

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 34

VEOLIA TRANSPORTATION, INC. d/b/a  
GBT ACCESS

Employer<sup>1</sup>

and

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 371

Petitioner<sup>2</sup>

Case No. 34-RC-072660

**DECISION AND DIRECTION OF ELECTION**

This case arises out of a petition filed under Section 9(c) of the National Labor Relations Act, as amended (the Act). The parties were provided an opportunity to present evidence on the issues raised by the petition at a hearing held before a hearing officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; the Petitioner is a labor organization within the meaning of the Act; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Employer provides para-transit services to the elderly and the disabled pursuant to a contract with Greater Bridgeport Transit Access, which is also referred to as GBT Access. This requires the Employer to provide door-to-door bus service for individuals who have been pre-qualified for such service by GBT Access – hereinafter referred to as riders - which involves picking up the rider from their home, taking them to their requested location, such as a doctor's office, and then returning the rider to their home. Some riders are also accompanied by personal assistants, who also have to be approved by GBT Access in order to ride the buses. The bus drivers (also referred to as

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<sup>1</sup> The Employer's name appears as corrected at the hearing.

<sup>2</sup> The Union's name appears as corrected at the hearing.

operators) who perform the driving work are represented for the purposes of collective bargaining by the Amalgamated Transit Union Local 1336, which is not involved in this proceeding. Rather, the Petitioner seeks to represent the five individuals who are responsible for scheduling and dispatching the bus drivers, i.e., a “scheduler” and four “dispatchers”. Although otherwise in accord as to the scope and composition of the unit, the Employer claims that the petition must be dismissed because the scheduler and the four dispatchers, who it refers to as “dispatch-supervisors”, are all supervisors under Section 2(11) of the Act. Because the Employer has failed to satisfy its burden of establishing that the scheduler and the dispatchers are supervisors under Section 2(11) of the Act, I have directed an election as requested by the Petitioner.

**I. Facts**

**A. Background**

All of the Employer’s employees work out of its facility located at 1 Cross St. in Bridgeport, Connecticut. Primarily responsible for the overall operation of the Bridgeport facility is General Manager Dawn Groters and Operations and Training Manager Joseph Rivera.<sup>3</sup> There are approximately 22 bus drivers, who are primarily supervised by Rivera. The scheduler - Kelli Scott - reports directly to Rivera, and the four dispatchers – Fred Poole, Glenn Cunningham, Earl Murray, and Alex Ruiz – report directly to both Groters and Rivera. There are also four reservationists, but the record does not reflect to whom they report. There are also several employees at the Bridgeport facility who work directly for GBT Access, including several mechanics who are responsible for servicing the Employer’s buses.

In accordance with its contract with GBT Access, the Employer is only permitted to operate a maximum of 17 buses per day Monday through Friday.<sup>4</sup> Thus, on any given weekday, a maximum of 17 drivers are scheduled for and thereby operate the Employer’s buses. Weekday hours are between 4:30 am and 9:00 pm, and weekend hours are between 9:00 am and 7:00 pm. Pursuant to the union contract governing the drivers, they each bid on a particular run time, such as 7:30 am to 4:00 pm. Several drivers operate “split shifts”, such as 7:30 am to 11:30 am and then 2:00 pm to 6:00 pm.

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<sup>3</sup> The Employer stipulated that both Groters and Rivera are supervisors under Section 2(11) of the Act.

<sup>4</sup> The Employer appears to have a far more limited weekend schedule, as only four drivers are regularly scheduled to work on Saturdays and two are regularly scheduled on Sundays.

Although not entirely clear, it also appears that each driver can indicate a preference for driving location, as the Employer is required to provide service to the Towns of Fairfield, Stratford, Trumbull, West Haven, Orange, and Shelton. However, the preferred locations for each driver are not guaranteed, but rather will be accommodated to the extent possible.

Scott, the scheduler, works 11:00 am to 7:00 pm, Monday through Friday. Three dispatchers are scheduled for each weekday, with overlapping schedules. Thus, Poole works Monday through Friday from 4:30 am to 10:30 am, and Saturday from 4:30 am to 1:00 pm. Murray works Tuesday through Thursday from 8:00 am to 4:00 pm, and unspecified hours on Saturdays and Sundays. Cunningham works 3:00 pm to closing on Monday through Thursday, 1:30 pm to closing on Friday, and 8:00 am to 12 pm on Sunday. Ruiz, a recent hire, works 7:00 am to 3:00 pm on Monday, 7:00am to 2:00 pm on Friday, and 12 pm to 8:00 pm on Sunday.

**B. Daily operations**

Riders who have been qualified by GBT Access to utilize the Employer's para-transit services are required to make a reservation at least 24 hours in advance of their scheduled pickup time, and up to 7 days in advance. Reservations are made by telephone to the reservationists, who are on duty from 8:30 am to 4:30 pm. All reservations must be called in by 4:30 pm for the next day. Utilizing a software program called Stratagen, the reservationist enters the pickup and return trip into the system, which automatically schedules the trip based upon its knowledge of the available drivers' run times and their driving locations. However, if the computer program reveals that the trip cannot be programmed into the system due to other scheduled trips that are already in the system, the reservationist can suggest another time that can be accommodated by the system. If the caller does not want to accept an alternative trip, then the trip as requested by the rider will be placed on a wait (or standby) list.

Each weekday after 4:30 pm, the scheduler accesses Stratagen in order to finalize the next day's schedule. The Employer typically has about 350 trips per weekday, about 250 of which will automatically be scheduled by Stratagen. Thus, the scheduler is primarily responsible for scheduling the remaining 100 trips, most of which are on the wait list. Any trips that she cannot schedule will remain on the wait list for the next day, at which time a dispatcher (usually Fred Poole during the early morning hours) will attempt to schedule the remaining trips on the wait list. In attempting to schedule the

additional trips on the wait list, the scheduler may change the assignments that have been automatically scheduled by Statagen in order to insure that each driver has a balanced workload. The scheduler may also consider certain factors particular to individual drivers in setting the final schedule. Thus, any driver on light duty status (there are presently two) cannot be assigned to transport riders in wheelchairs. There is also one overweight rider who is confined to a wheelchair who cannot be assigned to a certain female driver who is physically incapable of pushing that rider in the wheelchair. Other than those factors, the record establishes that all trips are assigned to drivers based upon their scheduled run times and, if possible, their preferred location. Once the scheduler has finalized the schedule in the evening, she prints out a manifest for each driver for the next day, leaving a copy of each manifest for the dispatcher to distribute to each driver.

