

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

NSTAR ELECTRIC & GAS COMPANY, INC.¹

Employer

and

Case 1-RC-112623²

**UTILITY WORKERS UNION OF AMERICA,
AFL-CIO, LOCAL 369**

Petitioner

APPEARANCES:

Keith H. McCown and Jeffrey S. Siegel, Attorneys, of Boston, Massachusetts, for the Employer.
Burton E. Rosenthal and Louis A. Mandarini, Attorneys, of Boston, Massachusetts, for the
Petitioner.

DECISION AND DIRECTION OF ELECTION

The Employer receives and distributes electricity and gas to customers in the Greater Boston area, as well as the Massachusetts counties of Barnstable, Plymouth, Bristol, Essex, Middlesex, Norfolk, and Worcester. Petitioner currently represents a broad bargaining unit of production/maintenance, and office/technical and professional employees working at or out of the Employer's facilities in these areas. Petitioner seeks an *Armour-Globe*³ self-determination election to add 13 transmission systems supervisors (TSSs) and three senior transmission outage coordinators (STOCs) employed at the dispatch center to its existing production and maintenance/office-technical and professional unit.⁴ The Employer opposes the petition, asserting that the TSSs and STOCs are supervisors under Section 2(11) of the Act because they have authority to effectively recommend hiring, assign and responsibly direct other employees, using independent judgment, as well possess secondary indicia of supervisory status. Additionally, the Employer asserts that they are managerial employees under Section 2(13) of the Act based on their ability to formulate and effectuate policy on behalf of the Employer including representing management interests by taking or receiving discretionary actions that effectively control or implement Employer policies.

¹ The name of the Employer appears as amended at the hearing.

² This case was transferred to the undersigned pursuant to the interregional assistance program under OM 03-77, for decision writing purposes only.

³ *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942).

⁴ Petitioner amended the petition at the hearing to remove the senior TSS classification. Trevor Tessin is the only person in that classification.

As discussed below, based on the record and relevant Board law, I conclude that the Employer has not satisfied its burden to prove that the TSSs and STOCs are statutory supervisors, or that they are managerial employees. I further find that the TSSs and STOCs possess a sufficient community of interest with the existing bargaining unit to vote in a self-determination election as to whether to be included in that unit.

I. OVERVIEW

A. Employer's Operation

The Employer is a public utility providing electric and gas service. It does not generate electricity, but transmits and distributes it to the consumer. In April 2012, the Employer merged with Northeast Utilities (NU). The Employer became a wholly owned subsidiary of NSTAR, LLC, a Massachusetts utility holding company, which in turn is a wholly owned subsidiary of NU. The Employer's corporate offices are located in Westwood, Massachusetts. The Employer's Massachusetts Avenue dispatch center in Dorchester (also known as the emergency management center) is the only facility involved in this petition.

The Employer's transmission system is interconnected to transmission systems throughout North America by the National Grid. The Employer is part of the Eastern Interconnect transmission system, extending west from the Atlantic coast to the Rocky Mountains and down to Texas. In the 1990's when the utility industry was de-regulated, Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs) were formed to facilitate markets for the generation, transmission and distribution of energy. ISO-New England (ISO-NE) manages the electricity market for the New England area. In about 2007, the Employer became one of six Local Control Centers (LCCs) in the New England area, meaning that it runs its own transmission activities and monitors its own equipment, which were previously under the control of the National Grid and Rhode Island Eastern Massachusetts Vermont Energy Control Center (REMVEC). The LCCs operate independently under the collective management of ISO-NE. The Employer also remains subject to oversight by various regulatory agencies, such as the Federal Regulatory Energy Commission (FERC), the North American Electric Reliability Corporation (NERC) and the Northeast Power Coordinating Council (NPCC) which variously have responsibilities for licensing, setting rates, compliance, and assuring the reliable delivery of product.

The Employer is aligned into two operational groups: transmission and distribution. The transmission group maintains the overhead towers and underground lines that receive electric power from the generator entities, and delivers it to substations maintained by the Employer where the power is converted to a lower voltage level for distribution to customers. Substations are fenced-in yards containing electrical equipment, including breakers and transformers. The distribution group is responsible for delivering electricity from the substations to customers via overhead lines and underground cables.

The parties' collective bargaining agreement (CBA), which is effective June 2, 2012 to June 2, 2015, lists 122 production/maintenance classifications and 104

office/technical/professional classifications. There are approximately 2000 total bargaining unit employees.

The Employer's overhead and underground bargaining unit employees work in the field, dispatch center, and at the substations. They maintain and repair the lines and equipment in the transmission and distribution systems. These unit employees include field and substation employees working as operating mechanics (OMs), line workers, trouble shooters, field engineers, and dispatch center employees employed as system and distribution dispatchers. They number approximately 45 dispatchers, and 721 field employees consisting of 318 overhead line workers, 196 underground line workers, 101 field operations mechanics and 106 engineers, and 51 electrical customer service techs.

These unit employees report to about 30 first line supervisors, who report to senior supervisors James Finn, Richard Fernandes, Peter Killion, Robert O'Loughlin, and Peter Kane. The senior supervisors in turn report to one of three Managers of Electric Service: Richard Gaughan, Paul Dardinski, and Martin O'Malley. The Managers of Electric Service report to Vice President of Electrical Systems operations Michael Hayhurst. The parties are in agreement that all of the first line supervisors, senior supervisors, managers of electric service, and vice president of operations are supervisors within the meaning of the Act.

The bulk power operations group, including the TSSs and STOCs at issue herein, is responsible for the operation of the Employer's transmission system. The petitioned-for TSSs and STOCs report to John Conlon, Manager of Bulk Power Systems Operations, also known as transmission operations. Also reporting to Conlon are one non-bargaining unit transmission operations support specialist (TOSS), J.P. Gabriel;⁵ one bargaining unit operations support assistant, Christine Greer; and senior TSS Tessin.

1. EMSS/SCADA

The Employer maintains a computerized energy management software system (EMSS) to evaluate the transmission system and ensure its reliability. Supervisory Control and Data Acquisition (SCADA) is a part of the EMSS that provides data concerning load,⁶ voltage, and amps on lines, breakers and circuits located in the field and at substations. A wide range of employees, including mainly TSSs, STOCs, systems and distribution dispatchers, supervisors, and managers, and occasionally OM line workers, use SCADA to access information and additional software applications contained within SCADA. An example of information accessed via SCADA includes alarms resulting from a sudden change in voltage or a tripped line or breaker. Software applications within SCADA are targeted to each classification that uses SCADA. For example, all employees that use SCADA have access to an application that provides a visual map of transmission and distribution lines. SCADA also provides employees who perform switching activities, as described below, the ability to use remote terminal units

⁵ The TOSS' job duties include compiling data for NERC-compliance. The parties stipulated that if the petitioned for classifications are found to be employees and appropriately included in the bargaining unit, it should also include the TOSS.

⁶ Load means amount of power measured in megawatts used by consumers.

(RTUs) which are connected to breakers and switches in substations, to remotely operate the affected breakers and switches. This begins the switching process.

2. Switching, Tagging and Clearance Orders

Switching is the sequential opening and closing of switches in the transmission and distribution system to isolate a section of power lines and to interrupt the flow of electricity so that field employees can perform routine maintenance or repair a section of line that has been damaged. Switching is also performed to restore the flow of electricity to a section of power lines that have been serviced or repaired. All switching must be performed in accordance with the Employer's distribution and transmission switching, tagging and clearance procedures, referred to herein as the switching procedure. The record evidence demonstrates that station managers and supervisors, dispatchers, and TSSs, draft and submit switching orders/applications, which are step-by-step procedures to open and close switches. These orders are then relayed to the field employees for execution.⁷ Switching orders completed by dispatchers must be approved by a dispatcher supervisor. Switching orders completed by TSSs must be reviewed by another TSS, but TSSs are not authorized to sign off on others' switching orders. No one else signs off on the TSSs' switching orders. In conjunction with switching orders, the TSSs prepare transmission tagging cards for field employees to hang on equipment in need of repair, and the STOCs review switching orders for validation of tagging points.

