

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

In the Matter of

CAPITAL POWER OPERATIONS (USA) INC.

Employer

and

UTILITY WORKERS UNION OF
AMERICA/BROTHERHOOD OF UTILITY
WORKERS COUNCIL, LOCAL 310, AFL-CIO

Petitioner

Case 01-RC-080478

DECISION AND DIRECTION OF ELECTION¹

The Employer, Capital Power Operations (USA) Inc., supplies operations and maintenance services to owners of power generating facilities, including Tiverton Power, a combined cycle natural gas plant located in Tiverton, Rhode Island that burns natural gas to generate electricity. The Petitioner seeks to represent a unit consisting of all full-time and regular part-time boiler operators, control room operators, and maintenance employees employed at the Tiverton, Rhode Island facility. The Employer maintains that

¹ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

the control room operators are statutory supervisors who should be excluded from the unit because they possess the authority to assign and responsibly direct the work of Operator B employees. The Union asserts that the control room operators are not statutory supervisors. I find that the Employer has not met its burden of demonstrating the supervisory status of the control room operators, and I shall direct an election in the petitioned-for unit.

Tiverton Power generates and sells electricity, via CPM Group in Calgary, to Independent System Operator (ISO) New England, the non-profit entity responsible for the distribution of electrical power throughout the New England region. The Employer submits daily bids to ISO New England (via CPM) to provide a fixed quantity of electrical power to the region for the following day. ISO New England, in turn, reviews bids from multiple power companies and purchases power from Tiverton Power on almost a daily basis. Tiverton is “online,” i.e., producing and distributing power, approximately 8,000 out of 8,760 hours per year.

The most senior representative of management at the Tiverton facility is Facility/Plant Manager Tricia Keegan. She has four direct reports: Operations Manager Kevin Bieu; Maintenance Manager Steve Hooper; the plant administrator; and the operations systems specialist.² Keegan has worked at Tiverton as facility/plant manager since July 2009. Her responsibilities include preparing long- and short-term budgets and managing those budgets. She also has financial and emergency response authority, and the authority to bring in contractors, if necessary, to clean up in the event of a spill. She typically works a 40 hour work week, from 7:00 a.m. to 3:30 p.m., Monday through Friday.

Operations Manager Bieu, a stipulated supervisor, is responsible for the daily operation of the facility. His responsibilities include observing, identifying, and correcting anomalies, and environmental reporting. Bieu was originally hired as an operator B technician in September 2001, and three years later was promoted to control room operator. He has served as operations manager since July 2007, and, as such, is a salaried, exempt employee. In that capacity, Bieu works Monday through Friday from 7 a.m. until 4:30 p.m., spending a total of about ten hours a week in the control room. He has ten direct reports, including nine full-time employees and one part-time co-op student from Massachusetts Maritime Academy. The full-time employees include four B operators and five A operators, who are also referred to as control room operators and, occasionally, watch supervisors.

The facility operates 24 hours per day, seven days per week, 365 days per year. Both the control room operators and the B operators work 12 hour shifts, from 7 a.m. to 7 p.m. and 7 p.m. to 7 a.m. One control room operator and one B operator are on duty at all times. Control room operators work a rotating schedule: 48 hours one week, 36 hours the next week, and then 40 hours the third week. The 40-hour week is considered a

² The operations system specialist has no direct reports. The maintenance manager has three direct reports.

“relief week,” during which the control room operator is expected to cover for operators who are on vacation. If nobody is on vacation, the relief operator works from 7 a.m. to 3:30 p.m., and rather than performing his usual control room duties, he is expected to perform other duties assigned to him by Bieu, such as completing and/or reviewing paperwork.³

Control room operators are responsible for the operation of the facility when Bieu and Keegan are off-duty. They are authorized to place equipment in service, take it out of service, and take emergency actions, as conditions may require. If an issue arises that a control room operator is unable to handle on his own, he is expected to contact Bieu or Keegan. Brian Medeiros, a control room operator who has served in that capacity at Tiverton Power for 13 years, testified that he has called Operations Manager Bieu (when Bieu is off-duty) for assistance approximately six times a year. Medeiros testified that because he has been on the job for a while, he does not call Bieu for guidance frequently, but that less experienced operators are likely to consult Bieu more frequently.

