UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of **Case No.: 03-RC-144384**

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Employer,

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 320,

Petitioner.

EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION

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PRELIMINARY STATEMENT

As the Employer in the above-referenced case, Central Hudson Gas & Electric Corporation ("the Employer" or "Central Hudson") hereby submits, pursuant to § 102.67 of the Rules and Regulations of the National Labor Relations Board ("the Board"), the present Request for Review with respect to the Acting Regional Director's Decision and Direction of Election ("DDE") dated February 25, 2015.

BACKGROUND

This matter arises out of a Petition filed by the International Brotherhood of Electrical Workers, Local 320 ("Petitioner," "the Union" or "Local 320"). Following a hearing on January 28, 29 and 30, 2015 before Hearing Officer David M. Turner, Jr., the Acting Regional Director found that the following unit was appropriate:

> All full-time and regular part-time junior system operators, assistant systems operator customer service, assistant systems operator engineering, operations shift supervisor, system operations coordinator, system operator engineering, and system operator customer service employees, excluding all system dispatch center supervisors, managers, guards and supervisors and professional employees as defined in the Act, and all other employees.

(DDE p. 29.)

Central Hudson submits that the Acting Regional Director ignored the evidence in the record and existing Board precedent when he inappropriately included all of the above positions in the unit finding that they are not supervisory or managerial employees, and therefore, are subject to representation pursuant to the National Labor Relations Act ("the Act").

SUMMARY OF ARGUMENT

A substantial question of law is raised because the Acting Regional Director's DDE departs from established Board precedent. Specifically, the Acting Regional Director failed to take proper account of the petitioned-for positions' overall responsibility for Central Hudson's operations, their assignment of work and responsible direction of employees and their effective recommendation of other supervisory actions. The Acting Regional Director's decision essentially eliminates Central Hudson's supervision of its field employees for the bulk of the hours of operation. The Acting Regional Director also failed to recognize that the Operations Shift Supervisors have additional supervisory responsibility with respect to the System Operators and Assistant System Operators. Further, the Acting Regional Director improperly minimized the petitioned-for positions' policymaking authority in concluding that they are not managerial employees. Finally, the Acting Regional Director should have excluded the petitioned-for positions from the unit in light of the Union's waiver of the right to represent them.

FACTS

Central Hudson is an end use supplier of electricity and natural gas to approximately 300,000 electric customers and approximately 75,000 natural gas customers across more than 2,600 square miles in the mid-Hudson region of New York State. (Tr. 13.) It operates and maintains both electric and gas transmission and electric and gas distribution systems. (*Id.*)

Central Hudson is organized into several operating groups, which are further divided into "divisions." (Tr. 123.) The petitioned-for positions fall within two divisions across two different groups. Some of the positions are among the "System Operations" division within the Engineering group, and others are among the "Transmission and Distribution (or "T&D") Operations," a division within the Customer Services group. (Tr. 12, 15, 123; Er. Ex. 5-6.)

Despite spanning two divisions and groups, the petitioned-for positions perform similar and interrelated functions.

System Operations at Central Hudson

Central Hudson's System Operations division has operational authority for scheduling, planning, and directing all construction and maintenance activities on Central Hudson's electric and natural gas transmission systems. (Tr. 14-16.) Manager System Operations Jeffrey May oversees the department. (Tr. 14.) May has three direct reports: Senior System Operator Ugo D'Amato and two System Operations Coordinators. (Tr. 55; Er. Exh. 5.) Five Operating Shift Supervisors report directly to the Senior System Operator. (Tr. 65; Er. Ex. 5.)

Each Operating Shift Supervisor oversees a three-person crew comprised of System Operators and Assistant System Operators who report directly to him. (Tr. 38; Er. Ex. 5.) Two of the three assigned to each Operating Shift Supervisor are included within the organizational hierarchy of the Employer's Engineering Group. The third is organized as a member of the Customer Service group. (Tr. 38.)

