UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

ALTERNATE CONCEPTS, INC. **Employer**	)	
and	)	**Case No. 28-RC-6750**
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 30, AFL-CIO **Petitioner**	)	

REQUEST FOR REVIEW OF
ALTERNATE CONCEPTS, INC.

I. INTRODUCTION

On or about December 7, 2010, Office and Professional Employees International Union, Local 30, AFL-CIO (the "Union" or "Petitioner") filed a petition in Case 28-RC-6750 seeking to represent "Transportation Supervisors to include Line Controllers, Line Supervisors, Dispatchers and Instructor" employed by Alternate Concepts, Inc. (the "Employer" or "ACI"). On December 15 and 16, 2010, a hearing was held before Hearing Officer John Giannopoulos to consider and determine the question of whether the Employer's transportation supervisors are supervisors within the meaning of the National Labor Relations Act.

On January 10, 2011, the Regional Director of Region 28 issued a Decision and Direction of Election. In his Decision, the Regional Director found that ACI's line controllers and crew dispatchers are supervisors within the meaning of the Act. The

Regional Director, however, also found that the field supervisors and supervisor/instructor are not supervisors within the meaning of the Act.

In accordance with Section 102.67(c)(1) and (2) of the Board's Rules and Regulations, ACI hereby requests review of the Regional Director's finding that field supervisors and the supervisor/instructor are not supervisors within the meaning of the Act. The Employer submits that his finding:

1. raises a substantial question of law or policy because of (i) the absence of, or (ii) a departure from, officially reported Board precedent; and

2. is clearly erroneous on the record and that such error prejudicially affects the rights of the employer.

II. FACTS

A. General

ACI manages and operates the light rail vehicle system in and around Phoenix, Arizona pursuant to a contract with Valley Metro Rail ("VMR").[1] (Tr. 166-167) Ron MacKay is the general manager of the Phoenix operation. (Tr. 12) Reporting to him are Henry Miranda, Director of Transportation, Frank Hauser, Manager of the Operations Control Center ("OCC"), and Karen Lauderdale, project administrator. Additionally, ACI employs a payroll and human resources clerk, Caroline Cory. (Tr. 14-18)

Reporting to Miranda and Hauser are twenty-six (26) transportation supervisors, including twelve (12) field supervisors, one (1) supervisor/instructor, nine (9) line controllers, and four (4) crew dispatchers. (Tr. 14) The field supervisors, supervisor/instructor, and crew dispatchers report to Miranda at the Operations Maintenance Center ("OMC"). The OMC is located at 48th and Washington Street. The

[1] A different and separate company contracts with VMR to perform mechanical and maintenance work on the light rail vehicles. (Tr. 167)

line controllers report to Hauser at the OCC which is located at 302 First Avenue. (Tr. 15-16; 24)

Reporting to the transportation supervisors are forty-nine (49) operators. (Tr. 13) The operators are represented for collective bargaining purposes by Amalgamated Transit Union, Local 1433 ("Local 1433"). (Tr. 20) ACI and Local 1433 are parties to a collective bargaining agreement effective from January 1, 2009 through June 20, 2012 (Pet. Ex. 1)

B. Transportation Supervisors

1. General

Transportation supervisors are paid on a salary basis. The salary range for supervisors is $53,000 to $60,000 per year. They receive time and one-half for hours worked in excess of 40 in a workweek. They receive twenty-two (22) PTO days and twelve (12) paid holidays. (Tr. 120-123) They also have a 401k with a 3% minimum employer contribution. They are covered by the same health insurance plan as MacKay, Miranda, etc.[2] (Tr. 171-174) Transportation supervisors receive a cell phone or a stipend in lieu thereof. They are free to use the company cell phone for personal use within reasonable limits. (Tr. 186; 199)

Field supervisors swipe in when reporting to work but do not swipe out. Their time is generally maintained by the crew dispatchers. The supervisor/instructor does not swipe in or out. (Tr. 183; 200; 286)

