

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

VIRGO MEDICAL SERVICES, INC.

Employer

and

Case 04-RC-104485

TEAMSTERS UNION LOCAL NO. 115

Petitioner

**REGIONAL DIRECTOR'S DECISION  
AND DIRECTION OF ELECTION**

The Employer, Virgo Medical Services, provides medical transportation services from two facilities in Pennsylvania and New Jersey. The Petitioner, Teamsters Local 115, seeks to represent a unit of Drivers, Dispatchers, and On-Site Coordinators assigned to the Employer's Philadelphia, Pennsylvania facility. The Employer asserts that a unit limited to employees at the Philadelphia facility is not appropriate and that the employees at its East Orange location must also be included.<sup>1</sup> Additionally, the Employer contends that Dispatchers and On-Site Coordinators are statutory supervisors who should be excluded from the unit, while the Petitioner asserts that these positions are not supervisory.

A Hearing Officer of the Board held a hearing, and the parties filed briefs. I have considered the evidence and the arguments presented by the parties, and as discussed below, I conclude, in agreement with the Petitioner, that a unit limited to the Philadelphia facility is appropriate. I further conclude that Dispatchers and On-Site Coordinators are not supervisors within the meaning of Section 2(11) of the Act and should be included in the unit.

**I. OVERVIEW OF OPERATIONS**

The Employer's main office is in East Orange, New Jersey, where the Employer also has a transportation facility. The Employer acquired the East Orange medical transportation operation from another company sometime prior to April 2010. Chief Operating Officer Tony Agosto, Director of Operations Glen Biellic, and the Human Resources Department are based in

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<sup>1</sup> In a letter submitted by the Petitioner to the Region after the close of the hearing, the Petitioner stated that it does not wish to proceed to an election if East Orange employees are included in the bargaining unit.

East Orange, where the Employer maintains employees' personnel files, payroll records, and other administrative records.

There are approximately 81 Drivers based at East Orange, including Mobility Assistance Vehicle Technicians (MAVTs) and Emergency Medical Technicians (EMTs).<sup>2</sup> Operations Manager Katherine Filoramo is in charge of the facility, which also has three full-time Dispatchers<sup>3</sup> and an On-Site Coordinator. The facility has a drivers' room, a parking area for the Employer's 35 vehicles, and a maintenance garage. Approximately 85 percent of the East Orange Drivers' work involves transporting patients from Veterans Administration (VA) hospitals in East Orange and Lyons, New Jersey to various medical appointments, and the remaining 15 percent of their transports are for private residents and nursing home patients.

On October 1, 2012, the Employer began servicing the Philadelphia VA Medical Center and hired Operations Manager Rodney Arrington to oversee its Philadelphia operations.<sup>4</sup> Arrington reports to Director of Operations Bielic. The Philadelphia facility has one Dispatcher, Shalena Whiteman, who reports to Arrington. The On-Site Coordinator position also reports to Arrington, but that position is currently vacant. The Philadelphia facility employs about 21 full-time Drivers, all of whom are MAVTs, and the Drivers transport patients only from the Philadelphia VA Medical Center, not nursing homes or private individuals.<sup>5</sup>

In Philadelphia, the Employer is currently operating out of a small trailer on Haines Street, where there is a desk with a computer and a time clock. The Employer is in the process of constructing a more substantial building on this property. The 17 vehicles that operate from the Philadelphia facility park in the parking lot outside of the trailer.

The VA medical centers provide the Employer with daily manifests showing patient appointments, and these manifests are uploaded into the Employer's computer system. In Philadelphia, Arrington and Whiteman look at the manifests each day and assign Drivers to transport patients in particular vehicles. If, after the Philadelphia Drivers are assigned, there are openings or gaps in the schedule, Arrington asks Director of Operations Bielic to send additional Drivers from East Orange. Drivers are given their assignments for the next day when they return to the facility at the end of the day, or by telephone at night or the next morning.

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<sup>2</sup> The Employer contends that the unit should include EMTs, but there are no EMTs currently working out of the Philadelphia location. As I have found that a unit limited to the Philadelphia location is appropriate, and since the Petitioner has informed the Region that it does not wish to proceed to an election if East Orange employees are included in the unit, it is not necessary to determine whether EMTs should be included. All references to "Drivers" in this Decision refer to MAVT Drivers unless otherwise noted.

<sup>3</sup> The Operations Manager and On-Site Coordinator at that location also perform some dispatching functions.

<sup>4</sup> The parties stipulated that Arrington is a supervisor within the meaning of Section 2(11) of the Act.