Within the T&D Operations division of the Customer Service group, Ryan Hawthorne, Director of Dispatch Operations, oversees approximately a dozen positions that perform functions similar to those of the System Operations division. These positions include both System Operator and Assistant System Operators titles, as well as Junior System Operators and a System Dispatch Center Supervisor.[1] (Er. Exh. 6.) The activities of these positions within the Customer Service group are primarily directed at the distribution aspect of the Employer's electric and gas system, meaning the lower voltage and volume components that enter homes and businesses. (Tr. 13-14.) By comparison, the System Operations function within the Engineering

[1] The System Dispatch Center Supervisor position, which has been stipulated to be a Section 2(11) supervisory position, is currently vacant. (Tr. 154.)

group primarily pertains to transmission aspects of the systems, higher voltage and pressure components that transmit electricity and gas out towards the end use locations. (*Id.*) However, due to the nature of the Employer's shift scheduling, there is crossover between Customer Services and Engineering employees in the petitioned-for job categories. (Tr. 35.)

Central Hudson's System Operations and Customer Service divisions' responsibility is to maintain service 24 hours per day, seven days per week, 365 days per year. (Tr. 55.) Only a few of the employees in the petitioned-for positions work during normal business hours—from 8:00 a.m. until 4:30 p.m. in the winter and from 7:30 a.m. until 4 p.m. after daylight savings time. (Tr. 573.) This includes the Junior System Operators, the System Operations Coordinators, and one of the Assistant System Operators.[2] (*Id.*) The remaining petitioned-for positions work 12-hour shifts on a six-week rotating schedule. (Tr. 36, 447-49, 573-574.) This includes the Operations Shift Supervisors, the System Operators and all of the other Assistant System Operators. (Tr. 37, 147.)

All of the petitioned-for positions work out of the same building. (Tr. 30.) The employees on the Engineering side work primarily in a room referred to as the "transmission floor," and the employees on the Customer Service side primarily work in an adjacent room referred to as the "control center." (Tr. 29-30, 34.) The Operations Shift Supervisor on duty works on the transmission floor along with one of the other employees on the shift (an Assistant System Operator or System Operator) (Tr. 30, 145, 150-151, 694.) The other two employees on the shift (Assistant System Operators/System Operators) work in the control center. (Tr. 34.) The System

[2] The lone Assistant System Operator assigned to a regular day shift typically performs tasks similar to those of a Junior System Operator. (Tr. 50.)

Operations Coordinators and the Senior System Operator work in a separate office adjacent to the transmission floor. (Tr. 30, 32.)

Mr. May and Mr. Hawthorne normally work during normal business hours, Monday through Friday. (Tr. 165, 256, 500.) Ugo D'Amato, the Senior System Operator also works the day shift, Monday through Friday. (Tr. 681.) Because Central Hudson is a 24/7 operation, the result of Mr. May, Mr. Hawthorne and Mr. D'Amato only working during normal business hours is that a manager at their levels is not present most of the time, for approximately 128 hours a week. (Tr. 55, 130-131, 256.) During those hours, the other system operations employees working rotating shifts, led by the Operations Shift Supervisors, oversee the entirety of Central Hudson's gas and electric operations. (Tr. 68, 122, 141, 256, 271.)

The Petitioned-For Positions

Collectively, the Junior System Operators, Assistant System Operators, System Operators, and Operations Shift Supervisors monitor the electric and gas distribution systems and direct field employees to trouble calls. (Tr. 37, 129-30, 137, 368-69; Er. Exs. 11-13, 25.) These positions are involved in both planned and unplanned events. Planned events include, among other things, executing switching orders (which can also be unplanned) and responding to customer complaints. With respect to unplanned events, these positions' primary responsibility is to direct first responders to investigate trouble calls. Central Hudson's call center receives calls about power outages or other incidents; those calls are logged electronically in a computer system monitored by the petitioned-for positions. (Tr. 124.)

When a trouble call comes in, petitioned-for positions working in the control center send out a first responder who assesses the situation. (Tr. 131-32.) The operator then decides when and how the necessary work is to be performed. (*Id.*) In that regard, these positions have the

authority to require a crew to stop work on one job and to respond to a trouble call if they deem it necessary. (Tr. 316, 371.) Similarly, employees in the petitioned-for positions have the authority to determine whether a crew should be held over, which would likely incur overtime costs, or whether additional crews should be called to work. (Tr. 371, 426.)

