

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**ALTERNATE CONCEPTS, INC.**

**Employer**

**and**

**Case 28-RC-6750**

**OFFICE AND PROFESSIONAL EMPLOYEES  
INTERNATIONAL UNION, LOCAL 30, AFL-CIO**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The Petitioner, Office and Professional Employees International Union, Local 30, AFL-CIO, seeks an election in a unit comprised of all transportation supervisors to include Line Controllers, Line Supervisors, Dispatchers, and Instructors employed by the Employer, Alternate Concepts, Inc., at its Phoenix, Arizona facilities. More specifically, the Petitioner seeks to represent individuals holding the titles field supervisor, line controller, crew dispatcher, and supervisor/instructor. The unit proposed by the Petitioner would include 26 employees. Contrary to the Petitioner, the Employer contends that these individuals are statutory supervisors within the meaning of Section 2(11) of the Act and, therefore, cannot form an appropriate unit for purposes of collective-bargaining. Based on the record as a whole and for the reasons more fully described below, I find that the record fails to establish that the Employer's field supervisors and supervisor/instructor are supervisors within the meaning of Section 2(11) of the Act or that they should otherwise be excluded from the unit. However, I also find that the record demonstrates that the remaining classifications – line controller and crew dispatcher – are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit found appropriate herein. Because the Petitioner had indicated it would proceed to an election in an alternate unit, I shall direct an election in a unit consisting of the Employer's field supervisors and supervisor/instructors.

**DECISION**

**1. Hearing and Procedures.** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

**2. Jurisdiction.** At the hearing, the parties stipulated, and I find, that the Employer, Alternate Concepts, Inc., is a Massachusetts corporation with an office and place of business in Phoenix, Arizona, where it is engaged in the business of providing public transportation services. During the 12-month period preceding the hearing, the Employer, in

conducting its business operations, derived gross revenues in excess of \$250,000 and purchased and received goods at its Phoenix, Arizona facilities valued in excess of \$5,000 directly from points outside the State of Arizona. I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Board's exercise of jurisdiction in this matter will accomplish the purposes of the Act.

**3. Labor Organization Status and Claim of Representation.** The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

**4. Statutory Question.** As more fully set forth below, a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

**5. Unit Finding.** This case presents a single issue: whether the Employer's field supervisors, line controllers, crew dispatchers, and supervisor/instructors are statutory supervisors. To provide context for my discussion of this issue, I will provide the record facts regarding the Employer's operations; the Employer's management structure; and the job duties and functions of the classifications at issue. I will then discuss the case law and analysis that supports my conclusion that the Employer's field supervisors and supervisor/instructors are not statutory supervisors, but that the remaining classifications are statutory supervisors.

#### **A. The Employer's Operations**

The Employer provides public transportation services in various cities in the United States, including the light rail system in the Phoenix, Arizona metropolitan area. The Employer has managed and operated the Phoenix light rail system since its inception in February 2007, pursuant to a contract with Valley Metro Rail, which owns all of the light rail vehicles. Under this contract, the Employer is responsible solely for the operation of the light rail system, which consists of approximately 50 vehicles that travel over a 20-mile rail segment running from Mesa, Arizona, to north Phoenix, Arizona. The Employer is not responsible for the maintenance of any of the light rail equipment or facilities; that duty is handled by another contractor hired by Valley Metro Rail.

The Employer operates out of two facilities, the operations control center (OCC), located in downtown Phoenix, and the operations and maintenance center (OMC), located several miles away. The OCC houses the technology used to monitor and control the light rail vehicles. The OMC houses the Employer's administrative offices and is the place where the light rail vehicles are serviced and stored when not in operation. The OMC is owned by the City of Phoenix and rented by Valley Metro Rail. The revenue service hours for the light rail system are from 5:00 a.m. to 11:00 p.m. Sunday through Thursday, and 5:00 a.m. to 2:00 a.m. Friday and Saturday.

Ron Mackay is the General Manager of the Employer's Phoenix operations, and has held that position since February 2007. He reports directly to the Employer's corporate

offices in Boston, Massachusetts. Mackey is responsible for delivering the day to day service for the Phoenix light rail system. Three people report directly to Mackey: Henry Miranda, Director of Transportation, Frank Hauser, Manager of the OCC, and Karen Lauderdale, Project Administrator. The parties stipulated, the record reflects, and I find, that Mackey, Miranda, Hauser, and Lauderdale are supervisors within the meaning of the Act. The Employer's administrative staff, including Mackey, Houser, and Lauderdale, have offices at and work out of the OMC. Houser works out of the OCC.