As noted above, Fred Poole is the first dispatcher to arrive in the morning, at 4:30 a.m. According to Poole, who was subpoenaed by the Petitioner but called as a witness by the Employer, the first thing he does each morning is determine whether there are any group trips scheduled for that day so that he can assign a larger capacity bus to those drivers handling the group trips.<sup>5</sup> Poole then accesses the wait list to determine whether he can place any of those trips (typically between 10 and 50) onto the driver manifests. In doing so, he relies upon the same factors discussed above that were considered by the scheduler in preparing the manifests the night before, i.e., time and location. And, just like the scheduler, the only significant variable is that he won't assign the light duty drivers to handle a wheelchair trip, or the petite female driver to handle a wheelchair trip involving an overweight rider. According to Poole's uncontradicted testimony, these individual assignment variables are "common knowledge" to everyone involved in scheduling the drivers. Poole also specifically denied that he assigns any trips based upon the individual preferences of either a rider or a driver.

When the drivers arrive for their shift, Poole hands each of them their manifest for the day, along with a money bag for collecting fares, a receipt, and a trip card which is utilized by the driver to check the bus prior to leaving the yard. Poole also assigns each driver a bus, which is based solely upon the next bus in line. Once again, Poole

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<sup>5</sup> The Employer has a total of 22 buses available for service each day, all of which are parked at its Bridgeport facility. All buses have wheelchair lifts, but some have a greater passenger capacity. Otherwise all the buses appear to be the same.

specifically denied that he assigns any buses based upon a driver's personal preferences.

As the day progresses, Poole continues to place trips from the wait list as the circumstances permit. For example, as trips are cancelled or there are rider no-shows, opportunities arise to place the additional trips. Poole will also attempt to place trips that have been called in by GBT Access in the course of the day. Poole maintains radio contact with all the drivers throughout his shift, and all such radio transmissions are also monitored throughout the day by General Manager Groters. Much of Poole's shift consists of fielding phone calls from riders (or GBT Access) as to when their bus is expected to arrive and who is their driver. This often requires him to contact particular drivers to determine whether they're running on time or whether they might be delayed for a particular trip. In the event that a driver is generally running behind schedule (which is "red flagged" on Poole's computer), Poole might reassign certain trips from that driver to other available drivers. Once again, the primary basis for any such reassignment is time and location.

In either placing additional trips from the wait list with a driver, or reassigning trips in the course of the workday in order to keep everyone on time and on schedule, drivers may question Poole's trip assignment before "accepting" it. In this regard, the driver may be reluctant to take the additional assignment because it may delay his other trips, or the driver may have a personal conflict, such as a doctor's appointment, that Poole was not aware of. Poole may then decide not to add the additional trip, but ultimately the driver is obligated to "accept" the additional trip or be subject to possible discipline if he does not accept. Although Poole admitted that there have been a number of occasions when a driver initially refused an additional trip, in each instance where he specifically asked the driver whether he was refusing the trip, the driver ultimately accepted. There is no evidence or claim that any driver has been disciplined for refusing to accept an assigned trip.

Poole also assists the drivers in the event that any problems arise in the course of a trip. In this regard, all drivers are instructed that they are to wait no more than 5 minutes for the rider to appear and board the bus. However, in those situations where the 5 minute window has expired, the driver will first call Poole for assistance as to whether he should wait longer or depart. That decision will be based upon the particular circumstances of each case. For example, if the rider is there but simply delayed, Poole

can determine whether the driver can remain because the delay will not adversely impact the driver's remaining trips. If the rider is not answering at all, Poole can attempt to call the rider and resolve the situation. Other problems that might arise in the course of a trip include a medical emergency involving the rider, such as vomiting, or vehicle breakdown. Since such problems usually require the vehicle to be taken out of service, Poole will have to provide appropriate instructions to the affected driver and reassign that drivers' remaining trips to other drivers. Regardless of how each of these individual situations are resolved, there is no dispute that Poole bases any reassignments arising out of these problems on the same factors noted above – time and location.

As noted above, Poole only works until 10:30 am each weekday. Two other dispatchers work staggered shifts for the remainder of each weekday. There is no evidence or claim that the work performed by the other dispatchers varies in any significant respect from that performed by Poole.

**C. Alleged supervisory indicia**

It is undisputed that neither the scheduler nor the dispatchers have the authority to hire, transfer, suspend, lay off, recall, promote,<sup>6</sup> discharge, or reward<sup>7</sup> employees, or to adjust their grievances,<sup>8</sup> or effectively recommend such actions using independent judgment. There is also no evidence that either the scheduler or the dispatchers play any role in evaluating the work performed by the drivers, or training them. Thus, the sole bases upon which the Employer relies in contending that the scheduler and dispatchers are supervisors under Section 2(11) of the Act is their purported authority to assign, responsibly direct, and discipline employees, along with secondary indicia of their supervisory authority.

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<sup>6</sup> Groters testified that she will be consulting with the dispatchers as to whether to retain recently hired dispatcher Alex Ruiz, who is still in his probationary period. She claimed that she will not retain Ruiz if any of the dispatchers' object. She admits that she has never utilized this procedure in the past. Even assuming that she does so, such evidence is insufficient to support the conclusion that the dispatchers "promote" employees within the meaning of Section 2(11) of the Act.

<sup>7</sup> The Employer proffered evidence showing that dispatchers can praise drivers for doing a particularly good job, or may pass along praise from a rider or GBT Access. It is undisputed that such praise does not result in any monetary rewards for the driver.

<sup>8</sup> Groters testified that the dispatchers may become involved in the grievance procedure under the drivers' contract if a grievance was being processed that involved the dispatcher. However, there is no evidence or claim that the dispatchers serve as the Employer's representative at any stage of the drivers' grievance procedure, or have adjusted any driver grievances.

## **1. Job Description**

The Employer proffered a job description entitled “Paratransit Dispatcher Supervisor”, which it admits was only provided to the most recently hired dispatcher, Alex Ruiz, in December 2011. Although Poole testified that he may have been provided a job description when he began his employment with the Employer six years ago, no such job description was proffered by the Employer. The job description states the following “overview” of the position:

The Dispatch Supervisor at Veolia Transportation must have the ability to explain the expectations of the company regarding job performance and hold people accountable for their actions in the workplace. Dispatchers are required to provide impeccable customer service to our clients and passengers. These individuals schedule and dispatch operators to service vehicles that carry passengers. Dispatchers keep records, logs, and schedules of the calls that they receive, they monitor and control the actions that they take. In addition they will maintain information on each call and then prepare a detailed report on all activities occurring during their shifts.