During nonbusiness hours, the petitioned-for positions perform similar job duties; however, because there are fewer field workers available, the petitioned-for personnel often must perform call outs to respond to trouble calls. (Tr. 321.) They do so by first deciding the number and classification of employees needed for the call, then by initiating a computerized procedure to call field employees. (Tr. 254.) The computer will then begin calling employees, giving them time to respond before moving to the next employee. (Tr. 576-78.) If this procedure does not result in the required number of employees, the System Operations personnel have the authority to require employees, including the field supervisors and foreman, to respond to the call. (Tr. 126, 319, 369-71.)

A similar procedure is followed to adjust staffing in the Employer's call center after hours. Petitioned-for personnel may initiate call-ins among telephone representatives and customer service representatives after hours either based on unexpected vacancies (e.g., employees not showing up or leaving early) or call volume (e.g., greater than anticipated need for people answering telephones). (Tr. 345, 348, 371-73, 403-04, 424.) In either situation, Assistant System Operators, System Operators, or Operations Shift Supervisors have full discretion to evaluate the current needs of the company and decide whether to modify staffing and what the necessary levels should be, and then initiate the call-in process to seek the desired personnel. (Tr. 115, 124, 372-73, 405.)

Given training and qualification requirements, working as a Central Hudson System Operator is a necessary precondition to becoming an Operations Shift Supervisor at Central Hudson. (Tr. 162-63.) Likewise, an individual must first work as an Assistant System Operator before being eligible to become a System Operator. (Tr. 162-63.) It is not required that an individual first be employed as a Junior System Operator before becoming an Assistant System Operator, though it is not uncommon for a Junior System Operator to later become an Assistant System Operator. (Tr. 163, 303-04.)

Central Hudson treats all of the petitioned-for positions as part of the Employer's Management Team. (Tr. 164.) Unlike bargaining unit employees, they are scheduled to attend the Employer's Annual Management Conference and participate in other supervisor training programs. (Tr. 164-66, 381, 401-02.) At the Annual Management Conference, various aspects of Central Hudson's business, including financial information, are discussed. (Tr. 164-65.)

All employees in the petitioned-for positions are salaried, exempt employees. (Tr. 619-20.) Newly hired management employees, including those in the petitioned-for positions, are assigned a market-match dollar amount based on reports provided annually by an outside compensation consultant. (Tr. 621-22, 625.) Recognizing that inexperienced new hires are not necessarily on par with the average employee for a position on a market-wide basis, actual starting salaries are generally lower than the market match figure. (Tr. 622-23.) At the time of hire, Central Hudson establishes an estimated schedule of future increases to eventually get individuals on par with the market as they gain experience. The initial compensation schedule is not set in stone for any employee, but rather depends on actual performance. Employees who perform beyond expectations move to the market match faster, and those not meeting expectations may not receive the scheduled increase. (Tr. 623.) Both the progression toward the

market match and separate annual merit-based increases are determined based upon review of each employee's annual performance review. (Tr. 101-02, 624.) By contrast, bargaining unit employees are paid negotiated hourly rates pursuant to the collective bargaining agreement. (Tr. 624; Er. Ex. 17.)

Junior System Operators

The role of the Junior System Operator ("JSO") is to control and direct planned outages and responses to trouble situations. (Tr. 304-05; Er. Ex. 25.) The JSOs are responsible for prioritizing field work as generally described above. (Tr. 312, 321-22.) However, because they work during days when crews are regularly scheduled across the Central Hudson service area, Junior System Operators generally do not need to call in off-duty employees. (Tr. 155.) There are occasions when Junior System Operators fill in for Assistant System Operators on off-hours shifts due to staffing needs. (Tr. 155-56.) In those instances, Junior System Operators would participate in calling in employees in the same manner as Assistant System Operators and System Operators who typically work in the control center after hours. (Tr. 155, 497-98.)