Switching is performed in three scenarios: planned, contingent, and emergency. Planned switching is scheduled ahead of time and is usually performed in the context of maintenance work that must be performed by field employees in substations or along transmission and distribution lines. The field employees assigned to perform the switching operation generally receive copies of the switching orders in advance of the operation from their direct supervisor. Unlike planned switching, contingency switching is not scheduled ahead of time and is performed when planned switching orders must be modified or when unexpected trouble arises that must be addressed immediately. In contingency switching, a TSS communicates the switching sequence to the field supervisor, who in turn communicates with the field employee. Sometimes, a TSS might communicate the switching sequence directly to the field employee executing the operation. Emergency switching is performed by dispatchers or TSSs in situations that require immediate action to prevent the loss of life or property. This switching may be performed without a written switching order. In these situations, after life and property have been secured, the dispatcher or TSS can revert to contingency switching and prepare a written switching order.

Dispatchers and TSSs issue clearance orders to field employees in association with switching operations, signifying that there is no flow of electricity through a piece of equipment or line. Once the clearance order issues, the field employee physically places a tag on the equipment to alert anyone with access to the breakers or switches that the equipment cannot be operated. At the same time, the dispatcher or TSS in charge of the clearance order places an electronic tag on the breakers or switches through SCADA from the control room to alert anyone

⁷ Most often, the field employee executing the switching operation is an OM. However, field engineers, or trouble shooters might be assigned to a switching operation as well.

with access to SCADA that the device is de-energized. TSSs are responsible for initialing off on switching orders to signify that the switching is complete and power is restored.

B. Duties and Terms and Conditions of Employment of the TSSs

The TSS position came into existence in 2007, at the same time the Employer became an LCC. Before then, this same position was titled bulk power system supply coordinator, or bulk dispatcher. The TSSs are still commonly referred to as bulk dispatchers. Their job duties include monitoring the transmission system per standard company operating procedures and guidelines for scheduled outages, including switching lines in and out for scheduled work; responding to system events; and ensuring compliance with NERC real-time⁸ operations standards. The TSSs work, along with the STOCs, Toss, and bargaining unit dispatchers and operations support assistant, in a large control room, located at the Massachusetts Avenue dispatch center.

The TSS position is separated into two classifications: TSS-operations (TSS-O) and TSS-security (TSS-S). There are four TSSs who are trained as TSS-Os, six who are trained as TSS-Ss, and three who are in training to become TSS-Os. The normal progression is to qualify as a TSS-O first and then to qualify as a TSS-S.

The TSS-Os primarily perform switching and tagging procedures, and monitor the transmission system for potential operating issues. They respond to planned, or scheduled, transmission outages delineated in the Employer's annual work plan. The annual work plan is created by the Employer's systems planning group and project management team, comprised of upper management officials Joseph Mayall, Manager for Project Management; Coleman Geary, Project Manager; and Brian McDevitt, Manager of Employer Crews. The work plan lays out jobs planned and scheduled by the management team for the entire year. TSSs are not part of the systems planning group or project management team. Planned work occurs more frequently on the day shift and is considered to be a job that is scheduled at least five days in advance.

Night shift TSS-Os are responsible for reviewing next-day scheduled jobs and running a study in advanced software applications to determine whether all projected jobs can be completed. When any conflict exists between planned jobs in transmission versus system and distribution dispatch, transmission jobs are typically top-priority. The Employer's project management team makes any final decisions regarding these conflicts. Day shift TSS-Os access scheduled outage work through the transmission operating application (TOA), which is a software program contained in SCADA. The TOA contains the field employees' assignments as designated by their supervisors. The CBA also defines set geographical areas of work for field employees. From there, the TSS-Os coordinate and prioritize line repairs assigned to the field employees. The nature of outage work sometimes requires that the TSS-Os have some discretion to make adjustments in field assignments, which automatically impacts the schedules of the field employee(s) executing the outage. For the most part, the TSSs are in regular communication with the field supervisors and dispatchers regarding planned work and, in this regard, they generally communicate field assignment adjustments to the field supervisors, who in turn make re-assignments to the OMs and other field employees involved. There is a first line supervisor

⁸ Real-time operations are operations that affect the transmission system at that instant.

on duty at all times during the day shift. In making field assignment adjustments, the TSS might take into account avoidance of overtime of the field employee, as avoidance of overtime is a company-wide policy. There are some situations, however, such as in the event of a trouble call requiring immediate response, in which field overtime is unavoidable. In this case, the TSS might authorize overtime for a field employee after discussion with the field supervisor and/or Manager Conlon. Ultimately, the field supervisors, not the TSSs, possess full authority to assign and approve overtime for field employees. Likewise, TSSs do not approve early start times, vacation, sick, or personal days for any field employees.

TSS-Os are responsible for responding to unplanned outages (also known as trouble calls) such as a tripped line, a balloon on a wire, an unknown systems disturbance, or an outage due to a weather event, which may require field employees to make load adjustments in the field. In this regard, the TSSs possess authority to dispatch field employees out of their assigned geographical areas to address the issue and fix the line if necessary. This dispatching consists, for the most part, of telling the field employee where to go. Field OMs and engineers are experts in the field and are capable of diagnosing issues. The field employee will generally report back to his/her supervisor and/or the TSS as to the repair performed. Rather than dispatch the field employee directly to a trouble call, the TSS might also contact the field supervisor to dispatch the field employee. The record indicates that the only time a TSS would consider changing the pre-determined assignment of a field employee to dispatch him elsewhere is in the event of an unplanned system disturbance, and even then, the field supervisor is authorized to override such TSS action.

On the night and weekend shifts, about five “rover” OMs (rovers) are assigned to cover transmission repairs for the Employer’s northern, western and southern territories. Rovers are scheduled and assigned work and geographical work locations by their on-call field supervisors who complete rover lists, or line-ups, which are inputted into the computer and generated by the TSSs. A TSS may need a rover to cover a trouble call, such as a tripped line, or an alarm or police activity at a substation, during the night or weekend shift. In this case, the TSS will either request the on-call field supervisor to dispatch the rover to the field, or will independently dispatch rovers to trouble calls in the field. If dispatching the rover him/herself, the TSS reviews the pre-drafted rover line-up showing employees’ assigned geographical areas to determine which rover to call. The TSS will then notify the rover’s on-call supervisor or manager regarding the dispatch. Occasionally, a rover may be needed outside of his/her assigned geographic area. In this situation, the TSS can either request the rover to work out of his/her assigned area, or contact the rover’s on-call supervisor to transfer the rover. In either case, the authority of the field supervisor overrides any authority possessed by the TSS. The rover line-up is also provided to the dispatchers on the night and weekend shifts.

In the event of a major system outage, TSS-Os and TSS-Ss work together, along with the systems and distribution supervisors, to direct restoration of the transmission system. Most major system outages are unintentional, such as when a weather event causes a brownout or blackout. An intentionally caused system outage is called load shedding. TSSs are trained and authorized to independently shed load to respond to a major system outage and initiate emergency response procedures, without higher management involvement. This includes the deployment of additional field employees as necessary to respond to the outage in order to

maintain the reliability of the transmission system. In this regard, the Employer annually posts a letter in the control room advising all dispatch center employees that TSSs are authorized to direct dispatch supervisors to take all necessary actions, including load shedding, without prior approval, in order to maintain the reliability of the transmission system. Dispatchers are likewise authorized to de-energize equipment, or cut off power, in response to a major system event. Following the initial stages of the outage performed by the TSS, any decisions regarding a major system outage are addressed and made by upper management officials company-wide. There has not been a blackout in the Employer's coverage area since the 1960's and there has been no load shedding performed by any employees in the history of the Employer.