The job description also lists the following dispatcher “duties”:

1. Assigns transportation services and maintains check out logs.
2. Assigns stand-by or extra-board operators in the event of operator absences, increased service volumes or in order to minimize service disruptions as a result of traffic, vehicle malfunctions, operator problems and/or emergency situations.
3. Maintains attendance log for operators and other appropriate staff.
4. Assigns vehicles giving consideration to preventive maintenance schedules and capacity needs.
5. Maintains two-way communication with operators, providing information on customers, cancellations, and directional assistance when necessary.
6. Monitors operators and trip status, making adjustments and reassignments as necessary to ensure on time performance.
7. Maintains scheduling and performance data in the event of real-time operations.
8. Documents accurately and appropriately daily events related to service.
9. Communicates effectively with operations staff regarding scheduling or passenger issues.
10. Maintains professional demeanor and appearance.
11. Handle multiple tasks accurately and effectively in a fast paced environment.
12. Other duties as assigned to ensure the efficient operation of the department.
13. Effectively direct employees in the performance of their duties.
14. Administers discipline to employees for violations of Company rules, regulations and policies.
15. Supervises and oversees the dispatch and operator common areas.
16. Designs and update routes, as necessary in a safe and efficient manner.
17. Performs the job functions of a driver when necessary.
18. Communicates with maintenance personnel for vehicle service calls. Designs and update routes, as necessary in a safe and efficient manner.

19. Monitor service using Automated Vehicle Locators and Mobile Data Terminals.
20. Performs the job functions of a driver when necessary.
21. Communicates with maintenance personnel for vehicle service calls.

Finally, the job description sets forth the following “minimum requirements” for the dispatcher position:

1. High school diploma or equivalent.
2. 1-2 years previous dispatch and/or customer service experience.
3. Must be able to work flexible hours or shifts.
4. Must be able to demonstrate poise, tact, diplomacy and possesses good judgment and discretion.
5. Excellent communication skills both verbal and written a must.
6. Detail oriented, well organized, and possess effective time management skills.
7. Proven customer service and interpersonal skills a must.
8. General knowledge of Windows-based computer operating system and Microsoft office package.
9. Must be able to work as a member of the team.
10. Ability to interact professionally with internal and external customer on all levels and be able to work well with diverse groups.
11. Ability to adapt and remain flexible in a fast paced environment.
12. Able to use multi-line phone system and handle multiple tasks concurrently.
13. Must have a valid CDL.
14. Supervisory experience preferred.
15. Ability to read, comprehend and understand maps.
16. Familiarity with local geography and commonly known sites
17. Ability to communicate via two-way radio, and telephone.
18. Possess ability to quickly analyze a situation and provide timely solutions.
19. Familiar with the "Americans with Disabilities Act".
20. Demonstrates a strong problem solving capability in ever changing circumstances.

With regard to the job description, Poole testified that although the “overview” section sets forth “basically what we do”, he specifically denied that he “administers discipline” as set forth under item 14 under “duties”. He further testified that he had no “supervisory experience” at the time he was hired.

## **2. Assigning and Directing the Drivers**

The nature and extent of the scheduler’s and dispatchers’ authority to assign and direct the drivers is set forth in detail above. In addition, the record reflects that there are no written guidelines, policies or procedures that govern the schedulers or dispatchers decisions to assign and direct the drivers. Rather, the record reflects that such decisions are based upon the Employer’s longstanding practices and procedures that the scheduler and the dispatchers have learned through their on-the-job experience. In this

regard, I note that the present scheduler was formerly a dispatcher, and one of the dispatchers was formerly the scheduler. Thus, the collected body of knowledge accumulated by the scheduler and dispatchers from their many years of experience, which is then passed along to new dispatchers, enables them to effectuate the primary goal of the Employer's operation – making the paratransit buses run on time and within budget. While the absence of written guidelines, policies and procedures may result in the scheduler or the dispatchers making different decisions to assign or direct the drivers based upon the same or similar set of facts, the factors upon which those decisions are based – time and location – are always the same.

With particular regard to the direction of employees, there is no evidence that either the scheduler or the dispatchers have ever been held accountable for the work performed by the drivers, or that any adverse consequences might befall the scheduler or dispatchers should the drivers not perform their duties properly. In this regard, the Employer proffered two disciplinary actions issued to dispatcher Glenn Cunningham, one in 2001 and the other in 2004. Both disciplines involve Cunningham's failure to properly assign and re-assign drivers. Neither discipline involves any misconduct or failure to perform work on the part of the driver.

Although not entirely clear, it appears that the dispatchers may not assign overtime to a driver unless specifically authorized by Groters or Rivera. Moreover, once overtime is approved, it's assigned in accordance with the terms of the collective bargaining agreement. Drivers must place their name on an overtime desired list, and then all overtime assignments are made off that list strictly by seniority. And, even if the driver has signed the overtime list, he cannot be required to work any overtime. Poole also testified that he will not assign a trip to a driver if it would result in overtime for that driver.

The Employer proffered several forms and documents purporting to show that the dispatchers approve time off requests and changes to drivers' daily hours. These forms included several completed "operator daily time cards" signed by a dispatcher. According to Groters, these forms are completed when a driver either forgets to punch in or punch out, so their time needs to be "manually" entered into the system through the use of this card. After the dispatcher signs off, the card is provided to Rivera. According to Groters, if Rivera approves the change, he then enters the information into the computerized payroll system (ADP) so that the driver can be properly paid for the

hours worked. However, Rivera testified that he simply processes the change and does not review it, unless there is something “completely outrageous” or a “mistake” on the card. According to Poole, these cards are only used when a driver either forgets their “punch card” entirely, so that they can’t use the electronic system to punch in and out, or simply forgets to punch in or out. Thus, contrary to the implication on the signature line of the card, Poole testified that the card has nothing to do with working overtime. In completing the card, Poole simply enters the starting and ending time for that driver, signs the card, and passes it on to Rivera.

The Employer also proffered an “absence form” that is utilized by all employees to request time off. According to Poole’s uncontradicted testimony, the form is used whenever a driver calls in sick or requests time off. He completes the form by entering the drivers name, leave date, return date, and reason for absence, signs it, and forwards it to Groters or Rivera for approval. He enters no information in the “office use only” section, and plays no role in either approving or denying the absence.

