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Alternate Concepts, Inc. and Office and Professional Employees International Union, Local 30, AFL-CIO. Case 28-RC-006750

April 27, 2012

DECISION ON REVIEW AND ORDER
REMANDING

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On January 10, 2011, the Regional Director for Region 28 of the National Labor Relations Board issued a Decision and Direction of Election finding, among other things, that the Employer's line controllers and crew dispatchers are supervisors within the meaning of Section 2(11) of the Act and therefore must be excluded from the petitioned-for unit of line controllers, crew dispatchers, field supervisors, and supervisor/instructor.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's finding that line controllers and crew dispatchers are statutory supervisors based on their authority to assign and responsibly direct. On February 11, 2011, the Board granted the Petitioner's request for review.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the matter, we find, contrary to the Regional Director, that the record fails to establish that line controllers and crew dispatchers are supervisors within the meaning of the Act; accordingly, they may be included in the petitioned-for unit with field supervisors and the supervisor/instructor.

I.

The Employer operates the light rail transit system in the Phoenix, Arizona metropolitan area.² The system consists of light rail vehicles (trains) that travel a 20-mile track. Trains travel on a daily basis from early morning to late evening, and each train covers the entire 20-mile

¹ By the same order, the Board majority (then-Member Pearce and former Member Becker, Member Hayes dissenting), denied the Employer's request for review of the Regional Director's finding that field supervisors and the supervisor/instructor are not statutory supervisors.

² The Employer manages and operates the transit system under a contract with Valley Metro Rail, Inc., a nonprofit public corporation that owns the trains.

run.³ The train operators are represented by Amalgamated Transit Union, Local 1433, and they are covered by Local 1433's collective-bargaining agreement with the Employer. The Employer's facilities include an operations control center (OCC), which houses the technology used to control and monitor the trains, and an operations and maintenance center (OMC), which houses administrative offices and trains that are not in service. The Employer's daily operations are overseen by a general manager to whom the director of transportation, the manager of the operations control center, and the project manager all report. The parties stipulated that the individuals in these four positions are statutory supervisors.

As noted above, the Petitioner seeks to represent the Employer's field supervisors,⁴ supervisor/instructor,⁵ crew dispatchers, and line controllers. At issue here is the inclusion of the four crew dispatchers and nine line controllers, who the Regional Director found, in agreement with the Employer, are statutory supervisors based on their authority to assign and direct the Employer's employees.

A.

Crew dispatchers. Crew dispatchers are primarily responsible for the safe and timely dispatch of trains according to established route schedules. To understand the crew dispatchers' duties and responsibilities, it is necessary to understand the basic assignment procedures for train operators.

Local 1433-represented train operators' daily shift and route assignments, as well as their vacations and days off, are determined on a quarterly basis in accordance with the bid and seniority procedures set out in the operators' contract with the Employer.⁶ Operators bid on 38 "fixed" routes, which run at specific times during the day. Operators also bid on 11 "extra board" positions. Extra board operators are scheduled each day as "back-ups" and will, in order of seniority, be offered a run, if, for example, a regular operator becomes ill during a shift or if an additional train is needed to maintain service.

³ The Employer's general manager testified, "you start at Sycamore and go to Montebello or you start at Montebello and go to Sycamore."

⁴ *Field supervisors* are responsible for the continuous delivery of rail service; they ensure that operators follow the Employer's rules and procedures, such as observing traffic signals, opening doors on only one side, and the like. Field supervisors also act as incident commanders if there is an unusual incident such as equipment failure or an accident.

⁵ The *supervisor/instructor* trains employees and otherwise performs the same duties as the field supervisors.

⁶ In accordance with the terms of the operators' collective-bargaining agreement, crew dispatchers may also authorize single-day vacations for operators if there are vacancies in the schedule after the bid procedure is closed. Those single-day vacations must be granted in the order of the requesting operators' seniority.