Assistant System Operators

When working in the control center, Assistant System Operators ("ASO") perform similar functions as the Junior System Operators. (Tr. 153.) However, the ASOs, unlike the JSOs, work rotating shifts. (Tr. 573.) As a result, the ASOs' primary responsibilities (on the Customer Service side) often are for off-hours response to customer issues. (Tr. 339.) Because Central Hudson is not fully staffed off hours, these employees regularly perform call-out functions in order to staff field employees to address emergency or other unplanned system disruptions. (Tr. 339.)

Although Assistant System Operators are designated within the Employer's organization charts as either falling in the Customer Service or Engineering groups, Engineering group ASOs regularly work in the control center performing Customer Service functions. The typical 4-person shift includes two Engineering ASOs/SOs. One works on the transmission floor with the Operations Shift Supervisor, and the other works in the control center alongside the Customer Service ASO/SO. The two ASO/SOs working in the control center perform the same work. At times, both ASO/SOs working in the control center could both be from the Customer Service group or could both be from the Engineering group. (Tr. 38, 143, 145-46.)

The control center work primarily consists of receiving notifications of customer issues across the Central Hudson distribution system and assigning employees to respond to them. (Tr. 142, 368-69.) In this respect, Assistant System Operators regularly direct field employees, such as line crews, gas crews, and commercial representatives. (Tr. 129-30.) ASOs must evaluate the issues presented to determine the appropriate resource to respond to each situation and, when there are competing demands for resources, prioritize which calls to respond to in which manner and with which crews. (Tr. 369, 410.) The ultimate call-out procedure is automated, but the Assistant System Operators must initially determine which category of employee should be assigned to each customer issue. (Tr. 133.)

When working on the transmission floor, an ASO/SO primarily monitors and responds to issues occurring with respect to the transmission system, rather than dealing directly with customer issues. (Tr. 145-46.) Often, an ASO working on the transmission floor will be receiving on-the-job training from the Operations Shift Supervisor to prepare the ASO to become North American Electric Reliability Corporation ("NERC") certified (electric transmission) and

Department of Transportation ("DOT") Operator qualified (gas transmission) and Central Hudson switch (electric and gas transmission) qualified. (Tr. 349.)

System Operators

The System Operator ("SO") is a higher level operator who must first gain experience as an ASO. (Tr. 374.) To be promoted from an ASO to an SO, an employee must become NERC certified, DOT operator qualified, and pass a Central Hudson switching test. (Tr. 46.) In the normal progression, an ASO is promptly promoted to SO upon becoming fully qualified in these respects. (Tr. 47, 359, 374, 438.)

To become switch-qualified, Assistant System Operators study a Central Hudson-specific qualification manual. (Tr. 73.) The qualification manual describes different types of schemes, systems, and equipment relevant to Central Hudson's operations, but it is not a compilation of all possible switching orders. (Tr. 73.) Indeed, switching orders implemented at Central Hudson are specific to the circumstances actually presented in any given situation. (Tr. 73.) They must be prepared based on various factors, such as how the different components within the relevant substation operate, what types of switches and breakers are present, etc. (Tr. 73.) Based on training and experience, System Operators (and Operations Shift Supervisors) develop an effective and safe approach to performing the necessary work on the transmission system. (Tr. 73.) Once an Assistant System Operator is promoted to System Operator, s/he becomes an "Operating Authority" for the electric and gas transmission systems. (Er. Ex. 2.)

System Operators perform many of the tasks performed by JSOs and ASOs and must prioritize response to system issues based on various factors. (Tr. 138, 150-51, 378.) In addition, the SOs plan, draft and implement switching orders. (Tr. 378.) Switching orders are step-by-step instructions to defining the precise sequence of tasks to be performed to accomplish specific

goals on the electrical system, such as, taking a piece of equipment out of service for maintenance or repair and then returning it to service. (Tr. 16, 470-74, 477-84.) The switching orders are reviewed by another switch qualified operator. (Tr. 74-75, 83-85). The SO assigns and directs field employees as to what steps to take pursuant to the switching order, which involves issuing specific instructions about exactly what to do and when. (Tr. 70-74.)