While the TSS-Ss perform many of the same duties of the TSS-Os related to switching and tagging procedures, TSS-Ss primarily work with EMSS/SCADA advanced applications – State Estimator, Loadflow, and Contingency Analysis – to perform reliability analyses, document actions, and communicate events to field and management personnel. Additionally, the TSS-Ss are the primary contact with ISO-NE regarding communication of transmission system activities. They participate, with other LCCs, in a daily conference call with ISO-NE to discuss upcoming work and system conditions, including alerting ISO-NE of any planned switching procedures.⁹ The TSS-Ss perform contingency analyses to monitor the voltage levels of the transmission system for potential overload which sometimes require generator power to be adjusted. They will communicate with the public utility that owns the generator in question for purposes of adjusting generator power. ISO-NE, which has primary authority for monitoring generation requirements, also assesses, analyzes and forecasts power generation and communicates with a TSS-S regarding acquiring excess power generation based on necessity. While TSSs are authorized to transmit on-line power from the utility,¹⁰ they are not involved in the purchase of electrical power.

The TSSs work a round-the-clock rotating shift schedule which includes 12 hour shifts a majority of weeks from 5:00 a.m. to 5:00 p.m., or 5:00 p.m. to 5:00 a.m., and eight-hour shifts during relief weeks. During the eight-hour shift relief weeks, the TSSs often take vacation time or are engaged in training activities involving ISO-NE and NERC reliability standards. The TSSs manage their own schedules and set their hours among themselves without any management involvement. Manager Conlon and senior TSS Tessin each work a 40-hour work week, Monday through Friday. When they are not at the dispatch center, the TSSs are the only transmission employees on site. However, Manager Conlon is on-call round-the-clock for all transmission matters. The TSSs are paid by salary, plus a \$200 per week overtime stipend, and are subject to an incentive plan which can result in a 9 to 12-percent annual bonus based on job performance and meeting set job goals. They are provided health benefits and unlimited sick pay. Senior TSS Tessin is also paid by salary, and earns about 15 per cent more in salary than the TSSs, as well as a \$5000 per year stipend. Manager Conlon's salary is about 30 per cent more than the TSSs'. Bargaining unit employees are paid hourly, receive benefits per their CBA, and do not receive performance-based bonuses.

⁹ The record indicates that these conference calls do not involve the participation of Conlon or any other management representative of the Employer.

¹⁰ Such acquisition of excess power is considered to be "out of economics" (also referred to as "out of rate") meaning outside of the allotted generation purchased by the Employer for the year.

TSSs are required to have extensive knowledge of utility transmission operations, including ability to use EMSS and its software applications to interpret results and initiate appropriate action. Regarding education and experience, TSSs are required to possess a bachelor's degree in engineering, business administration, or related discipline, plus five years of experience in dispatch, transmission, distribution, generation, or field service; or an associate's degree, plus seven years of experience; or a minimum of nine years of experience. TSSs are also required to be NERC-certified as a systems operator. The certification procedure consists of a one-week training program and an exam administered by ISO-NE. Experienced TSSs provide on-the-job training to less experienced TSSs. The Employer presented one example in the past seven years, in which an experienced TSS recommended to Conlon that the TSS-in-training was not ready to advance.

TSSs are evaluated annually by Conlon regarding their performance in areas such as operating within the transmission budget set by the Employer, participation in audits by regulatory agencies, and training provided to less experienced TSSs. The record indicates that some experienced TSSs also provide evaluation input to Conlon for less-experienced TSSs regarding their performance in areas such as reporting incidents, monitoring lines, and potential load violations. Bargaining unit employees are not subject to performance-based evaluations. Prospective TSSs are interviewed by Manager Conlan, senior TSS Tessin, and the human resources department. Following the interview, Conlon introduces the applicant to TSSs working in the control room for observation of TSS activities for about 15 to 30 minutes. While Conlon testified that such TSSs make recommendations to him at his request as to the applicants' suitability for hiring, and that he has followed all such recommendations, the record is unclear as to how many recommendations have been made by TSSs. On the other hand, the record is clear that none of the TSSs participate in the interview process, and further, that Conlon, along with the human resources department, makes all final hiring decisions.

Some of the TSSs represent the Employer on task forces, also known as working groups, with other LCC and ISO-NE representatives. Task forces with TSS participation include the voltage task force, the system restoration working group, the transmission operations working group, and the transmission outage coordination working group. Participation on these task forces is voluntary, although Conlon may suggest certain TSSs' for certain task forces. The TSS representative on these task forces relays any recommendations reached by the task force regarding transmission procedures and guidelines to Conlon, who independently makes all final decisions involving the Employer. Task force participation is recognized in a TSS's evaluation for purposes of incentive pay. A day-shift TSS-S participates in a daily conference call with the electrical operations group, comprised of dispatch supervisors, managers, and executives, to review scheduled work and provide information on transmission system status. While the record indicates that the TSSs participate in first line supervisor and safety meetings, the frequency of such meetings and the identity of the attendees are unclear.

There is some record evidence that the TSSs develop and implement action plans which could result in the movement and shifting of field personnel. Examples of action plans provided by the Employer include plans for load shedding, shifting of a capacitor or reactor bank, and generator adjustment. However, there is no additional record evidence as to the execution of these action plans by any field employees. Additionally, as noted previously, there has been no

load shedding in the history of the Employer. There is also some record evidence that the TSSs are involved in revising transmission system standard operating procedures (SOPs).¹¹ Senior TSS Tessin has drafted the majority of revised SOPs, and only two of the 13 TSSs have written revised SOPs addressing response to contingencies in tripped-line situations. Written job descriptions for the TSSs indicate that they are supervisors. Recently, the Employer retained an outside consultant to formulate task sheets to augment job descriptions for the TSS-O and TSS-S roles. In doing so, the outside consultant sought input from and surveyed all of the TSSs regarding their tasks. The outside consultant received greater input from three experienced trainer employees employed in the training department, all of whom are qualified as TSSs. These trainer employees are not sought for inclusion in the petitioned-for unit.

C. Duties and Terms and Conditions of Employment of the STOCs

The Employer employs three STOCs: Brian Tiernan, Peggy Dumas, and Jim Clark. They work in a side room of the same control room where the TSSs work. They report to Manager Conlon. Their job duties include coordinating outage applications for transmission equipment, and submitting them to ISO-NE;¹² performing outage and generation studies to analyze restrictions and risks, and reliable operation of the transmission system; and coordinating future jobs to meet outage goals. Whereas the TSSs have “real-time” responsibility for reliability and operation of the transmission system, the STOCs make analyses as to future work and its impact on the Employer’s work plan. Like the TSSs, the STOCs are not involved in development of the work plan. Regarding outage applications, ISO-NE approves, rejects or requires amendment to the applications it receives from the STOCs, based on its own reliability assessment including impact on the entire transmission market. Regarding outage analyses, the STOCs use and maintain complex computer simulation software contained in the EMSS to simulate system outages on a monthly basis. Regarding their responsibility to coordinate jobs to meet outage goals, using transmission operating software applications, like the TSSs, the STOCs interact regularly with field supervisors concerning where and when field employees will be needed for scheduled jobs. All STOCs are qualified to perform TSS work when needed, and do so with some regularity.