### **3. Disciplining drivers.**

With regard to discipline, the Employer introduced a blank form which it claims has been used by dispatchers to discipline drivers up until the week before the hearing in the instant case, when it was replaced with a new form discussed below. The old form has no title, other than the Employer’s name and its corporate address in Baltimore, Maryland. After listing information about the employee and the date of the “problem”, there are 8 boxes that can be checked under the heading “specific nature of problem”: tardiness, absenteeism, performance below standards, carelessness, not following orders, unsafe actions, breaking house rules, and other. There follows a section for entering the “details” of the problem, whether the employee has been warned for this or a similar problem and the type of discipline issued, and the “action taken”. There are signature lines at the bottom for the “supervisor”, the employee, and a “personnel representative”. At the very bottom, it states: “Note: continuance of improper conduct may result in suspension or dismissal”. The Employer also introduced four such completed forms that were signed by a dispatcher on the “supervisor” line. According to Groters, these are the only examples of discipline she could find that were issued by the dispatchers, because their employees are so good at their jobs, they rarely need to be disciplined. Indeed, Groters admitted that only one driver has ever been terminated during her six years with the Employer. Both Groters and Rivera testified that they do

not review the completed discipline forms, but rather simply place them in the drivers' personnel file for future use in the event that the employee engages in further misconduct.

Shortly before the conclusion of the hearing, the Employer introduced a different blank discipline form that it claims it provided to the dispatchers during a staff meeting on January 27, the Friday before the hearing in the instant case. This document is entitled "Employee Disciplinary Report", and includes the following statement at the top of the form:

The following disciplinary action was taken today and is to be made part of the official record of the above named employee. Veolia views progressive discipline and the issuance of written disciplinary action as a constructive method of communicating to employees the importance of meeting the performance standards established by Veolia. Veolia believes that adherence to Veolia policies and procedures and exemplification of a positive work ethic by all employees is essential in creating a work environment that is satisfying, safe and productive.

Veolia believes that progressive discipline is a mutually beneficial process for both employee and employer. It is Veolia's intention to utilize this process, whenever practical, to identify opportunities to improve in job performance and provide direction to employees for taking corrective measures.

However, continued violation of Veolia policies could result in additional disciplinary action, leading up to and/or including termination. Veolia recognizes there are certain offenses, that if committed by an employee, are serious enough to justify immediate discharge, thereby superseding the progressive discipline process.

The remainder of the form consists of check-off boxes indicating verbal warning, written warning, suspension without pay, and termination; a section entitled "Disciplinary History", with 26 numbered check-off boxes setting forth the prior misconduct committed by the employee; a section to explain the violation; a section to set forth the "corrective measures to be taken by Employee"; an employee acknowledgement section; a signature line for the "employee rep"; and a signature line indicating the name and title of the person issuing the discipline. According to Rivera, when he provided this new form to the dispatchers during the staff meeting on January 27, he informed them that they should use this form in lieu of the previous form, and that they were supervisors and capable of using the form. Although he admitted that "we don't run into too many situations where it's necessarily needed", he wanted them to have the form in the event that they needed it. He also told them to enter only the following information on the

form: employee name, the date, the position, the “box in the middle of the form” indicating what the violation was going to be, the “check box explaining the violations”, and the signature at the bottom. Thus, the dispatchers were not instructed to complete either the “disciplinary history” section or the “corrective measures to be taken by employee”. Rivera admitted that no one has used the new form to date.

Poole testified at length regarding the dispatchers’ use of the discipline form. According to Poole, he was never provided with any instructions for completing the form until the January 27 staff meeting. Rather, he has used the form on only two occasions during his six years as a dispatcher simply to document a potential disciplinary incident, and that in completing the form he did not believe that he was either disciplining the employee or even recommending that discipline be issued. In this regard, Poole noted that he does not have access to any employee’s personnel file, so he has no way of knowing whether the employee was previously disciplined for the same or similar conduct, and thus is unable to determine whether discipline should be issued or the level of discipline to be issued. Although Poole admitted under repeated questioning by Employer’s counsel that in completing the form, he *could* recommend discipline, he nonetheless reiterated that he has never recommended that any employee be disciplined.

Two of the completed disciplinary forms entered into evidence by the Employer were signed by Poole. He acknowledged completing Employer Exh. 14 in July 2009, which simply states some information about the employee and the date of the incident, and the following under “details regarding this problem”: “Jackie showed up to work late, and was out of uniform.” Nothing else appears on the form other than Poole’s signature. Poole explained that he completed the form simply to document that the employee arrived at work out of uniform. Groters never followed up with him concerning the report, and he does not believe that the employee was disciplined as a result of the incident. Poole also admitted completing Employer Exh. 15 in August 2008, which, similar to Exh. 14, simply contains some information about the employee and a statement under “details regarding this problem”. However, as noted by Poole, the incident had nothing to do with any misconduct on the part of the employee and was clearly not disciplinary in nature. Rather, as stated by Poole on the form, the employee’s wife called in to report that the employee was ill and had been taken to the emergency room, that his bus was parked in front of his house, that Poole had reassigned his remaining trips to other

drivers and had arranged for the bus to be picked up, and that the wife would drop off the money bag. Poole was sure that the employee was not disciplined as a result of this incident.

Poole also testified regarding another completed disciplinary form entered into evidence by the Employer, but which Poole admittedly did not sign. Regarding Employer Exh. 17, which is dated June 4, 2008, Poole testified without contradiction that the top of the form explaining the “details regarding this problem” was completed by the dispatcher, and the remainder of the form, including the discussion with the driver and the action taken (a verbal warning), was completed and signed by former Safety Manager Robert Wilson. In providing this testimony, Poole again confirmed that either Groters or Rivera are responsible for completing the section of the form indicating any disciplinary action.