The control room operator spends 11½ of his 12 working hours every shift in the control room, sitting in a horseshoe-shaped area facing multiple computer monitors. He is expected to remain in the room and, if he has to leave briefly, for example, to use the restroom, heat up food for a meal, or go to his cleaning station, he makes sure that another control room operator, or a B operator covers the room in his absence. Should a situation arise in the control room in his absence, such as an alarm sounding, the B operator would immediately call him back into the room, since B operators do not possess the training or experience level to be able to operate a piece of equipment for an extended period of time.

The control room operators are responsible for approximately 20 systems at the facility that, collectively, produce power that is sent to a step-up transformer, and then down the transmission lines to National Grid. These systems, many of which can be either monitored or operated remotely from the control room, include: a gas turbine generator; a heat recovery steam generator; a steam turbine generator; a Laos condenser (part of the chilling system); natural gas compressors; an air/cool condenser; a raw water storage tank; a wastewater storage tank; a Hersig (for emissions control); and a large emissions stack. Hazardous materials, including hydrogen, and aqueous and anhydrous ammonia, are also stored on site.

³ B operators do not work a relief week.

From the control room, the control room operators can monitor the functioning of equipment throughout the facility, trip breakers and switches in the high yard,⁴ and communicate with other facility employees via plant radio, with ISO New England via a dedicated telephone line, and with National Grid via radio. Although they are responsible for ensuring that certain systems, including the auxiliary zero waste discharge, auxiliary boiler or super heater, auxiliary pre-heater, and certain areas of the chiller system, are operating correctly, they are not responsible for monitoring those systems. Moreover, they can remotely operate and change a few set points for the anhydrous ammonia system (the most hazardous system at the facility) from the control room; however, they do not make adjustments and modulations to those set points.

Since they are expected to remain in the control room throughout their shifts, the control room operators gather information concerning the functioning of equipment outside of that room in two primary ways. First, they are expected to constantly monitor computer control monitors in the control room for any indication that any of the systems is not functioning at optimal capacity. In addition, they gather information from the B operators, whom they assign to make observations and report back, as well as to perform tasks which are designed to ensure the plant's continued safe and efficient functioning. If, for example, a control room operator determines, using the equipment in the control room, that an adjustment must be made to the temperature of the super heater, he will ask the B operator to actually make the adjustment. Similarly, if a control room operator detects low gas pressure, he will ask the B operator to stop the compressor. If a control room operator detects a low drum level, he will ask the B operator to inspect the feed water regulator to determine why the boiler is losing water. If the B operator reports, based on his observation, that the regulator is working properly, the control room operator can rule that out as the cause of the water loss, and investigate other possible causes, such as a tube leak inside the boiler, which would not be visible from the exterior. The control room operator might also direct a B operator to start the chiller system, based on market conditions.

The control room operators are also considered lock out/tag out (LOTO) supervisors. If a piece of equipment requires repairs or adjustments, the LOTO system is used to de-energize it so that it can be worked on safely. As LOTO supervisors, the control room operators maintain the "supervisor key" which is used in the control room to unlock locks from the LOTO box. The question of whether or not a LOTO permit is required in any particular instance is dictated by a written procedure in effect at the facility. Typically, the control room operators do not deviate from these procedures, which do not anticipate every possible occurrence, but which do provide guidelines to follow in deciding whether or not to issue a permit. Although all control room operators,

⁴ The "high yard" or "switch yard" consists of a series of metallic poles with utility lines running in and out of the main facility. If National Grid notifies the Employer that it must take a line out of operation, after opening the appropriate breakers, the control room operator would direct the B operator to go out to the high yard and hold a bypass button so that the control room operator can close them from the control room.

B operators and mechanics at the facility receive the same training concerning this procedure, only control room operators are designated as LOTO supervisors. As LOTO supervisor, the control room operator is responsible for initiating the paperwork to de-energize the equipment in question so that the work can be done. In deciding to initiate a LOTO, he may rely on his own experience and/or on input from the individual requesting to perform the work. Before he authorizes the LOTO, he has to be certain that the equipment has been de-energized, and that the work can, therefore, be performed safely. Once he is notified that the work has been completed, the control room operator notifies the B operator that the LOTO is ready to be released. He then waits for the B operator to confirm (based on his observations) that the equipment is ready to be re-energized, and, once he has received such assurances, signs off on the LOTO form, thus authorizing the equipment to be brought back online.

