

**Capital Transit Company and Division 689, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL.** Cases Nos. 5-CA-667 and 5-RC-856. October 21, 1955

SUPPLEMENTAL DECISION, DETERMINATION,  
AND ORDER

On June 16, 1953, the Board issued a Decision and Order in Case No. 5-CA-667,<sup>1</sup> in which it found that Capital Transit Company, herein called the Respondent, or the Company, had violated Section 8 (a) (5) and (1) of the National Labor Relations Act, as amended, and ordered the Respondent to cease and desist and to take certain affirmative remedial action.

Thereafter, the case was considered by the United States Court of Appeals, District of Columbia Circuit, upon the Board's petition for enforcement of its Order. The Respondent contested the validity of the Order by challenging the Board's earlier certification<sup>2</sup> in Case No. 5-RC-856 upon the grounds that: (1) It was based upon an invalid election; and (2) inspectors, who were included within the bargaining unit, were supervisors. On February 17, 1955, the court handed down its opinion<sup>3</sup> in which it found the Respondent's first contention without merit. However, with respect to the Respondent's second contention, the court remanded the case to the Board for further findings as to the status of inspectors under Section 2 (11) of the Act.<sup>4</sup>

In its decision finding that "inspectors are not supervisors within the meaning of the Act" the Board stated, *inter alia*:

It is also their duty to see that safety rules and regulations of the Employer are observed and schedules maintained. If they observe an operator ignoring such rules . . . in more serious violations they are required to make a factual written report. However, in no case does the violation report contain a recommendation of any kind. In extreme cases involving the public safety such as operating a vehicle while under the influence of alcohol, the inspector is required to remove the operator from the vehicle and place him in the hands of an official, the police, or take him to the Employer's doctor. Inspectors do not, in the course of their duties, receive a

<sup>1</sup> 105 NLRB 582

<sup>2</sup> Certification was issued on October 27, 1952, based on proceedings reported at 98 NLRB 141 and at 100 NLRB 1173.

<sup>3</sup> 221 F. 2d 864.

<sup>4</sup> Section 2 (11) provides: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, *suspend*, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or *responsibly to direct* them, or to adjust their grievances, or effectively to recommend such action, *if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.*" [Emphasis supplied.]

report as to any action taken after investigation of the violation reports turned in by them.

. . . The direction and control exercised by inspectors is concerned primarily with equipment rather than personnel, and any direction or control of personnel is incidental thereto. The Board has held that this is not "responsible direction" within the meaning of the Act.

In remanding the case to the Board, the court stated, in pertinent part:

The Board found that in extreme cases involving the public safety the inspectors are required to remove an operator from his vehicle. It did not find whether or not inspectors have authority to 'suspend' operators. . . . There is evidence in the record which indicates that the control exercised by inspectors relates primarily to equipment. . . .

But there is also evidence which indicates the existence of other inspector authority not so closely related to traffic control as to be merely incidental thereto. The Company's rule-book provides that an inspector may relieve from duty any operator found violating any rule in the manual or operating his vehicle in a reckless or dangerous manner. . . .

The Board failed to determine, as a matter of fact, the extent, if any, to which rule-book authority was actually exercised. Nor did it determine, as a matter of its own policy, the difference, if any, between the effect of actual and merely potential authority. . . .

Pursuant to the court's direction, the Board has reexamined the record regarding the "rule-book authority" of inspectors, with particular reference to those portions of the rules referred to by the court, and the record as it relates to other instructions, including oral directions, issued to inspectors regarding their duties, responsibilities, and authority.

At the outset, before discussing the specific matters presented to us by the remand, we believe it appropriate to make certain general observations with respect to court and Board precedents that establish the framework within which our determination will be made.

It is well settled that the mere title of supervisor as applied to certain positions does not establish supervisory status under the Act.<sup>5</sup> Rather, it is the functions, duties, and authority of the individual which must be determinative according to statutory standards.<sup>6</sup> And the power or authority bestowed must not "be 'routine' in the natural sense of that word."<sup>7</sup> Nor may the discretion accompanying the duties be so

<sup>5</sup> See *Mother's Cake and Cookie Company*, 105 NLRB 75, 85, and cases cited therein. . .