Groters testified about the remaining completed disciplinary form, Employer Exh. 16. Similar to Employer Exh. 14 and 15 signed by Poole, Employer Exh. 16 simply has a written account of the “details regarding this problem” and a check mark before the box “not following orders”, and is signed by former dispatcher (now scheduler ) Kelli Scott. According to the completed form, the driver took a group trip to Oakville, Connecticut and was supposed to return to Bridgeport where he would have his lunch break and perform other trips before returning to Oakville to pick up the group. The driver decided to remain in Oakville for his lunch break, and then remain until the group was ready to be picked up. Groters, who did not claim to have any personal knowledge of the incident, testified that as a result of the driver remaining in Oakville, the dispatcher had to reassign several other trips that had been scheduled for that driver. Once again, there is no evidence that the driver was actually disciplined for this conduct, or suffered any other adverse consequences as a result of the completion of the form. Groters did claim, in connection with this document, that dispatchers have the authority to change a driver’s lunch break (which is initially designated by the scheduler on the driver’s manifest). However, any such change to the lunch break would only occur in connection with any related changes made by the dispatcher to the driver’s daily manifest, such as additional assigned trips. As noted by Groters, the driver will first be asked by the dispatcher to change the lunch break, and in most instances they readily agree, but that ultimately the dispatcher could order the driver to change his lunch break. However, Poole testified that in the event a driver refused to agree to

modify his lunch break, Poole would contact Groters before proceeding any further. Moreover, Groters did not testify to any instance in which a driver was disciplined for refusing to abide by a change in his lunch break.

The Employer also proffered six completed documents entitled “Driver Incident Report” which are utilized by drivers to document incidents that occur while driving a bus. Although some of these forms are signed by a dispatcher on the “supervisor” line, there is no evidence or claim that any of these documents constitute any form of disciplinary action. Moreover, Poole testified that the incident reports are utilized by the drivers to document “out of the ordinary” events, and that he simply signs the report and forwards it to Groters. Thus, the Employer claims that these documents show the nature and extent of the dispatcher’s role in connection with the driver’s daily job duties, such as reporting a client complaint about a driver using excessive speed in the bus yard (Employer Exh. 21). As to that incident report, which was signed by the dispatcher, Groters admitted that she entered the information under “Administrative Response” indicating that she had personally spoken to the driver and “told him to slowdown coming into the yard and garage”.

Groters also testified that dispatchers have the authority to send drivers home in the event the driver refuses to follow the dispatchers’ instructions, or if the dispatcher suspects that the driver is under the influence of drugs or alcohol. In the latter regard, the dispatchers (as well as Groters and Rivera) are required to take a course entitled “Supervisor Reasonable Suspicion Training”, which provides them with training that they can utilize to determine whether a driver is under the influence of drugs or alcohol and thus should not be permitted to drive. However, the dispatcher alone cannot make the determination that a driver is under the influence; rather, it must be corroborated by another person who has received the same training. In this regard, Groters admitted that if a dispatcher suspects that a driver is under the influence of drugs or alcohol, he does not permit them to go out on the road until Groters or Rivera arrives and corroborates the “reasonable suspicion”.

Moreover, Poole testified that he would never send an employee home for any reason without first speaking with Groters or Rivera. In this regard, Poole admitted that on one occasion when a driver reported for work without any part of her uniform, he asked her to go home (she lived nearby) and return in uniform. Poole further testified that if the driver had refused to retrieve her uniform, he would have contacted Groters

first rather than sending the driver home for the day. Moreover, there is no evidence or claim that this driver suffered any adverse consequences, such as loss of pay or discipline, as a result of her failure to wear her uniform that day.

#### **4. Secondary Indicia**

The Employer relies upon a host of secondary indicia in support of its claim that the scheduler and the dispatchers are supervisors under Section 2(11). Regarding their wages, benefits and other terms and conditions of employment, the record establishes that, in contrast to the drivers, the dispatchers wear a different uniform; have full access to the dispatch office including the computers and e-mail addresses and a personal filing cabinet; may use the Employer's copy machine for personal matters; have a different number of holidays; have 24 hour access to the Employer's facility; have access to greater life insurance benefits; have greater training opportunities, including courses related to supervision; must sign a confidentiality agreement; have access to certain rider medical information; attend separate staff meetings with Groters and Rivera; have different options regarding health insurance; and work different schedules. However, with particular regard to wages, the record reflects that dispatchers are paid between \$15.63 and \$18.71 per hour, and are eligible for overtime. According to the drivers' contract, drivers hired before July 1, 2010 are paid between \$12.58 and \$19.39 per hour, and Poole confirmed that there are several drivers who are paid at a higher rate than the highest paid dispatcher.

With particular regard to the staff meetings, the record reflects that the scheduler and the dispatchers attend a quarterly meeting with Groters and Rivera during which they discuss various matters impacting the dispatchers' work as well as the Employer's overall operations.<sup>9</sup> The "staff meeting agenda" from the July 7, 2010 meeting reflects that the meeting addressed the following matters:

1. Dispatch - adding trips in addition to existing trips. Example: 7/26/2010 - Berry
2. Requesting Drivers for office coverage without first notifying Dawn or Joseph
3. Dispatchers going on the road without notifying Dawn or Joseph
4. Change in dispatch hours - Effective August 2, 2010
5. Bus Assignments - Not being done correctly
6. Address changes - using common sense about the destinations were allowing drivers to drop clients at!
7. Lawsuit discussion
8. Client wants 3-4 people per hour, not 5... It is not possible. This forces us to

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<sup>9</sup> It appears that the drivers attend a separate staff meeting, the frequency of which is not reflected in the record.

provide bad service not only to our clients, but our customers

9. Service level scores, July 09 - June 10 are 2.50, they need at a minimum to be at 2.60

Another proffered staff meeting agenda from some time in 2010 reflected the following items: new no show report; stand-by operators; radio communications/cell phone; uniforms; and forecasting and scheduling work. Finally, as noted above, the new discipline forms were distributed to the dispatchers at the January 27, 2012 staff meeting, during which they were also told that they were supervisors and could use the new form to discipline drivers. However, the agenda for the January 27, 2012 meeting was not proffered by the Employer.