System Operations employees who are DOT Operator qualified (including all System Operators, Operations Shift Supervisors and some Assistant System Operators and System Operations Coordinators) have the authority to procure additional natural gas on behalf of Central Hudson when necessary to maintain necessary system levels. (Tr. 103-04, 106, 452-53, 468.) In this capacity, they monitor the system to ensure that gas volumes coming in match the volumes expected to be consumed by customers and that the pipeline is operated within the right pressure range. (Tr. 105.) Their decisions in managing the gas pressures and flows through the system, which qualified employees in these titles are authorized to make without higher approval, affect the Employer financially and are made daily among employees in these positions. (Tr. 106-08.) Because they are switch qualified, System Operators can and do fill in for Operation Shift Supervisors. (Tr. 139-40, 378-80.)

Operations Shift Supervisors

Central Hudson's Operations Shift Supervisors ("OSS") are given broad authority to "Plan, schedule, coordinate, and supervise personnel in the operation of the electric and gas Transmission systems and prepare, approve, and direct Transmission switching and valving in accordance with established procedures, practices, and safety rules." (Er. Ex. 11.)

Like the System Operators, Operations Shift Supervisors have the authority to prepare and execute switching and valving orders. Operations Shift Supervisors also review and approve

the switching orders of other switch-qualified employees, including System Operators and other Operations Shift Supervisors. (Tr. 75.)

Outside of business hours, the System Operations Coordinators and Senior System Operator are not at work, leaving the Operations Shift Supervisor in charge of planning and coordinating all intraday outages. (Tr. 67.) In this capacity, the Operations Shift Supervisor would have to perform many of the same coordination functions, such as notifying outside entities and communicating with internal resources, that the System Operations Coordinator normally performs for pre-scheduled outages, as discussed below. (Tr. 67-68.) Off-hours, the Operations Shift Supervisor has full latitude and discretion to make decisions on behalf of Central Hudson—decisions that obviously could have significant impacts. (Tr. 68.) Their direct supervisory authority includes both Engineering and Customer Service ASO/SOs assigned to them on shift. (Tr. 147.)

As described above, each Operations Shift Supervisor supervises three other System Operators on each shift. (Tr. 443, 463-64.) They are personally responsible for overseeing the day-to-day operations of the electric and gas transmission system. (Tr. 65.) Outside of normal business hours (which means the overwhelming majority of each week, plus holidays), the Operations Shift Supervisor is ultimately responsible for all Central Hudson employees on duty. (Tr. 48-49, 55.) This includes not only System Operators and Assistant System Operators, but also telephone representatives, customer service representatives, and field crews. (Tr. 55.) That responsibility includes both making personnel decisions, such as managing employee absences by deciding whether or not to fill unscheduled vacancies, and overseeing the work performed by the employees on duty. (Tr. 66.)

Operations Shift Supervisors, like ASOs and SOs, have the authority and discretion to call in field employees and telephone/customer service representatives based on current or projected staffing levels and on what they are witnessing across the system during their shift. (Tr. 115-117, 124-25, 130, 264-65.) In all cases, Operations Shift Supervisors (along with System Operators, Assistant System Operators, and Junior System Operators) have the independent authority to require other Central Hudson employees, including field supervisors, to perform necessary work, even it requires overriding established call lists or other procedures. (Tr. 117, 122, 126, 265-66, 269-72.)

Operations Shift Supervisors can also call in additional System Operations personnel (including the cross-over Customer Service ASO/SOs and even Junior System Operators) based on the individual employees' respective experience level and current demands on the system. (Tr. 117-18, 137, 485.) Operations Shift Supervisors also have input in the pre-scheduling of employees in the department. (Tr. 120-22.) On any shift, the Operations Shift Supervisor can also decide whether an ASO/SO will work exclusively in the control center or will come into the transmission room to work on training exercises or, if qualified, switching orders, among other transmission system issues. (Tr. 198, 445-47.) Operations Shift Supervisors have also arranged to swap shifts amongst themselves without approval from their direct supervisor, though they have to notify him for regulated fatigue monitoring purposes. (Tr. 212-14.)