<sup>5</sup> The Employer also uses several per-diem employees, who work on an "on-call" basis. The parties agree that per-diem employees should be included in the unit if they work at least 20 hours a week.

The East Orange and Philadelphia facilities are between 84 and 92 miles apart depending on the route.<sup>6</sup> Bielic testified that it is about a two-hour drive between these locations. There is no bargaining history at either location.

## II. THE RELEVANT LEGAL STANDARDS

### A. Multi-Location Unit

Where an employer operates multiple facilities, the Board presumes that a petitioned-for unit limited to employees at a single facility is appropriate. *J&L Plate, Inc.*, 310 NLRB 429 (1993); *Bowie Hall Trucking, Inc.*, 290 NLRB 41, 42 (1988). This presumption in favor of a single-location unit can be overcome by a showing that the facility has been effectively merged into a more comprehensive unit or is so functionally integrated with another unit that it has lost its separate identity. *Budget Rent a Car Systems, Inc.*, 337 NLRB 884, 885 (2002); *New Britain Transportation Co.*, 330 NLRB 397 (1999). The burden is on the party opposing a petitioned-for single-location unit to present evidence to overcome the presumption. *J&L Plate*, supra; *Red Lobster*, 300 NLRB 908, 910-911 (1990). Factors considered in determining whether the single-facility presumption has been rebutted include: centralized control over daily operations and labor relations, including the extent of local autonomy; similarity of employee skills, functions and working conditions; degree of employee interchange; geographic proximity; and bargaining history, if any. *New Britain Transportation*, supra; *Globe Furniture Rentals, Inc.*, 298 NLRB 288 (1990). The Board has described the burden of overcoming the single-facility presumption as “heavy.” *Mercy Sacramento Hospital*, 344 NLRB 790 (2005).

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 10-13 (2011), the Board modified the framework to be applied in making certain unit determinations. The *Specialty Healthcare* framework applies when the petitioner seeks a unit consisting of employees readily identifiable as a group who share a community of interest, but another party seeks a broader unit. The party seeking a broader unit must demonstrate “that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit.” [Emphasis added]. To determine community of interest, the Board examines such factors as the degree of functional integration between employees, common supervision, employee skills and job functions, contact and interchange, and similarities in wages, hours, and other terms and conditions of employment. *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004); *Home Depot USA, Inc.*, 331 NLRB 1289 (2000); *United Operations, Inc.*, 338 NLRB 123 (2002). Additional employees share an overwhelming community of interest with petitioned-for employees only where there is no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011).

The Board did not indicate in *Specialty Healthcare* whether the analytical framework set forth in that case is intended to apply to a multi-facility unit issue. Assuming *Specialty*

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<sup>6</sup> I take administrative notice of this distance, which is derived from the Google Maps website. See Federal Rule of Evidence 201.

*Healthcare* applies, it would transform the traditional burden applied in these cases into a requirement that the party seeking to overturn the single-facility presumption demonstrate that employees at the facilities it seeks to add share an overwhelming community of interest with employees at the petitioned-for location. Because of the uncertainty regarding the Board's intentions in this area, I will analyze the multi-facility issue using both the traditional and the *Specialty Healthcare* standards.

### **B. Supervisory Status**

Supervisors are specifically excluded from coverage under the National Labor Relations Act. The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001); *Shaw, Inc.*, 350 NLRB 354, 355 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Croft Metals*, supra; *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River*, supra at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *NLRB v. Kentucky River*, supra at 713; *Shaw, Inc.*, supra at 355. The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Oakwood Healthcare*, supra at 693 (2006); *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. See *Children's Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Oakwood Healthcare*, supra at 687 (2006). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *G4S Regulated Security Solutions*, 358 NLRB No. 160, slip op. at 1 (2012); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Finally, the sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Shaw, Inc.*, supra at 357, fn. 21; *Oakwood Healthcare*, supra at 693; *Kanahwa Stone, Co.*, 334 NLRB 235, 237 (2001).

### III. THE MULTI-LOCATION UNIT ISSUE

#### A. Facts

##### *Local autonomy*

Operations Manager Arrington is the highest-ranking official based at the Philadelphia facility. He oversees daily operations and attempts to ensure that everything runs smoothly. Arrington works from 8:30 a.m. to approximately 8:00 to 8:30 p.m., and he is on-call 24 hours a day.