<sup>6</sup> See *Red Star Express Lines of Auburn, Inc v N. L. R. B.*, 196 F.2d 78, 80 (C. A. 2).

<sup>7</sup> See *Precision Fabricators, Inc v N. L. R. B.*, 204 F. 2d 567 (C. A. 2). Also see *Potomac Electric Power Company*, 111 NLRB 553.

circumscribed by limitations, either in the authority granted or in the specific conditions placed upon the exercise of such authority, as to negate the use of independent judgment.<sup>8</sup> Further, it may not be a sporadic assumption of a position of command and responsibility.<sup>9</sup> On the other hand, the real existence within an individual's regularly assigned duties of any of the powers enumerated in Section 2 (11) will make a man a supervisor even though the necessity for the exercise of such power is infrequent.<sup>10</sup> But where the issue is the actual existence of a supervisory power, the absence of any *exercise* of authority may negative its existence.<sup>11</sup> Thus, there is precedent for the position that frequency or infrequency of the exercise of authority becomes irrelevant only where there is no question that the authority conferred is supervisory.<sup>12</sup> Having outlined the precedents applying the Act's definition of a supervisor, we turn now to a consideration of the particular issues arising from the court's remand.

We view the remand as requiring the Board to determine whether the rules vest in inspectors statutory supervisory authority.<sup>13</sup> In reaching such a determination the court's opinion indicates that the Board, in its additional findings, is to consider: (1) Whether inspectors have any authority to suspend operators; (2) whether inspectors exercise rule-book authority, and if so, to what extent; and (3) whether, under Board policy, there is any difference between actual and merely potential supervisory authority.

We believe the precedents outlined above can best be applied to the issues presented by first analyzing the rules themselves and then looking at their application in practice.

<sup>8</sup> See *Continental Oil Co.*, 95 NLRB 358, 362, 363, *Auto Transport, Inc.*, 100 NLRB 272, 275

<sup>9</sup> See *N. L. R. B. v. Quincy Steel Casting Company, Inc.*, 200 F. 2d 293, 295 (C A. 1), citing with approval *Great Northern Icing Co.*, 73 NLRB 116. Also see *Helms Motor Express, Inc.*, 107 NLRB 132, 135; *American Broadcasting Co.*, 107 NLRB 74, 75.

<sup>10</sup> *Peter Kiewit Sons' Company*, 106 NLRB 194, 195, *United States Gypsum Company*, 93 NLRB 91, 92, particularly footnote 8 therein and cases cited. See also *Ohio Power Co. v. N. L. R. B.*, 179 F. 2d 385 (C A. 6), discussed and distinguished in *N. L. R. B. v. Leland-Gifford Company*, 200 F. 2d 620, 625 (C A. 1).

<sup>11</sup> *Wood Mfg. Co.*, 95 NLRB 633, 647; *The Steel Products Engineering Co.*, 106 NLRB 565, 579; *The Clinton Construction Co.*, 107 NLRB 946, 947, *WCAU, Inc.*, 93 NLRB 1003, 1005; *Sherold Crystals, Inc.*, 104 NLRB 1072, 1075. See also *N. L. R. B. v. Whittin Machine Works*, 204 F. 2d 883, 886 (C A. 1).

<sup>12</sup> See *N. L. R. B. v. Quincy Steel Casting Company, Inc.*, footnote 9, *supra*.

<sup>13</sup> As noted in our earlier decision, and by the court, it is undisputed that inspectors do not possess the supervisory authority vested in the personnel department, the division superintendents and their assistants, or the superintendent of transportation. Further, with respect to the Board's finding that the authority of inspectors "responsibly to direct" operators was primarily concerned with equipment and not "responsible direction" within the meaning of the Act, the court stated: "To the extent that their direction of operators is related to that function (e. g. ordering operators to drive new routes), it might reasonably be viewed as incidental to their control over the movement of vehicles." Thus, the determination to be made is what, if any, supervisory authority directed to personnel rather than to the movement of vehicles is conferred upon inspectors by the rule book.

