**

To “assign” an employee is to commit “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, 348 NLRB at 689.

The evidence does not establish that the Supervisors, other than perhaps CFS Ashley, assign clerks to a location, department, or wing. Ashley is involved in assigning floaters to different departments. However, this seems to be based on where they are needed to cover when

other clerks are absent. The evidence does not show that the Supervisors appoint clerks to a time or give significant overall duties. Instead, the evidence demonstrates that the clerks' overall duties are determined by and set forth in their respective job descriptions. For the most part, clerks in each team seem to have designated tasks, perform the same types of tasks each day, and do not require detailed instructions from their respective Supervisor. To the extent that the supervisors ask clerks to perform certain tasks, the evidence demonstrates that these assignments generally involve discrete tasks. For example, the DDSMM may ask a clerk to handle an urgent customer dispute. The RCM may ask a collector to follow up on an overdue account. CFSs may: ask clerks assigned to a specific "service" to handle a particular escalation; ask clerks to fix discrepancies in the company-wide system showing the status of containers; and ask clerks to send transport orders to truckers or to cancel transport orders. CFMs may ask clerks to follow up on cargo that needed to be moved or ask clerks to check on the status of containers. Therefore, the Employer has not met its burden to prove that the Supervisors have authority to assign.

### **C. Responsibly direct**

The difference between assignment of work and responsible direction of work is a question of accountability: the 2(11) function of "assign" can exist even when the putative supervisor is not accountable for how the staff performs their assignments. In contrast, the 2(11) function of "responsibly to direct" only exists when the putative supervisor is "accountable" for the proper performance of tasks by other employees. *Oakwood Healthcare*, 348 NLRB at 692. Accountability is established where putative supervisors have the authority to take corrective action if necessary, and are subject to adverse consequences for the performance of their staff. *Oakwood Healthcare*, supra.

Here, each Supervisor supervises a team consisting of four to 11 clerks. The record shows that the Supervisors provide oversight of their respective teams to ensure that tasks are completed timely and correctly. Supervisors exercise independent judgement in deciding how to guide and support their respective teams to maximize team performance. Some encourage cross training among the team members. Others have regular meetings with their team to spot and address issues. Supervisors ensure that their teams avoid excess storage fees. The evidence shows that the DDSMM prepares a priority dispute report every other week and instructs clerks to handle certain customer disputes to ensure that high-priority disputes and escalations are dealt with. The RCM monitors customer disputes and ensures that her team members are handling them in a timely manner. She establishes deadlines for collectors to follow up on overdue accounts, and ensures that the work of collectors who are absent are handled by other collectors or temps from the hiring hall. She also provides approvals to send certain accounts to a third party for collections.

CFSs Buitrago and Torres communicate with clerks on a daily basis asking them to perform tasks related to updates to ensure proper container routing. They assign clerks to handle escalations. They assign clerks to handle additional "services" to cover for clerks who are absent. Buitrago and Torres asserted that the assignment of additional services is discussed with Senior Manager Gardaya, but no details of this discussion were provided. Similarly, CFS Jackson ensures that her clerks respond to truckers' emails in a timely manner. Jackson monitors the

clerks' work to ensure there are no errors and ensures that her clerks fix discrepancies in the system. CFS Ashley ensures that clerks are doing their job and getting containers moved in a timely manner to avoid storage fees. The CFS does this by instructing clerks to perform a variety of tasks including checking for a late gate for a container that was past the cutoff, and asking clerks to send transport orders to truckers or to follow up with truckers regarding containers available to be moved. He directs clerks to work on extra charges submitted by truckers for an hour a day, and asks clerks to find alternative companies to transport containers.

CFMs also make sure that their teams complete their work, ensuring that containers reach their final destination and that containers are moved quickly enough to reduce storage time. CFM Harder commented on her performance evaluation that she is able to have daily meetings/discussions with the team where they review new information and existing issues. She also sets expectations for the team to achieve departmental and Employer goals.

The record evidence shows that Supervisors are held accountable for the job performance of clerks on their team. For example, the RCM's performance review shows that she is evaluated on ensuring that issues are resolved in a timely manner by her team and that errors are reduced in the collections process. The RCM is also evaluated on her team's job performance (e.g. identifying issues with collections accounts and implementing corrections and resolutions; boosting production in the collections process and the team's productivity). The RCM's manager praised the RCM in her written performance review for her contributions to her team's success.