Arrington has the authority to issue verbal and written warnings for employee misconduct, but all suspensions and discharges must be approved by Director of Operations Bielic, who is based in East Orange. When Drivers submit requests for days off, Arrington consults with Bielic before granting the requests.<sup>7</sup>

Arrington conducts initial job interviews with applicants and makes hiring recommendations. After Arrington interviews the applicants, if they pass muster with him, they are interviewed again in East Orange before they are hired. The Employer has hired three of the four applicants that Arrington recommended.<sup>8</sup> Arrington also recommended the promotion of a Philadelphia Driver to the On-Site Coordinator position, and she received the promotion.<sup>9</sup> The Employer does not permit Drivers to work overtime, so Arrington does not have authority in this area.

The Employer tracks the Philadelphia and East Orange schedules using a computer system that allows managers and Dispatchers at both locations to monitor all of the company's daily manifests. The Philadelphia employee time clock is connected to the computer system, which is based in East Orange. No records are currently maintained in the Philadelphia office. When Drivers need to call out from work, they contact the East Orange facility. All vehicle repairs are performed at the maintenance garage in East Orange.

Arrington's purchasing authority is strictly limited; he controls only a few hundred dollars at a time and must call the East Orange office to obtain supplies. These supplies are delivered to Philadelphia by Drivers from East Orange.

Chief Operating Officer Agosto testified that he spends two or three days a week at the Philadelphia location, and Director of Operations Bielic stated that he has made about 15 trips to the Philadelphia facility since October 2012. The record does not indicate what these officials do when they come to Philadelphia.

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<sup>7</sup> The record does not indicate whether such requests are ever denied, and if so, the reasons for such denials.

<sup>8</sup> Arrington initially testified that the fourth applicant may have failed a drug test. However, he later indicated that he was uncertain about this.

<sup>9</sup> That individual no longer works for the Employer, and her position is now vacant.

*Driver duties, qualifications, and terms and conditions of employment*

The duties of the Drivers from the East Orange and Philadelphia facilities are similar. Both groups transport patients to and from their medical appointments, are trained in CPR, and are certified to transport wheelchair-bound patients. Drivers at both locations are required to complete the same paperwork, including MAVT Rig Check Sheets at the beginning and end of their shifts and Transportation Certifications for each patient. As noted above, however, East Orange Drivers transport patients from private residences and nursing homes, in addition to VA hospitals, while Philadelphia Drivers transport patients only from VA hospitals.

Philadelphia Drivers are paid a higher starting wage rate (\$10.50 to \$12.01 per hour) than East Orange Drivers (\$8.50 to \$12.00 per hour). Agosto testified that the Employer hired Philadelphia Drivers at a higher starting rate in order to convince some of the East Orange Drivers to transfer to Philadelphia.

Drivers at both locations are subject to the same personnel policies and receive the same benefits.<sup>10</sup> The Employer maintains a single list of employee hire dates that it uses only for the purpose of determining pay raises.

Drivers at the two facilities wear different uniforms. East Orange Drivers wear navy blue pants with a blue-gray shirt, while Philadelphia Drivers wear navy blue pants and shirts. When Bielic was hired, the Employer already had a uniform contract covering the East Orange location, and Bielic testified that when that contract expires, he plans to have all Drivers wear the Philadelphia uniform.

Drivers do not have written schedules or regular start times. Rather, they are told what time to report on a daily basis; a Driver may start at 7:00 a.m. one day and 1:00 p.m. the next. The Driver who takes a patient to an appointment is not necessarily the Driver who picks up that patient after the appointment. East Orange Drivers work at times on Sundays because their facility operates seven days a week. The Philadelphia location is not open on Sundays.

*Transfers, contact and interchange*

When the Employer first contracted with the Philadelphia VA, it used East Orange Drivers to transport Philadelphia-area patients to their appointments. After Philadelphia hired its own workforce, East Orange Drivers Carmin Jones and Vincent Paulin, who live in Philadelphia, requested to transfer to the Philadelphia facility. Their requests were granted. Drivers Baron Deshong and Mark Wright punch in at the East Orange facility each day, and wear the East Orange uniform, but since October 2012, they have spent approximately 95 percent of their time working from the Philadelphia schedule.<sup>11</sup> The record does not indicate who gives them their

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<sup>10</sup> All managers, supervisors, and employees receive the same benefits, including health insurance and vacation time.

<sup>11</sup> The Petitioner seeks to include Deshong and Wright in the Philadelphia single-facility unit.

daily assignments.<sup>12</sup> East Orange Drivers Gary Washington and Maurice Hunt spend about 50 percent of their time transporting patients listed on the manifests of each of the two facilities.