With particular regard to the additional training opportunities offered to the scheduler and dispatchers, the record reflects that the following courses were voluntarily taken by the following schedulers and/or dispatchers over the past few years: Managing within the Law (Cunningham); Drug and Alcohol Program Manager Training (Poole and Scott); Building Your Talent Pool (Cunningham); Improving Employee Performance (Cunningham); Setting Performance Expectations (Cunningham); Sensitivity Training, including Americans with Disability Act and Customer Service Training (Murray in 2000). As noted above, all of the schedulers and dispatchers have taken the Reasonable Suspicion training.<sup>10</sup>

## **II. Analysis - Supervisory Status of Scheduler and Dispatchers**

It is well-established that the burden of proof rests upon the party alleging that an individual is a supervisor. *Oakwood Healthcare Inc.*, 348 NLRB 686, 694 (2006); accord *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Oakwood Healthcare Inc.*, supra. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. *Id.*, at 688; *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). The Board has found that a particular indicia of supervisory status has not been established if the evidence is in conflict or otherwise

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<sup>10</sup> The Employer also relies upon evidence purporting to show that the drivers, the drivers union, GBT Access, riders, and the dispatchers themselves consider the dispatchers to be supervisors under the Act. Much of this evidence is based upon pure hearsay, rank speculation and “evidentiary spin”. As such, it is not a reliable indicator for establishing supervisory status under the Act.

inconclusive regarding that indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears Roebuck & Co.*, 304 NLRB 193 (1991). Indeed, a lack of evidence is construed against the party asserting supervisory status. *The Wackenhut Corp.*, 345 NLRB 850, 854 (2005).

Based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of establishing that the scheduler or the dispatchers possess and exercise supervisory authority within the meaning of Section 2(11) of the Act. In reaching this conclusion, I note the undisputed absence of any evidence that the schedulers or dispatchers have the authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, or reward other employees, or to adjust their grievances, or to effectively recommend any of these actions using independent judgment. Thus, the only arguable basis for finding that the scheduler and dispatchers are supervisors is their assignment and direction of the work performed by drivers, and their involvement in disciplining drivers.

**A. Assigning Employees**

In *Oakwood*, the Board defined the term “assign” as “the act of designating an employee to a place (such as 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.” *Oakwood*, supra, at 689. As set forth in detail above, the record clearly establishes that the scheduler and the dispatchers assign employees within the meaning of *Oakwood*. In this regard, the scheduler initially prepares the master schedule the evening before each workday, which assigns each trip to a particular driver in a particular geographic area during a particular time period. The dispatchers in turn continually modify and re-adjust the overall schedule in the course of each workday by further assigning and re-assigning trips to drivers in particular geographic areas during particular time periods.

Having determined that the scheduler and dispatchers assign drivers within the meaning of the Board’s definition in *Oakwood*, it is now necessary to determine whether they exercise independent judgment in making such assignments. In *Oakwood*, the Board defined the term “independent judgment” as requiring that “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,” provided that the act is “not of a merely routine or clerical nature”. *Id.* at 693. The Board emphasized that “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as “independent” under the Act lies somewhere in between these extremes.” *Id.* Thus, according to the Board in *Oakwood*, judgment is not independent if “dictated or controlled by detailed instructions, whether set forth in company policy or rules, the verbal instructions of higher authority, or the provisions of a collective bargaining agreement.” *Id.* However, “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Id.* A general example of a decision requiring the use of independent judgment, according to the Board in *Oakwood*, involves weighing “the individualized condition and needs of a patient against the skills or special training of available nursing personnel” when assigning nurses to patients. *Id.* Examples of judgments that do not rise above the routine or clerical, according to the Board in *Oakwood*, include “assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating,” or assignments made “solely on the basis of equalizing workloads.” *Id.*

Based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of establishing that the scheduler and dispatchers exercise independent judgment in their assignment of drivers, as defined by the Board in *Oakwood*, to warrant the conclusion that they are supervisors under Section 2(11). More particularly, I note the absence of any evidence showing that the scheduler or dispatchers consider the “skills or special training” of available drivers in the daily assignment of work. To the contrary, the evidence establishes that to the extent that the scheduler and dispatchers initially assign and then re-assign drivers to perform other trips in the course of a shift, such authority is routine in nature and guided almost exclusively by non-discretionary factors, i.e., time and location. In contrast, there is insufficient evidence to establish that the scheduler or dispatchers assign and re-assign the drivers based upon their own assessment of either the relative skills and abilities of the driver or the nature and extent of the work being assigned. See *Croft Metals*, 348 NLRB 717, 721-722 (2006); *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Quality Chemical, Inc.*, 324 NLRB 328, 330 (1997); *Kent Products, Inc., White Cloud*

*Division*, 289 NLRB 824 (1988). Rather, any deviations from assignments based solely upon time and location, i.e., not assigning light duty or petite drivers to transport riders in wheelchairs, is commonly known by the scheduler and all the dispatchers and is not based upon their own personal assessment of the drivers. Under such circumstances, their assignment of the work performed by the drivers does not require the exercise of independent judgment. See *Express Messenger Systems, Inc.*, 301 NLRB 651, 654-655 (1991)(dispatcher not supervisor where he did not use independent judgment in assigning and directing bike messengers); *Interstate Motor Freight System*, 227 NLRB 1167 (1977)(dispatchers not supervisors of freight drivers); *Carey Transportation, Inc.*, 119 NLRB 332 (1957)(dispatchers not supervisors at company providing airline passengers with transportation to and from New York area airports); *Auto Transports, Inc.*, 100 NLRB 272 (1952)(dispatchers of over-the-road truck drivers are not supervisors). See also *S.D.I. Operating Partners, L.P., Harding Glass Division*, 321 NLRB 111 (1996)(leadman); *Chevron Shipping Co.*, 317 NLRB 379 (1995)(watch officers); *Leland Stanford Jr. University*, 194 NLRB 1210, 1214 (fire captains)(1972); *Security Guard Service, Inc.*, 154 NLRB 8 (1965)(shift supervisor). In addition, I note that General Manager Groters continually monitors all radio transmissions between and among the dispatchers and drivers, and that Groters may always be contacted by the dispatchers during an emergency or other non-routine situation. See *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 393 (1989). Finally, I note that the scheduler and dispatchers' purported authority to prevent drivers from operating a bus if they suspected them of being under the influence of drugs or alcohol is not an indicium of supervisory authority. See *Spector Motor Freight System, Inc.*, 216 NLRB 551, 552-553 (1975); *Michigan Masonic Home*, 332 NLRB 1409, 1411 fn. 5 (2000); *Chevron Shipping Co.*, supra; *Freeman Decorating Co.*, 330 NLRB 1143, 144 (2000); *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491, 497 (1993).

#### **B. Responsibly Directing Employees**

In *Oakwood*, the Board defined the term “responsibly to direct” as the act of directing “what job shall be done next or who shall do it,” provided that “the direction is both ‘responsible’ and carried out with independent judgment.” *Id.* at 691. The Board in *Oakwood* further found that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee 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 by the employee are not performed properly.” Id. at 692. “Accountability” for purposes of responsible direction must be established, according to the Board in *Oakwood*, by showing “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. In this regard, the Board in *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) found that there must be “evidence of actual accountability”, which the Board interpreted as requiring “more-than-merely-paper showing” that a prospect of adverse consequences exists.

