

Nos. 11-1397, 11-1432

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AVISTA CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

(A) Parties and Amici: Avista Corporation, the petitioner/cross-respondent here, was a respondent in the case before the National Labor Relations Board. The Board is the respondent/cross-petitioner here, and the Board's General Counsel was a party in the case before the Board. The International Brotherhood of Electrical Workers Local 77, AFL-CIO, was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board's Decision and Order issued on August 9, 2011, and reported at 357 NLRB No. 41.

(C) Related Cases: This case has not previously been before this Court or any other court.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Avista Corporation to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Avista. The Board found that Avista violated Section 8(a)(5) and (1) of the National Labor Relations Act¹ by refusing to bargain with its

¹ 29 U.S.C. § 158 (a)(5) and (1), as amended.

employees' duly elected collective-bargaining representative, International Brotherhood of Electrical Workers Local 77.

The Board's Decision and Order issued on August 9, 2011, and is reported at 357 NLRB No. 41.² (JA 539-40.) The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of Act, which authorizes the Board to prevent unfair labor practices affecting commerce.³ The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act.⁴ The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

As the Board's Order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act.⁵ Section 9(d), however, does not give the

² "JA" references are to the joint appendix. "SA" references are to the Board's supplemental appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to Avista's opening brief.

³ 29 U.S.C. §§ 151, 160(a).

⁴ 29 U.S.C. § 160(e) and (f).

⁵ 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

Court general authority over the representation proceeding, but instead authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board."⁶ The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the rulings of the Court.⁷

Avista filed its petition for review on October 11, 2011. The Board filed its cross-application for enforcement on November 8, 2011. The petition and the cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE

The ultimate issue in this case is whether the Board reasonably found that Avista violated the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of an appropriate unit of distribution

⁶ 29 U.S.C. § 159(d).

⁷ 29 U.S.C. § 159(c). *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

dispatchers. The resolution of this issue turns on a subsidiary one: whether substantial evidence supports the Board's finding that Avista did not carry its burden of proving that its distribution dispatchers are statutory supervisors excluded from the Act's protections.

STATEMENT OF THE CASE

This case involves Avista's failure and refusal to bargain with the Union after Avista's distribution dispatchers voted in favor of union representation in a Board-conducted election. The Board found that Avista's refusal to bargain violated Section 8(a)(5) and (1) of the Act and ordered Avista to recognize and bargain with the Union. (SA 1.) Avista does not dispute that it has refused to bargain. Instead, it claims that, in the underlying representation proceeding, the Board erred in finding that Avista failed to meet its burden of proving that the dispatchers who comprise the bargaining unit are statutory supervisors. (Br. 8.) The Board's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. Background: Avista's Business and Organizational Structure

Avista provides electricity and natural gas to customers in parts of Washington, Idaho, and Oregon; its operations are divided into three regions and ten geographic service areas. (JA 420; JA 69-70.) Avista has several departments,

including the Engineering Department, which includes the distribution dispatchers, and the Operations Department, which includes field employees such as construction managers, operating engineers, foremen, linemen, and gas servicemen. (JA 420; JA 14, 180-181, 411.) Some Operations Department employees, including linemen and servicemen, are represented by the Union and covered by a collective-bargaining agreement. (JA 420; JA 13.)

Construction managers and foremen in the Operations Department determine field employees' daily schedules and day-to-day assignments, which include performing maintenance and repair, executing planned switching orders, and reconnecting customers. (JA 422 & n.9; JA 107, 222-24.) Field employees work during normal business hours. Outside normal hours and on weekends, they may be asked to respond to a trouble incident, but are not required to do so. (JA 424; JA 106, 130, 178.) Certain areas—Spokane for electricity, Oregon for gas, and some rural areas—have field employees or crews assigned to work or be on-call after hours. These employees are expected to respond to any trouble incidents. (JA 422; JA 102, 188, 246-47, 279.)

B. Duties and Responsibilities of Avista's Distribution Dispatchers

There are 10 distribution dispatchers who monitor the electric and gas distribution systems from the Spokane office and dispatch field employees to trouble calls. (JA 420-21; JA 14, 411.) Dispatchers are scheduled to work 24

hours a day, 7 days a week, primarily in 12 hour shifts. (JA 420; JA 11, 17.) They rotate shifts, so that each dispatcher works all the shifts at both the gas and electric desks. (JA 420.) The Chief Distribution Dispatcher, Mike Broemeling, supervises them. (JA 420; JA 11.) He works Monday through Friday, 7 a.m. to 5 p.m., and is “on-call all the time.” (JA 420; JA 75.)

Dispatchers are not required to have any experience in Avista’s field operations prior to hire, nor are they required to undergo training in field work after hire. (JA 421, 43-44, 240-41, 151, 300.) They have varied backgrounds, including experience as a meter reader, customer service/designer, mapper, lineman, and 911 operator, and learn the dispatch job by observing other dispatchers. (JA 421; JA 43-44, 240-41.)

Dispatchers are involved in unplanned and planned events. (JA 428; JA 90, 95, 104.) Unplanned events—chiefly, sending first responders to investigate trouble calls—are the dispatchers’ primary responsibility. (JA 420, 422; JA 20.) Planned events include helping to execute switching orders (which can also be unplanned), and issuing hotline clearances and holds when requested by field employees. (JA 420-21 & n.6; JA 235.) Each type of event is described below.

1. Dispatchers’ involvement with trouble calls

A dispatcher’s primary responsibility is to dispatch field employees in response to gas and electric trouble calls. (JA 420, 422; JA 20.) Avista’s call

center receives calls about power outages or other incidents; those calls are logged into computer systems monitored by dispatchers. (JA 421-22; JA 15, 60-62, 76, 173.)

When a trouble call comes in, a dispatcher sends a first responder, a serviceman who assesses the situation. (JA 422; JA 56.) During the day shift, dispatchers know the identity of the first responder in advance: the field employees' daily schedule shows where each crew is working, as well as the designated first responder in each geographic area. (JA 422; JA 222-23, 233, 236, 236-37.) In Spokane and Coeur d'Alene, where more than one crew will be working, dispatchers first call the general foreman to see which crew he wants to send. (JA 251.) Dispatchers cannot require a crew to stop work on one job and respond to a trouble call. (JA 423-424; JA 251, 253-54.)