Bielic testified that since the Employer has been operating in Philadelphia, it has used East Orange Drivers to supplement the Philadelphia workforce one to five times a week. The Employer did not, however, provide documents to support this testimony, and the record does not indicate who supervises the East Orange Drivers when they work from the Philadelphia schedule. When East Orange Drivers supplement the Philadelphia workforce, they may transport patients without going to the Haines Street facility.

East Orange and Philadelphia Drivers transport patients to some of the same hospitals, dialysis centers, and clinics and may interact while they wait for patients, although the record does not show how often this occurs. Bielic testified that he has seen Drivers congregating outside the Philadelphia VA, but it was not clear whether these Drivers were from both facilities and whether congregating is a common occurrence.

The only documentary evidence of Driver assignments, the Philadelphia manifest for May 1 through May 4, 2013, shows that Philadelphia Drivers picked up about 31 patients in New Jersey. Most or all of these New Jersey locations were in locations in southern New Jersey that were closer to the Philadelphia facility than to the East Orange facility, which is in northern New Jersey. Two out of 200 Philadelphia VA patients were transported by East Orange Drivers during those four days.

Bielic testified that the Employer generally conducts MAVT recertification training and new employee training at the East Orange facility once a month. The Employer also conducts refresher courses for Drivers whenever Bielic deems they are necessary.

The Employer's Christmas parties and company picnics have been held in East Orange, but it is not clear how many such celebrations there have been or whether any Philadelphia employees attended.<sup>13</sup> When Philadelphia Drivers take their vehicles to New Jersey for time-consuming repairs, they normally are assigned East Orange transports during the repair process.

## **B. Analysis**

### *Single-Facility Presumption Analysis*

I find that the Employer has not met its heavy burden to overcome the presumption favoring the appropriateness of the petitioned-Philadelphia-facility unit.

There is considerable local autonomy at the Philadelphia facility, which has its own Operations Manager, On-Site Coordinator, and Dispatcher. The Board has found the presence of

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<sup>12</sup> Bielic testified that former East Orange Drivers Craig Vass and Ed Carter also spent about 95 percent of their time working off the Philadelphia schedule. The record does not indicate the dates of their employment with the Employer.

<sup>13</sup> In this connection, it seems unlikely that any company picnics were held between the time the Employer started its Philadelphia operation in October 2012 and the date of the hearing, May 22, 2013.

a local manager and dispatchers to be evidence of significant autonomy over local terms and conditions of employment. *D&L Transportation*, 324 NLRB 160, 161 (1997); also see *Cargill, Inc.*, 336 NLRB 1114, 1114 fn. 1 (2001). The parties stipulated that Arrington is a supervisor within the meaning of Section 2(11) of the Act. He oversees the daily operations and may impose low levels of discipline without consulting anyone from East Orange. He is on call 24 hours a day to deal with any issues that arise at the facility, and he is heavily involved in the hiring process. According to Bielic, Arrington also effectively recommends starting wage rates for Drivers, although Agosto suggested that these recommendations are made by "Dispatch Managers." In either case, these recommendations are made at the Philadelphia facility.

The Board has identified employee interchange as another critical factor in deciding whether the single-facility presumption has been rebutted. *Mercy Sacramento Hospital*, 344 NLRB 790 (2005); *First Security Services Corp.*, 329 NLRB 235, 236 (1999). The regular shifting of employees between facilities tends to undermine the identity of employees at a particular site as a discrete group and indicates the merger of employees into a multi-location grouping. The absence of significant interchange, on the other hand, will necessarily have a tendency to reinforce employee identification with the other employees at their separate facilities and support a finding that a single-location unit is appropriate. In *New Britain Transportation*, supra, the Board suggested that a party seeking to rely on this factor to rebut the single-facility presumption must present detailed evidence of interchange, in context, and show that a high percentage of employees regularly work in the jurisdiction of other facilities.

There is some interchange between employees at the Employer's two facilities, but the Employer has not shown that there is enough to meet the Board's standards. Drivers Deshong and Wright report to East Orange but work in the Philadelphia area approximately 95 percent of the time, and Drivers Washington and Hunt work about 50 percent of the time at each location. The evidence as to these four Drivers is not enough to show substantial interchange in a unit of 21 Drivers. Bielic's testimony that the Employer uses East Orange Drivers to supplement the Philadelphia workforce one to five times a week is vague, conclusory, and unsupported by documentary evidence. Moreover, this testimony does not place the interchange in context -- there is no evidence as to the number of East Orange Drivers who supplement the Philadelphia workforce or the Employer's total number of driving assignments each week. The only records produced by the Employer, manifests for a four-day period in May 2013, show that only two out of 200 Philadelphia VA patients were transported by East Orange Drivers, an insubstantial amount. In short, the Employer's documentary evidence lacks adequate context and does not demonstrate significant interchange. *New Britain Transportation*, supra; *Cargill, Inc.*, supra.