The Employer's operating procedures describe the process for various kinds of plant startups, based on how long the plant has been offline. A "hot stop" startup takes about one and a half to two hours, and a "cold stop" startup can take up to four hours. In both instances, the control room operator relies on the B operator to perform various functions outside of the control room to assist in the startup. For example, while the control room operator can give the gas turbine a start command from the control room, he would have to direct the B operator to go out and perform various functions, including opening up valves, lining up a second vacuum pump if there is a problem with the air cooler/condenser, or shutting down a condensate pump if one was started up during the startup process.

In addition to their LOTO responsibilities, control room operators are responsible for authorizing various permits at the facility including but not limited to "hot work" permits, confined space entry (CSE) permits, and scaffold permits. The Employer has written procedures that govern, in each of these instances, when a permit is required. "Hot work" is work involving flammable or explosive materials that are stored throughout the facility. Before any such work can be performed, the person who is going to perform the work is required to obtain a "hot work" permit from the control room operator. Typically, faced with such a request, the control room operator will ask a B operator to go to the area where the work is going to be performed to assess whether there are any safety hazards (such as combustible materials) in the area. Once the B operator reports back that any possible hazards have been removed, the control room operator will issue the "hot work" permit. Similarly, the control room operators are responsible for authorizing CSE permits, i.e., permits to perform work in a confined space, such as the Hersig. They issue these permits, once again, relying on written procedures, although there is a rule in place prohibiting employees of Tiverton Power to enter confined spaces because they have not received the necessary training.⁵

Control room operators also serve on the Employer's safety committee, and participate in daily marketing calls, providing CPM Group and senior management at

⁵ Although it is not entirely clear from the record, it appears that only non-employee contractors receive these permits.

Tiverton Power with forecasts of the volume of electricity the plant will be capable of producing the following day, based on ambient conditions. In addition to the control room operators, the safety committee is comprised of managers and non-management employees.

The control room operators receive “night orders” from Bieu on a daily basis. These consist of a list of tasks for them to perform if nothing more important arises. In addition, Bieu may direct them to perform particular tasks, such as to clean their work station or to call someone in to make a repair. For example, in Petitioner’s Exhibit 1, an email exchange between control room operator Medeiros and senior management concerning Medeiros’ alleged failure to follow Bieu’s order to clean his assigned station, Keegan makes this explicit:

My expectation is that all direct orders will be followed and that any safety concerns should be brought up to the manager at the time the safety concern is raised. If Kevin [Bieu] is comfortable with a B operator in the control room with an A operator in a known location and available by radio, his decision would prevail....

In the event of an anticipated emergency such as a hurricane, senior management at the facility has historically developed a plan to address a possible loss of power at the facility. In anticipation of Hurricane Irene, in the summer of 2011, for example, senior management worked with a number of facility electricians to develop such a plan, and arranged to have an emergency diesel generator onsite. The normal procedure in the event of a loss of power under such circumstances would be for the control room operator to first attempt to use alternate energy sources and, if that was unsuccessful, to switch, with the help of the B operators, to the diesel generator. The evidence in the record indicates that Medeiros, who was on duty at the time of the power loss attributable to Hurricane Irene, adhered to this established procedure, and that he contacted Bieu, who was off-duty at the time, to advise him that he had not been successful in switching the plant over to the alternate power source, and that he was going to have to use the diesel generator.