During the night shift, the dispatchers' response to a trouble call varies by the location of the incident. In Spokane, field employees are on-duty from 3 to 11 p.m. weekdays and are assigned to any trouble incidents in that area; in Oregon, gas employees are designated to be on-call 24 hours a day. (JA 422; JA 55, 102, 130, 246-47.) In addition, certain areas have designated local representatives who respond to calls. (JA 188, 279, 377-80.) But in other areas, dispatchers initiate an automated, computerized procedure to call field employees. (JA 422; JA 103.)

Rather than selecting particular employees to respond to an incident, dispatchers use a computerized system to select the number and classification of employee needed. (JA 427; JA 113-14, 250.) Once the dispatcher selects the number and classification of employees needed, the computer generates a list of all available servicemen in that area. The computer will then begin calling employees, in the order of least overtime first, giving each employee four minutes to respond before moving to the next employee on the list. (JA 424 & n.14; JA 78-79.) If no employee is available to work in a particular geographic area, Avista's written policy requires the dispatcher to contact the on-call supervisor before looking for responders outside that area. (JA 424; JA 248-49, 270.)

Most often, dispatchers send one first responder, but in certain circumstances, the field employees' collective-bargaining agreement requires two. (JA 423; JA 70-71, 110, 113-14, 150, 340.) Once on the scene, the first responder may decide the incident requires additional personnel. He will then contact the dispatcher and propose the type of assistance he needs. (JA 423; JA 295.) Together, they collaboratively decide whether additional personnel will be sent, and the collective-bargaining agreement specifies the classification of employee to send. (JA 422; JA 113, 134, 150, 247.) The dispatchers then initiate the computerized system to call the additional personnel.

With the exception of employees in Oregon who are designated on-call, field employees decide whether to accept a call-out and are not disciplined if they refuse. (JA 424; JA 106, 130, 178, 245.) Dispatchers cannot require an employee to respond to a call, accept assignment to a trouble call during the employee's shift, or stay late to respond to a call. (JA 423-24; JA 111-12, 124, 211, 285.) When an incident occurs toward the end of a shift, dispatchers can ask a crew to stay late after first speaking with the crew's supervisor but cannot require that crew to stay. (JA 284-85.) The same applies when a dispatcher needs additional help: while he can ask another dispatcher to stay late or come in early, he cannot require it, and the other dispatcher can refuse with no penalty. (JA 424; JA 283-84.)

Normally, dispatchers send responders to incidents in the order in which they occur. (JA 422; JA 189.) If multiple incidents arise, such as during a storm, dispatchers determine the order of response based on unwritten guidelines. The guidelines give first priority to responding to incidents where public or employee safety is at risk, and second priority to restoring power to as many customers as possible. (JA 422; JA 32.) Avista also has a number of essential service customers, such as sewage systems, which receive first priority and are flagged in the computer system for dispatchers. (JA 190, 214.) Once field employees complete work on a trouble call, they notify the dispatcher, who enters the information into a computer system. (JA 128.) Dispatchers do not direct the work

of the field employees: they do not give field employees detailed instructions on how to complete a repair, monitor an incident after sending personnel to respond, or follow-up to see if a repair was completed correctly. (JA 421, 423; JA 56, 134-37.)

2. Dispatchers' involvement with switching orders, and hotline clearances and holds

In addition to dispatching employees to trouble incidents, dispatchers assist with switching orders, and issue hotline clearances and holds. (JA 420-21 & n.6.) Switching is the sequential opening and closing of electric switches to isolate power at a certain location for maintenance or repair by field employees. (JA 424; JA 36-37.) The process is guided by a switching order that states the date and time switching will begin and includes a step-by-step sequence to be followed. (JA 424; JA 90.) Both field employees and dispatchers can stop a switching order if they feel it is incorrect or unsafe. (JA 424-25; JA 85, 88, 93, 121, 263.)

The dispatcher's role is to coordinate the switching, via radio, with the employees responsible for performing steps on the switching order. (JA 424; JA 36.) The dispatcher repeats the steps listed on the switching order to the employees involved. The employees then confirm with the dispatcher when each step is complete. (JA 424; JA 68, 90-93, 226-28.) The dispatcher ensures that the steps are completed in the proper order and logs the times each step is completed. (JA 424; JA 228.) When field employees cannot use their radios for whatever

reason, they may communicate via cell phone with each other and bypass the dispatcher altogether. In that situation, the dispatcher will log the times of the order after the fact. (JA 227-28.)

Most switching orders are planned and are written by systems operators or engineers, not dispatchers. (JA 424-25; JA 64, 224.) The general foreman determines the location of a planned switching order and which field employees will be assigned to execute it. (JA 67.) On occasion, two to three times a month, dispatchers will write unplanned or emergency switching orders. (JA 425; JA 37, 65, 94, 200, 259.) Dispatchers never write planned switching orders. (JA 424; JA 93.)

Dispatchers also issue hotline clearances and holds. (JA 421 n.6.) For a clearance, the breaker or switch is physically locked in the off position by an employee and cannot be opened until the employee removes the lock. For safety reasons, the employee will call Dispatch when they are in the clear. (JA 105, 169-70.) The dispatcher's job during a hold—issued when a field employee needs to work on a “hot” or energized line—is to log information about the hold into the system, which takes one minute or less. A hold means that the “hot” line will not be re-energized until the crew indicates it is in the clear. (JA 66, 97, 105, 220-21.) A dispatcher does not control the power remotely; the de-energizing and re-

energizing of the lines are performed by the field employees themselves or remotely by systems operators. (JA 97, 221.)

