

Table of Contents

EMPLOYER’S REQUEST FOR REVIEW 1

GROUND FOR REQUEST FOR REVIEW 1

SUMMARY OF ARGUMENT 1

BACKGROUND FACTS..... 3

 I. REJECTED EXHIBITS DEMONSTRATE THAT RELIEF SUPERVISORS
 SPEND A REGULAR AND SUBSTANTIAL PROPORTION OF THEIR TIME
 PERFORMING SUPERVISORY DUTIES. 4

 II. THE SUPERVISORY DUTIES OF RELIEF SUPERVISORS..... 8

 III. ALL RELIEF SUPERVISORS PERFORM THE SAME SUPERVISORY
 DUTIES. 9

 IV. RELIEF SUPERVISORS REGULARLY SPEND A SUBSTANTIAL AMOUNT
 OF TIME PERFORMING SUPERVISORY DUTIES. 13

ARGUMENT AND CITATION TO AUTHORITY 14

 I. THE PETITIONED-FOR UNIT IS INAPPROPRIATE FOR BARGAINING
 BECAUSE RELIEF SUPERVISORS ARE STATUTORY “SUPERVISORS”
 UNDER SECTION 2(11) OF THE ACT. 15

 II. THE HEARING OFFICER’S CONDUCT IN REFUSING AMR’S
 ADDITIONAL EVIDENCE REFLECTING THE AMOUNT OF TIME THAT
 RELIEF SUPERVISORS SPENT ENGAGING IN SUPERVISORY DUTIES
 AND HIS RULING TO NOT ACCEPT THE DOCUMENTS HAS RESULTED
 IN PREJUDICIAL ERROR..... 25

CONCLUSION..... 27

Citation of Authorities

ALADDIN HOTEL, 270 NLRB 838 (1984)..... 16, 21
ARCHER MILLS, INC., 115 NLRB 674 (1956) 17, 20
BARRE NATIONAL, INC., 316 NLRB 877 (1995) 25
CANONSBURG GENERAL HOSP. ASS'N, 244 NLRB 899 (1979)..... 18
CARLISLE ENGINEERED PRODUCTS, INC., 330 NLRB 1359 (2000)..... 19
NORTH MANCHESTER FOUNDRY, INC., 328 NLRB 372 (1999) 25
OAKWOOD HEALTHCARE, INC., 348 NLRB 686 (2006) 16, 17, 19, 23, 24
OSTEOPATHIC HOSPITAL, 327 NLRB 1172 (1999) 25
RHODE ISLAND HOSPITAL, 313 NLRB 343 (1993)..... 16
SWIFT & CO., 129 NLRB 139 (1961) 17

EMPLOYER'S REQUEST FOR REVIEW

COMES NOW the Employer, American Medical Response Ambulance Service, Inc., (hereafter "the Employer" or "AMR"), by and through its undersigned counsel, and timely files this Request for Review of the Regional Director's Decision and Direction of Election (hereafter "D&DE"), which issued on March 21, 2012, within the deadline as extended. This Request for Review is filed pursuant to Section 102.67(c)(1) & (2) of the National Labor Relations Board's Rules and Regulations, as amended.

GROUNDS FOR REQUEST FOR REVIEW

The Employer requests review of that portion of the D&DE which finds that its relief supervisors are not statutory supervisors, on the grounds that: (1) The conduct of the Hearing Officer resulted in prejudicial error to the Employer; (2) The D&DE is predicated on clearly erroneous factual findings which prejudicially affect the rights of the Employer; and, (3) Although the Regional Director recognized that relief supervisors perform supervisory functions as set forth within Section 2(11) of the Act, his finding that they failed to do so on a regular and substantial basis represents a significant departure from the undisputed record evidence, along with officially reported Board precedent.

SUMMARY OF ARGUMENT

The Employer operates a medical transport company that provides emergency medical services in Dona Ana County, New Mexico on a 24/7 basis, including responses to 911 calls and non-emergency patient transfer services and standby events. (Tr. 25-27). On February 15, 2012, the National Emergency Medical Service Association ("the Union") filed a petition seeking to represent "All full-time and part-time EMTs and Paramedics, Mechanics, and Lead Operations Employees Employed by the Employer in Las Cruces and in/and around Dona Ana County." At

the hearing, the Union clarified that it was seeking to represent “All full-time and part-time clerks, billers, paramedics, EMTs [emergency medical technicians], mechanics, and VST [vehicle service technician], along with the Employer’s “relief supervisors,” but excluding all operations supervisors. (Tr. 9). In response, the Employer argued that the proposed unit was inappropriate because, among other things, the relief supervisors are statutory supervisors as defined by Section 2(11) of the Act.

In the D&DE, the Regional Director noted that the “the record establishes that relief supervisors perform the same functions as operations supervisors when they are acting as the on-duty supervisor, including assigning and directing work, scheduling employees, and issuing and effectively recommending discipline, such that they would fulfill the indicia of statutory supervisors under Section 2(11).” D&DE, p. 9. Nonetheless, the Regional Director found that, “based on a lack of evidence that relief supervisors serve in that role on anything other than a sporadic and irregular basis,” relief supervisors did not spend “a regular and substantial portion of their work time performing supervisory functions and, thus, are not statutory supervisors.” D&DE, p. 9.

This finding ignored overwhelming evidence to the contrary that was either presented at the hearing or subsequently provided to the Hearing Officer at his direction while the record remained open, as well as numerous Board decisions finding supervisory status under similar circumstances. This evidence fully established that the relief supervisors regularly and permanently occupied their positions (for which they earned a significant pay premium at all times), performing supervisory functions in excess of 15 percent of their overall time worked. For these reasons and as more fully set forth below, the D&DE must be overturned to the extent it purports to include relief supervisors within the bargaining unit.