Crew dispatchers, who work out of the OMC, determine if operators and field supervisors have reported to work on time. The operators' contract specifies the procedures that are to be followed if an operator is late or absent from work. Crew dispatchers also determine, by visual inspection, if operators and field supervisors are fit for duty, i.e., if they are "clean and neat" in appearance, wearing the proper uniform, and not obviously under the influence of alcohol or drugs. A crew dispatcher may send an obviously impaired operator for drug/alcohol testing.⁷ Although the Employer contends that crew dispatchers may prevent operators from operating a train if they are unfit for duty, the Employer concedes that no crew dispatcher has ever done so.

Crew dispatchers assign specific trains to individual operators. Each train is numbered and parked in the rail yard; crew dispatchers provide operators with a yard map showing the location of the train to which the operator has been assigned for the day. All trains, however, are the same. In addition, all routes are the same although a route may occasionally be serviced by two trains coupled together, and all trains follow the same route. The only differences are that service routes are numbered differently and run at different times during the day, and some trains do not make every stop.

Crew dispatchers, at the request of line controllers, may send out additional trains driven by extra board operators in order to maintain continuous service. Crew dispatchers occasionally have instructed operators to perform duties other than driving the trains, such as fueling the Employer's cars and trucks or running errands. On at least one occasion, a crew dispatcher instructed an operator to report back to the OMC at the end of the operator's shift instead of leaving directly from the end point of the operator's run.⁸

The crew dispatcher's job description states, among other things, that crew dispatchers must be knowledgeable about established schedules, safety guidelines, the Employer's Rules, and the Employer's Standard Operating Procedures (SOP). The SOP manual is a standardized, "very extensive set of procedures." It specifies the actions employees are to take under both usual and ex-

traordinary circumstances.⁹ Crew dispatchers must also be familiar with the Employer's troubleshooting manual, which addresses maintenance and mechanical issues pertaining to the operation of the trains, including, for example, solutions for resolving operational complications, such as a disabled train.

B.

Line controllers. Line controllers, who work out of the OCC, are responsible for ensuring that the trains operate on schedule and that service is maintained. Line controllers monitor the entire rail system using video screens and monitors. Line controllers maintain radio contact with operators to alert them about service disruptions, such as accidents or track work, and they will discuss with operators solutions to operational problems as suggested in the SOP and troubleshooting manuals. Line controllers coordinate the safe pull-out and pull-back of trains into and out of the terminal at the beginning and end of service; remotely control the switching, single-tracking, and routing of trains; energize and de-energize the tracks; and work with first responders in the event of emergencies. Like crew dispatchers, line controllers must be knowledgeable about established schedules, safety guidelines, and the Employer's SOP and troubleshooting manuals.

In performing their duties, line controllers may determine if additional trains are needed to maintain service. In such an event, the line controller will contact the crew dispatcher to determine if there are extra board operators available to take added trains. Both line controllers and crew dispatchers may also extend rail service beyond regular operating hours and request that operators stay beyond their regular schedules when the Employer's managers have flagged that a special event will require additional service. According to the Employer, there are over 300 special events during the year in the Phoenix area. Most do not have a significant impact on the Employer's usual operations, but football, basketball, and baseball games, as well as convention center events such as concerts, may require the extension of rail service beyond regular service hours. The Employer's management team meets weekly to develop a "strategy" or contingency plan for handling upcoming scheduled events. The plan may include providing enhanced rail service beyond regular service hours, in which case operators

⁷ The operators' contract incorporates the Employer's drug and alcohol testing policies.

⁸ The Employer's witnesses did not explain why the operator was directed to return to the OMC on this occasion, nor did they provide any other details as to this incident. Local 1433 filed a grievance on behalf of the affected operator, in which it claimed that an operator on a pre-assigned run is not required to return to the OMC at the completion of the work day. The grievance ultimately settled, and the Employer offered no evidence that the settlement supported its view of the merits.