The STOCs generally work the day shift from 6:00 a.m. to 2:30 p.m., and like the TSSs, manage their own schedules. They are subject to the same salary pay scale as the TSSs, although the STOCs are slightly higher-paid, and they receive the same performance-based bonuses. They are subject to the same technical knowledge/skill and education/experience requirements as the TSSs. Like the TSSs, the STOCs are evaluated annually by Conlon regarding their performance in areas such as scheduling outages within ISO-NE outage goals, operating within reliability criteria, safety, switching errors, and NERC-compliance. The interview and hiring process for new STOCs appears to be the same as for new TSSs. The STOCs do not participate in the interviews of prospective STOCs. Their involvement with applicants is limited to being introduced to them by Conlon in the control room and showing them the outage coordination process. There is no record evidence that the STOCs make hiring recommendations to Conlon or anyone else.

¹¹ SOPs are created and revised for purposes of NERC compliance audits of the transmission system regarding reliability standards.

¹² The outage applications submitted to the ISO-NE are drafted in accordance with strict guidelines.

Like the TSSs, the STOCs participate voluntarily on the same task forces that the TSSs participate in. They also represent the Employer in a daily conference call including representatives of other LCCs and ISO-NE to discuss ongoing transmission jobs. This conference call with ISO-NE takes place in the morning, unlike the TSS conference call with ISO-NE which takes place in the late evening to early morning. There is record evidence, without detail, that one experienced STOC, Jim Clark, attends the monthly electric systems design committee meeting, which is also attended by supervisors and managers.

D. Duties of the Employer's Dispatchers

The Employer employs approximately 45 dispatchers, including system dispatchers, distribution dispatchers, and service dispatchers.¹³ Generally, system dispatchers and distribution dispatchers perform the same job duties. System dispatchers are responsible for the operation and restoration of the electric sub-transmission and network systems (i.e., power from electric towers and below ground transmission lines to substations), and distribution dispatchers are responsible for the operation and restoration of the electric distribution system (i.e., power from substations to customers). They prepare and check switching orders, enforce tagging procedures, and receive reports of trouble, emergency, and routine operation of the system in the same ways as the TSSs' and STOCs, using the EMSS computer system, SCADA, and other specific software applications. Like the petitioned-for employees, they dispatch field personnel and give instruction to locate, isolate and clear problems. In this regard, their dispatch work is largely limited to contact with field supervisors and managers who pre-assign, direct, and redirect the field employees based on system needs.

Because the equipment on one system impacts the equipment on the other systems, dispatcher work overlaps frequently with TSS and STOC work, especially during the spring and fall when there are more scheduled outage projects. The dispatchers and TSSs often have similar issues show up on SCADA and find themselves on three-way calls with field employees resolving switching issues. When there are conflicts between systems, transmissions issues automatically take precedence over system and distribution system issues. In the event of a major system outage, dispatchers are authorized to de-energize equipment just as TSSs are authorized to shed load. Dispatchers and TSSs use the same rover list, and deploy rovers in the same way to job sites.

The dispatchers work in the same dispatch center and control room as the TSSs and STOCs, about 30 feet away from the TSSs. They are paid per the CBA and do not receive any performance based bonuses. They are not authorized to approve overtime for field employees. Rather, such overtime is approved by field supervisors. Dispatchers are internally trained, tested and certified by the Employer, and must pass a dispatcher apprentice program. They are not NERC-certified. They do not interact with ISO-NE or participate in task forces or working groups involving ISO-NE. The record indicates that they occasionally sit in on daily conference calls with management personnel to discuss ongoing work projects.

¹³ Job descriptions for system and distribution dispatchers are in the record. No job description for service dispatchers (also referred to as report dispatchers) is in evidence. Limited record evidence indicates that service dispatchers handle accident reports at substations.

II. ANALYSIS

A. Board Law

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are “statutory supervisors if: (1) they hold the authority to engage in any one of the 12 listed supervisory functions, (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.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

Consistent with *Kentucky River*, the *Oakwood Healthcare* Board adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Oakwood Healthcare*, 348 NLRB 686, 692 (2006). “[A]ctions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Id.* at 693. The Board instructed that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.*

The burden to prove supervisory authority is on the party asserting it. *Supra* at 687; *Kentucky River*, *supra*, at 711-712. Purely conclusionary evidence is not sufficient to establish supervisory status. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough). Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *New York University Medical Center*, 324 NLRB 887, 908 (1997), *enfd.* in relevant part 156 F. Ed 405 (2nd Cir. 1998); *The Door*, 297 NLRB 601 n.5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). See also, *Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) *enfg.* 356 NLRB No. 94 (2011). In *Entergy Mississippi, Inc.*, 357 NLRB no. 178, 2 (2011), the Board specifically

directed that the prescriptions for determining supervisory status enunciated in *Oakwood Healthcare* apply in the utility industry.

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Id.*; *Golden Crest*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000), *Frenchtown Acquisition*, supra at 308.

Even though the Act makes no specific reference to “managerial employees,” under Board policy this category of personnel is excluded from coverage of the Act, and is not entitled to bargaining rights. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). See also *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Managerial employees are defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. To be considered managerial, an individual must exercise discretion within, or even independently of, established employer policy and be aligned with management. *NLRB v. Yeshiva University*, supra, at 682-683. The determination of an employee’s managerial status depends on the extent of his or her discretion, and an employee who exercises limited discretion, bordering on routine performance, will not be deemed managerial. *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963).

An *Armour-Globe* self-determination election permits employees who constitute an identifiable distinct segment so as to comprise an appropriate voting group and who share a community of interest with an already represented unit of employees, to vote whether to join that unit. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *Armour & Co.*, 40 NLRB 1333, 1336 (1942); *Globe Machine & Stamping*, 3 NLRB 294, 299-100 (1937); see also *NLRB v. Raytheon Company*, 918 F.2d 249, 251 (1st Cir. 1990). It is well established that a certifiable unit need only be an appropriate unit, not the most appropriate unit. *International Bedding Company*, 356 NLRB No. 168, slip op. at 2 (2011), citing *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). See also *Boeing Co.*, 337 NLRB 152, 153 (2001) (“If [the petitioned-for] unit is appropriate, then the inquiry into the appropriate unit ends.”)

A primary consideration in determining an appropriate unit is whether there is a shared community of interest between the employees that would require their inclusion in the unit. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985). The Board looks to a variety of factors to determine whether a community of interest exists, including, *inter alia*, the nature of employee skills and functions; common supervision; the degree of functional integration; interchangeability and contact among employees; work sites; general working conditions and fringe benefits; and bargaining history. *International Bedding Company*, supra, slip op. at 2; *Boeing Co.*, supra at 153; *NLRB v. Paper Mfrs. Co.*, 786 F.2d 163, 167 (3rd Cir. 1984); *Rinker Materials Corp.*, 294 NLRB 738, 738-739 (1989). The petitioner’s position regarding the scope of the unit is also a relevant consideration. *International Bedding Company*, supra, citing *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964); *E.H. Koester Bakery & Co.*, 136 NLRB 1006, 1012 (1962). However, that issue is not dispositive with regard to what constitutes an appropriate unit, and certain proposed units, such as those based on an arbitrary, heterogeneous,

or artificial grouping of employees will be found to be inappropriate. See *Moore Business Forms, Inc.*, 204 NLRB 552, 553 (1973).