There have been two permanent transfers between the facilities; former East Orange Drivers Jones and Paulin voluntarily transferred to the Philadelphia facility when it commenced operations. The Board has stated, however, that "voluntary interchange is given less weight in determining if employees from different locations share a common identity." *New Britain Transportation*, supra at 397.

Philadelphia and East Orange Drivers generally transport patients from different VA facilities using separate fleets of vehicles, and there is little opportunity for contact between them. Although Bielic testified that Philadelphia and East Orange Drivers transport patients to some of the same medical facilities, the record does not indicate the extent to which they are in contact with each other when they do so. Moreover, any such contact is only incidental to the

Drivers' task of transporting patients to common locations. See *D&L Transportation*, supra. Additionally, Drivers from both locations may meet at one or two parties a year and at training sessions, but such events are not frequent and do not demonstrate substantial contact.<sup>14</sup>

Drivers at East Orange and Philadelphia have the same basic skills and duties, but there are some differences in their terms and conditions of employment. The Philadelphia Drivers have generally higher wages and are not scheduled on Sundays, and the two groups wear different uniforms. Additionally, the East Orange Drivers may transport patients from private homes and nursing facilities, while the Philadelphia Drivers only transport patients from VA facilities.

Finally, the 84 to 92-mile distance between the Philadelphia and East Orange facilities is substantial. While not determinative, significant geographic separation is an important factor where, as here, there are other persuasive factors that support a single-facility unit. *New Britain Transportation*, supra; *Bowie Hall Trucking*, supra at 43; *Eschenback-Boysa Management Co.*, 268 NLRB 550 (1984).

In its brief, the Employer cites *Budget Rent a Car*, supra, 337 NLRB at 885, and *Dattco, Inc.*, 338 NLRB 49 (2002), in support of its argument that only a combined Philadelphia/East Orange unit is appropriate. Both cases are distinguishable. In *Budget Rent a Car*, the single-facility presumption was rebutted by evidence that the employer's rental car offices were so functionally integrated that they had no separate identities. Significantly, the petitioned-for rental car office did not have its own fleet inventory; the vehicles were shared among five stores. Moreover, there was no separate management at each facility and considerable employee interchange and contact. Operations at the Employer's Philadelphia and East Orange locations are not similarly integrated, as there are separate fleets of vehicles, separate management, and far less employee interchange and contact. In *Dattco*, the Board found that the employer rebutted the single-facility presumption where, among other things, one-third of the Drivers from the petitioned-for trucking terminal were shuttled out to service other terminals on a daily basis and reported to supervisors at those terminals. That level of contact and interchange is well beyond the level established in this case, and *Dattco* therefore is not controlling.<sup>15</sup>

On balance, in view of the extensive autonomy of the Philadelphia operation, the lack of significant employee interchange or contact, and the substantial distance between the two facilities, I find, applying the Board's single-facility unit standards, that a unit limited to Philadelphia employees is appropriate. *Cargill, Inc.*, supra; *D&L Transportation*, supra.

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<sup>14</sup> In April 2013, the Employer provided transportation for a Veterans' golf tournament, an event that was sponsored by the Philadelphia VA facility and held in New Jersey. Bielic coordinated the transportation, and Arrington was involved in scheduling the Drivers, who were all from the Employer's East Orange location. As all Drivers for this event were from the same facility, I accord little significance to this evidence.

<sup>15</sup> I also find *Trane*, 339 NLRB 866 (2003) to be distinguishable because in that case, there was no separate supervision at the petitioned-for facility.

*Specialty Healthcare analysis*

I reach the same result applying the *Specialty Healthcare* standards. The initial step required under *Specialty Healthcare* is a determination of whether employees in the petitioned-for unit constitute a discrete group with a community of interest. In this case, the Philadelphia employees constitute such a group. They share local supervision and have common skills and duties and similar terms and conditions of employment. Since this community of interest has been demonstrated, the burden is on the Employer to show that the East Orange employees share an overwhelming community of interest with the Philadelphia employees. As the Board explained in *Northrop Grumman Shipbuilding, Inc.*, supra, 357 NLRB No. 163, slip op. at 3, "additional employees share an overwhelming community of interest with the petitioned-for employees only when there 'is no legitimate basis on which to exclude [the] employees from' the larger unit because the traditional community-of-interest factors 'overlap almost completely.'"