C. The Representation Proceeding: Following a Hearing, the Board's Regional Director Issues a Decision and Direction of Election, Finding that the Dispatchers Are Not Statutory Supervisors; the Board Affirms His Finding; the Dispatchers Select the Union in a Secret-Ballot Election

The Union filed an election petition to represent Avista's 10 distribution dispatchers. (JA 304.) At a pre-election hearing, Avista contended that the dispatchers are supervisors under Section 2(11) of the Act because they have authority to discipline or effectively recommend discipline, and assign or responsibly direct the work of others, using independent judgment. Avista stipulated that the dispatchers do not have any other type of supervisory authority. (JA 426; JA 117-18.) In its post-hearing brief, Avista dropped its contention that the dispatchers have authority to discipline or effectively recommend discipline. Instead, Avista claimed only that they assign or responsibly direct the work of others. (JA 426 & n.16.)

Following the hearing, the Board's Regional Director issued a decision and direction of election, finding that the dispatchers are not statutory supervisors because they do not assign or responsibly direct other employees using independent judgment. Accordingly, he directed that an election be conducted among the dispatchers. (JA 430.)

Thereafter, Avista requested review of the Regional Director's decision and direction of election, but only with respect to his finding that the dispatchers do not assign work using independent judgment. (JA 482 & n.1, 483-507.) The election was held on October 5, 2009, but the ballots were impounded pending resolution of the request for review. (JA 450.)

On April 11, 2011, the Board issued its decision on review and order affirming the Regional Director's decision and direction of election, and remanding the proceeding to him for further processing. (JA 433-36.) Thereafter, the Regional Director opened and tallied the ballots, which showed that the Union had won the election by a vote of 9 to 1. Accordingly, he certified the Union as the dispatchers' collective-bargaining representative. (JA 437-38.)

D. The Unfair Labor Practice Proceeding: Avista Refuses To Bargain with the Union

On May 11, the Union requested that Avista recognize and bargain with it. (JA 439.) Avista refused, stating that it intended to challenge the certification. (JA 440.) On June 9, the Board's Acting General Counsel issued a complaint, based on a charge filed by the Union, alleging that Avista's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (JA 441-45.) In its answer, Avista admitted its refusal to bargain but denied that the refusal was unlawful, contending that the certified bargaining unit was inappropriate. (JA 446-47.)

On June 27, 2011, the General Counsel filed a motion with the Board for summary judgment. (JA 449-56.) The Board issued an order transferring the case to itself and directed Avista to show cause why the motion should not be granted. (JA 535.) In its response, Avista stated that it was continuing to assert that “the employees in the bargaining unit are supervisors,” and cited its request for review of the Regional Director’s decision and direction of election. (JA 536-37.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On August 9, 2011, the Board (Chairman Liebman and Members Becker and Hayes) issued its Decision and Order in the unfair labor practice case, granting the General Counsel’s motion for summary judgment. The Board found that “[a]ll representation issues raised by [Avista] were or could have been litigated in the prior representation proceeding.” (SA 1.) The Board also found that Avista did “not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.” (SA 1.) Accordingly, the Board found that Avista violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees. (SA 2.)

The Board’s Order requires Avista to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with,

restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.⁸ (SA 2.) Affirmatively, the Board's Order requires Avista, upon request, to bargain with the Union and to post a remedial notice. (SA 2.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Avista failed to meet its heavy burden of showing that its dispatchers are statutory supervisors.

Accordingly, the Union was appropriately certified as the dispatchers' collective-bargaining representative, and Avista violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

Avista's claims concerning the dispatchers' alleged supervisory authority are limited. In the representation proceeding below, it stipulated that the dispatchers do not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward other employees, or adjust their grievances, or effectively recommend those actions. Additionally, although Avista contends on review that the dispatchers discipline or effectively recommend discipline, and responsibly direct the work of others using independent judgment, it abandoned those contentions in the representation proceeding below. Avista cannot now resurrect those abandoned claims; under Section 10(e) of the Act, the Court lacks jurisdiction to consider them.

⁸ 29 U.S.C. § 157.

Instead, on review Avista has preserved only its contention that the dispatchers are statutory supervisors because they assign work to others using independent judgment. Substantial evidence supports the Board's finding that Avista failed to meet its burden of showing that the dispatchers possess this type of supervisory authority. In the first place, the record reveals that dispatchers do not assign substantial overall duties to field employees. Rather, as the record suggests, they merely provide ad hoc instructions. In addition, Avista failed to prove that dispatchers have authority to require field employees to undertake assignments. Absent proof of such authority, Avista could not establish that the dispatchers assign work within the meaning of Section 2(11) of the Act. Furthermore, Avista failed to show that the dispatchers use independent judgment in making assignments. Rather, the record shows that field employees are selected in advance by Operations Department managers or by an automated computer system, and that the dispatchers follow company guidelines in dispatching those employees. As for the dispatchers' involvement in switching procedures, at most it shows that they hold responsible positions, not that they exercise independent judgment in assigning work to others.

Finally, Avista wastes considerable ink in mistakenly contending that the Board's decision should be overturned because the Board purportedly relied on

*Mississippi Power & Light Co.*⁹, a case that predates *Oakwood Healthcare, Inc.*¹⁰ by several years. In fact, the Board found it unnecessary to rely on *Mississippi Power*. Instead, the Board appropriately reiterated that *Oakwood Healthcare* represents the correct legal standard for determining supervisory status. Avista also misses the mark in critiquing the Board's decision in *Entergy Mississippi, Inc.*¹¹ which issued after the Board's decision in this case. These arguments are a diversion from the real issue in this case—namely, whether substantial evidence supports the Board's finding that Avista failed to sustain its burden of proving that dispatchers assign work using independent judgment. Given Avista's failure to show that the dispatchers are statutory supervisors, the Board's Regional Director properly certified the Union as their representative, and the Board appropriately directed Avista to bargain with the Union.

⁹ 328 NLRB 965 (1999).

¹⁰ 348 NLRB 686 (2006).

¹¹ 357 NLRB No. 178 (2011).