B. Application of Board Law to this Case

1. Supervisory Status¹⁴

The parties stipulated that the only indicia of supervisory status at issue are authority to hire, promote, assign, and responsibly direct, as well as to effectively recommend such action.¹⁵

In reaching the conclusion that the TSSs and STOCs are not supervisors within the meaning of the Act, I rely on the following analysis and record evidence.

a. Assignments

In *Oakwood Healthcare*, supra at 689, the Board clarified that the authority to assign under Section 2(11) means designating an employee to a place, such as a location, department, or wing; appointing an employee to a time, such as a shift or overtime period; or giving an employee significant overall duties. Ad hoc instruction to perform a discrete task is not assignment, id., and is discussed below in connection with the function of responsible direction.

(i) Place

The cumulative record shows that field employees are assigned to a set geographical working area per the CBA. They routinely receive their field assignments from their supervisors. The TSSs access field employees' daily assignments through the TOA software application in SCADA. If any adjustments in assignments are necessary, or if an unplanned trouble call comes up, the TSSs will generally call field supervisors to contact field employees to convey any re-assignments or direct field employees to the trouble call. Likewise, the STOCs interact regularly with field supervisors concerning where field employees will be needed for scheduled jobs. The TSS might also directly communicate changes in schedules or trouble calls to field employees, mostly OMs. If necessary, the TSSs route the field employees from one trouble location to another. Once the TSS routes the field employee to the re-assigned or trouble location, there is little if any communication thereafter, because the field employees are capable of diagnosing problems and performing necessary repairs. If additional support is needed, the field employees generally contact their supervisor first, then a TSS, for further guidance.

TSSs also manage unplanned major system outages in the transmission system, which are rare. If a major system outage occurs, the TSSs are authorized to shed load and initiate emergency procedures, without higher management involvement, including the deployment of additional field employees as necessary to respond to the outage. The dispatchers are likewise

¹⁴ Unless indicated otherwise, the following discussion with respect to the TSS supervisory status also applies to the STOCs.

¹⁵ No evidence was adduced as to the indicia of authority to promote or to effectively recommend such action, thus I shall not consider such indicia. I disagree with the Employer that the minimal evidence elicited regarding the TSSs' role performing on-the-job-training equates with the authority to promote or effectively recommend same.

authorized in such event to de-energize their equipment. Following the initial stages of this type of outage, any decisions are addressed and made by upper management officials company-wide. Fortunately, the Employer has not been required to intentionally shed load in response to a major system outage during its entire history. Further, there has not been a blackout within the Employer's coverage area since the 1960's.

During the night and weekend shifts, TSS are authorized to dispatch rovers to a trouble call using a pre-drafted rover line-up list showing the rovers' assigned geographical areas. More often, as in the case of reassignment of planned work and trouble calls, however, the TSS will contact the rover's on-call supervisor who will in turn contact and direct the rover. In either case, the authority of the field supervisor overrides any authority possessed by the TSSs.

Overall, the evidence establishes that the TSSs occasionally dispatch field employees to re-assigned locations during planned outage work, and to trouble locations during unplanned outages. However, such assignments are not permanent in nature and are either completely structured based on the Employer's designation of the field employee or established call out lists. Accordingly, I find that, although the TSSs inform field employees as to where they are to go, the evidence fails to establish that these "assignments" are made with any supervisory discretion as required by *Oakwood. Entergy Mississippi*, supra at 9.

(ii) Time

The cumulative record evidence does not reflect that TSSs assign field employees to regular shifts or reporting times. The evidence does reflect that while TSSs occasionally dispatch field employees during normal business hours and call-out rovers to work on trouble cases outside normal business hours, the TSSs, as well as the STOCs, generally interact with field supervisors, rather than directly with field employees, concerning when field employees will be needed for scheduled jobs. In these situations, the TSSs follow the rover line-up provided to the TSSs at the beginning of their shifts. The TSSs have no authority, except in the event of a major system outage, to override the on-call supervisor and order the field employee to respond to the call. Typically, the TSSs contact the appropriate on-call supervisor for assistance in assigning a field employee to respond. Once the field employee is designated, to respond to the trouble, the TSSs route the employee to the trouble location. That employee then becomes the first responder. The first responder investigates the source of the trouble and reports the information to the supervisor first, and then the TSS, if necessary. If the first responder determines that additional employees are needed to address the trouble, the first responder informs his/her supervisor first, then the TSS.

When field employees are assigned to outage locations, they generally work until the trouble is cleared and even longer if additional outages are anticipated. This can result in overtime expenses for the Employer. While avoidance of overtime is a company-wide policy, there are some situations, such as in the event of a trouble call requiring immediate response, in which field overtime is unavoidable. In this case, the TSS might authorize overtime for a field employee after discussion with the field supervisor and/or Manager Conlon. Ultimately, the field supervisors, not the TSSs, possess full authority to assign and approve overtime for field employees.

In sum, the evidence fails to establish that the Employer's TSSs or STOCs appoint field employees to a time. As the Board noted in *Golden Crest*, 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." Id. at 4. See also, *Entergy Mississippi*, supra. Therefore, I find that the Employer has failed to establish that its TSSs or STOCs possess the authority to assign field employees to work time or overtime.

(iii) Significant Overall Duties

The cumulative record reflects that neither the TSSs or STOCs assign daily overall duties to field employees. Rather, field employees receive their daily assignments from their direct supervisors, and the TSSs access such assignments via SCADA and the TOA. Moreover, when TSSs write switching orders for planned outages, the necessary field employees are scheduled by their supervisors to execute the orders during planned switching operations. In unplanned outage situations, the TSSs route field employees to specific outage locations and may request that field employees execute switching orders to restore power. The switching orders are best viewed as a series of discrete tasks that the TSSs relay to the field employees to be performed in a sequential order. The Board has determined that such ad hoc assignments are not sufficient to confer supervisory status. *Croft Metals*, supra.; *Entergy Mississippi*, supra at 11. Therefore, I find that the Employer has not established that its TSSs or STOCs assign significant overall duties to field employees.

(iv) TSSs and STOCs Do Not Exercise Independent Judgment in Giving Assignments to Field Employees

Assuming arguendo that the Employer's TSSs inform field employees as to where they are to report beyond the limited circumstances I have enumerated herein, I am guided by the principle that any assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). Thus, the question is whether the Employer has met its burden of proving by a preponderance of evidence that the TSSs make judgments when assigning field employees to outage locations AND that any such judgments are free of the control of others and not controlled by detailed instructions. Mere inferences or conclusory statements without supporting evidence is insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). I find that the Employer has failed to establish that the TSSs exercise independent judgment when routing field employees to outage locations.

The cumulative record does not reflect that the TSSs, perform an analysis of the field employees' skill set and level of proficiency at performing certain tasks when routing field employees to an outage location. This stands in stark contrast to the evidence presented in *Oakwood Healthcare* where the charge nurses analyzed the personality of the staff and patients and specific skills or abilities of the nursing staff in making assignments. Id. at 693; *Barstow Community Hospital*, 352 NLRB 1052, 1053 (2008). *Entergy Mississippi*, supra at 9.

Notwithstanding this lack of evidence, the Employer broadly contends that if TSSs make decisions regarding assignment or direction based on any judgments, whether the judgment concern the technical structure of the system or whether or not to assign field employees to address trouble cases, such judgments are supervisory because they are made independently and result in a supervisory function. The record does reflect that in multiple outage situations the TSSs prioritize trouble cases, and based upon the status of a case, can route field employees from one trouble case to another trouble case. In prioritizing cases, the TSSs consider such things as the number of customers affected, the size of the customer, and the weather.