[2] Transportation supervisors generally receive the same benefits as MacKay, Miranda, etc. However, Miranda and Hauser can receive a discretionary bonus that transportation supervisors are not eligible to receive. (Tr. 180)

Field supervisors and the instructor/supervisor[3] wear uniform shirts that state "Metro Supervision". They wear black pants and shoes with the uniform shirt. (Tr. 177-179)

2. Field Supervisors

Field supervisors report to work at the OMC. Two (2) of the field supervisors- Filippino and Ellsroad - have cubicles at the OMC. The remaining field supervisors share an office that contains three (3) computers. Field Supervisors (and the supervisor/instructor) have access to company e-mail. Operators do not. (Tr. 184; 211; 275)

Generally, three (3) field supervisors are on duty at one time. After being determined fit for duty, the field supervisors will take a company vehicles and go into the field on the alignment, the alignment being the 20 miles of track on which the light rail vehicles operate. The alignment is divided into three (3) sectors with each on-duty field supervisor responsible for and working in a particular sector. (Tr. 13; 24-26)

Field supervisors are responsible for the continuous delivery of service, i.e., the continuous operation of the light rail vehicles.[4] (Tr. 24) Field supervisors are responsible for ensuring that operators follow all rules and procedures, including observing traffic signals, proper speeds, stopping and picking up passengers, opening doors only on the proper side, not operating the vehicle with doors open, etc. Field supervisors talk to and counsel operators who fail to follow the rules and instruct them on following the rules and procedures. (Tr. 26-28)

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[3] She does not need to wear the uniform shirt when conducting training. (Tr. 178-179)

[4] The light rail vehicles generally operate from approximately 4 a.m. to a little after midnight (last runs begin at 11 p.m.) Sunday-Thursday and 4 a.m. until approximately 3 a.m. (last run at 2 a.m.) Fridays and Saturdays. (Tr. 92)

Prior to April 8, 2010, field supervisors were authorized to issue verbal and written warnings to operators who failed to follow proper rules and did in fact, issue such warnings. (See Er. Exhs.[5] 5, 6 and 7). On April 8, 2010, Miranda sent an e-mail to the transportation supervisors (including the instructor/supervisor, crew dispatchers, and line controllers) informing them to no longer use the counseling forms and that he and MacKay would handle discipline. (Pet Ex. 2). Miranda informed the supervisors that they were still expected to report infractions, via e-mails or on the Unusual Occurrence Report ("UOR") to Miranda or MacKay. (Pet. Exh. 2; Tr. 253; 269)

Those reports and e-mails are effective recommendations of discipline for operators. Thus, MacKay testified that he takes the word of a supervisor because he/she reported it; that it is not an option whether to issue discipline, that it will be issued. (Tr. 205-208). MacKay will review video if that is available. (Tr. 208) However, the Company does not conduct an independent investigation of the facts. Rather, they issue an infraction notice and hold a due process hearing permitting the operator to tell his/her side of the story. Thereafter, Miranda or MacKay determines the level of discipline to be issued (not whether to issue discipline at all.) (Tr. 209)

Field supervisors report to the scene of any unusual occurrence on the alignment, whether an equipment failure, a derailment, or an accident. Generally, an operator will report any such or similar problem to the line controller at the OCC. (Tr. 36-37) The line controller will make all necessary telephone calls, including calling the appropriate field supervisor to report to the scene. (Often, the field supervisor will hear about the problem on his/her radio and be in process to the scene.) (Tr. 36-37; 83)

[5] Exhibit 5 is a warning issued by field supervisor Ellsroad. (Tr. 30)

The field supervisor will take control of the scene, becoming the Incident Commander in the event of an accident. (Tr. 37) If the accident is not such that would automatically require that the operator be sent for a drug and alcohol test, the field supervisor will conduct a visual, fitness for duty check. Emp. Exh. 8 is an example of a circumstance where the field supervisor exercised his independent judgment to allow the operator to continue in service after a vehicle came in contact with the side of the light rail vehicle. The field supervisor can determine to take the operator out of service and have the operator escorted[6] for a drug and alcohol test. If this happens, the field supervisor, another supervisor, or another operator will be required to eventually operate the light rail vehicle when it is cleared to resume operation. (Tr. 47-48)