ARGUMENT

THE BOARD REASONABLY FOUND THAT AVISTA VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 7 of the Act gives employees the right to choose a representative and to have that representative bargain with the employer on their behalf.¹² Employers have the corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act.¹³ Avista admits (Br. 7) its refusal to bargain with the Union, but argues that it had no legal obligation to do so because the distribution dispatchers are statutory supervisors and are excluded from the Act's protections. Accordingly, if substantial evidence supports the Board's finding that Avista failed to meet its burden of proving that the dispatchers are supervisors, then Avista's refusal to bargain violated Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its order.¹⁴

¹² 29 U.S.C. §157.

¹³ See 29 U.S.C. § 158(a)(5) and (1). A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

¹⁴ See *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 645 (D.C. Cir. 1999).

A. Applicable Principles and Standard of Review

Section 2(3) of the Act excludes from the term “employee,” and hence from the Act’s protections, “any individual employed as a supervisor.”¹⁵ Section 2(11) of the Act defines the term “supervisor” as follows:

[A]ny 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.¹⁶

In accordance with this definition, individuals are statutory supervisors only “if (1) they have the authority to engage in any of the 12 listed supervisor functions” and “(2) their ‘exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.’”¹⁷

As the Supreme Court has explained, the burden of demonstrating employees’ Section 2(11) supervisory status rests with the party asserting it.¹⁸ The

¹⁵ 29 U.S.C. § 152(3). *See VIP Health Servs.*, 164 F.3d at 648.

¹⁶ 29 U.S.C. § 152(11).

¹⁷ *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001) (citation omitted). *Accord VIP Health Servs.*, 164 F.3d at 648; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The third requirement for supervisory status—that the authority is held “in the interest of the employer,” *Kentucky River*, 532 U.S. at 713—is not at issue here because the first two requirements are not met.

¹⁸ *Kentucky River*, 532 U.S. at 711-12; *accord Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999).

party seeking to prove supervisory status must establish it by a preponderance of the evidence.¹⁹ To meet this burden, the party seeking to prove supervisory status must support its claim with specific examples, based on record evidence.²⁰

Accordingly, merely conclusory or generalized testimony is insufficient to establish “independent judgment” or any other element necessary for a supervisory finding.²¹ Moreover, it is settled that job descriptions and other “paper power” are insufficient to prove supervisory status.²²

The Board’s supervisory determination must be upheld as long as it is supported by substantial evidence, and will not easily be overturned on appeal.²³ Indeed, because of the Board’s expertise in deciding who is and who is not a supervisor within the meaning of Section 2(11) of the Act, “the Board’s findings

¹⁹ See, e.g., *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006).

²⁰ See *Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”).

²¹ See, e.g., *Beverly Enters.- Mass.*, 165 F.3d at 963; *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006).

²² *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

²³ *VIP Health Servs.*, 164 F.3d at 648.

relative thereto are entitled to great weight.”²⁴ Under the substantial evidence test, a reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it de novo.”²⁵

B. The Court Lacks Jurisdiction To Consider Avista’s Claims that the Dispatchers Discipline, Effectively Recommend Discipline, and Responsibly Direct the Work of Other Employees Using Independent Judgment; in Any Event, Those Claims Are Meritless

1. Overview of uncontested and contested issues

At the pre-election hearing, Avista stipulated that the dispatchers do not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward other employees, or adjust their grievances, or effectively recommend those actions. (JA 426; JA 117-18.) Accordingly, those indicia of supervisory status are plainly not at issue here. Instead, before the Court, Avista seeks to prove supervisory status by claiming (Br. 8, 13, 15-16, 31-32) that the dispatchers have authority to discipline or effectively recommend discipline, and to assign or responsibly direct work using independent judgment. In the proceedings below,

²⁴ *Oil, Chem. & Atomic Workers*, 445 F.2d at 241 (quoting *NLRB v. Metro. Life Ins. Co.*, 405 F.2d 1169, 1172 (2d Cir. 1968)). *See also Desert Hosp. v. NLRB*, 91 F.3d 187, 193 (D.C. Cir. 1996) (“A Board determination regarding supervisory status is entitled to special weight and is to be accepted if it has warrant in the record and reasonable basis in the law.”).

²⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

however, Avista explicitly abandoned its claims regarding discipline and responsible direction. Accordingly, as shown below, Section 10(e) of the Act²⁶ bars Avista from attempting to revive its claims on review—claims that, in any event, have no merit.

Instead, Avista properly preserved for review only its claim that the dispatchers assign work using independent judgment. We show below that substantial evidence supports the Board’s finding that Avista failed to meet its burden of proof with respect to this indicator of supervisory status. We further show that Avista wastes considerable ink in criticizing two decisions that the Board did not rely on here.

2. The Court lacks jurisdiction to consider Avista’s claims concerning discipline and responsible direction because Avista abandoned them in the representation proceeding

The Court lacks jurisdiction to consider Avista’s contentions that the dispatchers discipline or effectively recommend discipline, and responsibly direct the work of others, because Avista failed to preserve those claims at the time appropriate under the Board’s practices. Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused

²⁶ 29 U.S.C. § 160(e).

because of extraordinary circumstances.’²⁷ The Supreme Court has interpreted Section 10(e) as depriving the Court of jurisdiction over issues that a party failed to present at the time appropriate under the Board’s practices.²⁸

Specifically, under Section 102.67(f) of the Board’s Rules and Regulations, if Avista had wanted to preserve its claims that the Regional Director erred in not finding that the dispatchers recommend or effectively recommend discipline, and responsibly direct the work of others, then it was required to raise those claims in a request for Board review of the Regional Director’s decision and direction of election.²⁹ But although Avista filed a request for Board review, it explicitly stated that its request for review was “limited to the issue of whether the dispatchers ‘assign’ work or personnel utilizing independent judgment as required by Section 2(11) of the Act.” (JA 485 n.1.) Nowhere in its request for review did Avista

²⁷ *Id.*

²⁸ *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *See generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”).

²⁹ *See* 29 C.F.R § 102.67(f) (party’s “[f]ailure to request review shall preclude [that party] from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.”)

challenge the Regional Director's conclusion that Avista had dropped its claim regarding discipline by failing to address the issue in its post-hearing brief. (JA 426.) And nowhere in its request for review did Avista contest the Regional Director's specific finding that the dispatchers lacked authority to responsibly direct the work of others. (JA 482-507.)