⁹ For example, the "Normal Train Operation" section of the SOP manual includes such basic procedures as operators' reporting for duty; the "Special Train Operation" section includes procedures for single track operation, adverse weather conditions, and incident management. There are also "Emergency" and "Signal System and Switch Operation" sections that cover security issues, evacuation procedures, derailments and collisions, downed wires, and communication problems.

may be asked to work beyond their scheduled shifts.¹⁰ In effect, the Employer's managers give the "go-ahead" to continue rail service in order to serve patrons who attend these events.¹¹ Additionally, the Employer has an arrangement with the sports and entertainment center in Phoenix that permits the center's patrons to enter the transit system if they hold a ticket to the day's event, and the Employer routinely holds its trains beyond the regular schedule to provide late night service to the center's employees after an event.

C.

In general, both the crew dispatchers and line controllers receive wages and benefits that are comparable to those received by the field supervisors and the supervisor/instructor. All are salaried and are paid wages within the same range, receive overtime after 40 hours, enjoy the same number of vacation days and holidays, and receive a cell phone or stipend in lieu thereof. All four of those classifications are generally entitled to the same pension and health insurance benefits as managers.

II.

Contrary to the Regional Director, we find that the Employer has failed to meet its burden of establishing that the crew dispatchers or line controllers are supervisors. The Employer offered insufficient evidence to show that either group has authority to "assign" or "responsibly direct" employees using independent judgment.

A.

The Board set out the analytical framework for determining supervisory status in *Oakwood Healthcare*, 348 NLRB 686 (2006), in which it defined the statutory terms "assign," "responsibly to direct," and "independent judgment." See also *Croft Metals*, 348 NLRB 717, 721–722 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727, 728, 731 (2006). The burden of proving supervisory status rests on the party asserting that such status exists. *Oakwood Healthcare*, 348 NLRB at 694, citing *Dean & Deluca New York*, 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Id.* at 1047–1048; *Springfield Terrace LTD*, 355 NLRB 937, 941 (2010). Mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB at 731; *Lynwood Manor*, 350 NLRB 489, 490 (2007).

¹⁰ The Employer is required to inform Valley Metro Rail about the possibility of overtime work.

¹¹ The Employer's general manager indicated that overtime in these situations was not uncommon.

Like the other statutory indicia of supervisory status, the authority to assign and responsibly to direct other employees are not determinative of supervisory status unless they are exercised using independent judgment. To exercise "independent judgment," an individual must act or effectively recommend action "free of the control of others," using a degree of discretion rising above "the merely routine or clerical." *Oakwood Healthcare*, 348 NLRB at 693.

In *Oakwood Healthcare*, 348 NLRB at 689, the Board explained that assignment means 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 an employee significant overall duties as opposed to ad hoc instructions that the employee perform a discrete task. There must be specific evidence that a putative supervisor "has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken." *Golden Crest Healthcare Center*, 348 NLRB at 729.

The Board in *Oakwood Healthcare*, 348 NLRB at 691, also interpreted the meaning of the phrase "responsibly to direct": "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' and carried out with independent judgment." The Board further held that, for direction to be "responsibl[e]," the person directing the performance of a task must be accountable for its performance. To establish accountability for purposes of responsible direction, the party with the burden of proof must show that "the employer delegated to the putative supervisor the authority to direct the work [of others] and the authority to take corrective action, if necessary," and also that "there is a prospect of adverse consequences for the putative supervisor" if the putative supervisor "does not take these steps."¹² *Id.* at 692. Evidence of actual accountability must be present to prove responsible direction. *Alstyle Apparel*, 351 NLRB 1287, 1287 (2007); *Golden Crest Healthcare Center*, 348 NLRB at 731.

B.

We find that neither the crew dispatchers nor line controllers are statutory supervisors. The Employer has failed to show that either group assigns or responsibly directs work using independent judgment.

¹² Accountability may be established by a showing that putative supervisors have experienced "material consequences," either positive or negative, as a result of directions given to others. *Golden Crest Healthcare Center*, 348 NLRB at 731.