BACKGROUND FACTS

The Hearing on this matter commenced before Hearing Officer Mitchell Rubin at the Federal Courthouse in Las Cruces, New Mexico on Tuesday, February 28, 2012 and continued through Friday, March 1, 2012. Ten witnesses ultimately testified at the Hearing: Joaquin Graham (Operations Manager), Marc Lopez (Supervisor), and Brynn Quirico (Supervisor) testified for AMR, while Cevan Griffin (former employee)¹, Damon Griffin (Paramedic)², Andrew Gomez (Mechanic), Jaime Hanson (EMT Basic), Charlie Alvarenga (Paramedic), Petti Erstad (Field Training Officer), and Stephanie Andavazo (Lead Clerk) testified on behalf of the Union.

AMR currently employs five supervisors (three on a full-time basis and two in a relief capacity). (Er. Ex. 2, Tr. 52). The Employer is required to deploy supervisors at all times pursuant to its operating agreement with Dona Ana County. (Er. Ex. 3). When acting as on-duty supervisors, the relief supervisors “step into the shoes” of their full-time counterparts. (Tr. 91, 375). As the Regional Director himself pointed out:

Therefore, when one or more of its three operations supervisors is absent due to illness or scheduled leave, the Employer’s relief supervisors step in to act as operations supervisor on a per-shift basis.

(D&DE, p. 5). The Regional Director acknowledged that the Employer has “two designated relief supervisors” who act as operations supervisors as needed. (D&DE, p. 5) (emphasis added).

As numerous witnesses testified and as found by the Regional Director, there is no difference between operations supervisors and relief supervisors when the relief supervisors are serving as on-duty supervisors.

The record shows that relief supervisors, when acting as the on-duty

¹ Griffin has an outstanding unfair labor practice charge against AMR.

² Damon Griffin is Cevan Griffin’s husband.

supervisor, perform the same functions and duties, and possess the same authority and responsibilities, as operations supervisors.

(D&DE, p. 6). Also, as the Regional Director pointed out:

Here, the record establishes that relief supervisors perform the same functions as operations supervisors when they are acting as the on-duty supervisor, including assigning and directing work, scheduling employees, and issuing and effectively recommending discipline, such that they would fulfill the indicia of statutory supervisors under Section 2(11).

(D&DE, p. 9).

I. REJECTED EXHIBITS DEMONSTRATE THAT RELIEF SUPERVISORS SPEND A REGULAR AND SUBSTANTIAL PROPORTION OF THEIR TIME PERFORMING SUPERVISORY DUTIES.

At the conclusion of the Hearing, Hearing Officer Rubin left the record open until March 9, 2012, for the limited purpose of compelling the Employer to submit additional exhibits in response to modified subpoena duces tecum number B-571654, issued by the Region on February 24, 2012 (and received by the Employer on February 27, just 24 hours prior to the hearing). (Tr. 229). The Employer submitted the subpoenaed documents on March 7th, 8th, and 9th, reflecting a substantial amount of time spent by relief supervisors in the performance of their supervisory duties.

Remarkably, however, the Hearing Officer subsequently reversed course after previously holding the record open and insisting upon the submission of these documents in order to “make it easier for the reader to understand,” refusing to accept the subpoenaed documents, striking the record of those already furnished, and closing the record retroactive to the conclusion of the hearing.³ (Tr. 309-14, 613, 617).⁴

³ A copy of the subpoena and the Hearing Officer’s subsequent Order retroactively closing the record and refusing to accept the Employer’s documents are attached as Exhibits A and B, respectively. The subpoena was modified at the hearing, only requiring responses to numbers 2 and 8.

⁴ The Employer submitted its brief on the evening of March 19, 2012. The Regional Director issued his D&DE on March 21, 2012.

Within the four business days provided to it for a response, AMR generated a series of reports reflecting the hours each relief supervisor was scheduled to perform supervisory work compared to their hours of scheduled non-supervisory work, as well as the underlying raw data over the most recent two-year period. AMR also provided a chart reflecting the percentage of shifts for which relief supervisors engaged in supervisory duties.

On March 7, AMR provided its first set of documents demonstrating the amount of time spent by relief supervisors performing supervisory duties, attached as Exhibit C. This report listed the total hours scheduled for each employee designated as a relief supervisor between January 2010 and February 2012, broken down by hours worked as operational supervisor, relief supervisor, and non-supervisory duties. The final column shows the percentage of supervisory hours as compared to non-supervisor hours for each relief supervisor. This chart demonstrates proportions of supervisory time ranging from 12.5% to 33.39%.⁵ See Exhibit C.

The second report is a 19-page chart identifying the supervisor for each shift from January 1, 2010 through February 12, 2012. Relief supervisors are highlighted and are also indicated by the designation “Shift as RLF” in the left column. This report of scheduled shifts provides the raw data for determining both the percentage of supervisory hours for each relief supervisor contained in the first report, as well as the percentage of total shifts covered by relief supervisors in the fourth report. The third report simply lists the job classifications for each of these employees, including when they became relief supervisors. The fourth report lists the number of shifts covered by operations supervisors and relief supervisors, demonstrating that 24.94% of the shifts over the preceding two-year period were covered by relief supervisors. See

⁵ These figures do not include Mike Sandoval, who had been a relief supervisor for less than a month, Damon Griffin who failed to complete relief supervisor training, and David Journey who lost his relief supervisory roll after just a few hours. The percentages in the final column only compare relief versus non-relief hours. During this period, four of the individuals listed served as operations supervisors as well as relief supervisors.

Exhibit C.

On March 8, AMR furnished an updated version of the third report in response to the Region's subpoena, clarifying when certain employees started and stopped working as relief supervisors, attached as Exhibit D. This chart explains when Angela Morgan did not work as relief supervisor, notes that Marc Lopez never worked as a relief supervisor, and that Damon Griffin never completed his relief supervisor training. It also shows that David Journey lost his relief supervisor status the same month that he assumed the position. *See* Exhibit D.

On March 9, the Employer provided a chart reflecting shift assignments from January, 2010 through July, 2012, attached as Exhibit E. The Employer calculated the hours worked as a relief supervisor by contrasting the hours scheduled in this chart with the second chart in Exhibit C.⁶ The Employer further offered to provide over 700 pages of duty rosters (an example of which was introduced as Employer's Exhibit 34), requesting two additional business days in which to prepare and send the documents. Shortly thereafter, however, the Hearing Officer convened a conference call to declare that he was closing the record retroactive to the conclusion of the hearing, and rejecting (without explanation) any and all documents subsequently submitted in response to the subpoena that he had served upon AMR himself. *See* Exhibit B.