The Employer has failed to meet this burden. There is little evidence of contact and limited interchange between the two groups, and employees at the two facilities are supervised separately on a day-to-day basis by different Operations Managers. The existence of these factors favoring separate units is sufficient to defeat any claim of an overwhelming community of interest between the Philadelphia and East Orange employees and to require a finding that Philadelphia facility employees constitute an appropriate unit.

In short, whether the Board's single-facility unit presumption or the *Specialty Healthcare* framework applies, I find that the Employer has not carried its burden of rebutting the appropriateness of a unit limited to Philadelphia employees. Accordingly, I shall direct an election in a Philadelphia-only unit.<sup>16</sup>

**IV. THE SUPERVISORY STATUS OF DISPATCHERS AND ON-SITE COORDINATORS**

**A. Dispatchers**

*Facts*

There are three full-time Dispatchers at the East Orange facility (Steven Kolis, Jose Cintron and Derek Brown) and one at the Philadelphia location (Shalena Whiteman).<sup>17</sup>

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<sup>16</sup> The Petitioner seeks to include in the unit Drivers Deshong and Wright, who spend 95 percent of their time working in the Philadelphia area, although they report to East Orange. As there is insufficient evidence as to how they are supervised or the extent of their contact with employees from East Orange and Philadelphia, among other things, they shall be permitted to vote subject to challenge. The Petitioner does not seek to include Drivers Washington and Hunt, who are based in East Orange but work in the Philadelphia area half of the time, and they shall not be included in the unit.

<sup>17</sup> The Employer submitted into evidence a document that purports to be its organizational flow chart, which identifies the classification at issue as "Dispatch Supervisor." However, the

Dispatchers report to the Operations Managers at their respective facilities. In performing their dispatching duties, they answer calls from On-Site Coordinators, facilities, and patients, and communicate regularly with the Drivers. At the Philadelphia facility, Operations Manager Arrington and Dispatcher Shalena Whiteman use Philadelphia VA Medical Center manifests that are uploaded into the Employer's computer system to assign Drivers to specific pick-ups and vehicles. Arrington contacts Bielic when he needs additional Drivers from East Orange to cover jobs on the Philadelphia VA's manifest. Throughout the workday, Dispatchers generally dispatch the first Driver available to transport the next patient.

Bielic testified that Dispatchers have the authority to issue verbal and written warnings to Drivers and send Drivers home if they do not have proper identification, are out of uniform, or refuse assignments. He also testified that Dispatchers can recommend, but not impose, suspensions and discharges.

The record includes only two examples of Dispatcher involvement in discipline. Bielic testified that Dispatcher Whiteman recently warned a Driver for refusing to transport a patient as assigned and sent the Driver home. However, Arrington, who was closer to the scene, testified that Whiteman called him about the Driver's misconduct, and he told Whiteman to "write it up" and submit it to Bielic. Bielic also testified that Whiteman wrote up a Driver after receiving complaints about him from three different patients. However, Arrington testified to a far more circumscribed role for Whiteman in this matter; he stated that Whiteman did not give the Driver the write-up or recommend any discipline, but simply made a factual report of the Driver's misconduct. Arrington testified generally that, "it doesn't always necessarily mean that the dispatcher is going to recommend a type of discipline to me or Glen. They can just submit what they did wrong." He further suggested that if there were a pattern of misconduct by a Driver, he and Bielic would need to address it. Bielic initials all disciplinary notices.

As a purported example of a situation in which a Dispatcher effectively recommended a Driver's discharge, Bielic mentioned Pedro Oreo, who was discharged by the Employer after he was warned for speeding and following multiple complaints about his behavior. Bielic testified that Oreo's discharge must have been recommended by his dispatch department because he personally had no idea how Oreo performed on the road. The Employer did not produce records memorializing Oreo's warnings or discharge. Indeed, the Employer did not produce any warnings that were signed by any Dispatcher. At another point, Bielic testified that although they have the right to do so, no Dispatcher has ever made a recommendation to discharge an employee.

Chief Operating Officer Agosto testified that Dispatchers have the authority to transfer Drivers from one location to the other. In this connection, he suggested that Drivers Wright and Deshong, who punch in at the East Orange facility but work primarily in Philadelphia, "would have asked" their Dispatchers if they could transfer to Philadelphia. At another point, however, Agosto testified that *he* would consider giving a Driver a transfer in order to keep the Driver happy.