Crew dispatchers and line controllers do not assign operators “significant overall duties”; they do not schedule operators, approve sick leave, or approve vacations longer than one day. Crew dispatchers and line controllers do not direct operators in how to drive the trains.

Further, crew dispatchers may only request, but not require, that operators work overtime. The operators’ contract expressly states that “[r]egular operators who do not desire to work extra [beyond their normal 40-hour work week] may refuse to do so.”¹³ Crew dispatchers typically ask on-duty operators if any of them wish to work overtime, and, if so, crew dispatchers assign the work by seniority as provided in the operators’ contract. There is no evidence in the record of any operator having refused to work overtime. Additionally, although the Employer contends that operators may be *required* to work beyond their scheduled shifts, as, for example, when a concert runs late, the Employer’s witnesses did not provide any details of specific instances of events where this has occurred.¹⁴

Even in the limited areas in which it could be said that crew dispatchers or line controllers “assign” or “responsibly direct” employees, the Employer has failed to carry its burden of showing that they exercise independent judgment and discretion in doing so. The Board has held that a purported supervisor does not exercise independent judgment when making assignments based on an employer’s detailed policies, a collective-bargaining agreement, or other such directives, or when such assignments are routine in nature. Action is not independent “if it is 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.” *Oakwood Healthcare*, 348 NLRB at 693. Here, any assignment or direction authority that crew dispatchers or line controllers exercise is either routine or significantly limited by the Em-

ployer’s SOP and troubleshooting manuals, as well as by its collective-bargaining agreement covering the operators, and thus does not involve the exercise of independent judgment required under Section 2(11).¹⁵ See *St. Petersburg Limousine Service*, 223 NLRB 209, 210 (1976).

For example, crew dispatchers possess the authority to assign particular trains to operators, assign extra board operators to trains when scheduled operators are not available, send out additional trains with extra board operators at the request of line controllers, and send employees home if they are late or unfit for duty. Line controllers determine whether additional trains and therefore whether extra board operators are needed or need to stay beyond their scheduled shift, decide whether operators need to single track, and inform operators of emergencies or track work locations. They also coordinate the pull-out and pull-back of trains. But, in all of these areas, crew dispatchers’ and line controllers’ exercise of their authority is circumscribed by the Employer’s Rules, SOPs, troubleshooting manual, operators’ contractual requirements, or is otherwise routine in nature.¹⁶

Similarly, although crew dispatchers inform the operators as to the location in the yard and the number of the

¹⁵ Similarly, the Employer’s field supervisors were found not to be statutory supervisors in part because so much of their authority was constrained by the Employer’s SOP and troubleshooting manuals.

¹⁶ The Board, in the past, has found similar facts to give rise to the conclusion that dispatchers are not supervisors. These cases provide some guidance here although each case of course depends on its own record. For example, in *St. Petersburg Limousine Service*, 223 NLRB at 210, the Board found that dispatchers did not exercise independent judgment where they assigned vehicles and gave directions to drivers according to the employer’s policies and the drivers’ collective-bargaining agreement, consulted an “extra board” if additional drivers were needed, and solicited but could not require employees to work overtime. The fact that they could send extra board drivers home early or send drivers home if they arrived intoxicated was insufficient to find the dispatchers to be supervisors. In *Southwest Airlines Co.*, 239 NLRB 1253 (1978), although dispatchers could delay, reroute, or cancel flights, and authorize additional, unscheduled flights, the Board found no supervisory status because the dispatchers had no input into which flight crew was assigned to operate the aircraft, nor could they require maintenance or other personnel to stay beyond their scheduled hours to handle unscheduled flights. Moreover, their dispatching duties were governed by extensive Federal Aviation Administration regulations and the employer’s own flight operations manual. In *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075–1076 (1985), the Board found that the dispatcher was not a supervisor because he did not exercise independent judgment in assigning work. The dispatcher did not make regular drivers’ initial route assignments; the dispatcher’s direction of drivers involved no more than providing them with information from customers; and the act of issuing trailer numbers to drivers was simply ministerial or clerical. The assignment of customer pickups was based on common sense, i.e., a driver’s proximity to the customer, as was telling drivers to take a different route in traffic or weather emergencies.