Exhibits C, D, and E to this Request were presented to the Hearing Officer as responsive to the modified subpoena following the conclusion of the hearing and while the record remained open. These documents make clear that one quarter of AMR's shifts are covered by relief supervisors, and that relief supervisors range in the amount of time spent performing supervisory duties from 12.5% to over one-third of their hours scheduled. Consequently, relief supervisors spend a regular and substantial portion of their time performing supervisory duties.

⁶ The Hearing Officer had asked the Employer to provide raw data showing hours worked for each day, but this information could only be obtained through a third-party vendor that did not have a database with the ability to sort through the information requested.

Q How regularly do relief supervisors work in a role as operation supervisor?

A Pretty regularly. I mean, it's hard to put a number on that, but pretty regularly, again, given all the different positions and times that they occupy that role, it's pretty frequent.

Q You would say it's frequent?

A Yes.

(Tr. 205).

The Employer permanently designates employees as relief supervisors, giving them a pay differential at all times whether they are performing supervisory duties or not. (Tr. 377, 532).

Q Assuming all obligations are met and the employee is meeting their performance requirements, will they always be considered a relief supervisor?

A Say that again?

Q Sure. I guess where I'm trying to get at is, do the relief supervisors get more pay for being a relief supervisor?

A Yes, relief supervisors make an additional five percent differential over their hourly, their base hourly rate, all of the time, so regardless of whether or not, or what position they are currently in, they receive an additional five percent differential and that essentially speaks to the example that I led earlier, if the on-duty supervisor is unable to come in for any given reason or whatever, and we assign a relief supervisor that task, they are under the obligation to go ahead and accept that assignment for the day, because they function as a supervisor.

(Tr. 115). This permanent assignment to relief supervisor is not sporadic, but rather includes a regular schedule of assignments.

The documents provided to the Hearing Officer at his insistence following the hearing demonstrate the large portion of time spent by relief supervisors performing supervisory duties. The inexplicable retroactive closing of the record and rejection of the Employer's documents

severely prejudiced AMR by prohibiting it from demonstrating the substantial and regular nature of the supervisory functions performed by relief supervisors.

II. THE SUPERVISORY DUTIES OF RELIEF SUPERVISORS.

Although the Regional Director fully acknowledged that relief supervisors perform supervisory duties (D&DE, p. 9), a brief review of how they do so is instructive for purposes of identifying the substantial and regular nature of their roles as supervisors.

The three full-time supervisors are Melissa James, Mark Lopez, and Brynn Quirico. (Er. Ex. 2; Tr. 35-36). The two relief supervisors are: Mike Sandoval⁷ and Matt Gaskins⁸. (Er. Ex. 2). Within the past year, AMR's most recent relief supervisors were Cevan Griffin⁹, Brynn Quirico¹⁰, Davis Edmonds¹¹, and Eric Parmer. (Tr. 204-205). The supervisors are described interchangeably as "field supervisors," "on-duty supervisors," "supervisors," or "relief supervisors." (Tr. 64). The on-duty supervisor is the highest ranking individual present during a shift. (Tr. 69-70).

All supervisors oversee the day-to-day ambulances and crews. (Tr. 47). They provide for immediate needs, address issues/concerns, serve as the front line for the resolution of complaints, make sure the ambulances get to where they need to be, and serve as liaisons to AMR's customers, patients, hospitals, and nursing centers. (Tr. 47, 69). As set forth within the supervisory job description, all supervisors are responsible for day-to-day operations, including facilitation of internal communications between field staff and management, outside agency interface, system status monitoring, facilitating short-term scheduling needs, equipment and

⁷ Sandoval became a relief supervisor in January 2012. (Tr. 55).

⁸ Gaskins became a relief supervisor in 2008 and is a currently employed in that capacity. (Tr. 55).

⁹ Griffin was a relief supervisor from the time she became a transport coordinator on November 16, 2009 through her termination. (Tr. 56; Er. Ex. 59). This was corroborated by Griffin's husband, who testified that she served as a relief supervisor at the same time she was designated as a transport coordinator. (Tr. 398).

¹⁰ Quirico served as a relief supervisor from April 2010 through January 2012. (Tr. 529).

¹¹ Edmonds served as a relief supervisor from mid-2010 through December 2011. (Tr. 55).

supply maintenance, as well as other operational support functions assigned by the Operations Manager. (Tr. 71; Er. Ex. 6). All of these job duties are applicable, and were assigned to the relief supervisors. (Tr. 76).

As the Regional Director found, relief supervisors perform the exact same duties as operations supervisors while are on duty. Specifically, he held that “relief supervisors, when acting as the on-duty supervisor, perform the same functions and duties, and possess the same authority and responsibilities, as operations supervisors.” (D&DE, p. 6). Furthermore, the performance of these supervisory duties is substantial and regular. The Regional Director stated that the Employer has “two designated relief supervisors” who act as operations supervisors as needed. (D&DE, p. 5). These supervisory duties are permanent and identical to full-time operations supervisors.

III. ALL RELIEF SUPERVISORS PERFORM THE SAME SUPERVISORY DUTIES.

Without supervisors, AMR’s operations would “grind to a halt.” (Tr. 117). That is why relief supervisors must always be available in the event that a full-time supervisor needs to take vacation, is sick, needs to take a day off, is assigned to a crisis situation, or is preoccupied with administrative paperwork. (Tr. 125 – 127). A relief supervisor may also undertake supervisory duties to obtain additional overtime. (Tr. 126).

All supervisors, including relief supervisors, share an office within AMR’s local base of operations at Post 7 that is labeled “Supervisor,” and all supervisors wear a white shirt embroidered with the word, “Supervisor.” (Er. Ex. 4; Tr. 33, 38, 65, 123, 530, 603). When performing supervisory functions, all supervisors drive a 2007 white Chevy Tahoe that is labeled “Supervisor” across the windshield. (Er. Ex. 5; Tr. 62-63, 67-68, 124, 530, 603).