The Employer has approximately 45 operations procedures in place, in addition to its startup and shutdown procedures. These include an integrated contingency plan and an emergency response plan, which set forth guidelines for handling different types of incidents that could occur at the plant. The operations procedures are, essentially, guidelines, as they do not set forth detailed specific steps that are mandated in every situation. Thus, there are written procedures in place that guide the control room operators in, for example, completing work authorization forms that are used as part of the LOTO procedure, and approving or denying requests for confined space entry permits, hot work permits, and scaffolding permits. Because these procedures do not anticipate every possible scenario that could arise, they require the control room operators to exercise their judgment; however, the control room operators typically do

not deviate from the procedures set forth in the guidelines.⁶ For example, while there are guidelines concerning how to handle a fire at the facility, they do not provide detailed instructions for handling a hydraulic fire. In the event of a hydraulic fire, the control room operator acts as the on-scene commander, and the B operator updates him from the field. Every employee at Tiverton Power is trained in how to fight a fire at the incipient stage. Control room operators must determine whether or not a fire is at the incipient stage, and whether and when anyone else, including a regulatory agency, needs to be notified. The facility's emergency response plan sets forth the procedure for bringing a fire under control; nevertheless, the control room operators must determine whether certain threshold points have been reached, and whether the plant needs to be evacuated. Similarly, in the event of a spill, the control room operator must exercise his judgment to determine the volume of the spill, which dictates whether the facility is required to notify the Environmental Protection Agency or any other state or federal regulatory agency.

There is no record evidence that control room operators hire, fire, discipline, or provide formal training to B operators, or any other employees, at the facility. Similarly, there is no evidence that control room operators recommend discipline or the discharge of B operators, or that they are involved in evaluating B operators' job performance. Finally, the Employer has presented no evidence that control room operators inspect the B operators' work, that they are held accountable for the B operators' work performance, or that they possess the authority to order a B operator to work or to approve a B operator's overtime request.⁷

The control room operators are hourly employees and earn between \$90,000 and \$130,000 per year, including overtime and bonuses. Operator B's earn approximately \$90,000, including overtime.

Analysis:

Pursuant to Section 2(11) of the Act, 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 recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*⁸

⁶ Some of the procedures, such as the lock out/tag out procedure, and the procedures concerning the storage and handling of hazardous waste materials, follow OSHA and other federal safety regulations, which the control room operators are required to follow.

⁷ A control room operator may, however, be asked by Bieu to call a particular off-duty B operator to find out whether he can cover for a B operator who has called out sick.

⁸ 273 NLRB 1677, 1689 (1985).

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*.⁹ The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification. *New Fern Restorium Co.*¹⁰ The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*¹¹

In *Oakwood Healthcare, Inc.*,¹² the Board refined its analysis of the terms “assign,” “responsibly direct,” and “independent judgment” in assessing supervisory status. The Board announced that it construes the term “assign” to refer to “the act of 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.”¹³

With respect to “responsible direction,” the Board explained in *Oakwood* that, if a person 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. For direction to be “responsible,” the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps.¹⁴

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. “[T]o exercise independent

⁹ 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

¹⁰ 175 NLRB 871 (1969). At the hearing, much attention was focused on the Employer’s use of the term “supervisor” to describe the control room operators themselves, their LOTO responsibilities, and, in that capacity, their guardianship of the “supervisor key.” The mere fact that an individual is referred to as a supervisor, is not dispositive as to his Section 2(11) status under the Act.

¹¹ 308 NLRB 101, 102 (1992).

¹² 348 NLRB 686 (2006).

¹³ *Id.* at 689.

¹⁴ *Id.* at 689-692.

judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”¹⁵ “[A] judgment 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.”¹⁶ The Board also stated that the degree of discretion exercised must rise above the “routine or clerical.”¹⁷

In the instant case, the Employer contends that the control room operators are Section 2(11) supervisors because they assign work to, and responsibly direct the work of, B operators. In reaching this conclusion, the Employer relies on its belief that the control room operators:

- maintain ultimate care, custody, and control of the facility for 76 percent of the plant’s operating hours, when senior managers are off-duty;
- exercise their independent judgment in assigning B operators to make observations regarding the operation of various equipment, and to perform a multitude of tasks throughout the facility;
- function as lock out/tag-out supervisors;
- possess the authority to issue work authorizations for non-routine work, as well as hot work, CSE, and other permits;
- participate in management meetings, including daily marketing calls;
- communicate directly with ISO New England, and various other outside entities;
- possess the authority to call employees in to work if a B operator calls in sick;
- serve as on-scene commanders in the event of an incident when Keegan and Bieu are off-duty;
- maintain the control room log;
- perform system start-ups.