¹³ The Employer asserts that the contract states that operators may be required to work overtime in an emergency situation, which the contract defines as “any work arising after posting work assignments for the next day.” The Employer’s general manager testified that, “if something occurs during the day—a police action where we have run differently and we need additional personnel or we need to keep personnel out there, that would be emergency work and [operators] have to stay.” The contract, however, is silent as to whether an operator may, in fact, be required to continue working in the event of an emergency. Nor did the Employer provide any specific instances in which an emergency led to crew dispatchers or line controllers requiring employees to work overtime.

¹⁴ The Employer also asserts that its operating rules state that an operator may be required to stay beyond a regularly scheduled shift if the next scheduled operator does not report to work. Administering that rule, however, does not allow any scope for independent judgment, and the Employer failed to show otherwise.

train to which they have been assigned, there is no evidence that such assignments involve independent judgment. See *Bay Area-Los Angeles Express*, 275 NLRB at 1075. Rather, assigning an operator to a train is simply a routine function: all trains are the same and all operators possess the same qualifications and skills. As stated above, drivers operate their assigned routes on a routine, regular basis, and the only difference in routes is what time of day the route is in service and how many stops are made. In accordance with the collective-bargaining agreement, crew dispatchers assign operators on the extra board to operate trains only to the extent that they inform them, in order of seniority, that a train must be put into service at the request of a line controller.¹⁷ Requesting an operator to continue working if a relief operator is not available similarly is not shown by the Employer to require the exercise of independent judgment; rather, requiring an operator to continue driving the train until the next operator shows up is not a choice, but a necessity. There is little or no flexibility in the SOP manual for the operation of the trains, as the options in particular circumstances are essentially predetermined, and employees have been trained to recognize that there are certain, specific actions that must be undertaken in various situations. As a field supervisor testified, “You wouldn’t exactly be flexible with the Standard Operating Procedures. Those are pretty much set in stone.” See *Southwest Airlines*, supra.

It is significant that the Employer’s business requires that the trains operate on time, with or without the originally scheduled operator. That does not, however, lead to crew dispatchers’ or line controllers’ exercise of judgment or discretion: if the scheduled operator is not present, then another operator, selected according to the prescribed rules, takes the run. The Employer failed to provide any details of specific circumstances showing otherwise.

Nor do line controllers or crew dispatchers exercise independent judgment in extending rail service beyond regular hours or ordering extra trains. The decisions to extend service generally are made by the Employer’s managers, who decide, in advance of prescheduled events such as ballgames or concerts, on a plan for providing transit services for the event, including the possibility that rail service may need to be extended beyond normal service hours. Thus, in those instances, line controllers and dispatchers merely put into effect decisions that have already been made. Although the Employer contends that crew dispatchers and line controllers have

independent authority to extend service in those circumstances, the evidence shows that the Employer’s managers plan for those contingencies. Significantly, the Employer failed to provide specific examples showing that line controllers and crew dispatchers have made overtime decisions in situations that required the exercise of actual independent judgment not circumscribed by predetermined guidelines or a previously determined management strategy. The determination that more trains or single tracking are needed due to operational or maintenance issues or other reasons appears to be governed by the Employer’s SOPs and troubleshooting manual, and the Employer provided no evidence that such determinations require the exercise of independent judgment.