In addition, the Employer employs 12 employees who are classified as field supervisors, 9 employees who are classified as line controllers, 4 employees who are classified as crew dispatchers, and 1 employee who is classified as a supervisor/instructor. The field supervisors, crew dispatchers, and supervisor/instructor report to Miranda at the OMC. The line controllers report to Hauser at the OCC. The Employer also employs a payroll and human resources clerk, who reports to Lauderdale. Finally, the Employer employs 49 operators, who are responsible for operating the light rail vehicles. The operators are represented for purposes of collective-bargaining by the Union. The Employer and the Union are parties to a collective-bargaining agreement covering the operator's unit, which is effective from January 1, 2009, through June 20, 2012.

## **B. The Disputed Classifications**

### **1. Field Supervisors**

There are usually three field supervisors on duty at any one time. They report to the OMC, where they swipe in cards to record their start time. After obtaining route information from the dispatcher, they take a company-provided vehicle into the field. Their primary duty is to ensure the continuous delivery of service. For this purpose, the Employer has divided the rail line into three roughly equal sectors, and each field supervisor is assigned to a sector. The field supervisor selects a location within his sector and watches the light rail vehicles pass. He notes issues such as whether a vehicle is running early or late, whether its head sign is correct, and whether the driver has pulled down the shades in his cab too far. Field supervisors may also ride in a light rail vehicle with an operator and complete a ride evaluation report, which has a series of boxes for the supervisor to check concerning whether the operator operates the train according to the Employer's rules and an area for comments. The record does not indicate what is done with this report, including whether the operator receives a copy or whether it becomes a part of the operator's file. The record does indicate, however, that the report will not result in a wage increase for the operator.

Before April 8, 2010, field supervisors issued "Documented Supervisor Counseling" forms to operators for various performance issues. These forms constituted a part of the progressive discipline policy outlined in the operator's collective-bargaining agreement, and contained sections indicating whether the counseling constituted a "verbal warning," "written warning," or other "disciplinary action." For example, on October 28, 2009, Field Supervisor Geoff Ellsroad issued a Documented Supervisor Counseling to an operator after observing the operator run his train at excessive speeds in several areas. Ellsroad indicated that the counseling constituted a verbal warning. However, on April 8, 2010, Miranda issued an

e-mail to the field supervisors, line controllers, crew dispatchers, and instructor/supervisor which stated as follows: “Please stop from using the ‘Documented Supervising Counseling’ cards. Discipline will be handled by R. Mackay or myself. Please gather all information, UOR’s, OCC reports, etc. and bring to the office.”

After April 8, if a Field Supervisor observed what he believed was a rule violation, he would describe the event in an Unusual Occurrence Report (UOR) or e-mail sent to Miranda. Based on the facts described in the UOR or e-mail, and the operator's previous disciplinary record, Miranda determines the appropriate level of discipline, i.e., verbal warning, written warning, or other disciplinary action. Miranda will then, pursuant to the collective-bargaining agreement, complete an infraction notice and provide copies of it to the operator and the Union. An operator who is issued an infraction notice may request a hearing “at which time all information pertinent to the case . . . will be presented by the parties . . .” The field supervisor does not participate in this hearing. Instead, Miranda typically handles these hearings on his own, although he may talk to the field supervisor in advance if the UOR or e-mail is not clear. The record does not include any examples of a UOR or e-mail submitted by a field supervisor upon which discipline was based.