### A. *The rules*

The Respondent has compiled a rule book,<sup>14</sup> a copy of which is furnished to each employee of the transportation department who is bound by the rules contained therein as well as special orders and other instructions. In addition, employees are governed by District of Columbia, State, and Federal regulations where applicable, and the rules so provide. New employees must be able to pass an examination reflecting their familiarity with the contents of the rule book.<sup>15</sup> This rule book is voluminous and covers almost to the minutest detail the procedure to be followed in almost any conceivable circumstance.<sup>16</sup>

Rules 132 and 238 bear the topic heading "Persons Authorized to Operate Car (Bus)" and are in two parts. The (b) sections of these rules referred to by the court and with which we are particularly concerned here, are almost identical, apparently having been worded separately for streetcar and bus operations. In combination they would read:

A motorman or operator (an operator) found violating the rules laid down in this manual or found operating his car (bus) in a reckless or dangerous manner or found in such a condition as to make it inadvisable for him to continue operating his car (bus)—may be relieved from duty by a supervisor. Such a motorman or operator (an operator) is thereupon required to surrender his car (bus) to the supervisor on demand and must report immediately with the supervisor at Division Office to the Division Superintendent or his representative.

It will be noted that these sections refer to relief from duty by a *supervisor*. Also, at various other places in the rule book the general term "supervisor" is used. Although the rules do not specifically so state it would appear from the method of Respondent's operations set forth in the record that in at least some of those instances where the term "supervisor" is used it relates to inspectors alone or among other classifications or titles.<sup>17</sup> And testimony regarding inspectors'

<sup>14</sup> The rule book is entitled "Manual of Rules for the Guidance of Operators and Other Employees of the Transportation Department."

<sup>15</sup> If there is any doubt concerning the exact meaning of any rule, special order, or instruction, employees are required to obtain an interpretation from their division superintendent (rule 2 (d)), and any situation not covered by the rules or instructions involving unusual complications or accident hazard must be reported immediately (rule 3 (b)).

<sup>16</sup> For example rule 51 on "Courtesy Toward Public" covers both the content of address and the tone of speech; rule 31 relating to "Standard Uniforms" not only contains specifications for approved uniform but also includes instructions as to the frequency of cleaning uniforms, changing to clean linens, and shining hardware and leather, and rule 37 on "Personal Habits" not only covers employee attitude and conduct toward fellow employees and the Company and its officials, but also provides that "employees must be temperate in their habits. They must adhere to the principles of clean living and decent conduct . . . and will not be retained in the service of the Company [if] . . . (1) Intemperate, immoral, or dishonest; . . ."

<sup>17</sup> Because inspectors are the only persons stationed at specific points along the transportation line, and, like officials of the transportation department, cruise the routes, it

duties indicates that inspectors were included in the term "supervisor" as used in the (b) sections of rules 132 and 238. But, although inspectors are sometimes referred to in the rules as supervisors, this appears to be simply a convenient form of broad designation by the Company to cover situations where company officials other than inspectors may also perform the same or similar particular functions. Moreover, as we have indicated, the mere title or designation of a person as a supervisor does not make him one within the statutory definition.<sup>18</sup>

The (a) sections<sup>19</sup> of rules 132 and 238 forbid the assigned operator to allow anyone other than certain designated persons to operate the vehicle, while the (b) sections, quoted above, set forth the specific conditions under which certain other persons may take over control of the vehicle with or without the assigned operator's consent. These rules, in their entirety, appear directed primarily toward who, other than the assigned operator, is authorized to drive a transportation vehicle. However, because the (b) sections contain the phrase "may be relieved from duty," we must determine the nature of the authority conferred upon those persons doing the relieving.

We note that inspectors are all qualified operators and there are a number of instances where their regular duties include taking over the operation of the transportation vehicle. For example, they may take over the operation of a bus to test some mechanical difficulty reported to them by the assigned operator or take the controls of a street-car in attempting to get it back in operation after a plow has become pulled. Thus, an inspector may relieve the assigned operator in the same sense as one operator relieves another operator under other specified circumstances.<sup>20</sup>

is apparent that they are referred to in some of the rules by the general term "supervisor" or included in other more specific groupings. Among the various examples available in the rule book is rule 54 (i) which states "At special points where supervisors are stationed to assist in the movement of cars or buses, they may dispatch such vehicles without stopping to receive or discharge passengers," and rule 72 (h) providing "An oral report of every ejection [of a passenger] must be made by the crew to the first member of the Supervisory Staff of the Transportation Department met or telephoned promptly to the Central Dispatcher."

<sup>18</sup> See cases cited in footnotes 5 and 6, *supra*.

<sup>19</sup> Section (a) in each of these rules, immediately preceding section (b) quoted in the text, are similarly almost identical and in combination would read:

Motorman or operator (an operator) must not permit any person to operate his car (bus) except (1) uniformed Inspector or Instructor; (2) other properly identified member of the Supervisory Staff of the Transportation Department; (3) student-motorman or operator properly assigned by the Training Division; (4) [in 238 only] Garage Mechanic or Foreman detailed to make mechanical repairs or adjustments.

<sup>20</sup> Examples of this are rules 131 and 237 in their entirety, and rules 16 (c) and (L), 82 (L), 107, 109 (f), 217 (d), and 219 (b), using such phrases as "point of relief"; "detailing another . . . operator to make the relief in accordance with schedule"; "when relief is made on the street"; "on meal relief"; "When relieving on the road, the crew making the relief", "will wait for relief bus", "Operator must test brakes in the first block after relieving another operator," etc.

What is meant or intended by the words "may be relieved from duty," as used here, is somewhat ambiguous in light of (1) the use of the general term "supervisor"—encompassing several classifications with varying duties and authority—in indicating who may do the relieving under specific conditions; (2) the primary purpose of the rules—that of designating who may operate the vehicle; and (3) the fact that the word "relieve" is commonly used in the rules and elsewhere in connection with circumstances wherein someone other than its present operator continues the vehicle in service or takes the vehicle to the barn or garage. Thus, "may be relieved from duty" in the (b) sections might refer either to some form of disciplinary action, or to the mere substitution of the inspector for an operator in order to keep the vehicle in service or prevent blocking of the rails, streets, or terminals.

Regarding disciplinary action, a number of the rules specifically state that failure to conform will subject the employee to such action after investigation, while others even state how many like offenses will constitute cause for discipline.<sup>21</sup> Under the heading "Discipline," rule 9 sets forth what shall be considered sufficient cause for discipline, and provides:

(b) Discipline is administered by Division Superintendents and Superintendent of Transportation Personnel. It is administered in the form of cautions, reprimands, suspensions from duty, or dismissal from the Company's service.

This rule further describes the various types of discipline, classifying them as (1) cautions or warnings; (2) reprimands or sharp censures; (3) suspensions or temporary layoffs; and (4) dismissal. It also indicates the degree of offense which will justify each of the stated types of discipline.<sup>22</sup>

Relief from duty is conspicuously absent from the listed forms of discipline in rule 9, as is any reference to inspectors or "supervisors" in the recitation of persons who administer discipline. Thus, it is apparent that, pursuant to the authority vested in his position by rule 9, if a division superintendent or one of his assistants, were to relieve an operator from duty under the (b) sections of rules 132 and 238, he could, when such action is called for, at the same time investigate, determine, and administer discipline. But it does not follow that an inspector, when performing the same function under the same rules can exercise the same power. For rule 9 does not give an inspector

<sup>21</sup> Examples are rules 16, 102, and 290 (c).