Accordingly, under Section 102.67(f) of the Board's Rules and Regulations, Avista was precluded from relitigating in the subsequent unfair labor practice proceeding the claims that it had abandoned in the representation proceeding concerning discipline and responsible direction. Indeed, consistent with Section 102.67(f), Avista did not even attempt to preserve those abandoned claims in the unfair labor practice proceedings. Instead, in its response to the notice to show cause why summary judgment should not be granted in the unfair labor practice case, Avista merely cited the request for review that it had filed in the representation proceeding. (JA 536-37.) But, as shown above, the request for review only preserved Avista's claim regarding assignment.

Having abandoned its claims regarding discipline and responsible direction, Avista cannot resurrect them here. As this Court recognizes, "a party must raise all of his available arguments in the representation proceeding rather than reserve

them for an enforcement proceeding.”³⁰ Far from providing a “firm indication” that it was not abandoning claims, which would be “generally adequate to preserve”³¹ them for court review, in this case Avista dropped its claim regarding discipline in its post-hearing brief—as the Regional Director expressly noted in his decision and direction of election. (JA 426 & n.16.) And in its request for Board review, Avista made it quite clear that it was not challenging the Regional Director’s failure to find that the dispatchers discipline, recommend discipline, or responsibly direct other employees. (JA 485 n.1.)

In these circumstances, Section 10(e) of the Act bars appellate consideration of Avista’s claims regarding discipline and responsible direction. Moreover, Avista cites no extraordinary circumstances that would justify its belated attempts to resurrect those claims. Therefore, the Court lacks jurisdiction to consider Avista’s claims that the dispatchers are statutory supervisors because they discipline or effectively recommend discipline, and responsibly direct the work of other employees.³²

³⁰ *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008) (quotation omitted).

³¹ *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 987 (D.C. Cir. 2001) (quoting *NLRB v. Best Prods. Co.*, 765 F.2d 903, 910 (9th Cir. 1985)).

³² *See Woelke & Romero Framing*, 456 U.S. at 665-66; *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997).

3. In any event, Avista failed to establish that the dispatchers discipline or effectively recommend discipline, or responsibly direct work using independent judgment

In any event, Avista failed to establish that the dispatchers have authority to discipline or effectively recommend discipline. (JA 426 n.16.) To the contrary, Chief Distribution Dispatcher Broemeling testified that dispatchers do not discipline field employees. (JA 116.) And there is no evidence to support Avista's assertion (Br. 16) that a dispatcher's recommendation of discipline "would 'absolutely' be considered." Instead, the record shows only that on a single occasion, a dispatcher "communicat[ed]" to Broemeling that an on-call employee had refused an assignment. (JA 119-21.) But supervisory status is not proven merely by showing that an individual once served as "a conduit of information" for those who make the disciplinary decisions.³³ As this Court has found, "mere reporting is insufficient to establish that [employees] effectively recommend discharge or discipline."³⁴

Nor did Avista show that the dispatchers responsibly direct the work of others. (JA 428.) An individual has the authority "responsibly to direct" under

³³ *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 322 (2d Cir. 1998); *accord NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 Fed. App'x 54, 57 (2d Cir. 2008).

³⁴ *Nathan Katz*, 251 F.3d at 989 (quoting *VIP Health Servs.*, 164 F.3d at 648). *See also NLRB v. Adco Elec., Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993) (reporting problems is what any employer would expect from experienced employees).

Section 2(11) of the Act if he “has ‘men under him,’ and . . . decides ‘what job shall be undertaken next or who shall do it,’ . . . provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.”³⁵ In addition, for responsible direction to be established, “it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”³⁶ But as the Regional Director noted in his decision and direction of election—which issued before Avista abandoned its claim of responsible direction—the dispatchers do not direct the work of field employees, nor are they held accountable for it. (JA 428.)

Avista’s dispatchers do not have “men under them” or decide “what job shall be undertaken next and who shall do it.”³⁷ (JA 428.) Instead, as the Regional Director noted, the order of emergency work is determined primarily by the trouble calls received. (JA 428; JA 70, 96, 189.) In many cases, first responders are identified for dispatchers on crew work schedules. And after normal business hours, the automated call-out system and the collective-bargaining agreement

³⁵ *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006) (citing *Oakwood Healthcare*, 348 NLRB at 691).

³⁶ *Oakwood Healthcare*, 348 NLRB at 692.

³⁷ *Id.* at 691.

covering the field employees determine which employees will be called. (JA 428; JA 70-71, 77-78, 223, 233, 236-37, 241, 245-46, 250.)

Moreover, before individuals will be deemed statutory supervisors based on their authority to responsibly direct the work of others, the employer must show that they are held accountable not only for their own performance but for the performance of others.³⁸ In this case, as Chief Distribution Dispatcher Broemeling and Dispatcher McAllister testified, the dispatchers are not evaluated on the work of the field employees, nor do they review the field employees' work or follow up to see if it was completed correctly. (JA 125, 134-35, 257-58, 296-97.) Instead, as Avista notes (Br. 16), dispatchers are merely held accountable for "their ability to assign field employees"—in other words, for performing their own jobs. Being held accountable for their own performance does not make the dispatchers statutory supervisors.³⁹ (JA 429.)

C. Avista Failed To Carry Its Burden of Proving that the Dispatchers Are Supervisors Because They Assign Work Using Independent Judgment

The Board reasonably found that Avista failed to meet its heavy burden of establishing that the dispatchers assign work to employees using independent

³⁸ *Id.* at 690-92.

³⁹ *Mars Home for Youth v. NLRB*, Nos. 11-1250, 11-1590, 2011 WL 5068084, at *8 (3d Cir. Oct. 26, 2011) (motion to publish granted, Jan. 19, 2012).

judgment, and therefore that they are statutory supervisors. (JA 525-26.) In *Oakwood Healthcare*, the Board explained that “assign” involves “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.”⁴⁰ Further, “assign” refers to a “designation of significant overall duties to an employee, not to . . . [an] ad hoc instruction that the employees perform a discrete task.”⁴¹ Key to a finding of assignment is the putative supervisor’s “power to require that these duties be undertaken.”⁴² And, as with all of the supervisory functions, assignment authority must be exercised with independent judgment, rather than based on routine or ministerial considerations.⁴³ As shown below, the Board reasonably found that Avista failed to make this showing.