Field supervisors are also responsible for reporting to the scene of any unusual occurrence, such as an equipment failure, derailment, accident, or passenger issue. The field supervisor becomes aware of such situations by monitoring radio communications, or may be dispatched by the line controller. At an accident scene, the field supervisor serves as an incident commander, and documents the accident scene, takes pictures, chalks wheels, obtains statements, and works with the police. The field supervisor will determine whether the operator needs to submit to a drug and alcohol test. In doing so, the field supervisor is largely constrained by the parties’ collective-bargaining agreement and federal regulations, and merely looks for obvious signs of impairment such as slurred speech, the smell of alcohol, etc. The field supervisor does not assess fault in accident situations. The field supervisor may also determine whether the light rail vehicle can resume operation. In some instances, when the accident results in part of the track being blocked, the field supervisor, in consultation with the line controller, determines whether to operate on a “single track” basis, that is, divert light rail vehicles to another section of the track, or call in buses to transport passengers. In 2009, there were 72 collisions between light rail vehicles and automobiles. In 2010, up to the date of the hearing, there were approximately 21 collisions.

The record contains evidence of a number of instances in which field supervisors have responded to unusual incidents. For example, on June 24, 2010, field supervisor Richard Amaya responded to a hit and run accident involving one of the Employer's light rail vehicles. He completed an UOR, in which he described the train number, car numbers, direction of travel, track, time of day, and weather conditions. The UOR also notes that there were no injuries, that no police report was taken, and that the operator was not required to submit to drug and alcohol testing. The field supervisor also took photographs of the incident and released the operator to resume service. Under “action taken,” the UOR states “Report submitted.” Similarly, on October 20, 2010, Amaya responded to a situation in which some passengers had threatened an operator. When he arrived at the scene, the operator and the passengers were on the platform exchanging words. Amaya instructed the operator to resume

service and had the passengers leave the platform. Amaya permitted the passengers to board a later train. Under action taken, the UOR states “Police Notified, Report submitted.”

In handling unusual occurrences, the field supervisor is guided by the Employer's Standard Operating Procedure (SOP), which is, as described by the Employer, a “very extensive set of procedures that outline how [supervisors] will do the various functions of their jobs” in response to particular situations. The SOP deals with a diverse range of issues that may arise, including, for example, what procedures to follow if an employee becomes ill, a passenger is injured or becomes ill, an operator is absent, single track operation becomes necessary, there is adverse weather, a disabled vehicle requires pulling or pushing, there is a suspicious package or bomb threat, evacuation of a train becomes necessary, a train collides with another vehicle or is derailed, a person is struck by a train, or there is a service delay or disruption. The SOP was developed largely by the former Director of Transportation, Mike Francis, and Mackey. All supervisors receive training in which the SOPs are read to them. Because the SOPs cannot predict every circumstance, they serve as guidelines and generally provide a number of options or “roadmap” for supervisors to follow to handle particular situations.

Field supervisors are scheduled to work either four 10-hour shifts per week or five 8-hour shifts per week. They are given a schedule that lists their hours of work and the sectors to which they are assigned. Field supervisors bid for these schedules every six months and, once the bid is complete, are given a copy of the schedule.

## **2. Instructor/Supervisor**

The Employer employs a single instructor/supervisor, Cynthia Scott. Scott devotes approximately 80 percent of her working hours to performing the duties of a field supervisor. The rest of her time is spent on training duties. Scott normally works from 6:00 a.m. to 2:00 p.m., unless her training duties require her to work different hours. This is a permanent schedule, and, unlike the other field supervisors, she is not required to bid for it. Before working for the Employer, Scott served as a supervisor for a bus and light rail company in St. Louis.

In October 2007, Scott and her husband (a line controller) prepared a training manual for new operators and supervisors, with input from the Employer's former Director of Transportation Francis. It was based in part on an Operator's Maintenance Manual, which described “everything there was to know about the trains.” The resulting training manual contains everything an operator needs to know to operate a vehicle, including signals, customer relations, and radio protocol.

Scott also developed and conducted the Employer's training program, which is a six-week course combining classroom instruction and practical experience. The record does not indicate what portion of the six-week training involves classroom instruction as opposed to practical experience or the total number of hours of instruction over the six-week period. Most of the initial hire training took place when the Employer began its revenue operations in August, September, and October 2008. There was some additional new hire training in

March or April 2009, when the Employer hired additional operators. As part of this training, Scott administers and grades tests which the employees are required to pass to maintain their employment. Scott drafted the tests based on information from the training manual. Mackey and Francis reviewed the tests and, in some instances, changed certain questions. A number of employees did not attain passing scores on the tests and were terminated.