I am not persuaded that the TSSs and STOCs exercise independent judgment and I do not find the Employer's arguments persuasive. Further, even assuming that the Employer met its burden in establishing that TSSs make judgments when routing field employees to outage locations, the evidence does not reflect that any such judgments are free of the control of others and are not, in fact, controlled by detailed instructions. The field employees receive their daily work assignments from their supervisors, not the TSSs. On-call supervisors make rover line-up lists, and the lists indicate which rover can be called out and in what order. TSSs then merely use the prepared lists to call-out rovers after normal business hours. If the outage occurs during normal business hours, the TSSs may re-direct field employees from their scheduled work assignments to the outage locations. If the trouble occurs after normal business hours or on a weekend, TSSs may call field employees since they already have the call-out lists prepared by the supervisors. In such situations, the evidence does not establish that the TSSs, in routing field employees to an outage location, are required to use any meaningful exercise of discretion. In fact, the evidence shows that the TSSs must follow established call-out procedures and simply tell the field employees when and where to report. Moreover, after a first responder has reported to an outage location and analyzed the trouble, the first responder, a field employee, informs the supervisor or TSS if additional employees are needed, and if so, what job classifications are needed. Thus, the evidence suggests that the field employees actually have greater discretion than the TSSs because it is the field employees who report to the site of an outage and determine what skills are needed and the number of employees needed to restore power. Essentially, the evidence establishes that the TSSs' routing of field employees to an outage location is nothing more than a routine task. Therefore, I conclude that the Employer has failed to prove that its TSSs or STOCs exercise independent judgment in assigning field employees to outage locations.

b. Responsible Direction

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies. *Oakwood Healthcare*, supra at 691- 692. As with all of the supervisory indicia enumerated in 2(11), responsible direction must entail independent judgment. Thus, the responsible direction must be (a) independent, free of the control of others; (b) involve a judgment, that is, require forming an opinion or evaluation by discerning and comparing data, and (c) involve a degree of discretion that rises above the routine or clerical. *Oakwood Healthcare*, supra at 692-693.

The first question is whether the Employer has established that TSSs *direct* other employees within the meaning of Section 2(11). The Employer asserts that TSSs responsibly direct field employees by directing the OMs in executing switching orders to restore power in outage situations. The evidence reflects that as part of their duties, the TSSs are responsible for writing switching orders for routine maintenance or to repair a section of line that has been damaged, or to restore the flow of electricity to a section of power lines that have been serviced or repaired. The record is absent of evidence that the TSSs interact with the field employees through the sequential steps of a switching order. At most, any interaction of TSSs with field employees during switching operations amounts to little more than an exchange of information or guidance. The evidence is insufficient to establish that the TSSs “direct” the field employees within the meaning of the definition set forth in *Oakwood Healthcare. Golden Crest Healthcare Center*, supra at 731. See also *Frenchtown Acquisition*, supra at 311, 312.

The next question is whether the Employer has established that the TSSs are *accountable* for their actions in directing the field employees. I find that the Employer has not met its burden. While Conlon testified that TSSs can be and have been held accountable for field employee deficiencies, this testimony is simply a conclusion without evidentiary value. The record lacks evidence that any TSS or STOC has been disciplined for failure to oversee or correct a field employee, or as a result of a field employee’s failure to adequately perform her/his duties.

The Employer relies on one document, an Incident Report Analysis Form, completed in March 2013 by the incident analysis team¹⁶ in support of its argument that the TSSs responsibly direct field employees. The incident report concerned a field employee who committed a switching error while in the field. The Employer claims that the TSS who created the switching order followed by the field employee was charged with the field employee’s switching error. However, the record is absent of evidence that the TSS in question was disciplined or otherwise affected regarding this incident. Although Conlan testified that this TSS’s switching error would be a factor to consider in his/her annual evaluation and performance-based bonus amount, there was no evidence that such personnel action occurred (as of the hearing the 2013 TSS evaluations have yet to take place). Thus, such argument by the Employer is based on speculation. Moreover, the error attributed to the TSS was for his failure to fully communicate the sequential process of the switching order to the field employee, which is an error in his job performance, not the field employee’s job performance. This shows that the TSSs are accountable for their own performance or lack thereof, not that of field employees. It does not establish responsible direction. *Entergy Mississippi*, supra at 7 - 8, citing *Oakwood Healthcare* at 695. Further, switching errors are rare and the record is absent of any additional evidence demonstrating that this same type of incident has happened in the past, or that any other TSS has been similarly held accountable. Contrary to the Employer’s characterization of the record evidence, I find that the TSSs are not held accountable for the work of field employees.

The TSS and STOC job descriptions list oversight responsibilities for field employees, as do the TSS and STOC evaluations. Job titles, job descriptions, or similar documents are not

¹⁶ The incident analysis team consists of senior TSS Tessin; Director of Electric Service Operations Joe Luchini; Principal Engineer Dan Foley; Lead Engineer Donna Picot; Manager of Control and Protection George Moskos; Senior Supervising Engineers Bill Crooks and Joe Peters; Manager of Station Operations Anthony Anzalone; and Supervisor of Field Safety John Duffy.

given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Frenchtown Acquisition*, supra at 307; *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Golden Crest*, 348 NLRB 727, 731 (2006), citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

The employer's reliance on *Woodman's Food Market*, 359 NLRB No. 114 (2013), to support its claim that the TSSs and STOCs responsibly direct, is mistaken. An unfair labor practice matter which involved the putative supervisor's 8(a)(1) solicitation of unit employees to sign a disaffection petition and the unlawful withdrawal of recognition, the sole issue was the supervisory status and/or agency status of the putative supervisor. The Board affirmed the administrative law judge's finding that the disputed person was an agent of the employer, and then declined to affirm the 2(11) determination, noting "We find it unnecessary to pass on the judge's findings regarding Wydeven's supervisory status under Sec. 2(1) of the Act." *Id.*, fn 1.

Based on the foregoing, I find that the Employer has failed to carry its burden of establishing that its TSSs and STOCs responsibly direct field employees within the meaning of Section 2(11).

c. Effective Recommendation to Hire

The Employer contends TSSs make effective recommendations leading to hiring.¹⁷ I do not agree.

Prospective TSSs are interviewed by Conlan, senior TSS Tessin, and the human resources department. The TSSs do not participate in these interviews. Following the interview, Conlon introduces the applicant to TSSs working in the control room for observation of TSS activities for about 15 to 30 minutes. While Conlon testified that the TSSs make recommendations at his request as to the applicants' suitability for hiring, and that he followed all such recommendations, the record is unclear as to how many recommendations have been made by TSSs. The record is clear that none of the TSSs participate in the interview process, and further, that Conlon along with the human resources department makes all final hiring decisions.

The TSSs' role in the hiring process is limited to being introduced to applicants at the control center and showing them around for about 15 to 30 minutes. Although the TSSs may participate in discussions with job applicants, I find that the evidence demonstrates that these discussions are more for the purpose of describing the job duties and assuring that there will be a harmonious working relationship among the TSSs, and do not constitute job interviews. Further, any discussions between the TSS and Conlon regarding applicants do not rise to the level of recommending the hire of employees. *Service Employees Local 1-J*, 273 NLRB 929, 933 (1984). See also, *Quality Chemical*, 324 NLRB 328, 329 (1997) (The Board did not find disputed employees to be statutory supervisors although they guided job applicants on a tour through the facility while interviewing them, and completed an evaluation form for the applicants. Although acknowledging that the putative supervisors had a role in the employer's

¹⁷ No evidence was presented by the Employer that the STOCs similarly possess such authority.

hiring process, the Board determined that final decisions on all hiring were made by upper management).