When at the scene of an accident, the field supervisor is responsible for documenting the scene, chalking wheels, taking pictures, soliciting witness reports, and working with the police department. While the police department may be concerned with conducting a detailed investigation of the scene, the field supervisor will be expected to use independent judgment to get the light rail vehicle operating. (Tr. 36-41)

While ACI has a large Standard Operating Procedure ("SOP") manual, these SOP's are a rough guideline or general road map of how to handle a variety of situations. (Tr. 80; 129; 226) Field supervisors are authorized and expected to exercise independent judgment to deviate from SOP's and, in fact, do so. (Tr. 190) As testified to by Dan Filippino, a field supervisor may have 3 or 4 options on how to handle a particular

[6] This will require assignment of another supervisor to escort the operator. (Tr. 48)

situation and are expected to exercise their independent judgment on which option to choose.[7] (Tr. 259-263)

Whichever option is chosen may determine whether the field supervisor directs the operator to remain at the scene to operate the light rail vehicle ("LRV") when it can be returned to service; to return to the OMC or somewhere else to get another train; to direct the operator on how to evacuate the passengers from his/her train; or to direct the operator in some other fashion (such as to take a drug and alcohol test). (Tr. 236-240)

Employer Exhibit 9 is an example of where a field supervisor was called by an operator to a station where the operator was having a confrontation with passengers who brought a dog (not a guide dog) on the train. The operator told the field supervisor he felt threatened and asked the field supervisor to call the police. The field supervisor exercised his independent judgment to reject the operator's request and, instead, directed the operator to get back on his train and operate it. (Tr. 51-54) Exhibit 9 is the Unusual Occurrence Report (UOR) written by the field supervisor to report the incident. MacKay testified that quite a few UOR's are written, that it is a daily occurrence on the average. (Tr. 54-55)

Employer Exhibit 15 is a grievance filed by Local 1433 alleging that ACI violated its collective bargaining agreement by permitting a supervisor to operate a train when operators were available. The supervisor in question was a field supervisor. (Tr. 109-111)

[7] When testifying, Filippino referenced a number of times the independent judgment he was authorized and expected to exercise. (Tr. 259-263)

3. Instructor/Supervisor

ACI employs one (1) instructor/supervisor, Cynthia Scott.[8] (Tr. 65) Her primary responsibility is to train operators and the other transportation supervisors. (Tr. 66) Ms. Scott prepared the initial training materials along with her husband, a line controller, and Mike Francis, the former Director of Transportation. (Tr. 307) Ms. Scott updates the training materials as necessary. For example, VMR suggested that some materials on the overhead lines be added to the training program. Ms. Scott, working with employees from the maintenance company, put the materials together and added it to her training. (Tr. 296-297; 308-310)

The initial training program for operators and supervisors is six (6) weeks and is conducted by Ms. Scott. (Tr. 66) (Mr. Filippino did some training also at the beginning. (Tr. 67)) Ms. Scott prepares tests during each module of the training, as well as a final test.[9] Those who pass all the tests (80% is the passing score) become certified to be operators and/or supervisors. (Tr. 294-296; 302) When Ms. Scott determined that several employees were unable to successfully pass the final test, those employees were no longer employed by ACI.[10] (Tr. 69-70)

Operators and supervisors must also be recertified annually. Ms. Scott conducts the annual one-day, eight hour, recertification training program. She prepares the recertification training test and determines if the operators or supervisors pass the test.

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[8] Ms. Scott came to ACI from St. Louis where she had eleven (11) years experience in bus and rail service, including ten (10) years experience in a supervisory capacity. (Tr. 308)

[9] While she received input from MacKay and Francis on the test questions, Ms. Scott was ultimately responsible for the content of the tests. (Tr. 310-311; 315)

[10] Because of an agreement with Veolia Transportation Services (operator of the bus system) where these employees came from they were returned to work with Veolia. (Tr. 69-70)

Anyone who fails their recertification in the judgment of Scott will no longer be employed by ACI. This has not happened to date. (Tr. 71-73)

The training prepared and conducted by Ms. Scott includes training on all the employer's rules and regulations. The supervisor training includes fitness for duty training, i.e., what supervisors need to look for when determining an operator's fitness for duty.[11] (Tr. 73)

When not training, Ms. Scott goes out on the alignment and assist as a field supervisor with all the authority and independent judgment exercised by field supervisors. She will frequently conduct ride alongs, riding with an operator and instructing/training the operator on how to improve his/her performance as an operator. (Tr. 288-290)

Until a few months ago, Ms. Scott attended weekly staff meetings also attended by MacKay, Miranda, Hauser and Lauderdale. Discussions at these weekly meetings include personnel issues. A few months ago, Scott asked MacKay if she could be relieved from attending these meetings and MacKay agreed. (Tr. 75-77) While no longer attending these staff meetings, Ms. Scott still meets weekly with MacKay and Miranda. (Tr. 301)

Ms. Scott has her own office and also has control of the training conference room. She has her own set of keys to the OMC. Also, Ms. Scott is free to change her hours

[11] Ms. Scott does a fitness for duty check of all employees and supervisors who attend training. (Tr. 315)

when conducting training classes which may often be in the afternoon and evenings.[12] (Tr. 143; 188; 311-312)

III. ARGUMENT

Field Supervisors and the Supervisor/Instructor Are Supervisors Within The Meaning Of Section 2(11) Of The Act

1. Introduction

Supervisory status under the Act depends on whether individuals possess authority to act in the interest of the employer to, inter alia, hire, assign or discipline other employees or responsibly to direct them or effective recommend such action. Section 2(11) of the National Labor Relations Act. Section 2(11) is to be read in the disjunctive and "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (7th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also P*acific Coast M.S. Industries*, 355 NLRB No. 226 (2010); *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998).

Because the undisputed evidence in the record demonstrated that the field supervisors and supervisor /instructor possess at least one of the supervisory indicia enumerated in Section 2(11) of the Act, they must be found to be supervisors.

2. Field Supervisors And the Supervisor Instructor Have Authority to Assign Employees

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2002), the Board set forth its definitions of "assign", "responsibly direct" and "independent judgment" and found

[12] Ms. Scott does check with Miranda on the scheduling of training classes to make sure that the operators or field supervisors are not needed to work. While Ms. Scott claims she receives permission to change her hours, it really is a perfunctory process apart from making sure that the individuals can be scheduled for training. (Tr. 286-288)

that the charge nurses of that employer were statutory supervisors based on their authority to exercise independent judgment in assigning nursing personnel. The authority to assign, according to the Board, 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 overall duties, i.e., tasks, to an employee ..." 348 NLRB at 689. The transportation supervisors employed by ACI clearly fit within this definition of "assign" and are statutory supervisors within the meaning of the Act.

Thus, the evidence demonstrates that field supervisors (including the instructional supervisor) must make assignments whenever there is an emergency, an accident or other unusual occurrence on the alignment. The field supervisor must initially decide whether to take the operator out of service and assign him/her to be drug and alcohol tested. If so, the field supervisor will need to find another supervisor to be assigned to escort the operator to be tested. Then, in conjunction with the crew dispatcher, another operator (or possibly supervisor) will be assigned to operate the train. (Tr. 47-48)

If the operator at the scene of this accident, emergency or unusual occurrence is not sent to be tested, the field supervisor will determine whether to assign the operator to remain with his/her train until it can be operated or whether to assign the operator to move to another location (the OMC or somewhere else) to pick up and operate a spare train. (Tr. 236-240)

If because of an emergency a train needs to be evacuated, the field supervisor will assign the operator to evacuate the train and direct the operator on how the evacuation of

passengers should be conducted. This, in part, will depend on whether the train is at or can be moved to a platform at a station. (Tr. 236-240)

In making these assignments, it is clear that transportation supervisors exercise independent judgment. In *Oakwood Healthcare*, *supra*, the Board found that when exercising " .... '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." 348 NLRB at 691-692.