The record indicates that the Employer has failed to meet its burden of proof under the standard set forth in *Oakwood Healthcare*, supra, in establishing that the control room operators are Section 2(11) supervisors. First, the Employer failed to establish that the control room operators exercise independent judgment in assigning B operators to a place or appointing them to a time, or in assigning them overall tasks. Moreover, the Employer failed to meet its burden of establishing that the control room operators responsibly direct the B operators.

¹⁵ Id. at 693.

¹⁶ Id.

¹⁷ Id.

Assignment

It is undisputed that the control room operators, by virtue of being confined to a single room throughout most of their shifts, rely heavily on the B operators to assist them in monitoring equipment throughout the facility and in performing hands-on tasks related to maintaining the safety and efficiency of the operation as a whole. The record demonstrates that the control room operators and B operators are in continuous contact throughout their shifts. Based on their observations of the computerized control system technology in the control room, the control room operators make assignments to the B operators. Thus, when a control room operator detects an anomaly in some aspect of the facility's operations, via these computerized control systems, he directs the B operator to observe and report back his observations, and, if appropriate, to make adjustments in the operation of the equipment or system in question. Indeed, although they may not exercise this authority frequently, control room operators have the authority to direct B operators to prioritize their work differently, i.e., to stop working on a particular project and to work on something else.

In carrying out many of the day-to-day operations at the facility, control room operators and other employees are guided by operations procedures that delineate how to proceed under various contingencies. While they do not account for every eventuality, and thus require the exercise of some discretion, the extensive guidelines maintained by the Employer in most instances direct the decision-making of the control room operators as far as their work assignments to the B operators.

The assignments at issue in this case are not permanent, and are not, for the most part, discretionary. Typically, only one B operator is on duty at a time, so the control room operator does not exercise discretion in determining which B operator is best-suited to perform a particular assignment. Thus, while the control room operators direct B operators where to go and what to do at various times throughout their work shifts, the evidence does not establish that such assignments are made with any of the supervisory discretion required under *Oakwood Healthcare*, supra.

Moreover, the Employer failed to establish that the control room operators' judgments in assigning B operators to various tasks are exempt from the control of senior management. The evidence shows that, while their job duties confer upon them a great deal of responsibility and discretion with respect to maintaining the safe and efficient operation of the facility, particularly when Bieu and Keegan are off-site, it is Bieu and Keegan, and not the control operators, who maintain ultimate authority over both the control room operators' and the B operators' work assignments. The email correspondence in Petitioner's Exhibit 1, for instance, makes clear that, while control room operators are authorized to assign work to B operators, ultimately the operations manager's authority prevails.

Finally, it is well established that the party seeking to establish supervisory authority must show that the 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*.¹⁸ Authority to request volunteers to fill a vacancy on a shift does not confer supervisory status. *Heritage Hall, E.P.I. Corp.*¹⁹ Thus, although they are sometimes called upon by the operations manager to find replacements for B operators who call in sick, the record makes clear that they do not possess the authority to order a B operator to work. Moreover, the record is devoid of any evidence that control room operators possess the authority to dictate the B operators' work schedules.

The Employer here has also failed to establish that the control room operators are statutory supervisors on the grounds that their assignment of work to the B operators constitutes an assignment of "significant overall duties," within the meaning of *Oakwood Healthcare*, supra. It is undisputed in the instant case that control room operators have the authority to assign B operators to carry out various functions outside of the control room relating to maintaining the safe and efficient operation of the facility, and even to assign them to remove them from one task that they are currently performing and assign them to a different task. Nonetheless, as described in *Oakwood*, a putative supervisor's authority to remove an employee from an assigned to work on something that the putative supervisor considers to be a higher priority or a "trouble case" does not constitute an assignment of significant overall duties where it involves prioritizing "trouble work" over routine work. *Entergy Mississippi, Inc.*²⁰

Taken together, the facts as analyzed above indicate that the Employer has failed to meet its burden of establishing that the control room operators are Section 2(11) supervisors based on their assignment of work to the B operators.