This activity on the part of the TSSs is distinguishable from the hiring activities involved in the cases cited by the Employer. In *Venture Industries*, 327 NLRB 918, 919-920 (1999) employees found to be supervisors fully conducted all interviews of existing employees with regard to in-plant postings, including both transfers and promotions, and then made recommendations to a department manager as to which applicant should be selected, which were followed about 80 to 90 percent of the time. In *Starwood Hotels*, 350 NLRB 1114, 1115 (2007) the disputed employee at issue found to be supervisory reviewed all applications and resumes, interviewed applicants, and made hiring recommendations to a manager which were routinely accepted.

d. Secondary Indicia

It is well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia are insufficient to establish supervisory status. *Golden Crest Healthcare*, supra at 730 n. 10; *Ken-Crest Services*, 335 NLRB 777, 770 (2001).

Written job descriptions for the petitioned-for employees suggest the presence of supervisory authority. But the expansive power set forth in the documents is at odds with the realities. The Board has long cautioned that evidence of actual authority trumps mere paper authority. *Avante at Wilson*, supra at 1057; *Golden Crest Healthcare*, supra at 731; *Valley Slurry Seal Co.*, 343 NLRB 233, 245 (2004); *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002); *Training School at Vineland*, supra at 1416.; *Chevron U.S.A., Inc.* 309 NLRB 59, 69 (1992). I conclude that the TSS and STOC written job descriptions are mere paper conveyances that do not impart actual supervisory authority.

The Employer contends that the compensation system and evaluation system of the TSSs and STOCs, providing for performance-based bonuses, is comparable to that of other supervisory employees. However, the Employer acknowledges that J.P. Gabriel, employed under Manager Conlon as a TOSS, is a non-supervisory and non-managerial employee subject to the same compensation plan. Therefore, I cannot find the petitioned-for employees to be supervisory, or managerial for that matter, merely based on their compensation plan.

Regarding the Employer's practice of allowing TSSs and STOCs to establish their own work schedules, by the Employer's own admission, they follow a set rotation. It does appear that the Employer has worked out a system similar to many other employers that, if an employee wants to change his/her schedule, he/she can as long as a replacement is found. This simply demonstrates that the dispatchers possess the same level of training and skill and can substitute for one another.

For the reasons cited above, I find that the TSSs and STOCs are skilled employees capable of working independently under the guidelines and various control systems established by the Employer within a highly regulated industry. The parties stipulated that these employees

cannot discharge, suspend, layoff, recall, or transfer employees. TSSs and STOCs do not perform appraisals of field employees and do not reward field employees. They cannot grant vacation or leave time or adjust grievances. Thus, based upon my determination above that they do not exercise independent judgment in assigning or responsibly directing the field employees, I do not find that the Employer's assertion of these secondary indicia establish that its TSSs and STOCs are statutory supervisors

e. Conclusion Regarding Supervisory Status

Based on the record as a whole and careful consideration of arguments made by the parties in their briefs, I find that the Employer has not met its burden of demonstrating that the TSSs and STOCs exercise independent judgment in performing any of the Section 2(11) supervisory functions. Specifically, utilizing the standards the Board set forth in *Oakwood Healthcare* and reiterated in *Entergy Mississippi*, I find that they do not possess authority to "assign" or "responsibly to direct" field employees with independent judgment, nor do they hire or promote, and therefore, they are not statutory supervisors.

2. Managerial Status

As an initial matter, the Petitioner has requested that the Employer be held to the stipulation it entered at the outset of the hearing, limiting the indicia relied upon for establishing the asserted managerial status of the TSS and STOC that "... This case does not concern 'pledging of Employer's credit'." That same first day of hearing, the Employer in eliciting testimony in support of its position on managerial status, clarified the stipulation, in essence narrowing the impact of the stipulation that the case does not concern "pledging of Employer's credit", and leaving open the receipt of evidence of other economic impact of the disputed employees' actions. The Petitioner objected, but did not further object to the Employer's proffered evidence in this regard. In brief, the Petitioner urges the undersigned to "disregard any evidence adduced by NSTAR outside the included indicia, in accordance with the governing joint stipulation." Given the timing of the Employer's clarification of its intent in entering the stipulation, which provided the Petitioner full opportunity to litigate all aspects of the managerial claims, in the interest of full consideration of all arguments advanced, and given that my decision herein is not adverse to the Petitioner's interests I decline to disregard the evidence of managerial status adduced by the Employer at the hearing.

I find that the Employer has failed to establish that TSSs and STOCs are managerial employees. The Employer argues that the TSSs and STOCs are managerial employees because they effectively operate the entire transmission system by themselves, and in doing so take complete ownership of the transmission system, including using their discretion in scheduling outages based on avoidance of overtime for the field employees, and committing the Employer to obtain additional power generation when needed. The Employer contends that such authority is akin to making economic decisions on behalf of the Employer. I disagree.

Recently, in *Connecticut Light and Power Company*, Case 01-RC-112451 (December 5, 2013), the Board denied the employer's request for review and affirmed the regional director's determination that the disputed circuit owner employees were not managerial employees despite

possessing authority to commit up to \$10,000 of the employer's funds, without higher approval, to correct problems on electrical circuits. The Board noted that "[t]heir spending discretion is exercised within the confines of the Employer's policy to ensure the reliable provision of electrical power to its customers and does not involve 'formulat[ing] and effectuat[ing] management policies by expressing and making operative decisions of the employer.'" Citing *Bell Aerospace*, 416 U.S. 267, 286 (1974); *International Transportation Service*, 344 NLRB 279, 286 (2005), enf. Denied on other grounds, 449 F.3d 160, 163 (D.C. Cir. 2006); *The Washington Post Co.*, 254 NLRB 168, 189 (1981). Likewise, in the instant matter, the TSSs' and STOCs' occasional actions in causing field employees to work overtime or requesting excess generation from utilities does not rise to the level of formulating and effectuating management policies by expressing and making operative decisions on behalf of the Employer.

The Employer further contends that the TSSs' and STOCs' attendance at management meetings and contact with regulatory agencies, such as ISO-NE and NERC, confer managerial status on them. However, there is no evidence in the record suggesting that the disputed employees are involved, for example, in regulatory compliance issues or that they pledge or commit the Employer to any recommendations made by the groups. Rather, they represent the Employer and serve as a conduit in the interactive process essential to the utility market. Any recommendations reached in the task forces that the TSSs and STOCs attend on behalf of the Employer are subject to managerial review and approval.

Finally, the Employer argues that the disputed employees are managerial based on evidence that they assisted in reviewing and revising some Employer SOPs and preparing task qualification sheets and some on-the-job training guides. The record evidence overall establishes that they must do so according to, and consistent with, established policy as devised by either the Employer or regulatory agencies. They do not possess the authority to set policies according to their own independent discretion, and any revisions they make are reviewed by supervision. The routine performance by employees of largely predetermined policies does not warrant finding them to be managerial employees. See *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963); *Kitsap County Automobile Dealers Assn*, 124 NLRB 933, 934 (1959).

Central Maine Power Co. and *Simplex Industries*, relied upon by the Employer to establish managerial status, are readily distinguishable. In *Central Maine Power Co.*, 151 NLRB 42 (1965), the disputed employees pledged credit and sold power, attended annual supervisory meetings, and their salaries and benefits were commensurate with the employer's second level supervisor. In finding them to be supervisors the Board noted that the absence of company or state regulations governing or relating to their load dispatch duties, and any standard operating procedures, was entitled to considerable weight in reaching its managerial determination. In *Simplex Industries*, 243 NLRB 111 (1979), the persons found to be managers (three) exercised broad discretion which was not proscribed by fixed employer policies; one of the managers had the authority to extend credit, up to as much as \$100,000, without any approval; another made annual purchases of up to \$5.75 million; and the third person, the transportation manager, clearly formulated, determined and effectuated the employer's policies regarding transportation.

Similarly, the Employer's reliance on *OGS Technologies*, 347 NLRB 299, 303 (2006), is misplaced. In response to the respondent's exceptions and without ruling on any of the underlying issues the Board remanded the case for assignment to a different administrative law judge to review the record and decide the issues de novo. Id. At 299. In *OSG Technologies*, 356 NLRB No. 92 (2011), the Board affirmed the administrative law judge, finding the die engineers continued to share a community of interest with the bargaining unit and were not managers. The Board noted that the changes to their job duties consumed about 2% of their working time, involving researching more efficient processes, attending conferences and dealing with vendors, and did not constitute a conflict of interest with their continuing placement in the unit. I do not agree with the Employer that the evidence in *OSG Technologies*, id. At 3, serves as a counterpoint to the evidence adduced at hearing in the instant matter, nor that it warrants a different finding with regard to the managerial status of the employees in dispute.

3. The Employer's Overarching Argument: the Fifth Circuit's Decision in *Entergy Gulf States, Inc.* Should Be Followed

The Employer argues that *Entergy Mississippi* was wrongly decided, and urges the Board to follow the Fifth Circuit's decision in *Entergy Gulf States v. NLRB*, 253 F. 3d 203 (5th Cir. 2001), declining to enforce the Board's order in *Mississippi Power & Light Company*, 328 NLRB 965 (1999), which found the employer's distribution dispatchers and system dispatchers to be employees, not statutory supervisors, and overruled *Big Rivers Electric Corp.*, 266 NLRB 380 (1983).

The Board has previously considered this argument in *Entergy Mississippi*, and rejected it. I am governed by the Board's determination, and follow extant Board law, which includes *Mississippi Power* and *Entergy Mississippi*, and apply the Board's teachings in *Oakwood Hospital* in reaching my conclusions herein.

4. The Appropriateness of a Self-Determination Election

The Petitioner seeks an *Armour-Globe* self-determination election whereby the TSSs and STOCs would vote as to whether they wish to be included in the existing bargaining unit or remain unrepresented. In determining the appropriateness of an *Armour-Globe* election, the Board examines whether the petitioned-for employees share a community of interest with the represented bargaining unit. *NLRB v. Raytheon Compan*, 918 F2d 249, 251 (1st Cir. 1990). If there is a sufficient community of interest between the fringe employees and the existing bargaining unit employees, an *Armour-Globe* election is deemed appropriate. I find that there is a sufficient community interest between the petitioned-for and represented unit employees, and particularly with the systems and distribution dispatchers. Therefore, I shall direct an *Armour-Globe* self-determination election.

In regard to the commonality of supervision, the petitioned-for employees at the dispatch center report directly to Manager Conlon. The bargaining unit employees report to First Line Supervisors at their designated reporting locations, who report to Senior Supervisors, who in turn report to one of three Managers of Electric Service. Ultimately, the petitioned-for employees share common supervision with bargaining unit employees as all Managers report to Vice

President of Electrical Systems Operations Hayhurst. Further, it appears that all employees are managed by the same Human Resource Manager and are required to comply with the same company-wide rules and policies.

With respect to job qualification levels, while the TSSs and STOCs are required to have more education and experience, both groups of employees are required to have knowledge of system operations and equipment. Moreover, there are classifications in the bargaining unit such as engineers that are likely required to attain and maintain a certain education level and expertise in their field. Functional integration between the disputed and represented employees also evidences the community of interest shared between the two groups of employees. In this regard, switching activities cannot be executed by the field employees without detailed planning by the TSSs and STOCs. There is also evidence of interchange between the petitioned-for and represented employees, especially the systems and distribution dispatchers. These employees work in the same control room at the same dispatch center, under similar conditions, and their work frequently overlaps.

Finally, I note that the TSSs perform dispatch duties that are virtually identical to the dispatch duties performed by the systems and distribution dispatchers, except that each group dispatches field employees to different aspect of the systems. Historically, when dispatchers have been found to be employees under the Act, the Board has included them in a production and maintenance unit. *Connecticut Power & Light*, 121 NLRB 768, 770-772 (1958); See also *Pacific Gas & Electric Company*, 97 NLRB 1397, 1402 (1952) (Board concluded dispatchers should be included in system-wide physical unit because they "perform vital functions in the integration and coordination of the Employer's electric utility system.")

C. Petitioner's request to reverse hearing officer and receive rejected exhibits into evidence and Employer's Motion in Limine

At the hearing, the Petitioner asked the hearing officer to consider evidence regarding bargaining unit classifications employed in Connecticut Northeast Utilities Service Co. (systems operations supervisors, chief of shift, and senior systems operations supervisors). Petitioner claims that Northeast Utilities is a joint employer with the Employer, and that in 2001, the classifications were stipulated into the bargaining unit in NLRB Case 34-RC-001880. Petitioner argued that the evidence concerning these three categories of employees, who hold the same job classifications and duties as the petitioned-for employees, is relevant with respect to the Employer's treatment of employees at its Connecticut operations performing the same work as the petitioned-for employees herein. In furtherance of its argument that the hearing officer should consider such evidence, Petitioner stated that if the Employer is allowed to offer evidence demonstrating that the petitioned-for employees are aligned with its undisputed supervisory and management personnel, then Petitioner should be likewise allowed to present evidence as to how the Employer has historically treated employees at other locations performing the same work as the petitioned-for employees.

By Motion in Limine and at hearing the Employer objected and requested that the hearing officer exclude all evidence related to the Northeast Utilities Connecticut employees on the basis that the classifications were stipulated into the Connecticut bargaining unit and not placed in the

unit as a result of any finding of supervisory or managerial status. The hearing officer granted the Employer's Motion in Limine and rejected the proffered evidence on the basis asserted by the Employer.

In its post hearing brief to the Regional Director, the Petitioner requested that the hearing officer's ruling be overturned, and the proffered evidence be admitted into evidence.

I find that the hearing officer's ruling on the Employer's motion was proper, I affirm the ruling on the basis stated, and deny the Petitioner's request to reverse the hearing officer on this issue.

CONCLUSIONS AND FINDINGS

Based on the foregoing discussion and on the entire record,¹⁸ I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are 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.
3. The labor organization involved 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. A self determination election is appropriate for the following voting group:

All full time and regular part-time transmission system supervisors (TSSs), senior transmission outage coordinators (STOCs), and transmission operations support specialist (TOSS) employed at the Employer's dispatch center located at 1165 Massachusetts Avenue, Dorchester, Massachusetts; but excluding all other employees, and supervisors and guards as defined in the Act.

If a majority of valid votes is cast for Petitioner, they will be taken to have indicated the employees' desire to be included in the existing unit of production/maintenance and office/technical/professional employees in the classifications listed in Schedule A, as described in the parties' collective bargaining agreement, and currently represented by the Petitioner. If a

¹⁸ The parties timely filed briefs, which were carefully considered.

majority of valid ballots is not cast for representation, it will be taken to have indicated the employees' desire to remain unrepresented.

Dated at Detroit, Michigan, this 3rd day of January 2014.

(SEAL)

/s/ Terry Morgan

Terry Morgan, Acting Regional Director
National Labor Relations Board, Region 1
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group 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, AFL-CIO, LOCAL 369. 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. Voting Eligibility

Eligible to vote in the election are those in the voting group 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. Voting Group 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 quit or 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.

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 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.). 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 **January 10, 2014**. 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,¹⁹ by mail, or by facsimile transmission at **313-226-2090**. 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.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

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

¹⁹ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

must be received by the Board in Washington by **January 17, 2014**. The request may be filed electronically through the Agency's website, www.nlr.gov,²⁰ but may **not** be filed by facsimile.

²⁰ To file a Request for Review electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.