In addition to new hire training, Scott is responsible for recertification training for all employees. This is annual training required by federal regulation. This training is an eight-hour course that covers the Employer's SOPs, and includes certain recurring topics, such as drugs and alcohol and maintenance. The training also includes instruction on any new policies or issues that arose during the year that are brought to Scott's attention in regular meetings with Mackey, Miranda, and the maintenance contractor. An example of one such issue was dealing with overhead power lines. As with the new hire training, employees are required to pass a recertification test to retain their jobs.

The training takes place in a training room at the OMC. This training room is available to anyone who needs it including, on occasion, the police. Recertification classes usually consist of three to five employees, and sometimes require Scott to modify her normal work hours. Scott informs Miranda before holding any recertification classes to make sure he can find coverage for the operators who will be in training. In some instances, Miranda may tell Scott she cannot hold training at a particular time because there is not enough coverage.

Scott also trains the Employer's supervisors. They receive the same training as operators, plus some additional training on how to troubleshoot mechanical problems on trains and reasonable cause for requiring drug and alcohol testing.

When Scott is acting as a field supervisor, she is not normally restricted to one sector. At least two or three times a week, Scott performs rides with operators and prepares ride reports. She watches to make sure that the operator is accelerating correctly, braking, maintaining a proper speed, and dealing with customers in an appropriate manner, and makes suggestions when she observes a problem. Scott may decide on her own who she wishes to perform ride-a-longs with and when, or Miranda, Mackey, or Lauderdale may instruct Scott to perform ride-a-longs with particular operators in response to a complaint. As with the ride reports prepared by the other field supervisors, the record indicates that the reports completed by Scott will not result in a wage increase.

### **3. Crew Dispatchers**

The Employer's four crew dispatchers work out of the OMC. Operators and field supervisors report to crew dispatchers at the beginning of a shift. The crew dispatcher assesses whether the operator or field supervisor is fit for duty, i.e., is wearing the proper uniform and does not appear to be under the influence of drugs or alcohol. To date, a crew dispatcher has not found that anyone was unfit for duty. The crew dispatcher also makes sure that operators report on time, generally 30 minutes before going on service. If an operator is tardy, the crew dispatcher may decide to assign that operator's shift to an extra board operator or a supervisor, if no extra board operator is available. If an operator or field supervisor is not

fit for duty or is tardy, the crew dispatcher may send that person home or have that person remain and assess a half-day absence.

Crew dispatchers are also responsible for scheduling operators. Much of this function is governed by the collective-bargaining agreement, which establishes a quarterly bid procedure in which operators bid for their desired routes. In addition to the 38 fixed routes which are bid, there are an additional 11 extra board positions bid, which are operators who are brought in at various times of the day as an insurance policy in case a scheduled operator is unavailable. The record also shows that crew dispatchers are authorized to dispatch spare trains and extra board operators as circumstances warrant. The record further shows that crew dispatchers have instructed operators to report back to the OMC at the end of their work day, as opposed to the usual practice of leaving work directly at the end point of their pre-assigned run; continue providing service after scheduled duty hours, incurring overtime expense to the Employer; extend their shifts beyond their regularly-scheduled hours; and perform other duties, such as fuel cars.

Crew dispatchers also have the authority to authorize requests from operators for single-day vacations, provided that the allotment of days off on the schedule is not exhausted and another operator can fill the vacancy. Vacations for longer period of times are awarded by seniority bid pursuant to the terms of the operator's collective-bargaining agreement.

#### **4. Line Controllers**

Unlike the other supervisor positions, line controllers work at the OCC and report to Hauser. They are responsible for monitoring the entire rail system through monitors, video screens, and radio contact with operators. They are able to remotely control the switching and routing of trains so that they do not collide or jeopardize people who are working on the tracks. Because line controllers have a bird's eye view of the system, they will instruct operators and supervisors via radio as to the best steps to resolve problems caused by derailments, collisions, or breakdowns, including whether to use a single track or a shuttle. This may include instructing field supervisors to operate manual switches to allow single tracking. They may also assist operators with mechanical problems by suggesting how to fix train malfunctions. Much of this instruction is based on a trouble shooting manual the Employer provides to its supervisors. Line Controllers are also responsible for making 911 calls in the event of an emergency

Line controllers also monitor gaps in service and may instruct crew dispatchers to assign an extra board operator to place a spare train in service to correct the gap. The record shows that line controllers may decide to extend rail service beyond regular service hours if necessary, for example, if a ball game or concert runs late. They may also instruct operators to hold over after the end of their regularly-scheduled shift. The record indicates that line controllers do not need permission from any manager to make these decisions.