Based upon the forgoing and the record as a whole, I find that the Employer has failed to satisfy its burden of establishing that the scheduler and dispatchers “responsibly direct” the drivers. See *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (12/30/11)(distribution dispatchers do not responsibly direct field employees using independent judgment); *New England Transportation Co.*, 90 NLRB 539 (1950)(dispatchers do not responsibly direct bus drivers using independent judgment). More particularly, I note the evidence establishing that the scheduler and dispatchers possess the authority to direct the drivers as to what job shall be done next or who shall do it, and that if a driver does not perform an assigned task, the dispatcher has the authority to instruct the driver to perform the task. However, there is insufficient evidence to establish that the scheduler and dispatchers are held “accountable” for the performance of such tasks by the drivers. In this regard, I note the lack of evidence establishing that there is a “prospect of adverse consequences” to the scheduler and dispatchers should a driver fail to perform an assigned task or fail to perform it properly. The disciplinary notices issued to dispatcher Glenn Cunningham in 2001 and 2004 are insufficient to establish that the scheduler and dispatchers are accountable for directing the work of the drivers. In this regard, the adverse consequence to dispatcher Cunningham was the result of his own work performance, i.e., failing to properly assign and re-assign drivers, rather than the actual work deficiency of any drivers. See *Oakwood*, supra, at 695, where the Board specifically found that disciplining charge nurses for failing to make fair assignments “shows that the charge nurses are accountable for their *own* performance or lack thereof, not the performance of *others*,

and consequently is insufficient to establish responsible direction” (emphasis in original).

Having found that the scheduler and dispatchers do not “responsibly” direct employees, it is unnecessary to address the issue of whether they exercise independent judgment. *Oakwood*, supra, at n.14. Nevertheless, even assuming *arguendo* that they responsibly direct employees within the meaning of *Oakwood*, I find that the Employer has failed to satisfy its burden of establishing that the scheduler and dispatchers exercise independent judgment in their direction of drivers to warrant the conclusion that they are supervisors under Section 2(11). More particularly, I rely upon the same factors upon which I relied in finding that the Employer failed to satisfy its burden of establishing that the scheduler and dispatchers exercise independent judgment in their assignment of drivers. See *Entergy Mississippi, Inc.*, supra; *New England Transportation Co.*, supra.

Accordingly, for the reasons set forth above, I find that the Employer has failed to satisfy its burden of establishing that the scheduler and dispatchers either assign or responsibly direct other employees utilizing independent judgment to warrant the conclusion that they are supervisors under Section 2(11).

### **C. Disciplining Employees**

With regard to their involvement in the disciplinary process, I find that the Employer has proffered insufficient evidence to establish that the scheduler or the dispatchers discipline the drivers utilizing independent judgment.<sup>11</sup> Rather, the evidence shows that the dispatchers are essentially conduits of information regarding potential disciplinary matters and that their responsibility is merely reportorial in nature. See *Express Messenger Systems, Inc.*, supra (dispatcher not supervisor where he did not effectively recommend disciplinary action); *NLRB v. Meenan Oil*, 139 F.3d 311 (2<sup>nd</sup> Cir. 1998); *Los Angeles Water and Power Employees Association*, 340 NLRB 1232, 1234 (2003); *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998); *Peco Energy Co.*, 322 NLRB 1074, 1083 (1997); *Rest Haven Nursing Home*, 322 NLRB 210, 212 (1996).

More particularly, I note that although the dispatchers’ may on rare occasions prepare a “disciplinary notice”, there is insufficient evidence to establish that the mere

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<sup>11</sup> The Employer does not contend, nor is there any evidence, that the scheduler is involved in the disciplinary process. Accordingly, the remainder of my analysis applies only to the dispatchers.

preparation of such notices constitutes disciplinary action. In this regard, the record shows that the dispatcher only fills in the top section of the notice by checking off a box regarding the “specific nature of the problem” and then provides the “details regarding this problem”. With that limited information, the notice is provided to Groters or Rivera, who are then responsible for taking any further action. This is consistent with the undisputed evidence that the dispatchers do not have access to the drivers’ personnel records, and thus would not be in a position to fill in any of the remaining information on the notice, including the nature and extent of any previous discipline, which is necessary to determine whether discipline will issue and the level of any such discipline. It is also consistent with the four completed disciplinary forms in evidence. Three of the forms (Employer Exh. 14, 15, and 16) contain nothing more than the dispatchers’ “details” of the problem, and are merely signed by the dispatcher and not the employee. Thus, there is nothing on the notice to indicate that the driver was actually disciplined as a result of the dispatchers’ mere preparation of the notice, and the Employer proffered no other evidence to establish that the driver named on each of these notices was actually disciplined at any time. Rather, both Groters and Rivera testified that these notices, after they reviewed them, were merely placed in the drivers’ personnel file for possible future use. This is entirely consistent with the reportorial, rather than disciplinary, nature of the notices.<sup>12</sup>

The remaining notice (Employer Exh. 17) contains the dispatcher’s “details” of the problem, with the remainder of the notice completed by the former Safety Manager showing that the driver was previously warned for the same or similar problem, that the Safety Manager interviewed the driver concerning the incident, and that the Safety Manager decided that the driver would be verbally warned for the incident. The Safety Manager also signed the notice. The notice does not reflect that the dispatcher was involved any further in the Safety Manager’s processing of the notice, nor did the Employer proffer any evidence of such. This is consistent with Poole’s uncontradicted testimony that he has no involvement whatsoever in the processing of the notice after completing the “details” section and submitting it to Groters or Rivera, as well as his

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<sup>12</sup> The fact that a new disciplinary notice form was provided to the dispatchers shortly before the hearing in this case does not alter my determination herein. Although the new notice makes it crystal clear that drivers could be disciplined as a result of the dispatchers preparation of the notice, there is no change as to the information that the dispatcher would place in the notice or the processing of the notice as described above. Moreover, there is no evidence or claim that any dispatcher has utilized the new notice.

testimony that he makes no recommendation regarding the disciplinary action to be taken when he prepares the notice. Thus, there is no record evidence that any dispatcher has ever recommended that a driver be disciplined, or that Groters or Rivera have ever solicited a dispatcher's recommendation regarding the discipline of a driver. Under such circumstances, with respect to the discipline of drivers, the dispatchers do not act "free of the control of others" within the meaning of *Oakwood*, and thus do not possess the requisite degree of "independent judgment" necessary to establish that they either discipline or effectively recommend the discipline of drivers. See *Avante at Wilson*, 348 NLRB 1056 (2006). Rather, the evidence shows that disciplinary action only occurs following an independent investigation and decision by higher management as to what, if any, discipline to impose. See *DIRECTV*, 357 NLRB No. 149 (2011).<sup>13</sup>

In reaching the above findings and conclusions regarding the supervisory status of the scheduler and dispatchers, I have considered the Second Circuit's decision in *NLRB v. Quinnipiac College*, 256 F.3d 68 (2001), which the Employer cites in its post-hearing brief. In that case, the Second Circuit reversed the Board's decision that "shift supervisors" in a 30 person university security department were not supervisors within the meaning of Section 2(11) of the Act. In reaching that conclusion, the Second Circuit concluded, contrary to the Board's decision, that the shift supervisors engaged in three of the indicia set forth in Section 2(11): assigning other employees, responsibly directing other employees, and effectively recommending discipline of other employees.

Initially, I note that the Second Circuit's decision is contrary to well-established Board law that I am bound to apply in the instant case, including *Oakwood* and its progeny that issued subsequent to the Second Circuit's decision, and that the Board has not to date adopted the Second Circuit's decision in *Quinnipiac*. Nevertheless, as described in detail below, I find that the facts and rationale underlying the Second Circuit's *Quinnipiac* decision are inapposite to the facts of the instant case.

With regard to the assignment of employees, the Second Circuit in *Quinnipiac* noted that in re-assigning or re-deploying employees, the shift supervisor utilized independent judgment by specifically considering "the employees' experience and

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<sup>13</sup> The Employer's reliance on *Progressive Transportation Services*, 340 NLRB 1044 (2003), *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), and *Starwood Hotels and Resorts Worldwide*, 350 NLRB 1114 (2007) do not alter my determination. The facts in each of those cases established that the disputed supervisors effectively recommended disciplinary action and that employees were actually disciplined based solely upon those recommendations.

capability to respond to a particular incident, as well as other campus security needs and requirements". As noted above, there is insufficient evidence in the instant case that the scheduler or dispatchers consider a driver's particular skills and abilities in assigning or re-assigning them in the course of a shift.

With regard to the direction of employees, the Second Circuit in *Quinnipiac* concluded that the shift supervisors' "responsibly directed" employees utilizing independent judgment because the record established that they were held accountable for the failure of other employees to perform their duties, thereby showing that they were "in command" of their shift. In reaching this conclusion, the Second Circuit relied upon two disciplinary actions issued to shift supervisors for failing to properly supervise other security department employees. The Second Circuit interpreted such disciplinary actions as supporting the notion that the employer viewed the shift supervisors as being responsible for the performance of other security department employees, that is, being "in command". In the instant case, the evidence is again exactly the opposite: the scheduler and the dispatchers have never been disciplined for failing to properly supervise the drivers, nor is there sufficient evidence to establish that their direction of the drivers requires the use of independent judgment.

Finally, with regard to the discipline of other employees, the Second Circuit in *Quinnipiac* noted the Board's finding that the shift supervisors could recommend that employees be disciplined, and concluded, contrary to the Board, that such recommendations were effective even though they were subject to an independent investigation by others. In the instant case, the evidence is, yet again, the opposite from what the Second Circuit relied upon in *Quinnipiac*: there is no evidence that dispatchers recommend that disciplinary action be taken, or that Groters or Rivera have ever relied upon a dispatcher's recommendation in issuing discipline.<sup>14</sup>

I also find inapposite the Employer's reliance on a Decision and Order issued on February 2, 2012 in *Veolia Transportation Services, Inc.*, Case No. 28-RC-071479. In that case, the regional director found that "road supervisors" at a fixed route transit

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<sup>14</sup> Moreover, the facts of the instant case are precisely those noted by the Second Circuit in *Quinnipiac* regarding its earlier decision in *NLRB v. Meenan Oil*, supra, 139 F.3d 311, in which it affirmed the Board's finding that the employer's oil and service dispatchers were not supervisors under the Act. In this regard, the Second Circuit in *Quinnipiac* noted that in *Meenan Oil*, the alleged supervisor simply notified management that there was a problem with an employee and made "no recommendation as to whether the employee should be disciplined." Thus, according to the Second Circuit, the alleged supervisor in *Meenan Oil* had acted merely as a "conduit for information and exercise[d] no judgment in passing the knowledge along to management."

operation in Las Vegas, Nevada were supervisors under Section 2(11) because of their role in disciplining and rewarding bus drivers. The regional director relied upon evidence showing that the road supervisors' initiated the disciplinary process through the regular issuance (6 to 12 times each day) of "observation notices" (OBNs) which actually resulted in disciplinary action being taken against the driver.

**D. Secondary Indicia**

The Employer's reliance on certain secondary indicia of supervisory status cannot confer supervisory status on the scheduler or dispatchers in the absence of the primary indicia of supervisory status enunciated in Section 2(11) of the Act. See *Golden Crest*, supra, at n. 10; *DIRECTV*, supra, slip op. at 4; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time dispatchers and schedulers employed by the Employer at its Bridgeport, Connecticut facility; but excluding all other employees, reservationists, office clerical employees, and professional employees, guards and supervisors as defined in the Act.

**DIRECTION OF ELECTION**

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

**Eligible to vote**: those employees in the unit who were 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 in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

**Ineligible to vote**: employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike

which commenced more than 12 months before the election date and who have been permanently replaced.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers Union, Local 371.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and 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, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, on or before February 22, 2012. No extension of time to file this list shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

#### **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 on Remand may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, or electronically pursuant to the guidance that can be found at the Agency's Website at [www.nlrb.gov](http://www.nlrb.gov). Select the **E-Gov** tab and click on **E-Filing**, then select the type of document you wish to file electronically and you will navigate to detailed instructions on how to file the document. **This request must be received by the Board in Washington by February 29, 2012.**

Dated at Hartford, Connecticut this 15<sup>th</sup> day of February, 2012.

/s/ Jonathan B. Kreisberg  
Jonathan B. Kreisberg, Regional Director  
National Labor Relations Board  
Region 34