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Employer concedes that this document was prepared in anticipation of litigation, and therefore the title used in this document is of no significance. Parties and witnesses regularly referred to this classification as "Dispatcher" throughout these proceedings.

Agosto testified that Drivers' initial wage rates are basically determined pursuant to standards set by the Department of Labor. He further stated that following an interview with the "initial supervisor, which may be one of the Dispatchers," . . . "it's handed up to the Dispatch Manager," who makes a recommendation to Bielic as to the employee's initial rate. Bielic then makes the decision, although Agosto may change it if he believes the recommended wage rate is too high or too low.

Philadelphia Dispatchers have the choice of being salaried or being paid on an hourly basis. If salaried, they earn \$600 per week. The record does not reveal their hourly wage rates.

At the Philadelphia location, Dennis Harvey works overnight from 11:00 p.m. to 7 a.m. performing two functions. He works as the Dispatcher and also personally transports patients as needed during the night. When Harvey is driving, East Orange Dispatchers perform his dispatching duties.<sup>18</sup>

#### *Analysis*

As the party asserting supervisory status, the burden was on the Employer to produce sufficient evidence to show that the Dispatchers exercise at least one of the supervisory powers set forth in Section 2(11). The Employer contends that it has satisfied this burden based on evidence establishing that Dispatchers assign work to Drivers, have the authority to transfer Drivers between Philadelphia and East Orange, recommend the initial pay rate for new Drivers, and have the authority to give verbal and written warnings and to send Drivers home without pay. I find the evidence insufficient to support these contentions.

The Dispatchers assign Drivers to pick up patients and to particular vehicles. However, these assignments are based entirely on Driver availability, and the assignment of similarly-skilled Drivers to patients is a routine function that does not require independent judgment. *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 7 (2012) (assigning an operator to a train does not involve independent judgment where all trains are the same and operators have the same qualifications and skills); *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 9-10 (2011) (assigning field employees to a location pinpointed by the employer's computer system does not involve the exercise of independent judgment).

As to the Dispatcher's asserted authority to transfer Drivers between the two locations, Agosto's testimony that Dispatchers "would" have authorized Deshong and Wright to work primarily in Philadelphia falls far short of the certainty needed to justify a supervisory finding. Moreover, Agosto suggested that he makes transfer decisions, and Arrington testified that he had asked Agosto and Bielic if he could keep Deshong and Wright in Philadelphia. Based on the foregoing, I find that the Employer's evidence is insufficient to establish that Dispatchers have the authority to transfer Drivers between the Employer's Philadelphia and East Orange locations.

Additionally, the record contains only two examples of Dispatcher involvement in Driver discipline. In the first instance, Dispatcher Whiteman informed Arrington that a Driver refused a trip, and Arrington told Whiteman to write up the Driver and to submit the write up to Bielic. In

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<sup>18</sup> The record does not indicate how many Drivers work at night.

the second instance, Whiteman wrote up a Driver after receiving several complaints about him, but she did not recommend that he be disciplined. In both cases, Whiteman simply reported facts to Arrington, and the Board has indicated that reports of employee infractions do not establish supervisory status if they do not inevitably produce disciplinary action. *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). To the extent Dispatchers have the authority to send employees home for serious infractions, the Board has held that such authority does not demonstrate supervisory authority because it does not require the use of independent judgment. *Michigan Masonic Home*, 332 NLRB 1409, 1411 fn. 5 (2000).

Bielic's testimony that his "dispatch department" must have recommended Pedro Oreó's termination does not demonstrate actual disciplinary authority because it is speculative and unsupported by any documentary evidence. Moreover, it contradicts his earlier testimony that no Dispatcher has recommended that a Driver be discharged. Indeed, the Employer failed to offer any warnings or disciplinary reports into the record. See, e.g., *Avante at Wilson*, supra at 1057. The Board has clearly stated that generalized testimony about supervisory status, absent specific, tangible examples is insufficient to establish supervisory status. *G4S Regulated Security Solutions*, supra, slip op. at 2; *Alternate Concepts*, supra, slip op. at 3. Accordingly, I find that the evidence is insufficient to establish that Dispatchers exercise supervisory authority in disciplining or recommending discipline of employees.