1. Dispatchers do not assign work; they merely provide ad hoc instructions

To establish the authority to assign work within the meaning of Section

⁴⁰ *Oakwood Healthcare*, 348 NLRB at 689.

⁴¹ *Id.*

⁴² *Mars Home*, 2011 WL 5068084, at *10 (citing *Golden Crest*, 348 NLRB at 729).

⁴³ *Jochims v. NLRB*, 480 F.3d 1161, 1171 (D.C. Cir. 2007) (stating that once an employee “was instructed by management” to do something, “her execution of those instructions was a routine task that did not involve independent judgment”).

2(11), it must be shown that the putative supervisor “prepare[s] the posted work schedules for employees, appoint[s] employees to the production lines, departments, shifts, or any overtime periods, or give[s] significant overall duties to employees,”⁴⁴ Avista failed to make such a showing. Indeed, the record reveals that the dispatchers do not prepare field employees’ shifts or assign them to particular areas, shifts, crews, or overtime periods, nor do they give significant overall duties to field employees. (JA 421, 426-28; JA 107, 124, 129, 211 224, 241-42, 283-85.)

Instead, the record suggests that dispatchers merely provide ad hoc instructions when they dispatch employees in response to trouble calls. (JA 426.) And even with respect to these ad hoc instructions, the dispatchers’ authority is limited. They are not trained to evaluate employees’ ability levels, and cannot select the particular employees who are sent in response to an incident. (JA 427; JA 113-14, 250.) In many situations, including ones that occur during normal business hours, dispatchers simply assign the trouble call to the employee designated by the Operations Department as the first responder in that geographic area. (JA 422; JA 102, 188, 246-47, 279, 377-80.) As for situations that arise after hours, when no first responder has been designated, dispatchers use a computerized system to call employees. (JA 422.) And in those after-hours situations,

⁴⁴ *Croft Metals*, 348 NLRB at 722.

dispatchers do not select particular employees to respond to an incident. Instead, they merely designate an employee classification, which in many cases is determined by a collective-bargaining agreement. (JA 423-24; JA 113-14, 250.)

Although Avista claims (Br. 19) that dispatchers have “total discretion” in assigning field employees to respond to trouble calls, Avista provided no evidence that the dispatchers have overruled or modified a first responder’s request for additional help. (JA 423.) To the contrary, the record shows only that once a first responder investigates, he either fixes the problem himself or tells the dispatcher which additional employee classifications and what type of equipment he needs. (JA 295.)

Moreover, Avista failed to prove that dispatchers have authority “to *require* that a certain action be taken.”⁴⁵ And supervisory authority is not established where, as here, the individuals in question have “authority merely to *request* that a certain action be taken.”⁴⁶ The record is clear that dispatchers cannot require employees to respond to a call-out or to work late. In fact, field employees can go into Avista’s computer system and take their names off the list for call-outs. Even if called by the computerized system to respond to a trouble call, employees do not have to accept the job, and there are no repercussions for refusing. (JA 424; JA

⁴⁵ *Golden Crest Healthcare*, 348 NLRB at 729 (emphasis in original).

⁴⁶ *Id.* (emphasis in original).

111-12, 124, 211, 285.) If a called employee fails to respond within four minutes, the computer simply calls the next person on the list. (JA 424 & n.14; JA 78-79.) In addition, while dispatchers can call in other dispatchers when the work load becomes stressful, they cannot require those dispatchers to report to work. (JA 424; JA 283-84.)

Nor can dispatchers move crews from a planned job to respond to a trouble call without discussing it with the foreman. (JA 423; JA 111-12, 241-42, 253-54, 284-85.) Because dispatchers can only request that employees respond to a trouble incident, they do not “assign” work under Section 2(11) of the Act.⁴⁷

Contrary to Avista’s claim (Br. 8-9, 15, 22), dispatchers do not have the authority to authorize overtime and cannot ask crews to remain past their shifts without first speaking with the crew’s supervisor. (JA 285.) Chief Distribution Dispatcher Broemeling, Director of Operations Alan Fisher, and Dispatcher McAllister all testified that dispatchers do not have the authority to require other employees to accept any assignment, including overtime assignments. (JA 427-28; JA 124, 211, 241-42, 283-85.) While dispatchers can ask employees to accept an assignment that would entail overtime, granting overtime to employees “as needed to complete assigned tasks is . . . a mechanical incident of assigning the

⁴⁷ *Mars Home*, 2011 WL 5068084, at *10 (citing *Golden Crest*, 348 NLRB at 729).

[employees] in the first place” and is not indicative of supervisory status.⁴⁸

In short, because Avista has not shown that dispatchers have authority to require employees to take an assignment, it has failed to prove that they assign work under Section 2(11) of the Act. As this Court stated in *Oil, Chem. & Atomic Workers*, “beyond the statements [of management regarding an individual’s supervisory authority], what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”⁴⁹ Such “tangible examples”—showing that the dispatchers assign substantial duties to field employees and can require them to perform those duties—are completely lacking here.⁵⁰

2. Avista failed to show that dispatchers use independent judgment in the assignment of work

For Avista’s dispatchers to be Section 2(11) supervisors, they must not only assign work to other employees, they must do so using independent judgment. As we now show, substantial evidence supports the Board’s finding (JA 426) that, even assuming the dispatchers assign work, they do not do so using independent judgment.

In *Oakwood Healthcare*, the Board clarified that “to exercise ‘independent

⁴⁸ *Atl. Paratrans*, 300 Fed. App’x at 56.

⁴⁹ 445 F.2d at 243.