When making assignments, field supervisors act on their own and free of the control of higher management. Field supervisors are in the field on their own making assignments without control from others.

Similarly, the assignments made by field supervisors are only made after they form an opinion or evaluation based on discerning and comparing data. The field supervisors discern data to judge how long a train may be out of service because of an accident, equipment failure or other emergency.

Notwithstanding the foregoing, the Regional Director found that "for the most part, field supervisors sit and watch the trains go back and forth along the tracks" and that their assignment of operators is "occasional and sporadic". The Employer submits that this finding is clearly erroneous.

First, ACI does not pay field supervisors in excess of $50,000 annually to, for the most part, sit and watch trains. On the contrary, field supervisors perform a critical function to oversee delivery of service.

Second, that critical function is neither sporadic nor occasional. In 2009, for example, there were approximately 72 accidents involving a train and a vehicle. (Tr. 44)

This number does not include numerous other unusual occurrences on the alignment, including derailments, an accident on the alignment involving single or multiple cars, equipment failures, passenger issues (*see e.g.,* Ex.-8), and the like. Thus, according to Ron MacKay, unusual occurrences on the alignment are a daily occurrence, on the average. (Tr. 54-55)

The Regional Director also erroneously found that the field supervisors exercise of independent judgment did not rise above the "routine or clerical". There is nothing routine or clerical about discerning all the necessary data and information and exercising independent judgment to assign an operator to pick up a spare train rather than wait for the problem to be corrected. There is nothing "routine or clerical" about assigning and directing an operator on the steps to take to safely evacuate a train.

Finally, the Regional Director found that much of a field supervisors' discretion with respect to unusual occurrences is constrained by the Standard Operating Procedure SOP) manual. However, as acknowledged by Fillipino, the SOP is only a guide or roadmap. And even with it, the field supervisor will have 3 or 4 options on how to handle unusual occurrences and will need to exercise his/her independent judgment when choosing between these options. While the UOR may be a factual account of what steps were taken by the field supervisor, the steps taken in the field demonstrate the independent judgment exercised by the field supervisors.

3. Field Supervisors And the Supervisor/Instructor Responsibility Direct Employees

To establish 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." *Oakwood Healthcare*, *supra*, 348 NLRB at 692. There can be little question that the employer has delegated to transportation supervisors the authority to direct the work and take corrective action when necessary.

Thus, field supervisors are on the alignment most of the day observing whether operators are following the employer's rules and procedures. And field supervisors are authorized and expected to take corrective action when an operator is not following the rules and procedures. These matters can range from ensuring that an operator's shade is up, to ensuring that the operator is driving at the proper speed and obeying traffic signals, to ensuring that the operator only opens the correct doors at a stop, and that the operator is not driving with any of his doors open. The field supervisor has been delegated with full responsibility for making certain that the rules and policies are being followed by operators. Indeed, the field supervisors are the <u>only</u> individuals working on the alignment daily to supervise operators, making certain they are following the rules and taking corrective actions as appropriate. Operators must, and do, follow the field supervisors' directives. *See e.g., Sun Refining Co.,* 301 NLRB 642, 649 (1991) (noting that subordinates were required to follow the orders of the individuals found to be supervisors).

Notwithstanding the foregoing, Petitioner will argue that no evidence has been offered demonstrating that field supervisors and the supervisor/instructor have been held accountable for their performance in directing the work of operators. *Oakwood Healthcare, supra*; see also *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). The employer submits that accountability (to the extent that it is an appropriate criteria) is inherent in the fact that direction of employees is such a significant component of the job

of field supervisors. Accountability is inherent in the clear, undisputed, and unequivocal evidence that operators accept and follow all directions issued to them by field supervisors. Without any doubt, the evidence establishes that the field supervisors' interests in directing the operators' tasks align with management. *Oakwood Healthcare, supra*, 348 NLRB at 692.

Accordingly, for this reason as well, field supervisors and the supervisor/instructor should be found to be statutory supervisors.

4. Field Supervisors And The Supervisor/Instructor Have Authority to Effectively Recommend Discipline Of Operators

With respect to disciplining of operators (as opposed to the daily verbal counseling), the evidence establishes that until April, 2010, transportation supervisors possessed the authority to issue written, verbal warnings and written warnings to operators. These verbal and written warnings constituted steps one and two of the progressive discipline system for Basic Standard Discipline in accordance with the collective bargaining agreement in effect between ACI and Amalgamated Transit Union, Local 1433. See *Article 29, Section 7* of that agreement at page 16, Pet. Ex. 1). A verbal warning also constitutes step one of the progressive discipline chain for secondary discipline, a more serious level of discipline with fewer steps, three (3) rather than five (5), in the progressive chain resulting in termination. Clearly, at least until April, 2010, transportation supervisors possessed authority to discipline employees.

In April, 2010, as a result of pressure from Local 1433, Miranda sent an email to transportation supervisors notifying them that they should no longer use the counseling form used to document verbal and written warnings and that discipline would be handled

by MacKay or him. Miranda notified transportation supervisors to continue to submit emails and reports to the office. (See also *Filippino's testimony* in this regard).

From this evidence, the Regional Director erroneously found that field supervisors have no authority to issue discipline, that their authority has been reduced to a mere reporting function. The employer submits that this finding is clearly erroneous.

First, as credibly testified to by MacKay, it was never the intention of the employer to remove from transportation supervisors the authority to discipline operators. Rather, the employer was simply changing the process for discipline with a greater centralized role for MacKay and Miranda. According to MacKay, transportation supervisors still possess authority to issue verbal and written warnings.

Second, even if it could be argued that transportation supervisors no longer have authority to issue discipline they, nevertheless, continue to have authority to effectively recommend discipline. After all, the field supervisors are largely and solely the eyes and ears of management. MacKay and Miranda are generally not working on the alignment to observe operations. They are not working at the OCC or in the dispatch area. They totally rely on the field supervisors for the evidence of any misconduct or rules violated by an operator.

Indeed, MacKay testified that if sent an e-mail or UOR from a field supervisor, he would take the word of the supervisor because they reported it. (Tr. 208) He and Miranda would not conduct an independent investigation except perhaps to review video if video was available. (Tr. 208) According to MacKay, if he or Miranda received a report from a field supervisor, there was no option on whether discipline would be issued. It was going to be issued. (Tr. 208)

MacKay and Miranda will not conduct an independent investigation of an incident forming the basis for discipline beyond the due process step of hearing the operator's version of the events (after issuance of an infraction notice). They rely on the reporting of the field supervisors. And that report (via email or an Unusual Occurrence Report) is an effective recommendation of discipline because such a report is only written after problems persist and counseling has not been effective. *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004); *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003 (fact that authority has not been exercised does not preclude finding that individuals possess supervisory authority).

Further, it is clear that the instructor/supervisor (beyond her authority to effectively recommend discipline when in the field) has authority to effectively recommend discipline for trainees who fail the certification process and operators/supervisors who fail the recertification process. Thus, the evidence is undisputed that the employer has terminated trainees who fail the certification process.[13] This failure is determined wholly by the instructor/supervisor who has complete authority to decide whether a trainee has passed the certification test.