The record further shows that CFSs and CFMs are evaluated on their ability to get containers moving in a timely manner (i.e. the capacity to manage storage fees). CFS Ashley's performance review shows that he was rated as "exceeded" in this category. CFM Harder was also evaluated on the ability to reduce storage costs and received the same rating. Her manager commented, "impressive work on reducing storage costs....Your efforts have made a substantial impact on our operational efficiency." Other comments on her evaluation indicate that her team accomplished a variety of goals such as getting current on invoicing and transport-order discrepancies. Harder commented on her performance evaluation that, "I have promoted cross-training for the 5 clerks ... and encourage them to support each other as backups on their various assigned tasks." Supervisors' performance evaluations are a basis for merit-pay increases and promotions. Thus, Supervisors may be subject to either positive or negative consequences based on the performance of the clerks they supervise. Accordingly, I find that the Employer has met its burden to show that the Supervisors have authority to responsibly direct employees.

#### **D. Adjust grievances**

To establish the Supervisors' Section 2(11) supervisory status based on their ability to adjust grievances, the Employer must show that they have the authority to resolve workplace complaints beyond minor disputes and use independent judgment in doing so. *See Ken-Crest Serv.*, 335 NLRB 777, 778-79 (2001); *Riverchase Healthcare Ctr.*, 304 NLRB 861, 865 (1991). Responding to informal complaints regarding workloads, break schedules and personality conflicts amongst employees is not sufficient to establish the authority to adjust grievance. *Riverchase Healthcare Ctr.*, 304 NLRB at 865. Further, it is insufficient to show that the

purported supervisor simply has some involvement in the grievance procedure. Rather, the Employer must present evidence demonstrating the role the purported supervisor plays in the procedure and that he or she independently adjusts employee grievances. *Training Sch. at Vineland*, 332 NLRB 1412, fn. 2 (2000).

Here, the first step of the grievance process under the CBA is to bring the issue to the employee's immediate supervisor. The Supervisors serve as the clerks' immediate supervisors. The record evidence shows that Supervisors have authority to adjust the type of grievances known as TILs. These grievances involve allegations that non-unit individuals performed OCU bargaining-unit work. Article IV of the CBA explicitly prohibits non-unit employees, including supervisors, from performing unit work. TILs are submitted to the Supervisors, who are responsible for researching each TIL and determining its validity. The Petitioner argues that Supervisors do not have the final say regarding TILs; that upper management conducts independent reviews. However, the Petitioner's witnesses provided vague and conflicting testimony regarding whether upper managers conduct an independent review of the TILs. Khan and Hogue deny doing so unless a TIL gets escalated. Although upper-level managers may review the Supervisors' TIL determinations, the weight of the evidence suggests that, for the most part, they do not conduct independent investigations of each TIL or overturn the Supervisors' determinations. Furthermore, the RCM's performance evaluation shows that one of her responsibilities is to "[t]rack/review/validate/resolve TIL[s] to ensure violations are addressed and processed appropriately." The record evidence shows that she and the other Supervisors carry out this duty.

While some TILs are straightforward, others are not. The evidence demonstrates that adjudicating TILs involves the use of independent judgment, weighing of factors to determine whether the work at issue involves work covered by the clerks' job descriptions and if the work, in fact, was performed by a non-unit individual. Certain duties in the job descriptions are vague and Supervisors are tasked with interpreting their meaning to assess whether the work at issue indeed involves OCU work. TILs are significant contractual disputes and the CBA imposes penalties for such violations. Penalties may amount to thousands of dollars that need to be paid to a single clerk. Accordingly, I find that the overall evidence establishes that the Supervisors have authority to adjust grievances, and are therefore Supervisors under Section 2(11) of the Act. *Comprehensive Health Planning Council*, 256 NLRB 1191, 1192 (1981) (adjusting grievances at first step of the grievance procedure established by a collective-bargaining agreement sufficient to establish supervisory status).

#### **E. Recommend hiring**

A hiring recommendation is not effective in the absence of a contention or finding that such recommendation is relied on without further inquiries. *Adco Electric*, 307 NLRB 1113, 1124 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993). *See also NLRB v. Missouri Red Quarries, Inc.*, 853 F.3d 920, 926–928 (8th Cir. 2017), *enfg.* 363 NLRB No. 102 (2017) (supervisory status shown where recommendations involved independent judgment and were not independently investigated). The Board has found that without additional evidence, a putative supervisor does not effectively recommend hiring where acknowledged supervisors also interview candidates. *Peacock*

*Productions of NBC Universal Media*, 364 NLRB 1523, 1526-27 (2016); *Republican Co.*, 361 NLRB 93, 98 (2014). The Board has noted that this is so even if there is testimony that the putative supervisors' recommendations are given "significant" weight. *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1388 (1998).