Each on-duty supervisor is provided a “supervisor” phone. (Tr. 530). All supervisors attend regularly-held bi-weekly supervisory meetings. (Tr. 50, 384). The supervisors document their daily events in a shift report. (Tr. 88). This communication log is used by the on-duty supervisor to inform the oncoming supervisory team of developments that took place over the course of the day. (Tr. 88). Relief supervisors frequently complete them. (Tr. 88). Relief supervisors act as full-time supervisors when on-duty for all intents and purposes. (Tr. 91, 375). Graham, Lopez, and Quirico testified that on those occasions, there is no difference between a full-time supervisor and the relief supervisor who is filling in. (Tr. 124 – 125, 374, 529).

Relief supervisors are not chosen at random. Rather, candidates must be in good standing, have at least one year of paramedic experience, and formally apply for the position. (Tr. 120).¹² Upon promoting into the position, they must complete a supervisory orientation process and on-the-job-training with a full-time supervisor that can take weeks before they are allowed to work on their own. (Tr. 120, 122). As compensation for this greater responsibility, relief supervisors earn an additional five percent differential over the base hourly rate at all times. (Tr. 115-16). This rate places them above all non-supervisory employees in compensation. (Tr. 125).

Relief supervisors have authority to recommend *and* discipline employees on their own without first seeking approval. (Tr. 49, 85, 102–103, 107, 385, 437, 535). They frequently document this discipline in their daily shift reports. (Er. Exs. 25, 26, 33, 36). In so doing, they are enforcing AMR’s progressive disciplinary policy, which typically starts with a verbal warning or coaching session, followed by a written warning, a final written warning, and then

¹² Employer Exhibit 11 is a management interview template that is utilized when employees apply for the relief supervisory position. (Tr. 121).

termination. (Er. Ex. 9; Tr. 107-108). The specific level of correction action, however, depends on the facts and circumstances surrounding each situation. (Er. Ex. 9).

The relief supervisors also have authority to assign employees to a certain place and time. (Tr. 99, 240). When acting as on-duty supervisor, the relief supervisors are in charge of building employee schedules by completing the duty roster, which assigns medic units (ambulances) to teams of employees for the day. (Tr. 48–49, 90, 532, 534). The on-duty supervisor opens the duty roster and enters the names of those employees scheduled for the following day. (Tr. 90). In the event that he or she encounters a hole in the schedule, the supervisor fills it by sending a text message to the crews notifying them that they will be moved around based on operational needs. (Tr. 90, 99, 534). These decisions are made within a limited timeframe, typically right there and then. (Tr. 534).

Relief supervisors must also consider a number of factors when prioritizing calls. (Tr. 534-535). For example, if relief supervisors receive two calls at the same time and only have one ambulance in service, they must use their independent judgment as to where to send the unit by taking into account distance, the severity of the call, and the number of patients involved. (Tr. 534). Likewise, if an employee calls in sick, the relief supervisor has authority to call their partner in early. (Tr. 100). These types of decisions are also made on the fly. (Tr. 100). If it is necessary in their sole determination, a relief supervisor can also hold employees over at the end of their shifts. (Tr. 532).

Relief supervisors have the authority to grant or deny shift trades after taking many factors into account, such as the individual's licensure level, whether the trade will result in overtime, and based on the employees' personal needs. (Tr. 100 – 102). Relief supervisors also have the authority to grant or deny personal time off. (Er. Exs. 42, 45, 46, 47, 48, 49, 50). In

addition, relief supervisors are integrally involved in the hiring process. (Tr. 106, 535). They often sit in on panels as part of a structured interview process. (Tr. 107, 536). At the end of the interview, relief supervisors can recommend that the applicant be hired, and these recommendations are often followed by management. (Tr. 107, 536). Employer Exhibit 52 offers just one example in which relief supervisor Matt Gaskins interviewed an applicant and recommended their hire. (Er. Ex. 52).

If employees have problems at work, they often come to their relief supervisors to resolve them. (Tr. 116 – 117, 537-538). Ms. Quirico testified that as a relief supervisor, employees often came to her with problems with their partners, protocol issues, treatment issues, outside agency concerns (i.e., hospitals, fire department), and mechanical issues. (Tr. 538). Graham and Quirico’s testimony was bolstered by Union witness Charlie Alvarenga, who acknowledged that he often came to his relief supervisor with grievances concerning the mechanical condition of Medic Unit 5. (Tr. 476).

Relief supervisors are key employees when they are on shift, serving in the exact same capacity as operations supervisors, and retaining full supervisory authority. (D&DE, p. 9) (“the record establishes that relief supervisors perform the same functions as operations supervisors when they are acting as the on-duty supervisor, including assigning and directing work, scheduling employees, and issuing and effectively recommending discipline, such that they would fulfill the indicia of statutory supervisors under Section 2(11)”). Furthermore, relief supervisor is a permanent designation, which requires a paramedic to undergo extensive training and leads to a higher pay differential. (D&DE, p.5) (the Employer has “two designated relief supervisors”). Relief supervisors are paid more at all times, regardless of whether they are performing supervisory duties.

IV. RELIEF SUPERVISORS REGULARLY SPEND A SUBSTANTIAL AMOUNT OF TIME PERFORMING SUPERVISORY DUTIES.

Notwithstanding the Regional Director’s finding that the record lacked a clear pattern or predictable schedule for assigning relief supervisors (D&DE, p. 9), the fact remains that relief supervisors regularly act as on-duty supervisors. (Tr. 205). Relief supervisors typically cover 24-hour shifts. (Tr. 125). In 2009, AMR initiated a program that allowed them to maintain a consistent number of supervisory hours on an ongoing basis. (Tr. 118–119). This program allowed full-time supervisors to devote up to 24 administrative hours per month to catch up with projects or take paid time off. (Tr. 118).

At the hearing, the Employer introduced the following Exhibits discussing the time that relief supervisors spent engaging in supervisor duties:

Exhibit No.	Dates	Employee Name	Supervisory Dates	Percentage of all Shifts as Supervisor
19	10/03/11 – 12/28/11	Matthew Gaskins	10/10/11 10/28/11 11/04/11 11/12/11 12/10/11 12/12/11	20%
20	10/01/11 – 12/31/11	Davis Edmonds	10/23/11 11/24/11 12/03/11(a.m.) 12/03/11(p.m.) 12/18/11 12/26/11	16.6%
21	10/04/11 – 12/29/11	Brynn Quirico	10/23/11 11/10/11 12/1/11 12/18/11 12/21/11	13.8%
22	10/01/11 – 02/02/12	Cevan Griffin	10/08/11 11/21/11 11/26/11	20.3%

			1/06/12	
			1/08/12	
			1/09/12	
			1/10/12	
			1/15/12	
			1/24/12 (a.m.)	
			1/24/12 (p.m.)	
			1/28/12	

These figures (which were introduced at the hearing) were further augmented by the documents provided on March 7-9. The Employer's records clearly demonstrate that relief supervisors perform supervisory duties for an average of 20% of their scheduled time. Also, individual relief supervisors spend between 13% and 33% of their time performing supervisory functions. *See* Exhibits C-E. The Region's refusal to admit and consider these records, which were subpoenaed (and therefore deemed presumptively relevant) by the Hearing Officer himself, resulted in prejudicial error to the Employer.

ARGUMENT AND CITATION TO AUTHORITY

The Board will grant a request for review on one of the following grounds:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

§102.67, NLRB Rules and Regulations.

I. THE PETITIONED-FOR UNIT IS INAPPROPRIATE FOR BARGAINING BECAUSE RELIEF SUPERVISORS ARE STATUTORY “SUPERVISORS” UNDER SECTION 2(11) OF THE ACT.

In the DD&E, the Regional Director held that relief supervisors perform the same functions as the operations supervisor when they are acting as on-duty supervisor, including assigning and directing work, scheduling employees, and issuing and effectively recommending discipline, such as they would fulfill the indicia of statutory supervisors under Section 2(11) of the Act. (D&DE, p. 9). The Regional Director, however, declined to find supervisory status, on the basis that the relief supervisors only serve in a supervisory role on a “sporadic and irregular basis,” and do not spend a regular and substantial portion of their work time performing supervisory functions. *Id.* Specifically, the Regional Director wrote:

. . . However, based on a lack of evidence that relief supervisors serve in that role on anything other than a sporadic and irregular basis, I find that the relief supervisors do not spend a regular and substantial portion of their work time performing supervisor functions, and thus, are not statutory supervisors.

Rather, the record establishes only that relief supervisors fill in for individual shifts in the absence of operations supervisors on an irregular and sporadic basis, as they are willing and able to do so.

(DD&E, p 9-10).

The Regional Director erroneously based his decision on a “lack of evidence,” completely ignoring the record and the documents that AMR attempted to introduce, which were rejected by the Hearing Officer. Accordingly, the only issues that remain are: (1) whether the Regional Director’s findings that the relief supervisors do not “regularly” serve as supervisors, but instead do so on a “sporadic and irregular basis” was supported by the record; (2) whether the Regional Director’s findings that the relief supervisors do not spend a “substantial” portion of their work time engaging in supervisory duties is supported by the record; and (3) whether the

Hearing Officer's conduct in refusing AMR's additional evidence reflecting the amount of time that relief supervisors spent engaging in supervisory duties and his ruling to not accept the documents has resulted in prejudicial error.

A. The Regional Director's Conclusion That The Relief Supervisors Only Serve In This Role On A "Sporadic Or Irregular" Basis Is Not Supported By The Evidence.

As the Regional Director noted, the standard *repeated* by *Oakwood* continues to be whether an individual spends a "regular and substantial" portion of his or her time performing supervisory functions. *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). "Regular" and "Substantial" are terms of art that have different meanings.

Under the Board's standard, "regular" means according to a pattern *or* schedule, as opposed to sporadic substitution. *Id.* (citing *Rhode Island Hospital*, 313 NLRB 343, 349 (1993) (employee serving as a relief supervisor every fourth weekend is a supervisor)). In *Rhode Island Hospital*, the Board found laundry group leaders to be statutory supervisors based on their "regular" rotation as a weekend supervisor. *Id.* at 349. Specifically, each group leader worked one weekend every four weeks as the weekend supervisor and while doing so possessed full supervisory authority. *Id.* The Board found that this substitution was not sporadic, but regular and substantial and the group leaders were excluded from the petitioned for units as they were supervisors under Section 2(11). *Id.* Notably, the Board in *Rhode Island Hospital* cited to *Aladdin Hotel*, 270 NLRB 838 (1984) in determining that the group leaders worked as supervisors on a "regular" basis. *Rhode Island Hospital*, 313 NLRB at 349.

The Board also confirmed in *Oakwood* that it has not adopted a strict numerical definition of "substantiality" and has found supervisory status where the individuals have served in a supervisory role for at least 10-15 percent of their total work time. *See Oakwood*, 348 NLRB at

694, fn. 49 (citing *Archer Mills, Inc.*, 115 NLRB 674 (1956) (ten percent deemed sufficient) (emphasis added); and *Swift & Co.*, 129 NLRB 139 (1961) (fifteen percent deemed sufficient) (emphasis added).

B. The Relief Supervisors “Regularly” Act As 2(11) Supervisors.

In determining that the relief supervisors do not regularly engage in supervisory duties, the Regional Director claims, without supporting his concluding statement, that:

The Employer presented evidence demonstrating the number of hours worked by four individuals serving as relief supervisors for a three-month period of time, October 1, 2011 through December 31, 2011. This brief snapshot establishes that relief supervisors worked anywhere from approximately 8% to 18% of their total hours as relief supervisors during which they performed supervisory functions. **However, the record fails to demonstrate any established pattern or predictable schedule used by the Employer to assign relief supervisor shifts.**

(DD&E, p. 9) (emphasis added).

The Regional Director then cites to *Oakwood* in an attempt to bolster his finding that the relief supervisors did not “regularly” engage in supervisory duties. *Id.* *Oakwood*, however, is clearly distinguishable from the matter at hand. In *Oakwood*, the Board initially reversed that portion of the Regional Director’s decision finding permanent charge nurses to be non-supervisory. *See Oakwood*, 348 NLRB at fn.4. For nurses who acted as supervisors on a part-time basis, the nurses chose a rotating charge nurse at the beginning of every shift on an *ad hoc* basis, from among any one of the 112 registered shift nurses. *See Oakwood*, 348 NLRB at 694.

In *Oakwood*, the record revealed that the rotating charge nurses had no established pattern or predictable schedule for when and how often the registered nurses would take turns as charge nurses. *Id.* To bolster this argument, the majority cited examples demonstrating how four separate departments within the hospital utilized different procedures when deciding which registered nurse would be assigned as the charge nurse. *See Oakwood*, 348 NLRB at 699. Based

on the four separate department's individualized procedures, the majority found that there was no "regularity" for assigning the charge nurse, declining to conduct an analysis into whether the rotating nurses acted as supervisors for a "substantial" part of their duties. *Id.*

Comparing the relief supervisors to the rotating charge nurses is inapposite – any nurse could become a charge nurse in *Oakwood*. The rotating charge nurses jumped in and out of the position. The relief supervisors in the instant matter, on the other hand, consist solely of individuals (two at present) who are permanently assigned to those roles, for which they were specially trained and earn a regular pay differential. (Tr. 115-116, 120, 122, 125, 204-205 Er. Ex. 2). The Regional Director even acknowledged that the Employer has "two designated relief supervisors." (D&DE, p. 5) (emphasis added). An employee is either a relief supervisor or they are not; the Employer does not randomly pull up paramedics to serve as rotating supervisors.

Moreover, unlike in *Oakwood* where the nurses were scheduled at the beginning of every shift, relief supervisors are scheduled in advance to act as relief supervisors when it is known that an operations supervisor will be unavailable. (Tr. 125-27). There was no record evidence establishing that relief supervisors, like the charge nurses in *Oakwood*, were only scheduled at the beginning of every shift. Finally, AMR introduced various Exhibits reflecting the percentage of time that the relief supervisors spent engaging in supervisory duties. (Er. Exs. 19-22).

The Regional Director's reliance on *Canonsburg General Hosp. Ass'n*, 244 NLRB 899 (1979), is therefore misplaced. In *Canonsburg*, the hospital had permanent supervisor nurses, permanent relief supervisors, and one acting relief supervisor. The Board reversed the decision of the Regional Director which found that the acting relief supervisor was a 2(11) supervisor. However, AMR's relief supervisors are a permanent position, much like the permanent relief supervisors in *Canonsburg* who actually were found to be supervisors.

The permanence of the Employer’s designation of its relief supervisors is what sets the instant facts apart from the *Oakwood* rotating charge nurses and *Canonsburg* acting relief supervisor. The Regional Director misconstrued the legal standard when finding: “[e]ven in the absence of operations supervisors, relief supervisors are [not] assigned to cover those shifts on any type of established pattern or predictable schedule. Rather, the record establishes only that the relief supervisors fill in for individual shifts in the absence of operations supervisors on an irregular and sporadic basis, as they are willing and available to do so.” (D&DE, p. 10).

Taking the Regional Director’s reasoning to its logical extension, a relief supervisor who performed supervisory duties 90% of the time would still not be “regular and substantial” to the extent they were scheduled on an irregular or sporadic basis. Holding that “the record fails to demonstrate any established pattern or predictable schedule used by the Employer to assign relief supervisor shifts” misapplies the *Oakwood* standard. (D&DE, p. 9) Rather, the Board in that case noted the established precedent that a supervisory role is by definition *not* sporadic if at least 10-15 percent of the employee’s total work time is spent performing supervisory duties. *See Oakwood*, 348 NLRB at 694. Consequently, the regularity of the supervisory duties turns upon the percentage of time spent performing those duties. Under any calculation, relief supervisors spend at least 10% to 15% of their work time performing supervisory duties, and therefore spend a regular and substantial portion of their time engaging in supervisory functions.¹³

While the Board does not adhere to a strict numerical definition, it has found supervisory status where the individual performs supervisory duties for 10-15 percent of their total time

¹³ The Regional Director’s reliance on *Carlisle Engineered Products, Inc.*, 330 NLRB 1359 (2000) is also misplaced. The Board in *Carlisle* found that the engineers only spent four percent of their time performing supervisory functions, and failed to find any supporting evidence that the engineers actually engaged in supervisory duties. The relief supervisors here engage in supervisory duties no different from operations supervisors, as found by the Regional Director himself, and spend far more than four percent of their time performing these functions.

worked. *See Oakwood*, 348 NLRB at 694, fn. 49 (citing *Archer Mills, Inc.*, 115 NLRB 674 (1956) (10 percent deemed sufficient)). Those exhibits that were admitted into evidence (and went un rebutted) establish that the relief supervisors in this case actually spent between 14% and 20% of their time engaging in supervisory duties, easily surpassing the Board's standard for "regular and substantial." (Er. Exs. 19-22). Furthermore, the documents provided to the Hearing Officer following the hearing (while the record remained open and well before the Region arbitrarily chose to exclude them by retroactively closing the record) show that relief supervisors worked 24.94% of all supervisory shifts during the period from January 1, 2010 to February 12, 2012. *See Exhibit C.*

Nonetheless, the Regional Director somehow found that, "based on a lack of evidence that relief supervisors serve in that role on anything other than a sporadic and irregular basis," they did not spend "a regular and substantial portion of their work time performing supervisory functions and, thus, are not statutory supervisors." D&DE, p. 9 (emphasis added). The Regional Director further found that the "brief snapshot" presented at the hearing demonstrated that relief supervisors worked from 8%-18% of their total hours as relief supervisors. That is because the Regional Director arbitrarily chose to skew his own analysis by confining record evidence to the fourth quarter of 2011, after subpoenaing (and receiving) two years of additional data.