We further find that the crew dispatchers’ determination of whether employees are on-time and fit for duty does not entail the exercise of independent judgment. An “on time and fit for duty” assessment is a routine matter: the individual is either on time or not,¹⁸ and the operator is either wearing the right uniform or not. Similarly, preventing an obviously impaired operator from operating a train is a routine matter of following the dictates of Employer policy, rather than an exercise of independent judgment.¹⁹ The Board generally does not find supervisory status based on employees taking action in response to safety hazards, such as conspicuously impaired drivers or extreme weather conditions. For example, in *Lincoln Park Nursing Home*, 318 NLRB 1160, 1162–1163 (1995), the Board found that an individual was not a supervisor where he could send employees home if they engaged in conduct that posed a threat to patient safety, as the exercise of such “restricted and sporadic authority limited to specific and predetermined kinds of conduct does not require independent judgment.” See also *Chevron Shipping*, 317 NLRB 379, 381 (1995), in which the Board stated that the authority to order intoxicated or insubordinate employees to leave work does not constitute supervisory authority, “as such violations are so egregious and obvious that little independent judgment is

¹⁸ The Employer contends that dispatchers may send operators home or assess a half day absence as a consequence for reporting to work late. However, the record lacks any specific examples in which this occurred, and the operators’ contract states only that an operator whose services are not required will be assessed an absence. The Employer also suggests in its brief that a dispatcher may tell an operator to stay home if he is late, based on an assessment of the “personnel situation” at the time. There is no evidence to establish that this type of assessment or determining when to send late operators home, which simply requires consideration of how many operators are available and ready and how many trains need operators, is not a matter of mere routine.

¹⁹ The Employer provided nonoperator employees with training in recognizing signs of impairment in others such as slurred words, an unsteady gait, or dilated pupils.

¹⁷ As set forth infra, there is no evidence that the line controllers exercise independent judgment in making this assessment.

needed.” The Employer offered no proof that its operations require a different result.

Further, to the extent crew dispatchers may approve 1-day vacations or request that operators work overtime, this authority is exercised pursuant to the terms of the collective-bargaining agreement covering the operators, which dictates the order in which approval may be given or requests made. The Employer failed to provide any specific details that would establish that such authority has been exercised with independent judgment.

In addition, we find no merit to the Employer’s contention that the occasional request from crew dispatchers that operators perform such discrete tasks as running errands or fueling company vehicles is sufficient to prove supervisory status. Even assuming that these types of directions are more than ad hoc instructions that employees perform discrete tasks and do indeed constitute assignments or directions, the Employer has not shown that crew dispatchers and line controllers can *require* that operators perform such nondriving tasks or that they entail the exercise of independent judgment. The record is devoid of specific circumstances where this has occurred.

Finally, even assuming arguendo that the crew dispatchers or line controllers have the authority to direct employees in their tasks in any way using independent judgment, the Employer has failed to sustain its burden of establishing that they have been *held accountable* for the work of others. There is no evidence that they have experienced any material consequences as a result of their alleged authority to direct others. Absent any such evidence, they cannot be found to responsibly direct employees within the meaning of Section 2(11) of the Act. See *Golden Crest Healthcare*, 348 NLRB at 731 (employer failed to meet accountability standard); *Oakwood Healthcare*, 348 NLRB at 695.

C.

In sum, the Employer has failed to meet its burden of establishing, on the basis of specific, detailed evidence, that either the crew dispatchers or line controllers assign or responsibly direct employees using independent judgment within the meaning of *Oakwood Healthcare*. Their authority to assign and direct employees is, as shown, quite limited, and to the extent they possess any such authority, the Employer has failed to establish that they exercise independent judgment in doing so. Rather, their authority is significantly circumscribed by the operators’ collective-bargaining agreement and the Employer’s various manuals, and the exercise of such authority as they possess is essentially routine. The Employer also failed to show that the crew dispatchers or line controllers were held accountable in their direction of others.

In light of the foregoing, we find that the crew dispatchers and line controllers are not supervisors within the meaning of the Act, and that they may properly be included in the petitioned-for unit, which includes the Employer’s field supervisors and the field supervisor/instructor. Accordingly, we remand this proceeding to the Regional Director for the direction of an election in the petitioned-for unit.

ORDER

IT IS ORDERED that this proceeding is remanded to the Regional Director for further appropriate action in accordance with this Decision.

Dated, Washington, D.C. April 27, 2012

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD