

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

**VEOLIA TRANSPORTATION
SERVICES, INC.¹**

Employer

and

Case 28-RC-071479

**AMALGAMATED TRANSIT UNION,
LOCAL 1637, AFL-CIO²**

Petitioner

DECISION AND ORDER

Amalgamated Transit Union, Local 1637, AFL-CIO (the Petitioner), seeks to represent a unit of all full-time and part-time road supervisors (RSs) employed by Veolia Transportation Services, Inc., (the Employer), at its Las Vegas, Nevada, facilities.³ The unit sought by the Petitioner would exclude all other employees, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act (Act). Contrary to the Petitioner, the Employer contends that the petitioned-for unit is inappropriate because RSs are supervisors under Section 2(11) of the Act. Based on the record as a whole and for the reasons set forth below, I find that the Employer's RSs are statutory supervisors within the meaning of Section 2(11) of the Act, based primarily on their roles in the discipline and rewarding of coach operators, and on this basis I shall dismiss the petition.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

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

2. Jurisdiction: The parties stipulated, and I find, that the Employer, a Maryland corporation, with an office and place of business in Las Vegas, Nevada, is engaged in providing

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ While the petition refers exclusively to RSs, during the proceeding it became apparent that RSs are also referred to as "Transit Supervisors," "Field Supervisors," and "Transit Service Supervisors." Therefore, any reference to RSs throughout this Decision also encompasses these other titles.

public transportation services in the metropolitan area of Las Vegas, Nevada. During the past 12 months, the Employer, in conducting its business operations described above, derived gross revenues in excess of \$250,000 and purchased and received at its Nevada facilities goods valued in excess of \$50,000 directly from points outside the State of Nevada. Accordingly, 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 assertion of jurisdiction in this matter will accomplish the purposes of the Act.

3. Labor Organization Status: 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: 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: The issue presented in this matter is whether Road Supervisors (RSs) are supervisors within the meaning of Section 2(11) of the Act. As discussed in more detail below, I conclude that RSs are statutory supervisors and are not employees within the meaning of Section 2(3) the Act. In setting forth the reasons for my decision, I shall provide an overview of the Employer's operations, followed by a description of the duties and functions of RSs, and the basis of my conclusion.

A. The Employer's Operations

The Employer, pursuant to its contract with the Regional Transportation Commission of Southern Nevada (RTC), operates a fixed-route public bus transportation service in the Las Vegas metropolitan area, which also includes North Las Vegas and Henderson, Nevada (the Employer's Las Vegas operations). Under the terms of the contract, the Employer is required to operate and manage a fixed-route bus service and maintain a fleet of buses, or "revenue vehicles," furnished by the RTC at facilities provided by the RTC. The Employer is also required to supply the workforce, equipment, and materials needed to operate the buses over the routes and service hours established by the RTC. To do so, the Employer is required to provide, maintain, and operate its own vehicles to support the operation and maintenance of the fixed route transportation service.

The Employer operates out of two facilities, referred to as the Simmons facility and the Sunset facility. Both facilities house administrative staff, coach operators (operators), managers, and bus yards where buses are parked. Currently, the Employer employs approximately 750 operators, who are responsible for the transportation of passengers. The majority of operators work out of the Sunset facility, though the facility to which an operator is assigned is dependant upon his or her assigned route.

The Employer's Simmons facility also houses the Bus Operations Center (the BOC) where the Employer's operations are centrally monitored. More specifically, the BOC serves as a centralized communications center where service is monitored through a computer system

through which operators, managers, and supervisors communicate. For example, operators who experience mechanical issues, disruptive passengers, emergencies, and any other issues effecting service, communicate with the BOC, which in turn dispatches RSs, local law enforcement, emergency services, or direct other appropriate responses. The BOC's goal in so doing is to maintain continuity of service.

B. Personnel and Management Structure

The Employer's Las Vegas operations are overseen by the General Manager, who is responsible for managing the Employer's personnel, management, and facilities. Reporting directly to the General Manager are the Manager of Training (currently vacant), the Field Supervision Manager, the manager of the BOC, and the Sunset Operations Manager. Of particular relevance to the issues presented in this case are the supervisors and employees overseen by the Field Supervision Manager, who is responsible for overseeing the Administrative Senior Supervisors (AS Supervisors), Senior Road Supervisors (Senior RSs), and RSs.