⁵⁰ *See Beverly Enters.-Mass.*, 165 F.3d at 963.

judgment,’ an individual must at a minimum act, or effectively recommend action, free from the control of others and form an opinion or evaluation by discerning or comparing data.”⁵¹ Independent judgment involves “a degree of discretion that rises above the ‘routine or clerical’” and is not dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”⁵² As the Supreme Court has explained, “the statutory term ‘independent judgment’ is ambiguous with respect to the *degree* of discretion required for supervisory status.”⁵³ Therefore, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies” an employee for supervisory status.⁵⁴

The Board’s interpretation of the term “independent judgment” follows, in part, from the general legislative purpose behind Section 2(11) to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees—such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees” —who enjoy the Act’s protections even

⁵¹ 348 NLRB at 692-93.

⁵² *Id.* (citations omitted).

⁵³ *Kentucky River*, 532 U.S. at 713 (emphasis in original).

⁵⁴ *Id.*

though they perform “minor supervisory duties.”⁵⁵ Accordingly, in implementing that Congressional intent, “the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights,” which Congress sought to protect.⁵⁶ Indeed, “many nominally supervisory functions may be performed without the ‘exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding’ of supervisory status under the Act.”⁵⁷

Oakwood Healthcare cautions that an assignment that boils down to simply “equalizing workloads” is “routine and clerical in nature” and does not implicate independent judgment, “even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.”⁵⁸ In addition, the Board explained that an assignment does not involve independent judgment if there is one “self-evident choice.”⁵⁹

⁵⁵ *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). *Accord Amalgamated Clothing Workers of Am. v. NLRB*, 420 F.2d 1296, 1300 (D.C. Cir. 1969).

⁵⁶ *Beverly Enters.-Mass.*, 165 F.3d at 962.

⁵⁷ *Kentucky River*, 532 U.S. at 713 (citation omitted).

⁵⁸ *Oakwood Healthcare*, 348 NLRB at 693, 697 (reiterating that independent judgment is not proven by the “mere equalization of workloads”). *Accord Lynwood Manor*, 350 NLRB 489, 490 (2007).

⁵⁹ *Oakwood Healthcare*, 348 NLRB at 693.

Applying these principles, the Board reasonably found (JA 426) that Avista failed to meet its burden of proving that the dispatchers exercise independent judgment in the assignment of field employees. As we show below, the dispatchers' assignment decisions do not rise above the routine or clerical, and in sending first responders to investigate trouble calls, dispatchers follow either chronological order or Avista's guidelines. Finally, while the dispatchers have responsible, even difficult jobs, responsibility and difficulty alone do not confer supervisory status.

a. Dispatchers do not exercise independent judgment in sending first responders to trouble incidents

To establish that the dispatchers assign work using independent judgment, Avista had to show that their decisions rise above the routine or clerical.⁶⁰ But the record is clear that even when sending field employees to trouble calls, dispatchers do not rely on their own judgment in determining whom to send. Nor do the dispatchers assess employees' skills and qualifications before dispatching them. Rather, a foreman or manager, or the collective-bargaining agreement, determines who will be the first responder in a given geographical area. (JA 427.) Further, during a call-out of field employees after hours, a computer system automatically dials the qualified employee in that area, starting with the individual who has the

⁶⁰ See 28 U.S.C. § 152(11); *Oakwood Healthcare*, 348 NLRB at 688.

least amount of overtime. (JA 424; JA 78, 245-46.) A decision whether to send additional personnel to assist the first responder is made collaboratively between the dispatcher and the field employee. (JA 427; JA 40, 195.) Where, as here, decisions “are largely mechanical and geographical and do not rest on consideration of the skill” of the field employee, those decisions do not evince independent judgment.⁶¹ Thus, Avista failed to prove that its dispatchers make decisions that rise above the routine or clerical.

b. By simply following Avista’s guidelines in setting priorities, dispatchers do not exercise the discretion required for independent judgment

In order to prove that the dispatchers use independent judgment, Avista also had to show that their decisions require the use of discretion.⁶² Decisions like the ones made by the dispatchers here—which are driven by company guidelines—are not discretionary and therefore do not impart supervisory status.⁶³

For the vast majority of their shifts, dispatchers merely send first responders to trouble incidents in chronological order. (JA 189.) And when multiple trouble calls do occur, dispatchers follow company guidelines. The guidelines give first priority to incidents involving public and employee safety, and to providing service

⁶¹ *Atl. Paratrans*, 300 Fed. App’x at 56. *See also Meenan Oil*, 139 F.3d at 321.

⁶² *Oakwood Healthcare*, 348 NLRB at 693.

⁶³ *Id.*

to essential service customers. The next priority is to restore power to as many people as possible. (JA 427; JA 32, 85, 189-90, 214, 269.) Even though the guidelines are unwritten, they are well-known and based on common sense considerations. (JA 427; JA 214, 275.) As Dispatcher McAllister testified, “usually it’s obvious, I think, how to prioritize.” (JA 275.) In addition, prioritizing multiple calls takes only 1 to 4 percent of his time. (JA 427; JA 287, 291-92.) Thus, because dispatchers follow Avista’s guidelines when prioritizing multiple incidents, any related decisions are not evidence of supervisory status.⁶⁴

c. The dispatchers’ involvement with switching orders does not establish that they use independent judgment in assigning work

Avista errs in relying (Br. 20-21) on the dispatchers’ involvement with switching orders as proof that they assign work to others using independent judgment. While the dispatchers may have “highly responsible positions,” it is not “responsibility per se or exercise of discretion or independent judgment in themselves that signify [supervisory status] under section 2(11).”⁶⁵ Indeed, “directing others in work that may be complex and potentially dangerous is not

⁶⁴ *Id. Accord Mars Home*, 2011 WL 5068084, at *10.

