

**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))	

**ALTERNATE CONCEPTS INC.'S STATEMENT IN OPPOSITION TO
PETITIONER'S REQUEST FOR REVIEW**

NOW COMES Alternate Concepts, Inc. ("ACI" or "Employer") and in accordance with Section 102.67(e) of the Board's Rules and Regulations, hereby files this Statement in Opposition to the Request for Review of Office and Professional Employees International Union, Local 30, AFL-CIO ("Petitioner" or "Union").

I. INTRODUCTION

On January 10, 2011, the Regional Director for Region 28 issued a Decision and Direction of Election in which he found, *inter alia*, that ACI's line controllers and crew dispatchers were supervisors within the meaning of the Act.¹ On January 25, 2011, Petitioner filed a Request for Review of this finding, alleging that the decision was clearly erroneous on substantial factual issues. ACI submits that the Regional Director's

¹ The Regional Director also found that ACI's field supervisors and supervisor/instructor were not supervisors within the meaning of the Act. On January 25, 2011, ACI filed a Request for Review of this holding.

ruling with respect to ACI's line controllers and crew dispatchers was correct both factually and legally and should be permitted to stand.

II. THE REGIONAL DIRECTOR CORRECTLY FOUND THAT CREW DISPATCHERS ARE SUPERVISOR WITHIN THE MEANING OF THE ACT.

With respect to crew dispatchers, the Regional Director cited seven (7) examples of the exercise of supervisory responsibility by crew dispatchers. Each of these examples is fully supported by the record and supports the finding of supervisory status of crew dispatchers.

First, the Regional Director noted that field supervisors and operators report to crew dispatchers at the beginning of each shift and that the crew dispatchers must determine if they are fit for duty, *i.e.*, in proper uniform and not appearing to be under the influence of alcohol and/or drugs. The crew dispatcher has the authority to prevent these employees from working if they appear unfit for duty. This finding is fully supported by the record (Tr. 94, 97, 207) and attests to the crew dispatchers supervisory authority.

Next, the Regional Director found that if an operator is late to work, the crew dispatcher has the authority to decide whether to assign that shift to an extra board operator or field supervisor and send the operator home for the day or require him to stay and assess a half-day absence. This finding is fully supported by the record. (Tr. 94-96)

Petitioner does not claim any error in this factual finding. Rather, it claims that this authority requires no exercise of independent judgment. (*See* pp. 3-4 of Petitioner's Request for Review.) Petitioner's argument is wide of the mark. There is no standard operating procedure or directive from management advising a crew dispatcher that after x number of minutes, an operator should be told to stay home or his/her run should be

reassigned. Rather, this is entirely a function of the crew dispatcher's independent judgment, knowing the personnel situation at the time.

Third, the Regional Director found that crew dispatchers can and have instructed an operator to report back to the Operations and Maintenance Center at the end of the day. In fact, a grievance was filed over this instruction. (Er. Ex. 12; Tr. 104) Nevertheless, the operator obeyed the crew dispatcher's instruction and grieved it thereafter. This instruction was fully within the authority of the crew dispatcher. (Tr. 104).

Fourth, the Regional Director found that crew dispatchers have directed operators to continue providing service, resulting in overtime being worked by operators. Again, this finding is fully supported by the record. (Tr. 86-88; 101; 107-108, Er. Exh. 14) Similar to the above, the Regional Director also found that crew dispatchers have authority to extend a shift beyond its regularly scheduled hours which would also result in overtime. (Tr. 101-102)

Sixth, in another similar example, the Regional Director found that crew dispatchers have the authority to direct or assign operators to perform other duties, such as taking out cars to be fueled. This finding is fully supported by the record. (Er. Exh. 14; Tr. 107-108) Indeed, in the situation described in Exhibit 14, the assignment of an operator to take out cars to be fueled resulted in authorizing overtime to be worked by other operators. Again, this assignment and exercise of independent judgment was fully within the crew dispatcher's authority. (Tr. 108)

Finally, the Regional Director found that crew dispatchers are authorized to grant single day vacations for operators. (Tr. 96) This is another example of independent

judgment exercised by crew dispatchers based on their assessment of personnel needs for a particular day. Notwithstanding the foregoing, Petitioner argues that this “is a very questionable exercise of independent judgment” (page 4 of Petitioner’s Request for Review) and refers to the Employer’s vacation guidelines for supervisors, (Pet. Exh. 5) However, Petitioner’s argument completely misses the mark. Crew dispatchers are authorizing single day vacations for operators and not field supervisors. There are no policy or collective bargaining guidelines which must be followed by crew dispatchers when deciding whether or not to grant a single day vacation. It is entirely based upon their judgment and assessment of the personnel needs on a particular day.²

All these facts fully supported by the record affirm the Regional Director’s finding that crew dispatchers are supervisors within the meaning of the Act. Indeed, as will be noted, *infra*, the Regional Director failed to make additional findings which would add further support to the overall conclusion.