Here, the evidence shows that the Employer relied on the Supervisors' interviews and assessments to hire the 10 candidates. There is no dispute that nobody else interviewed the candidates. The Petitioner argues the 2024 hiring process was entirely a formality; that Local 63 and the Employer had agreed that the A-list candidates would be selected for hiring. The Employer's witnesses deny that such agreement was reached. Notably, the MOU regarding the hiring does not state that the A-list candidates would be automatically hired. The MOU only states that the Employer would give priority to the A-list members. This position is also set forth in Candella's February 21, 2024 email to Local 63. Thus, the evidence shows that the Employer maintained its right to screen candidates to ensure they were sufficiently qualified regardless of which list they belonged to. It is clear that the Employer was under a deadline, per the MOU, to complete the hiring process. Nonetheless, the record shows that each individual was interviewed and evaluated. The rating sheets were filled out and the Supervisors' assessments were taken into consideration.

The Petitioner also argues that after the Petition was filed, the Employer decided to change course and have the Supervisors interview the candidates. In support of this argument, the Petitioner relies on record evidence that on about March 6, 2024, Hogue had told a clerk (who is also a Local 63 executive board member) that she would be interviewing the candidates. Hogue, however, explained that, at the time, she was not aware of the hiring process since no clerks had been hired since she started working there. In addition, Hillaert, not Hogue, was in charge of coordinating the hiring process. Moreover, as noted above, the record evidence shows that, in the past, Supervisors have interviewed, evaluated, and recommended candidates for hire. The record evidence demonstrates that in 2024, the Employer relied on the Supervisors' recommendations and evaluations, without independent investigation by upper management, in deciding to hire the 10 clerks. Therefore, I find that the Employer has met its burden to show that the Supervisors have authority to effectively recommend hiring under Section 2(11) of the Act.

#### **F. Secondary indicia**

Additionally, I find that the following secondary indicia further supports a finding that the Supervisors are supervisors under the Act: record evidence suggests that the clerks view the Supervisors as their supervisors; Supervisors attend supervisory meetings; Supervisors are the individuals with whom the clerks arrange time off; they have authority to grant time off within the guidelines set for each department; they inspect clerks' work, ensuring there are no errors and prioritize work; and they manage team attendance and can request temps from the hiring hall.

#### **VI. Confidential status of DDSMM and RCM**

An employee may be deemed confidential by the Board if the employee's job duties meet one of two tests. The first test, which has long been applied by the Board, is whether the

employee assists and acts “in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations.” *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956). The terms “formulate,” “determine,” and “effectuate” are read in the conjunctive, requiring the performance of all three. *Weyerhaeuser Co.*, 173 NLRB 1170, 1172 (1968). In *NLRB v. Hendricks County Rural Electric Membership Corporation*, 454 U.S. 170 (1981), the Supreme Court affirmed the Board’s use of this “labor nexus” test in determining whether an employee should be excluded from a bargaining unit based on confidential status. *Id.* at 176.

The second test for determining whether an employee is confidential considers the employee’s access to confidential information, regardless of whether the employee is in a confidential relationship with a member of management responsible for the employer’s labor policy. The Board will find an employee is confidential if he or she has regular access to information “concerning anticipated changes which may result from collective-bargaining negotiations.” *Pullman Standard Div. of Pullman, Inc.*, 214 NLRB 762, 762-63 (1974). Access to personnel or statistical data upon which the employer bases its labor relations policy is insufficient to establish one is confidential. *Id.* at 763. Further, access to labor relations information after the union or relevant employees become aware of the information does not establish an employee is confidential. *Id.* Rather, the Board looks to whether the employee has regular access to advance information regarding the employer’s bargaining strategy or the labor terms to which the employer would agree. *Id.*; *Bakersfield Californian*, 316 NLRB 1211, 1213 (1995).