⁶⁵ *Exxon Pipeline Co. v. NLRB*, 596 F.2d 704, 705 (5th Cir. 1979) (citations omitted).

enough to elevate an employee to supervisory status.”⁶⁶ Rather, Avista had the burden of proving that the dispatchers use independent judgment in assigning work *to others*.⁶⁷

The dispatchers’ primary role with switching orders is to coordinate the switching via radio and repeat the steps listed on the switching order to the employees involved. (JA 424, 429 n.18; JA 36, 68, 90-93, 226-28.) Most switching orders are written by system operators or engineers, not dispatchers. (JA 424-25; JA 64, 224.) Dispatchers do so only two or three times a month in emergency situations. (JA 425; JA 37, 65, 94, 200, 259.) Moreover, on the few occasions when dispatchers write switching orders, field employees can modify them, and they can insist that an engineer review any proposed changes. (JA 424-25.) As Dispatcher McAllister testified, his discretion in modifying a switching order is limited in that he would never modify an order without first getting approval from the field employee. (JA 256.) The Board reasonably found that simply relaying information to others is not evidence of independent judgment. (JA 429 n.18.)

⁶⁶ *Cooper/T.Smith, Inc. v. NLRB*, 177 F.3d 1259, 1266 (11th Cir. 1999) (citing *Exxon Pipeline Co. v. NLRB*, 596 F.2d 704 (5th Cir. 1979)).

⁶⁷ *See Exxon Pipeline*, 596 F.2d at 705.

3. Given Avista’s failure to show that dispatchers work using independent judgment, it errs relying on a so-called secondary indicator of status

Finally, in claiming that the dispatchers are statutory supervisors, Avista mistakenly relies on a so-called secondary indicator of supervisory status—one that is “not included in the statutory definition of supervisor but that often accompan[ies] the status of supervisor.”⁶⁸ It is settled that a secondary indicator of supervisory status cannot substitute for a showing of the primary indicia.⁶⁹

Thus, Avista’s argument (Br. 20) that dispatchers are the “only persons in authority” outside of normal business hours does not mean that they are themselves supervisors. As this Court has explained, such an argument “is without basis in the statutory definition of supervisors” because “Congress did not direct that the NLRA be interpreted such that there must be ‘supervisors’ in every workplace.”⁷⁰

Moreover, the dispatchers are not without supervision themselves. Supervisors are on-site during normal business hours, and Chief Distribution Dispatcher Broemeling is “on-call all the time.” (JA 428; JA 75.) In addition, on-call gas and electric supervisors are available 24 hours a day, and the Operations

⁶⁸ *Public Serv. Co. of Colorado v. NLRB*, 405 F.3d 1071, 1080 (10th Cir. 2005).

⁶⁹ *See, e.g., Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 242 (D.C. Cir. 1971).

⁷⁰ *VIP Health Servs.*, 164 F.3d at 649-50.

Department has asked the dispatchers to contact the on-call supervisor in the case of a major event so that Operations can “go out and run a lot of those orders out themselves and verify” the type of employee needed to respond. (JA 74, 168.) Furthermore, after hours, if no field employee in the area responds to a call-out, company policy requires the dispatchers to call the on-call supervisor to inform him that they have exhausted that area and must now call out employees from a different area. (JA 424; JA 248-49.) If a dispatcher needs more people at the end of a shift to respond to an incident, he calls the general foreman or the on-call supervisor.

D. Avista Misses the Mark in Criticizing *Mississippi Power & Light* and *Entergy Mississippi*—Cases on which the Board Did Not Rely

Avista wastes nearly a third of its brief (Br. 22-32) criticizing two decisions, *Mississippi Power & Light Co.*⁷¹ and *Entergy Mississippi, Inc.*,⁷² that the Board did not rely on here. To begin, Avista—misreading the Board’s April 11, 2011 decision on review and order—mistakenly takes the Board to task for relying on *Mississippi Power*. Although the Regional Director discussed *Mississippi Power* in his decision and direction of election, the Board in its decision on review and order explicitly “found it unnecessary to rely” on his discussion of that case.

⁷¹ 328 NLRB 965 (1999).

⁷² 357 NLRB No. 178 (2011).

Instead, as the Board noted in its decision on review and order, *Oakwood Healthcare* “represents ‘critical extant Board law,’ on the issue of supervisory status.”⁷³ (JA 435-36 & n.2.) Accordingly, Avista misses the mark in critiquing *Mississippi Power*.

Avista likewise invokes an imaginary foe in its lengthy critique of *Entergy Mississippi*, another case on which the Board did not rely here. Indeed, the Board did not even issue *Entergy Mississippi* until December 30, 2011—more than eight months after the Board denied Avista’s request for review of the Regional Director’s decision. (JA 525-26.) Moreover, as Avista itself recognizes (Br. 30), whether particular individuals are supervisors is an intensely fact-based inquiry. And as this Court has noted, “the Board’s conclusions on a record of conflicting claims are well within the measure of the substantial evidence test.”⁷⁴ The Board has made no universal determination that dispatchers can never be supervisors. Rather, based on the facts before it, the Board found that Avista failed to meet its burden of establishing that its claim that its dispatchers are statutory supervisors. It is of no moment that the Board reached a similar conclusion on the record before it in *Entergy Mississippi*.

⁷³ 348 NLRB 686 (2006).

⁷⁴ *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 396 (D.C. Cir. 1981).

For all of these reasons, Avista's arguments should be rejected. Substantial evidence supports the Board's finding that Avista failed to meet its burden of proving that the dispatchers are supervisors under the Act. Accordingly, Avista was obligated to bargain with the Union as the dispatchers' duly certified representative, and the Court should enforce the Board's Order in full.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Avista's petition for review and enforce the Board's Order in full.

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ADDENDUM

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1. STATUTES

Section 2 of the Act (29 U.S.C. § 152) provides in relevant part:

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, . . . but shall not include . . . any individual employed as a supervisor. . . .

(11) The term “supervisor” means 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.

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent

with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition . . . for the enforcement of such order No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

2. REGULATIONS

Section 102.67(f) (29 C.F.R § 102.67(f)) provides:

The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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|--------------------------------|---|-----------------------|
| AVISTA CORPORATION |) | |
| |) | |
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| |) | |
| v. |) | |
| |) | |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | Board Case No. |
| Respondent/Cross-Petitioner |) | 19-CA-33103 |

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,484 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 22nd day of February 2012

UNITED STATES COURT OF APPEALS
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)

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2012, I electronically filed the Board's final brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I served the brief on the following counsel through the CM/ECF system:

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