AS Supervisors are primarily responsible for managing the operators and administering discipline to operators for policy, safety, and attendance infractions. There are currently four AS Supervisors employed by the Employer, two at each facility. Senior RSs (also referred to as field seniors) are responsible for overseeing the work of RSs. Senior RSs conduct daily briefings with RSs and communicate information which may be needed by RSs to effectuate their duties. During daily briefings, issues that are of particular concern, such as safety matters and special events that impact service, are discussed. At these briefings, Senior RSs also distribute "tailgates" containing safety messages which RSs, in turn, are required to communicate to operators while out in the field.

1. Road Supervisors

The Employer currently employs approximately 43 RSs. RSs have several responsibilities, including supporting operators in carrying out their duties by disseminating information, making minor repairs to buses and fare boxes, removing disruptive passengers, reporting to accident scenes and conducting accident investigations, and responding to calls from the BOC. Moreover, RSs are responsible for ensuring that operators comply with the Employer's established policies and regulations while performing their duties. RSs work in the field monitoring operators and ensuring their compliance with safety and policy requirements, that RTC's route schedules are being followed, that customer service standards are met, and that operators are abiding by traffic laws and regulations.

To accomplish their duties and responsibilities, RSs have the authority to, and do, issue Observation Notices (OBN) to operators. OBNs may be issued where an operator is observed committing a violation of company policy. In addition to reporting operators who commit policy infractions, RSs can also issue operators a "Pat on the Back" (POB), a form of recognition for going above and beyond their assigned job duties. The issuance of a POB results in the verbal recognition of the recipient by the RS and an AS Supervisor for a job well done. It may also

result in the grant of an “On the Spot” award, which results in the recipient being given a letter of recognition, a plaque, and \$100.

When an OBN is issued to an operator for committing an infraction, the RS is authorized to meet with the operator to discuss the reasons for the issuance of the OBN and to obtain the operator’s signature. Once issued, regardless of whether the RS met with the operator, the OBN is forwarded to the Assistant Night Manager, who enters the OBN into a database maintained by the Employer for future reference and then forwards it to the appropriate AS Supervisor. The AS Supervisor then reviews the OBN, references the Employer’s database to determine how many, if any, violations the operator previously committed, and determines the appropriate level of discipline based upon the Employer’s progressive disciplinary policy. The AS Supervisor then meets with the operator and formally issues the discipline. Only in instances where the OBN is incomplete or when an operator requests the opportunity to do so are operators allowed to present their version of events. Having determined the appropriate level of discipline beforehand, the subsequent meeting with the operator, if requested, are not investigatory in nature.

In those instances where the AS Supervisor determines that a coaching or counseling is adequate, the discipline is noted directly on the OBN. Where it is determined that a higher level of discipline is warranted, a formal disciplinary notice is completed based on the OBN. Once the discipline is issued, a feedback memo is completed by the respective AS Supervisor detailing the level of discipline imposed upon the operator. The feedback memo is also forwarded to the RS who issued the OBN.

D. Legal Analysis

At issue is whether the Employer’s RSs are supervisors within the meaning of the Act. Section 2(3) of the Act specifically excludes supervisors from the definition of employees. Section 2(11) of the Act defines supervisors as follows:

...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.

When determining supervisory status, the Board exercises utmost care, as a finding of supervisory status removes an employee from the protections of the Act. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). The Board distinguishes two classes of workers: true supervisors vested with genuine management prerogatives, and employees such as “straw bosses, lead men, and set-up men” who are protected by the Act despite their performance of “minor supervisory duties.” Therefore, the dividing line between these two classes of workers, where Section 2(11) is concerned, is whether the putative supervisor exercises “genuine management prerogatives.” Those prerogatives are specifically identified as the 12 supervisory indicia set forth in Section

2(11) of the Act. Where the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions in the interest of the employer, and where such authority is exercised using independent judgment as opposed to a routine or clerical manner, Section 2(11) supervisory status is deemed to exist. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). Below I discuss the relevant supervisory criteria that apply to RSs in this case.