The Employer's records in fact show that relief supervisors spend between 13% and 33% of their time performing supervisory duties, with an average of approximately 20%. The Hearing Officer had specifically compelled the Employer to produce documents which he believed to be relevant, and then refused to accept those documents after receiving them while the record remained open. These documents clearly demonstrated a substantial portion of time spent performing supervisory duties, nearly doubling the high-end of the Regional Director's

finding, yet they were inexplicably dismissed in the process of concluding that the record lacked evidence showing a regular portion of supervisory work. The Regional Director's own calculations, however, fall well within the range that the Board considers regular and substantial. The Regional Director was confined to a "brief snapshot" as he puts it due solely to circumstances of his own making, i.e., his arbitrary decision to reject the documents that he himself had previously subpoenaed.

The Board confronted a similar issue in *Aladdin Hotel*, where it excluded casino dealers who substituted for supervisory/managerial personnel at rate of at least two times per month over the preceding three months as statutory supervisors. *Aladdin Hotel*, 270 NLRB at 840. As in *Aladdin*, the record here clearly shows that the Employer regularly utilizes relief supervisors to substitute for full-time supervisors. (Tr. 115, 118-119, 125, 205, 544). In fact, the record establishes that the Employer has been regularly utilizing relief supervisors since at least 2008, when Graham became the operations manager. (Tr. 23, 583). Even Union witness Cevan Griffin testified as follows:

Q: When were you first made aware of the Relief Supervisory position?

A: I think it was when – I think we started using Relief Supervisors when the change in management occurred.

(Tr. 583).

The Regional Director's holding that use of the relief supervisors was not regular is clearly erroneous. The use of the relief supervisors is not caused by any "extraordinary" circumstances, and their use will continue as it has for the past five years. The record is clear that relief supervisors must be available if a full-time supervisor needs to take vacation, is sick, needs to take a day off, is assigned to a crisis situation, or needs to take care of administrative paperwork. (Tr. 125–27). The record further reflects that these events occur on a regular basis.

In fact, Quirico testified that relief supervisors have recently been performing supervisory work as relief supervisors at a rate of three to four 24-hour shifts per month. (Tr. 544). Moreover, Employer Exhibits 19, 20, 21, and 22 clearly demonstrate that the relief supervisors spend substantial amounts of their time substituting for full-time supervisors. For example, the Exhibits reflect the following:

Exhibit No.	Dates	Employee Name	Supervisory Dates	Percentage of Shifts as Supervisor
19	10/03/11 – 12/28/11	Matthew Gaskins	10/10/11 10/28/11 11/04/11 11/12/11 12/10/11 12/12/11	20%
20	10/01/11 – 12/31/11	Davis Edmonds	10/23/11 11/24/11 12/03/11(a.m.) 12/03/11(p.m.) 12/18/11 12/26/11	16.6%
21	10/04/11 – 12/29/11	Brynn Quirico	10/23/11 11/10/11 12/1/11 12/18/11 12/21/11	13.8%
22	10/01/11 – 02/02/12	Cevan Griffin	10/08/11 11/21/11 11/26/11 1/06/12 1/08/12 1/09/12 1/10/12 1/15/12 1/24/12 (a.m.) 1/24/12 (p.m.) 1/28/12	20.3%

C. The Relief Supervisors Spent A “Substantial” Portion Of Their Work Time Performing Supervisory Duties.

In determining that the relief supervisors spend a “substantial” portion of their work time performing supervisory duties, the Regional Director wrote the following:

In addition, the record fails to establish that relief supervisors spend a substantial portion of their work time performing supervisory duties. As previously stated, the evidence offered by the Employer demonstrates that during the fourth quarter of 2011, four paramedics serving as relief supervisors spent between **approximately 8 and 18 percent of their total work time as relief supervisors**. The record also indicates that the Employer was not fully staffed at three operations supervisors during this time, such that there was a greater number of relief supervisors shifts available and required to be filled. Moreover, even when an operations supervisor is unavailable for a prolonged period of time, such as existed at various times during 2011, the Employer does not assign a relief supervisor to take over that position on a semi-permanent basis. Rather, as previously, noted relief supervisors cover open shifts as they are willing and available to do so.

(DD&E, p. 10) (emphasis added).

Although the Regional Director cites to *Oakwood* in arguing that the supervisors did not “regularly” engage in supervisory duties, he ignores *Oakwood*’s holding that the Board has not adopted a strict numerical definition of “substantiality” and has found supervisory status where individuals have served in a supervisory role for at least 10-15 percent of their total work time. *See Oakwood*, 348 NLRB at 694, fn. 49 (citing *Archer Mills, Inc.*, 115 NLRB 674 (1956) (ten percent deemed sufficient) (emphasis added); and *Swift & Co.*, 129 NLRB 139 (1961) (fifteen percent deemed sufficient) (emphasis added). Instead, the Regional Director cites to a series of inapposite cases, ignoring both *Archer Mills* and *Swift & Co.* in the process.

The Employer introduced exhibits that were admitted into evidence (and went un rebutted) fully establishing that the relief supervisors in this case spent between 14% and 20% of their time engaging in supervisory duties, easily surpassing the Board’s standard for

“substantial.”¹⁴ (Er. Exs. 19-22). Furthermore, the documents provided to the Hearing Officer following the hearing show that of all supervisor shifts during the period between January 1, 2010 and February 12, 2012, 24.94% were worked by relief supervisors. *See* Exhibit C.

Exhibit C, in the fourth report that was rejected by the Hearing Officer, demonstrates that 24.94% of the shift supervisory positions for the two-year period were covered by relief supervisors. Furthermore, the first report in Exhibit C shows that nearly 20% of the shifts scheduled for each individual relief supervisor, on average, were spent performing supervisory duties. Consequently, relief supervisors perform supervisory duties twice as often as the Board decisions cited by *Oakwood* as regular and substantial. *See Oakwood Healthcare*, 348 NLRB at 694. Covering a quarter of all shifts with relief supervisors, some of whom spend upwards of 33% of their time performing supervisory duties based on a regular system of filling-in for operations supervisors, is anything but sporadic.