There are usually two line controllers working at any given time, except in the early morning hours when there is no revenue service. During those periods, a single line controller is on duty. The OCC operates 24 hours per day, 7 days per week.

## **5. Facts Common to All Supervisor Positions**

Although all of the Employer's supervisors are paid a salary, they are also overtime-eligible and are paid time and one-half of their hourly rate (calculated at their salary divided by 2040) for any hours over 40 worked in a workweek. The salary range for supervisors is \$53,000 to \$60,000 per year.

All supervisors are provided with 22 days of paid time off each year, which may to be used for any purpose. Like the operators, they bid on dates for vacation. The supervisors also receive 12 paid holidays, are eligible to participate in a 401(k) retirement plan with a 3 percent minimum Employer contribution, and are covered by the same health insurance plan. Mackey, Miranda, Hauser, and Lauderdale receive these same benefits, but they may also receive discretionary bonuses for which the supervisors are not eligible.

Supervisors wear uniforms and receive some reimbursement for footwear and pants. Their shirts contain the designation "Metro Supervision." Supervisors also have the option of receiving a \$50 dollar stipend if they provide their own cell phone, or will be provided a company cell phone at no expense. They are free to use the company cell phone for personal use within reasonable limits. Line controllers and Hauser also have a portion of their parking costs paid for by the Employer.

Field supervisors, the instructor/supervisor, and crew dispatchers keep time by swiping in by card at the beginning of their shifts. They do not swipe out. Crew dispatchers generally monitor the time of operators and field supervisors. Line controllers do not follow this procedure; instead, Hauser keeps track of their time.

The Employer has job descriptions for each of the supervisor classifications. The record, however, indicates that these job descriptions have not been provided to the supervisors. The Employer does not contend that supervisors have any role in the decision to transfer, suspend, lay off, recall, promote, fire, or reward employees, or the adjustment of their grievances.

Finally, the Employer does not contend that any of the classifications at issue have the authority to take any of the following actions, or effectively recommend any of the following actions, with regard to its employees: hire, suspend, lay off, recall from lay off, promote, fire, reward, or adjust grievances.

### **C. Analysis**

#### **1. Applicable Law**

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

any individual having the 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.

Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., “assign” or “responsibly to direct”) listed in Section 2(11); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) their authority is held “in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. In determining supervisory status, the Board has instructed that “the burden of proving supervisory status rests on the party asserting that such status exists.” *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); accord *Kentucky River*, 532 U.S. at 711-12 (deferring to existing Board precedent allocating burden of proof to party asserting that supervisory status exists). The party seeking to prove supervisory status must demonstrate it by a preponderance of the evidence. *Dean & Deluca*, 338 NLRB at 1047; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

The Board in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), examined whether the acute care hospital charge nurses at Oakwood Heritage Hospital were statutory supervisors based on the charge nurses' role in assigning nursing personnel to patients and directing the nursing staff in the performance of their duties. The Board majority found that Oakwood's permanent charge nurses were Section 2(11) supervisors because they had the authority to “assign” and exercised independent judgment in making these assignments in the interests of their employer. 348 NLRB at 695-96. The Board also found that the hospital had failed to carry its burden of proving that the charge nurses responsibly directed employees within the meaning of Section 2(11). *Id.* at 698. In making these findings, the Board majority refined the analysis to be applied in assessing supervisory status and adopted the following definitions for the terms “assign,” “responsibly to direct,” and “independent judgment” as those terms are used in Section 2(11) of the Act.

The authority to “assign” refers to “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 over-all duties, i.e., tasks, to an employee.” In sum, to ‘assign’ for purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.” *Id.* at 689.

The authority “responsibly to direct” is “not limited to department heads,” but instead arises “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ ... provided that the direction is both ‘responsible’ ... and carried out with independent judgment.” *Id.* at 691. “[F]or direction to be ‘responsible,’ the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the

oversight if the tasks performed are not performed properly.” Id. at 691-92 “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id. at 692.

“[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Id. at 692-93. “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. at 693. “On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” Id. (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that “[t]he authority to effect an assignment ... must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” Id. (citations omitted).

## **2. Field Supervisors and Supervisor/Instructors**

In this case, the Employer has failed to adduce evidence sufficient to establish that the responsibilities carried out by the field supervisors meet the *Oakwood Healthcare* definition of “assign.” The field supervisors do not prepare the operators’ work schedules, appoint operators to any particular shifts or overtime periods, or give significant overall duties to them. For the most part, field supervisors sit and watch the trains go back and forth along the track. The record reflects that field supervisors sometimes instruct operators when there is an unusual occurrence, such as a collisions or derailment, including having them continue service on a single track. Such occasional and sporadic “assignments” do not implicate the authority to assign as that term is described in *Oakwood Healthcare*, because the activity does not constitute the “designation of significant overall duties to an employee.” Id. at 689. To the contrary, there is no new assignment of work; it is merely an instruction as to how to accomplish an already-assigned task. Nor does the preponderance of the evidence support a finding that field supervisors “responsibly direct” operators as that term is defined in *Oakwood Healthcare*. There is no showing that field supervisors direct individuals “what job shall be undertaken next and [who] shall do it.” Id. at 691. Operators serve one function – to drive trains back and forth on a track. When or how a particular operator will perform this job is largely determined by the parties’ collective-bargaining agreement, and field supervisors play no role in that decision.

Moreover, the Employer has failed to carry its burden of proving that field supervisors exercise independent judgment and discretion that rises above the “routine or clerical” in performing any of their duties. For example, the record reflects that, while at one time it appears that field supervisors could discipline operators based on their observations, that

authority was taken away after April 8, 2010, when the Employer informed its supervisors that henceforth all “[d]iscipline will be handled by R. Mackey or [Miranda].” After April 8, field supervisors merely reported events in the field to managers. There is no evidence that they recommended discipline based on their observations; indeed, the record shows that either Mackey or Miranda was solely responsible for determining whether to issue discipline, and that the reporting supervisor was largely excluded from the process. Although the Employer contends in its post-hearing brief that field supervisors have been delegated full responsibility for making certain that operators follow the Employer’s rules, ranging from driving at the proper speed and obeying traffic signals to keeping their shades up, the evidence fails to establish that they did anything other than report their observations. The Board has held that the ability to refer rule infractions to supervisors, or the mere inspecting and reporting the work of others, do not confer supervisory status. *Riverboat Services of Indiana, Inc.*, 345 NLRB 1286 (2005); *Brown & Root*, 314 NLRB 19, 21 n. 6 (1994). Similarly, the record does not establish that the ride reports prepared by field supervisors have any effect on an operator’s employment. See *Williamette Industries*, 336 NLRB 743 (2001) (the authority to evaluate is not a supervisory indicia if the evaluation does not affect employee status or tenure).

To the extent there is an unusual occurrence, such as an accident or derailment, the record is largely devoid of testimony concerning the factors, if any, taken into account by the field supervisors in determining how to proceed. The record does demonstrate, however, that much of the field supervisors’ discretion in such situations is constrained by the Employer’s SOPs. This extends to decisions to require an employee to submit to drug and alcohol testing after an accident, which is governed by the reasonable cause requirements of the parties’ collective-bargaining agreement and federal regulations. Thus, field supervisors are limited to looking for signs of obvious impairment, such as slurred speech and the smell of alcohol. Adhering to this impairment checklist does not require the exercise of independent judgment and discretion sufficient to establish supervisory status under the Act. See *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995) (authority to send employees home if they pose a threat to patient safety does not require sufficient independent judgment to confer supervisory status); *Chevron Shipping Co.*, 317 NLRB 379 (1995 (authority to order intoxicated employees to leave not supervisory). Similarly, to the extent that field supervisors are responsible for completing UORs whenever there is an unusual occurrence, the record reflects that these reports contain only factual information, such as train numbers, car numbers, track, time of day, and weather conditions. Although there is a section designated “action taken,” the record is devoid of any evidence of any action taken by a field supervisor in response to an unusual occurrence.

Based on the foregoing, I find that the Employer’s field supervisors are not statutory supervisors within the meaning of the Act.