The Employer also contends that Dispatchers effectively recommend initial rates of pay for new Drivers based on Agosto's testimony that "Dispatch Managers" make these determinations after an initial interview. Agosto's testimony on this point is inexact and somewhat confusing. First, it is not clear that "Dispatch Managers" was a reference to the Dispatchers. Second, Agosto's testimony on this point conflicted with Bielic's testimony that Operations Manager Arrington conducts the initial interviews with Philadelphia applicants. As noted above, the Board normally refrains from finding supervisory status where there are conflicts in the evidence regarding the extent of an individual's authority. *G4S Regulated Security Solutions*, supra; *Dole Fresh Vegetables*, 339 NLRB 785, 792 (2003); *Phelps Community Medical Center*, 295 NLRB 486 (1989). I therefore find that the Employer has not established that Dispatchers have any role in setting initial rates of pay for Drivers or that they possess any of the Section 2(11) indicia of supervisory status. *Entergy Mississippi*, supra.

## **B. On-Site Coordinators**

### *Facts*

On-Site Coordinators are the liaisons between the Employer and the VA. They have desks in the travel department of their respective VA facilities, from which they greet patients, perform some administrative duties, and coordinate transportation by contacting the Dispatcher to assign Drivers to pick up patients. On-Site Coordinators may be involved in helping to determine which Driver takes a patient by determining the availability of Drivers who are waiting at the VA.

Bielic testified that On-Site Coordinators have the same disciplinary authority as Dispatchers. In order to help maintain the Employer's professional image, they can send

employees home or issue warnings to Drivers who are not in uniform or who are engaging in misconduct such as smoking cigarettes or cursing. There is no evidence that any such warnings have been issued.

On-Site Coordinators may also recommend Drivers for "Employee of the Month," an honor which comes with a \$50 gift card. Bielic testified that there has never been a time when he did not follow an On-Site Coordinator's recommendation for these awards, but there is no evidence as to how often On-Site Coordinators have made these recommendations or the circumstances surrounding any award.

Like Dispatchers, On-Site Coordinators may choose whether to be paid by the hour or by salary. The East Orange On-Site Coordinator is paid a salary of \$600 per week.

### *Analysis*

The Employer has failed to meet its burden to show that On-Site Coordinators are supervisors. The Employer argues that the On-Site Coordinators have the same disciplinary authority as the Dispatchers, but as discussed above, this authority is not sufficient to establish supervisory authority. On-Site Coordinators can issue verbal and written warnings to Drivers and send Drivers home for obvious misconduct. However, these "on time and fit for duty" assessments are routine and do not require independent judgment. See *Alternate Concepts*, supra at 7. Moreover, the record contains no examples of actual involvement in discipline by any On-Site Coordinator.

On-Site Coordinators play a role in assigning Drivers to patients, but there is no evidence that they use independent judgment in this capacity. The record suggests that like Dispatchers, they do no more than match available Drivers to patients, a process that does not require independent judgment.

Finally, Bielic testified that they here has never been a time when he did not follow an On-Site Coordinator's recommendation as to the "Employee of the Month." However, Bielic did not indicate how many such recommendations the On-Site Coordinators have made or provide any evidence as to how these recommendations are made and put into effect. Conceivably, these awards are based on a rotational system or on detailed objective standards set by the Employer, rather than by use of independent judgment. It is also possible that the Operations Manager plays a role in deciding who should receive these awards. The record is silent on these points, however, and absent such evidence I cannot find that On-Site Coordinators use independent judgment in making "Employee of the Month" recommendations.

In summary, I find that the Employer has not satisfied its burden of proving that Dispatchers or On-Site Coordinators are statutory supervisors, and I shall include them in the bargaining unit.

## **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

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 case.

3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

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.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, and per-diem (working 20 hours or more per week) Drivers, Dispatchers, and On-Site Coordinators employed by the Employer at its Philadelphia, Pennsylvania facility; **excluding** all other employees, Operations Managers, guards, and supervisors as defined in the Act.

## **VI. 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 the purposes of collective bargaining by **Teamsters Union Local No. 115**. 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.

### **A. Eligible Voters**

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were 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, employees engaged in an economic strike that commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are 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 after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic

strike which began more than 12 months before the election date who have been permanently replaced.

**B. 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 seven (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.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **Thursday, June 27, 2013**. No extension of time to file this list shall 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 by mail, facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **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 three (3) copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

**C. 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 a minimum of three (3) working days prior to 12:01 a.m. on the date 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 five (5) 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 non-posting of the election notice.

## VII. RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Friday, July 5, 2013, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.<sup>19</sup> A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure

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<sup>19</sup> A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed: June 20, 2013

at Philadelphia, PA

A handwritten signature in black ink, appearing to read "Dennis P. Walsh", written over a horizontal line.

**DENNIS P. WALSH**

Regional Director, Region Four  
National Labor Relations Board