1. Discipline

The record establishes that RSs are primarily responsible for ensuring that operators are running on schedule and ensuring compliance with the Employer's policies and procedures. To accomplish these tasks, RSs are authorized to record and, where appropriate, issue OBNs. OBNs are issued to correct inappropriate conduct or performance and, as discussed below, serve a disciplinary purpose. By determining whether or not to complete an OBN, RSs exercise broad discretion in deciding whether or not to report infractions. In so doing, RSs evaluate and consider whether an operator's conduct or performance is appropriate, exercising independent judgment in the interest of the Employer. In determining whether to complete an OBN, an RS must consider a variety of factors, including, for example, whether the underlying matter involves issues beyond the control of the operator, or whether the operator acted in a rude, unprofessional, or discourteous manner, conduct that is subject to discipline. The record established that in the Employer's Las Vegas operations, approximately 6 six to 12 OBNs are issued daily.

As discussed above, once an RS completes an OBN, it is reviewed by an AS Supervisor, who, relying upon the OBN, determines the appropriate level of discipline to impose. The level of discipline issued by the AS Supervisor depends on a number of factors, including whether the operator has been the subject of a prior OBN for the same or similar conduct, the length of time since the last violation, and the severity of the violation committed. Once the RS prepares the OBN, the underlying incident is not further investigated. Rather, the violation as described by the RS is accepted as true by the AS Supervisor. The record shows that only in rare circumstances, e.g., where the OBN is challenged by the operator with convincing evidence or where the OBN is inadequately completed, does the issuance of an OBN by an RS not result in some form of discipline. While the RSs themselves do not directly determine the level of discipline imposed, RSs, by the act of issuing an OBN, initiate an integral first step of the disciplinary process which would not have otherwise occurred.

In arguing that RSs are not statutory supervisors, Petitioner relies upon the Board's recent decision in *DIRECTV U.S.*, 357 NLRB No. 149, slip op. at 1 (2011). In *DIRECTV U.S.*, the Board overturned a hearing officer's finding that an employer's field supervisors were not statutory supervisors. The field supervisors in that case had the authority to initiate the disciplinary process by drafting an "employee consultation form" (EFC). The EFC itself, and its content, were then subject to management review. In that case, after the field supervisors submitted a draft EFC, an operations manager, a site manager, and the human resources department each reviewed the EFC. At each stage of review, the reviewer could alter the language of the EFC, modify the level of discipline, or decide that the EFC should not itself be issued. Following such a review process, in those instances where discipline was deemed to be

warranted, field supervisors would meet with the employee, discuss the EFC, and afford the employee an opportunity to set forth his version of events. *Id.* at 2.

The facts in the instant case are distinguishable from those in *DIRECTV U.S.* Though the OBNs prepared by the Employer's RSs are, like the EFCs in *DIRECTV U.S.*, reviewed for the purpose of determining the level of discipline that should be imposed, the nature and degree of such review distinguishes the two systems. In the instant case, the first review of the OBN is conducted by the Night Manager, though such review is solely and simply for the purpose of entering them into the Employer's database before forwarding the OBN to the AS Supervisor. The AS Supervisor's review of the OBN is limited, as well. The facts and determinations set forth by the RS, as well as the merits of the infraction cited by the RS, are not independently investigated by the AS Supervisors.

While the Board has held that purely reportorial functions are not effective recommendations of discipline, it has clarified that the duty to report infractions is purely reportorial *only* where the employer then conducts its own investigation and decides, what if any, discipline to impose. See *Los Angeles Water and Power Employees' Association*, 340 NLRB 1232, 1234 (2003). The record in the instant case shows that OBNs issued by the Employer's RSs go beyond merely a reporting function. RSs exercise independent judgment in determining when and under what circumstances an operator should be issued an OBN. Moreover, the RSs' judgment, as reflected in the RSs' determination of the facts as set forth in the OBN, is not reviewed or further investigated by the Employer.

In fact, the record evidence, taken as a whole, shows that OBNs constitute a necessary and integral first step of the discipline meted out to employees. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007) (the Board, citing *Promedica Health Systems*, 343 NLRB 1351 (2004), *enfd.*, in relevant part 206 Fed Appx. 405 (6th Cir 2006), cert denied 549 U.S. 1338 (2007), held that supervisory status was established where a foundation for future discipline was laid by an individual's independent action).