Responsible Direction

The term "responsibly to direct," as defined in *Oakwood Healthcare*, supra, requires a finding of accountability. Thus, as described in a recent case,

"[I]t 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,"... [and] that "there is a prospect of adverse consequences for the putative supervisor," arising from his or her direction of other employees.

¹⁸ 348 NLRB 727, 729 (2006).

¹⁹ 333 NLRB 458, 459 (2001).

²⁰ 357 NLRB No. 178 at 7 (2011).

*Entergy Mississippi, Inc.*²¹

Here, the Employer here has not met its burden of establishing that the control room operators' job duties require them responsibly to direct the work of the B operators. More specifically, while it is undisputed that they direct the B operators' work, the Employer presented no evidence that it has delegated to its control room operators the authority to take corrective action with respect to the B operators, if necessary. Similarly, the Employer presented no evidence that control room operators are held accountable for B operators' failure to perform their job in accordance with the Employer's expectations. For these reasons, the Employer has failed to meet its burden of establishing that the control room operators are statutory supervisors on the basis of their responsible direction of B operators.

Independent Judgment

As indicated earlier, an individual cannot be found to exercise independent judgment in his authority over another person if that judgment is dictated or controlled by detailed company policies, instructions, or rules. In the instant case, the record demonstrates that, to a large degree, the control room operators' direction of B operators is guided and controlled by detailed operating procedures from which the control room operators do not typically deviate. While the record indicates that these procedures do not detail every possible contingency, the Employer has not met its burden of establishing that, in exercising its discretion with respect to the B operators' work assignments, the control room operators do so free of the control of others. The control room operator's handling of the loss of power at the facility during Hurricane Irene, which involved merely executing a plan that had been developed by senior management in anticipation of a possible power loss, reinforces this conclusion.

In arguing that the control room operators are statutory supervisors, the Employer repeatedly references the complexity of their job responsibilities and the substantial risk of adverse consequences to the general public and facility employees should the control room operators fail to exercise good judgment in performing their duties. It is well-established under Board law that such considerations are insufficient to confer supervisory status. Rather, the party bearing the burden of proof with respect to their supervisory status must demonstrate that the putative supervisor's exercise of professional expertise was carried out in relation to one of the indicia of supervisory authority. *Entergy Mississippi, Inc.*²² The Employer herein has failed to meet its burden in that regard.

²¹ Id. at p 4-5, citing *Oakwood Healthcare*, supra.

²² Id. at 5.

Secondary indicia

Finally, it is well-settled that, while indicia of supervisory authority may lend support to a conclusion regarding supervisory status, in the absence of evidence of the existence of one of the primary indicia, secondary indicia are not dispositive. *Arizona Public Service Co.*,²³ *Golden Crest Healthcare Center*;²⁴ *Ken-Crest Services*.²⁵ Thus, in the instant case, the disproportionately high ratio of supervisors to employees, five control room operators supervising four B operators, supports my conclusion that the control room operators are not statutory supervisors. *Arizona Public Service Co.*²⁶ In addition, the Employer's reliance on an apparent pay differential between the disputed employees and B operators is insufficient, by itself, to establish supervisory status. *Arizona Public Service Co.*²⁷ The same is true of the Employer's reliance on the control room operators' participation in morning meetings. *Connecticut Humane Society*.²⁸

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time boiler operators, control room operators, and maintenance employees employed at the Employer's 304 Progress Road facility in Tiverton, Rhode Island, but excluding all other employees, managers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Utility Workers Union of America/Brotherhood of Utility Workers Council, Local 310, AFL-CIO. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

²³ 310 NLRB 477 (1993).

²⁴ 348 NLRB 727, 730 fn. 10 (2006).

²⁵ 335 NLRB 777, 779 (2001).

²⁶ *Supra* at 481.

²⁷ *Ibid.*

²⁸ 358 NLRB 1, 23 (2012)

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining whether there is an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **June 26, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,²⁹ by mail, or by facsimile transmission at 617-565-6725. To file the

²⁹ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **July 3, 2012**. The request may be filed electronically through the Agency's website, www.nlr.gov,¹ but may not be filed by facsimile.

**DATED at Boston, Massachusetts
this 19th day of June, 2012.**

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072