Notwithstanding the foregoing, the Regional Director found that "the supervisor/instructor does not exercise any independent judgment or discretion in grading these exams; the answers are either right or wrong ..." This finding completely ignores the undisputed evidence that the supervisor/instructor prepares the exam and exercises both independent judgment and discretion in deciding on the exam questions. While Ms. Scott may consider suggestions from MacKay and Miranda (formerly Francis) on the

[13] While it has not happened, it is undisputed that the same would be true if an operator or supervisor failed the recertification process.

exam questions, this is merely a consultative role and in no way detracts from her exercise of independent judgment and discretion.

It is clear that MacKay and Miranda do not conduct any independent investigation when informed by Ms. Scott that someone has failed the certification/recertification process. It is clear that MacKay/Miranda exercise very little supervisory oversight over Ms. Scott. Rather, she has virtually unfettered discretion to prepare the training program, prepare the exams for each module and the final exam, and determine who has passed or failed the certification/recertification process. And, of course, failure results in termination without any independent investigation.

Based on the foregoing, and the entire record ACI respectfully submits that field supervisors and the supervisor/instructor have authority to effectively recommend the discipline of employees.

5. Field Supervisors And Supervisor/Instructor Possess Many Secondary Indicia of Supervisory Authority

The evidence establishes that field supervisors and the supervisor/instructor possess many of the secondary indicia of supervisory status. When taken together with the primary indicia noted previously, the evidence strongly supports a finding of supervisory status.

First, these employees carry the title of supervisor and wear uniforms informing the public that they are "Metro Supervision". Thus, the employer holds out to operators and the public that these employees are supervisors. Moreover, and most importantly, the operators and Local 1433 clearly and unequivocally view the field supervisors as their supervisors. Operators uniformly and consistently follow the instructions and direction of the field supervisors. Additionally, the field supervisors attend management meetings

(particularly the instructor/supervisor who attended weekly staff meetings until recently and who meets regularly on an informal basis with upper management). See e.g., *Maine Yankee Atomic Power Co.*, 624 F.2d 347 (1st Cir. 1980).

Second, field supervisors are paid on a salaried basis and paid at a significantly higher rate then operators. Also, they receive most of the same benefits as the mangers they report to. They also have an email account with the employer, a privilege exclusive to members of management. And the instructional supervisor has her own office at the OMC. These are all indicia of supervisory status. *See e.g.*, *Sheraton Universal Hotel*, 350 NLRB 1114 (2007); *McClatchy Newspapers*, 307 NLRB 773 (1992); *Liquid Transporters*, 250 NLRB 1421 (1980).

Notwithstanding the foregoing, Petitioner will argue that finding the field supervisors to be statutory supervisors will result in an extremely high ratio of 1 supervisor to every 2 employees (roughly). While this is certainly true, it must be remembered that the employer operates practically a twenty-four (24) hour operation and does run that operation seven (7) days a week. Further, the operators do not work in a plant or an office but can be found throughout a twenty (20) mile alignment. *Maine Yankee Atomic Power Co. v. NLRB*, supra, 624 F.2d at 365 (proper number of supervisory personnel matter for employer and not Board).

IV. CONCLUSION

Based upon the foregoing and the entire record, Alternate Concepts, Inc. respectfully submits that the Board should grant the employer's request for review and find that the field supervisors and supervisor/instructor are supervisors within the meaning of the National Labor Relations Act.

Dated: January 25, 2011

ALTERNATE CONCEPTS, INC.

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CERTIFICATE OF SERVICE

I, Nathan L. Kaitz, counsel for the employer, Alternate Concepts, Inc., hereby certify that on this 25th day of January, 2011 I served a copy of the within Brief of Alternate Concepts, Inc. by e-mail on:

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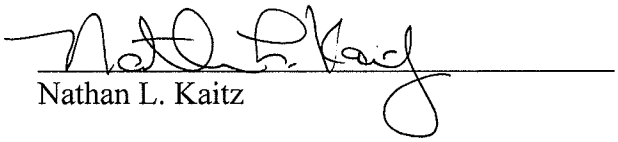

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