<sup>22</sup> Established company procedure is for an operator to be interviewed, when in the judgment of the authorized official the breach or accumulation of such breaches of rules contained on reports warrants such action. After the interview and an investigation by an authorized officer, he determines whether or not to administer discipline, and the appropriate type of discipline.

such authority and when he relieves from duty under the same circumstances, the (b) sections specifically provide that he must accompany the operator who "must immediately report at the Division Office of the Division Superintendent or his representative." The most likely conclusion to be drawn from the requirement that the inspector go with the operator to one of these company officials is that the latter and not the inspector are vested with the power to administer appropriate discipline.

We conclude from the foregoing that the inspectors' authority under the (b) sections of rules 132 and 238 to relieve operators is not synonymous with authority to suspend or discipline. Since when they take over a vehicle, they cannot administer any punishment for infractions of the rules, their authority is apparently limited in such circumstances to acting merely as substitutes for the operators. Viewing the rules and related instructions and procedures as a whole, it seems therefore that if inspectors possess any "real" supervisory authority, it must be found not in the rules themselves, but in their application in practice.

#### *B. The evidence as to the application in practice of the rules*

The testimony regarding the duties of inspectors is voluminous. Nine individuals who had worked in the classification of inspector from 6 to 16 years, representing approximately 75 man-years, were exhaustively examined with respect to all of their duties. In addition a division superintendent, who had worked as an inspector for 8 years, and 2 operators testified with respect to inspectors' duties. A number of the inspectors were specifically asked what authority they were enabled to exercise under the (b) sections of rules 132 and 238 or under instructions relating to the same subject. Several inspectors testified that they understood that they had authority to take control of a vehicle only if an operator was intoxicated; and that the specified procedure was to take the vehicle with the operator to the barn and turn the operator over to a supervisor or accompany him to the company doctor. Some testified that they understood this also extended to situations involving illness and injury of an operator. One inspector indicated he felt it his duty to take control of a vehicle if an operator was driving dangerously or recklessly, not because of any particular rule or instruction, but for the safety of the passengers, the public, and the Company. He also expressed his conviction that one of the other operators would be "bound" to do likewise. And, as stated by the court in its opinion, some of the inspectors apparently did not even know that they possessed any such authority.

At the time of the hearing, the parties were well aware of the existence of the rules and spared no effort in bringing forth what facts they

could from the 80-plus man-years of experience represented by the witnesses. Despite this fact, the incidents which could be related to the (b) sections of rules 132 and 238 are few.

Three of the inspectors had occasion to take over control of a vehicle when an operator was intoxicated. On two of those occasions the matter was called to the attention of the inspector by a supervisor, who informed the inspector that a specific operator in a particular vicinity was intoxicated, and instructed the inspector as to the procedure to follow. The third inspector accompanied a supervisor to the location of the vehicle and took over its operation while the supervisor took charge of the intoxicated operator. In each of these incidents specific instructions had been given by a superior. None of the other inspectors had ever encountered a situation involving an intoxicated operator.

One of the inspectors had an occasion to take over a vehicle because the operator was ill and another inspector took over the vehicle when the operator suffered an eye injury in an accident. In each of these incidents the inspector was merely substituting because of immediate necessity rather than as a disciplinary measure.

There were four occasions when an inspector took over the operation of the vehicle when its operator walked off. On each of these occasions the inspector wrote a factual report of the incident. On the first, the operator refused to take an additional run as he was required by the rules to do when his relief failed to show up. The second involved an operator who was consistently running slow on his schedule. Upon his second caution by the inspector he told the inspector that since he could not operate the vehicle to the inspector's satisfaction the inspector could take over. The inspector tried to persuade him to remain and do the best he could, but the operator refused. On the third, an operator was delaying his departure time while filling his change carrier and was blocking the terminal and street traffic. The police ordered the inspector to clear the way. The inspector told the operator to pull out on his trip or to pull around on a side street to fill his carrier. The operator failed to comply. The inspector returned and told the operator to pull out or get off the bus. The operator got off the bus. On the last occasion, an operator was wearing a nonregulation leather jacket. The inspector spoke to him about it. The operator indicated he did not care about the rules, he was going to wear this jacket. Thereupon, the inspector wrote a factual report. Upon return to duty, after a suspension administered by someone other than the inspector, the operator encountered the same inspector and began making unfriendly remarks about this inspector's having reported him. When the inspector spoke to him and indicated he would demand a public apology, the operator walked off his bus and quit the job. The inspector took over the operation of the vehicle.

The record demonstrates that in those instances where a factual report of an incident was filed by the inspector, he had no further connection with any action taken with respect thereto except for an occasional interview.<sup>23</sup> Several of the inspectors have never had to take over a vehicle for any cause, and some were not even aware that they could do so, although all had worked for the Company as operators before becoming inspectors.

We do not find in the inspector's role of taking over the operation of a vehicle, when its operator chose to get off the bus rather than comply with the rules applicable at the moment, convincing evidence of the use of independent discretion—for the inspectors are charged with the duty of keeping the transportation stock rolling on schedule. Here as in the case of illness, the inspector's action in operating the transportation vehicle was not as a disciplinary measure, but rather was because of immediate necessity. The first two of these incidents relating (1) to the operator's refusal to take an additional run; and (2) the operator's refusal to continue on his assigned run, may not have required immediate disciplinary action because of their nature. However, the third incident demonstrated a deliberate disregard of the rules for bus operation and the operator's noncompliance with the inspector's direction, under police orders, would appear to be of a sufficiently serious nature to warrant immediate disciplinary action, if indeed the inspector possessed any such authority. In these circumstances, it is particularly significant that the inspector merely took over the operation of the bus and wrote a factual report. Regarding the fourth incident, although the operator may have been suspended because he wore a nonregulation jacket, this does not establish a proximate relationship between the inspector's position and the suspension, for his role was merely that of a reporter. Moreover, the fact that the operator subsequently quit when the inspector indicated he would demand a public apology for the operator's disparaging remarks does not warrant the conclusion that if disciplinary action was required for this conduct, the inspector could or would make the decision that it be administered.

There was one other occasion when an inspector observed an operator wearing a nonregulation shirt. He told the operator to change on his trip to the barn and to return on his next round in proper uniform. The inspector then called the division superintendent and reported the circumstances. The driver returned on his next trip in proper uniform. Whether this operator complied with the rules voluntarily or at the direction of the division superintendent, who had authority to administer reprimands, is not shown. However, when

<sup>23</sup> Occasionally the inspector reporting a violation is called in for additional information in the investigation stage. See footnote 22, *supra*

considered in contrast with the jacket incident discussed above, this incident does indicate that being reported for breaking the regulation uniform rule, in itself, is not necessarily cause for suspension, or even reprimand. Both of these nonregulation uniform incidents demonstrate further that the inspector's authority is limited to making a factual report.

There was one remaining incident which would fall within the (b) sections of rules 132 and 238. On one occasion an inspector threatened to take over operation of a vehicle if the operator did not pull down his glare shade. The operator complied with the rule and pulled the shade. This was the only incident brought forth by the testimony having any relation to dangerous or reckless operation of a vehicle. None of the inspectors ever had occasion to take over the operation of a vehicle for dangerous or reckless operation.

The fact that in the last-mentioned incident the operator complied, thus obviating the necessity for the inspector to take over control, as he may have been authorized to do under the (b) sections of rules 132 and 238 is of no moment in ascertaining the extent of authority vested in the inspector in these circumstances. For rule 125<sup>24</sup> gives specific instructions stating when such curtains are to be drawn and when they are to be raised. Thus, in this situation, there was no room for discretion on the part of the inspector on the subject of what constituted safety, as the determination had already been made by the rules.

With respect to other phases of the rules, breaches are usually handled by calling the matter to the operator's attention or filing reports discussed in the Board's earlier decision. There is no testimony indicating that inspectors have ever taken any action in connection with rules dealing with personal cleanliness, habits, morals, or conduct toward the public. Much of the substance covered by the rules, as they relate to operators, aside from the movement on schedule of the vehicles, is of a type which an inspector would have little occasion to observe. That the inspector would have insufficient direct contact with operators to be informed concerning their personal habits is partly demonstrated on the record by the inability of inspectors generally to identify the specific operator involved by name when relating the various incidents mentioned above.<sup>25</sup>

<sup>24</sup> Rule 125 provides: "CURTAINS FOR USE BY MOTORMEN AND OPERATORS. (a) Motorman or operator, when operating car after dark, with vestibule windows closed, must keep the 'light' curtain drawn. When vestibule window immediately in front of motorman or operator is open, curtain must not be drawn. (b) On P. C. C. cars, curtains must always be drawn when using interior lights."

<sup>25</sup> It appeared throughout their testimony that the individual inspectors knew very few of the operators, with whom they came in contact, by name. Because of this the Union repeatedly urged that this inability on the part of inspectors to identify the person and the date of the incident seriously impaired the probative value of the testimony because the Union was placed in the position of being unable to obtain evidence to refute the testimony.

We have carefully studied the contents of rules 132 (b) and 238 (b), their relationship to other rules, and the entire record to determine whether any authority conferred upon inspectors is supervisory within the Act's definition. We have concluded that inspectors were included in the general term "supervisor" as used in the (b) sections of rules 132 and 238. However, as noted above, rules 132 and 238, in their entirety, are directed mainly toward specifying those classifications authorized to operate a transportation vehicle. When evaluated in their context, we conclude that the (b) sections of rules 132 and 238 do not establish within inspectors' regularly assigned duties the real existence of any of the powers enumerated in Section 2 (11).<sup>26</sup> However, because the term "may be relieved from duty" could be thought to impart authority to suspend, we have looked to other rules on the subject. From those other rules, we learn that the authority to suspend and administer other forms of discipline, as used in the rules is vested in persons other than the inspectors. In view of the foregoing, and to determine whether "may be relieved from duty" constitutes actual authority to suspend within the meaning of Section 2 (11) of the Act we have examined all evidence relating to the exercise of these particular rules. As noted above, the 3 occasions, in the 80-plus man-years of experience presented in the testimony, when an inspector took over operation of a vehicle because of the intoxication of the operator, were at the direction, and on one occasion in the presence, of a superior. They are, therefore, of little value in determining an inspector's authority to suspend. The two occasions when an inspector relieved an operator because of illness or injury and took over the operation of the vehicle, do not, in our opinion constitute suspension, but they do throw some light on what authority was conveyed by the words "may be relieved from duty." In these circumstances it is clear that "may be relieved from duty" is related to authority to operate the vehicle, and because of necessity rather than as a form of reprimand. The same may be said of the inspectors' roles in relation to an intoxicated operator who, according to the rules automatically discharges himself by his conduct.<sup>27</sup> Again, on those occasions when the particular operator walked off the bus rather than comply with the rules, the inspector took over operation of the vehicle pursuant to the requirements of the moment to keep the rolling stock moving and to maintain schedules.

From the foregoing, we conclude that the phrase "may be relieved from duty," when evaluated in light of the application of the rules,

<sup>26</sup> See footnote 10, *supra*.

<sup>27</sup> Rule 38 (e). "An employee found to be under the influence of intoxicants when reporting for duty, while on duty, or on, or about Company premises at any time, automatically dismisses himself from the service of the Company."

does not vest in inspectors the authority to suspend within the meaning of the Act.

As we have found that rules 132 and 238 do not in themselves establish the existence of any of the "real" powers enumerated in Section 2 (11) of the Act, nor do they, when considered in their context and application vest in inspectors the authority to suspend, we turn now to the question of whether in their application these rules confer upon inspectors any other indicia of statutory supervisory authority.