Similarly, I find that the Employer’s supervisor/instructor is not a statutory supervisor within the meaning of the Act. First, I note that the supervisor/instructor spends approximately 80 percent of her time performing the duties of a field supervisor. The remaining 20 percent of her time is spent training operators and other transportation supervisors about how to operate the light rail vehicles as desired by the Employer. There is

no evidence that, in her duties as an instructor, the supervisor/instructor exercises any of the Section 2(11) criteria on behalf of the Employer. More specifically, she has no role in hiring, transferring, suspending, laying off, recalling, promoting, assigning, rewarding, or disciplining other employees, or responsibly directing them, or adjusting their grievances. Although the record reflects that employees will be fired if they fail to obtain minimum scores on certain written exams, the supervisor/instructor does not exercise any independent judgment or discretion in grading these exams; the answers are either right or wrong, and she merely checks an operator's exam answers against an answer sheet.

### **3. Crew Dispatchers and Line Controllers**

In contrast, the preponderance of the evidence demonstrates that both the crew dispatchers and the line controllers assign and responsibly direct the work of operators and, in some cases, field supervisors. More specifically, both operators and field supervisors report to crew dispatchers at the beginning of their shifts. If the operators or the field supervisors do not appear fit for duty because, for example, they are not wearing the correct uniform, the crew dispatcher has the authority to prevent them from working. Likewise, if an operator is late to work, the crew dispatcher has the authority to decide whether to assign that person's shift to an extra board operator or field supervisor, and to send the operator home for the day or require him to stay and assess a half-day absence. Crew dispatchers have also instructed operators to report back to the OMC instead of their usual end point; to continue providing service, resulting in overtime; to extend their shifts beyond regularly-scheduled hours; and perform other duties, such as taking out cars to be fueled. Further, crew dispatchers have authorized time off in the form of single-day vacations which were not previously scheduled. Similarly, the record demonstrates that line controllers have authorized the dispatch of extra board operators into service when, for example, an extra train is required to correct a gap in service. They also have extended rail service beyond regular service hours and have required operators to hold over at the end of their shift. Each of these actions indicates supervisory responsibility. See, e.g., *Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971) (authority to assign work and overtime); *Western Saw Manufacturers*, 155 NLRB 1323 (1329 n. 11 (1965) (authority to approve time off).

The record establishes that crew dispatchers and line controllers may undertake these actions on their own initiative and exercise independent judgment and discretion in doing so. Because "the possession of any one of the authorities listed in Section 2(11) places the employee invested with this authority in the supervisory class," I conclude that the Employer's crew dispatchers and line controllers are statutory supervisors within the meaning of the Act. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949); accord *Harborside Health Care, Inc.*, 330 NLRB 1334 (2000); *Allen Services Co.*, 314 NLRB 1060 (1994). Accordingly, I shall exclude them from the unit found appropriate herein.

Therefore, based on the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time field supervisors and supervisor/instructors employed by the Employer at its Phoenix, Arizona facilities, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

There are approximately 13 employees in the unit found appropriate herein.

### **DIRECTION OF ELECTION**

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election that will issue soon, subject to the Board's Rules and Regulations.<sup>1</sup> The employees who are eligible to vote are those in the unit are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

### **OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 30, AFL-CIO**

### **LIST OF VOTERS**

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and

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<sup>1</sup> Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. The notices shall remain posted until the end of the election. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays. A party shall be estopped from objecting to non-posting of notices if it is responsible for the non-posting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within **seven (7) days** of the date of this Decision, the Employer file with the undersigned, two (2) copies of election eligibility lists containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the National Labor Relations Board Regional Office, 2600 N. Central Avenue, Suite 1800, Phoenix, Arizona, 85004, on or before **January 18, 2011**. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by January 25, 2011. The request may be filed electronically through E-Gov on the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>2</sup> but may not be filed by facsimile.

Dated at Phoenix, Arizona, this 10<sup>th</sup> day of January 2011.

/s/Cornele A. Overstreet  
Cornele A. Overstreet, Regional Director  
National Labor Relations Board  
Region 28  
2600 North Central Avenue, Suite 1800  
Phoenix, AZ 85004

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<sup>2</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, [www.nlr.gov](http://www.nlr.gov).