III. THE REGIONAL DIRECTOR CORRECTLY FOUND THAT LINE CONTROLLERS ARE SUPERVISORS WITHIN THE MEANING OF THE ACT

In finding the line controllers to be supervisors, the Regional Director relied primarily on three (3) examples of the line controllers’ exercise of supervisory authority. Each of these examples of supervisory authority is fully supported by the record and warrants the conclusion reached by the Regional Director.

First, the Regional Director found that line controllers act on their own initiative and exercise independent judgment when deciding to dispatch extra board operators into

² Without any record support, Petitioner claims that a manager must still approve the single day vacation and that all the dispatcher does is pass along the request or relay the manager’s decision. (Page 4 of Petitioner’s Request for Review.) This argument is factually inaccurate. Crew dispatchers are authorized to make this decision on their own and are not simply a conduit for a manager’s decision. (Tr. 96)

service when, for example, an extra train may be required to correct a gap in service. This finding is supported by the record. (Tr. 85-86) The line controller must exercise independent judgment when looking at where the trains are in time and distance to determine if the gap is large enough to require running an extra train. Line controllers do so on their own initiative without regard to any guidelines or standard operating procedures.

Second, line controllers exercise their independent judgment when deciding whether to extend rail service beyond regular hours. (Tr. 92-94) This results in operators being held over and working overtime.

Notwithstanding the foregoing, Petitioner argues that managers make the decision if a special event requires extending train service beyond regular hours. (Page 2 of Petitioner's Request for Review) However, Petitioner is confusing planned overtime surrounding a special event, *i.e.*, when it is known in advance that train service will need to be extended, with unplanned, last minute needs to extend service when, for example, a ball game goes into overtime or extra-innings, or a concert extends longer than anticipated. When the need for extended service is known in advance, managers will make that decision. However, when judgments need to be made during the evening, line controllers have that authority to exercise independent judgment on their own initiative.

Third, line controllers also have authority, as found by the Regional Director, to require operators to hold over at the end of their shift. (Empl. Exh. 11; Tr. 102-103) As with prior examples, operators directed by line controllers to hold over obey that directive and then, if they so choose, grieve thereafter.

As with crew dispatchers, the Regional Director properly found that line controllers assign and responsibly direct the work of operators and are, therefore, supervisors within the meaning of the Act.

IV. THE REGIONAL DIRECTOR OVERLOOKED ADDITIONAL EVIDENCE SUPPORTING HIS FINDING THAT CREW DISPATCHERS AND LINE CONTROLLERS ARE STATUTORY SUPERVISORS

In issuing his Decision and Direction of Election, the Regional Director overlooked additional evidence supporting his finding that crew dispatchers and line controllers are statutory supervisors. Thus, the Regional Director overlooked evidence that crew dispatchers have authority to alter the work schedule of operators by not only having them work overtime but also, on occasion, having them begin their workday at a different hour. (Empl. Exh. 13; Tr. 105-106)

Also the Regional Director failed to find that crew dispatchers and line controllers have the authority to effectively recommend the discipline of employees.³ See pp. 15-17 of the Request for Review of Alternate Concepts, Inc.

³ Employer's exhibits 5 and 7 are examples of disciplinary warnings issued by a crew dispatcher prior to the April 2010 change in the manner in which the employer issued disciplinary notices.

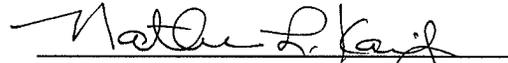
V. CONCLUSION

Based upon the foregoing, and the entire record, Alternate Concepts, Inc. respectfully submits that Petitioner's Request for Review should be denied.

Dated: February 1, 2011

ALTERNATE CONCEPTS, INC.

By Its Attorneys



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CERTIFICATE OF SERVICE

I, Nathan L. Kaitz, counsel for the employer, Alternate Concepts, Inc., hereby certify that on this 1st day of February, 2011 I served a copy of the within Brief of Alternate Concepts, Inc. by e-mail on:

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