The Regional Director predicated his holding on erroneous facts which prejudiced the rights of the Employer. The only reason he was confined to a paucity of data is because the Hearing Officer arbitrarily precluded the Employer from supplementing the evidence presented at the hearing. Even applying the Regional Director’s factual findings to the standard recited in *Oakwood*, however, the relief supervisors clearly meet the test for regular and substantial supervisory functions. Accordingly, relief supervisors must be excluded from any bargaining unit deemed appropriate.

¹⁴ The Regional Director specifically found that the brief snapshot presented at the hearing demonstrated that relief supervisors worked from 8% to 18% of their total hours as relief supervisors. The Employer’s records in fact show between 13% and 33%, with an average of approximately 20% of hours worked by relief supervisors performing supervisory duties. Even relying on the Regional Director’s calculations, however, this still falls within the range that the Board considers to be regular and substantial.

II. THE HEARING OFFICER'S CONDUCT IN REFUSING AMR'S ADDITIONAL EVIDENCE REFLECTING THE AMOUNT OF TIME THAT RELIEF SUPERVISORS SPENT ENGAGING IN SUPERVISORY DUTIES AND HIS RULING TO NOT ACCEPT THE DOCUMENTS HAS RESULTED IN PREJUDICIAL ERROR.

The conduct of the Hearing Officer unfairly prejudiced the Employer's ability to present evidence directly relating to the issue of the regular and substantial nature of relief supervisors' supervisory duties. After subpoenaing documents which the Hearing Officer presumably believed to be relevant, he then refused to accept those same documents while the record remained open. Subsequently, the Regional Director issued a decision in which he stated that he only relied on a "brief snapshot," holding that based on a lack of evidence, the Employer did not demonstrate that relief supervisors spent a regular and substantial portion of their work time performing supervisory functions. The Employer, however, had provided the Hearing Officer with documents covering a two-year period that unquestionably demonstrated a regular and substantial portion of time spent performing supervisory functions by relief supervisors.

Parties have a right to present relevant evidence on the issues presented by a petition, and the Board has ruled that it is prejudicial error to refuse the introduction of evidence under similar circumstances. *See Barre National, Inc.*, 316 NLRB 877 (1995). In *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999), the Board held that it was improper for a hearing officer to exclude testimony about a group of contested employees because of the small size of the group. A hearing officer should provide all parties with the due process to present relevant evidence at a hearing. Once on notice of a substantial issue, the hearing officer is obliged to conduct further inquiry. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999).

The Hearing Officer himself had subpoenaed documents that he believed to be relevant in determining the regularity of relief supervisors performing supervisory duties. As suggested by

the CaseHandling Manual, a hearing officer should not close the hearing before he “is satisfied that the record contains all available information bearing on the issues,” and that if “exhibits are outstanding, provision for their receipt should be made.” CHM, Sec. 11224.6. Furthermore, the CaseHandling Manual instructs hearing officers to accept post-hearing exhibits when “it advances and is useful to the processing of the case and is unavoidable.” CHM, Section 11224.6 (“Provision for the exhibit’s receipt should be made, by either stipulation or hearing officer’s ruling. An exhibit number should be reserved, with adequate provision for inspection and (written) comment by the other parties. Thereafter, the hearing officer should issue an order closing the hearing and setting a due date for briefs. Alternatively, the hearing may be closed, contingent upon receipt of the exhibit, and a date set for submission of briefs.”).

The Employer received the Hearing Officer’s subpoena less than 24 business hours before the hearing in the instant matter. The Employer worked diligently to produce this difficult information, sending numerous responses on March 7th, 8th, and 9th. AMR offered to send another 700 pages of records supporting the documentation already provided, requesting a few additional business days in which to complete this task. Despite these compliance efforts and the timely provision of numerous documents at the Hearing Officer’s request, he inexplicably closed the record and refused to accept the documents provided.

By disregarding Board precedent allowing the Employer to present relevant evidence with respect to the issues presented by the petition, and by ignoring the provisions of the CaseHandling Manual, the Hearing Officer engaged in conduct that resulted in prejudicial error to the Employer.

CONCLUSION

For all of the foregoing facts, arguments and citations to authority, it is urged that review be granted, that the Regional Director's Decision and Direction of Election be overruled and that the relief supervisors be excluded from the bargaining unit.

Dated: April 11, 2012

Respectfully submitted,

By: /s/ Steven M. Bernstein
FISHER & PHILLIPS LLP
Steven M. Bernstein
FISHER & PHILLIPS LLP
2300 SunTrust Financial Centre
401 E. Jackson Street
Tampa, FL 33602
sbernstein@laborlawyers.com

And

David M. Gobeo
FISHER & PHILLIPS, LLP
450 E. Las Olas Blvd.
Suite#800
Ft. Lauderdale FL 33301
dgobeo@laborlawyers.com

Counsel for Employer
AMR

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

In the Matter of)	
)	
AMERICAN MEDICAL RESPONSE)	
AMBULANCE SERVICE, INC.)	
)	
)	
Employer,)	
)	CASE NO. 28-RC-074676
and)	
)	
NATIONAL EMERGENCY MEDICAL)	
SERVICE ASSOCIATION (NEMSA))	
AFL-CIO,)	
)	
Petitioner.)	

CERTIFICATE OF SERVICE

I certify that on April 11, 2012, I e-filed the foregoing and served it via e-mail on the following:

Timothy Talbot
Talbot Law Group
105 E Street, Suite 2E
Davis, CA 95616
ttalbot@talbotlawgroup.com

Cornele A. Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 North Central Ave., Ste. 1400
Phoenix, AZ 85004
cornele.overstreet@nlrb.gov

Torren Colcord
National Emergency Medical Services Association
4701 Sisk Road
Suite 102
Modesto, CA 95356
torrencolcord@nemsausa.org

/s/ Steven M. Bernstein