Regardless of the test applied, the burden of establishing an employee is confidential rests with the party asserting confidential status. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987). Conflicting testimony or a lack of evidence is construed against the party asserting confidential status. See *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). The standard for establishing confidential status is to be narrowly construed. See *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956).

The Employer asserts that the DDSMM and RCM are confidential employees because their role in the TIL process gives them access to confidential negotiation strategy such as how TILs are selected for mitigation and the overall strategy concerning the cost reduction related to TILs. The Employer also argues that during the 2024 contract negotiations, the DDSMM and RCM had information about the total TIL liability that was close to \$1.3 million, which was considered when negotiating a resolution on outstanding TILs. Lastly, the Employer asserts that when the OCU was close to striking, Khan discussed with the RCM a contingency plan for temps to cover for clerks in the event of a work stoppage. Finally, the Employer asserts that the DDSMM and RCM, given their role in Finance, have access to confidential revenue information and outstanding balance information that the Employer would use in collective bargaining. However, a review of the record fails to show that the DDSMM and RC have regular access to documents outlining the Employer’s bargaining strategy. The record evidence is insufficient to show that the DDSMM and RCM have regular access to advance information regarding the Employer’s bargaining strategy or the labor terms to which the Employer would agree. They may be privy to financial information not known to the clerks or other employees. However, access to

confidential information alone does not establish that an employee is confidential. See, e.g., *Bakersfield Californian*, 316 NLRB 1211, 1211-12 (1995). Therefore, I find that the Employer failed to meet its burden to show that the DDSMM and RCM are confidential employees.

## VII. Managerial status of CFMs

The Act makes no provision for “managerial employees;” this category of personnel has been excluded from the protection of the Act by Board policy. Managerial status is reserved for those in executive-type positions, the true representatives of management who formulate and effectuate high-level employer policies or “who have discretion in the performance of their jobs independent of their employer's established policy.” *General Dynamics*, 213 NLRB 851, 857 (1974). The Supreme Court defines managerial employees as those who “formulate and effectuate management policies by expressing and making operative decisions of their employer.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The Court has further clarified that an employee may only be excluded as managerial if he or she “represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980). The party seeking to exclude an individual as managerial bears the burden of proof. *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

As with other categorizations that cost employees the protection of the Act, the standard for conferring managerial status is narrowly construed and requires specific evidence of managerial activity and independent judgment. See, *Curtis Industries*, 218 NLRB 1447, 1448 (1975). The standard is conjunctive, so a managerial employee must formulate *and* effectuate employer policy. *Dist. #1, Marine Engineers Beneficial Association*, 259 NLRB 1258, 1266 (1982), *enfd.* 723 F.2d 97 (DC Cir. 1983).

The Employer asserts that the CFMs are managerial employees because they implemented attendance policies (i.e. allowing only one clerk to be off at a time). However, the record evidence fails to show that the CFMs formulated that policy. The CFMs deny creating any policy. The Employer’s own witness, Hogue, testified on cross-examination that she simply assumed that the CFMs had created that rule. Therefore, the evidence is insufficient to establish that CFMs formulated Employer policy. The Employer’s other arguments—that CFMs are managerial employees because they ensure clerks check containers twice daily to make sure that all containers available to be moved are captured or by asking clerks to generate transport orders two weeks in advance—are likewise unpersuasive. The record shows that these are merely strategies to ensure the team’s work is being performed in a timely fashion. They do not represent high-level Employer policies.

Accordingly, I find that the Employer has not met its burden to show that the CFMs are managerial employees.

## VIII. Conclusion

Based on the record and in accordance with the discussion above, I conclude that the Supervisors are statutory supervisors under Section 2(11) of the Act. Accordingly, it is hereby ORDERED that the petition in this matter is dismissed.

### RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A copy of the request for review must be served on each of the other parties as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must contain a complete statement of the facts and reasons on which it is based.

**Procedures for Filing Request for Review: Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site ([www.nlrb.gov](http://www.nlrb.gov)), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden.** A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must comply with the formatting requirements set forth in Section 102.67(i)(1) of the Board's Rules and Regulations. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#).

A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5:00 p.m. Eastern Time**) on **April 14, 2026**, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on April 14, 2026**.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at [www.nlrb.gov](http://www.nlrb.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which must also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional Director and copies served on all the other parties. The opposition must comply with the formatting requirements set forth in §102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to §102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

Dated: March 31, 2026



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David Selder, Acting Regional Director  
National Labor Relations Board  
Region 21