In addition to the authority used in issuing OBNs, the record also establishes that RSs exercise broad discretion when using their authority to remove operators who they suspect are under the influence of drugs or alcohol. Utilizing the "reasonable suspicion" training they receive from the Employer, RSs have and exercise broad discretion in determining to remove operators without prior authorization from upper management. Where such instances do occur, RSs notify BOC *after* the operator has been removed so as to avoid service interruptions.

2. Rewarding Operators

In addition to issuing OBNs for infractions committed by operators, RSs are authorized to, and do, issue OBNs in the form of a "Pat on the Back" (POB) to recognize employees for going "above and beyond" their regular duties. When this occurs, RSs mark the OBN as being a POB and document the event and circumstance which gave rise to the POB. Operators who receive a POB may be recognized by the Employer in the form of a monetary award, generally consisting of \$100, a plaque, and a letter of recognition. Once issued, AS Supervisors review the submitted POBs and select one or several employees from the pool of submitted POBs.

While the POBs issued by RSs do not always result in the recognition of operators in the manner described above, the issuance of a POB serves as a nomination for an On the Spot award that enters the employee into a pool of employees eligible for a POB. Only those employees who are recognized by a POB are eligible to be rewarded with an On the Spot award, which includes monetary incentives. By issuing a POB, RSs exercise independent judgment in recommending what conduct and which employee should be rewarded. The effect of each RS's POB is evident by the direct link between the issuance of a POB and an On the Spot award which directly affects the wages of those employees who receive it. Cf. *Elmhurst Extended Care*, 329 NLRB 535, 537 (1999).

3. Secondary Indicia

In addition to the indicia expressly listed under Section 2(11), non-statutory indicia can be used as background evidence in determining supervisory status. See *Training School of Vineland*, 332 NLRB 1412 (2000); *Chrome Deposit Corps.*, 323 NLRB 961, 963 fn. 9 (1997). While the Board has held that secondary indicia alone does not establish supervisory status in the absence of the primary indicia set forth in Section 2(11), the Board has nonetheless held that secondary indicia such as higher pay, supervisor to non-supervisor ratios, and attendance at supervisor meetings may bolster evidence which demonstrates that individuals otherwise exercise one of the primary indicia. See *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Marian Manor for the Aged & Infirm*, 333 NLRB 1084 (2001).

In addition to the primary indicia discussed above, RSs possess several secondary indicia of supervisory status. For instance, the record establishes that RSs wear different uniforms which distinguish them from operators and identify them as "supervisors." RSs are issued e-mail accounts and given access to computers, unlike operators, so as to allow them to communicate with management about policies, procedures, and safety issues. In addition, RSs attend management meetings where policies, procedures, safety issues, and upcoming events which affect the Employer's operations are discussed. These meetings are exclusively attended by members of management and RSs.

The record also shows that there are four AS Supervisors and four Senior RSs. The parties stipulate, and the record shows, that the Employer's AS Supervisors and Senior RSs are statutory supervisors tasked with overseeing the work of the approximately 750 operators. If, as the Petitioner argues, RSs are not statutory supervisors, the only immediate supervisors for approximately 750 operators would be the four AS Supervisors and the four Senior RSs. Such a scenario would result in an employer-to-supervisor ratio of approximately 94 to 1, a ratio which the Board has repeatedly held to be disproportionate. See *The Bama Company*, 145 NLRB 1141, 1143, fn. 6 (1964); *Formco, Inc.*, 245 NLRB 127, 128 (1979). The disproportionately high ratio which would result from a finding that RSs are rank-and-file employees further supports the conclusion that RSs are supervisors within the meaning of Act.

Based on the foregoing and the record in this proceeding, I find that the Employer's RSs are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition filed in this matter be, and the same hereby is, dismissed.

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 February 16, 2012. The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov, but may not be filed by facsimile.⁴

Dated at Phoenix, Arizona, this 2nd day of February 2012.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004

⁴ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. 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 Board's web site, www.nlr.gov.