As will be noted from the incidents outlined above, inspectors may report, in addition to matters related to operation and changes of schedules, other violations of rules. However, the exercise of this function has not been extensive. No incident was brought to light concerning any such report covering rules regarding personal cleanliness, habits, morals, or manner of speaking, and other conduct toward the public. There were two such reports concerning the wearing of nonregulation uniforms. The evidence presented on this subject not only indicates that the inspectors make no determination as to any further action to be taken on such reports but also demonstrates that the penalty, if any, is so variable that an inspector would have no way of anticipating the results stemming from his report. We conclude, that the inspector's role, in making such reports, is merely that of a monitor. Monitoring does not constitute supervisory authority within the meaning of the Act.<sup>28</sup>

The remaining incident concerning the rule on the proper position of the glare shade during night driving is in our opinion a graphic demonstration of the lack of independent judgment or discretion allowed inspectors under the rules. The specific conditions placed upon the exercise of any authority by inspectors is so prescribed by the rules themselves, special orders, and other directives, including oral instructions and by the requirements of District of Columbia, State, and Federal regulations that they negate any statutory supervisory authority which might otherwise appear to be present.<sup>29</sup>

We turn now to the question raised by the court as to whether, in our judgment there is any difference between actual and merely potential supervisory authority. We assume that by "potential" the court has in mind "real" power which has not been exercised because of lack of an occasion for such action—due to a time element or certain other factors—and we would find that it would not make an individual any the less a supervisor. For, as noted above, the Board and courts have regarded the real existence of statutory supervisory authority within an individual's regularly assigned duties sufficient to establish his

<sup>28</sup> See *Frank G. Shattuck Company*, 106 NLRB 838, 841-844; *The Clinton Construction Company*, 107 NLRB 946, 948; *Potomac Electric Power Company*, 111 NLRB 553; *Super Valu Stores, Inc.*, 112 NLRB 55.

<sup>29</sup> See footnote 8, *supra*.

supervisory status without regard to the necessity for frequent exercise of such power.<sup>30</sup> However, we have found that inspectors do not possess any "real" supervisory authority either in the rules or their application.

Under all the circumstances, we conclude that inspectors do not have the authority to suspend employees, nor do they possess any of the other indicia of supervisory authority set forth in Section 2 (11) of the Act. Accordingly, the Board respectfully submits to the court that there is no basis for reversing our earlier finding that Respondent has violated Section 8 (a) (5) and (a) (1) of the Act.

The Respondent's motion for further hearing is denied for the reasons previously stated in earlier portions of this proceeding when the Respondent made similar requests.<sup>31</sup>

[The Board denied the motion.]

ACTING CHAIRMAN RODGERS took no part in the consideration of the above Supplemental Decision, Determination, and Order.

<sup>30</sup> See footnote 10, *supra*. Also see *Leland-Gifford Company*, 200 F. 2d 620, 625 (C. A. 1).

<sup>31</sup> Acting Chairman Rodgers would grant Respondent's motion for a further hearing and accordingly is not participating in the findings made in this decision.

**A. Werman & Sons, Inc. and United Shoe Workers of America,  
CIO, Petitioner.** *Case No. 1-RC-4023. October 21, 1955*

### DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Thomas E. McDonald, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer's motion to dismiss the petition on the ground that the Petitioner had made no demand for recognition nor claim of majority representation prior to filing the petition was referred to the Board. In view of our decision to dismiss the petition for other reasons, we find it unnecessary to consider this contention.

At the hearing the Employer alleged and offered to prove that the showing of interest made by the Petitioner was by use of undated cards secured over 2 years ago by misrepresentations, and that the Petitioner deceived the Board into assuming such cards were evidence of a current interest. Thus the Employer inferentially requested a dismissal of the petition on the basis of an inadequate showing of interest. The hearing officer properly declined to admit such evidence into the record on the ground that the Petitioner's showing of interest was as administrative matter and was not litigable by the parties.<sup>1</sup>

<sup>1</sup> See *Morganton Full-Fashioned Hosiery Company*, 102 NLRB 134.