The Operations Shift Supervisors have the authority to become involved in both hiring and disciplinary issues. Although they typically have not had final say in such matters, they can make recommendations in both areas. Operations Shift Supervisors have, in recent times, effectively recommended candidates for hire as Assistant System Operators and for promotion from Assistant System Operator to System Operator (by suggesting when ASOs are ready to take

the switching test). (Tr. 66, 258-62, 486-88.) Operations Shift Supervisors have also been allowed to make recommendations as to which ASOs are assigned to them, and in at least some cases those assignments have been made as a result. (Tr. 258.)

Operations Shift Supervisors also have the authority to take any immediate measures to remedy poor performance and misconduct, although the evidence reveals that instances where any such intervention would be necessary are a rare occurrence, as serious mistakes cannot be allowed to occur in the first instance given the nature of the work and potential consequences. Rather, Operations Shift Supervisors carefully oversee the ASO/SO working with them on the transmission floor to ensure effective performance. (Tr. 455-57.) Where appropriate, Operations Shift Supervisors have had counseling discussions with their direct reports. (Tr. 217-18.)

Operations Shift Supervisors are required to write annual performance appraisals for the Engineering ASOs/SOs assigned to their shifts, and they also provide feedback regarding the performance of their assigned Customer Service ASO/SO. (Tr. 66, 90-92, 222-25, 287, 374-75, 486.) These performance reviews are then passed to the Senior System Operator and other members of management and human resources and used in determining both merit- and market-based salary increases. (Tr. 101-02, 624.) The performance reviews can be used as a basis for both praise/reward and discipline, where necessary, and are used in establishing individualized goals for the next year. (Tr. 66-67, 74, 100-02.) Operations Shift Supervisors are also held accountable for errors made by the ASO/SOs whose work they are charged with overseeing. (Tr. 84-87, 97; Er. Ex. 10.)

As mentioned above, Operations Shift Supervisors are intimately involved in the training of their direct reports. (Tr. 74, 108, 382, 455-46, 466-76.) They do this both on-the-job during their regular off-hours shifts, and during the two weeks of their six-week shift rotation that their

crew is assigned to daytime "shop weeks." (Tr. 110.) Operations Shift Supervisors are also involved in the training of employees in other areas of the Employer's organization. (Tr. 110-11.) This includes, for example, training field personnel on the switching and tagging process. (Tr. 111, 493-95.)

As part of their annual goals, Operations Shift Supervisors are given additional project responsibility outside of their regular shift duties. For example, OSS William Kuhnle has been tasked with developing an operating guideline for the Gas Transmission System, and OSS George Harris has been developing a Central Hudson-wide initiative to have everyone use the phonetic alphabet when switching. (Tr. 111-14.)

Operations Shift Supervisors have primary responsibility for developing Central Hudson's Operating Procedures, which are approved by the Senior System Operator or System Operations Coordinator. (Er. Ex. 1, p. 5.)

Although it is possible that more than one Operations Shift Supervisor would be on-site at any given time (during days when one shift is on shop week and another is operating the system or for other staffing reasons), one individual is the designated Operations Shift Supervisor at all times, charged with ultimate responsibility for everything that goes on across the system. (Tr. 140-41, 278-79, 501.) As OSS Keith Hudak accurately put it, "I oversee the transmission grid and every aspect of it." (Tr. 452.)

System Operations Coordinators

The primary function of the System Operations Coordinators ("SOC") is to plan and schedule any outages on the Employer's electric and gas transmission systems on a day-to-day basis. (Tr. 56, 382-83, 395-96.) This includes receiving orders for outages and coordinating them with the New York Independent System Operator ("NY-ISO") and other outside utility entities

and organizations and large commercial and industrial customers within Central Hudson's service territory. (Tr. 57, 392-93.) The System Operations Coordinators must ensure that any requested outage can proceed without causing any overloads on other undue adverse impacts to customers or equipment. (Tr. 395.) The System Operations Coordinators must evaluate various factors in making those determinations. (Tr. 396.) Ultimately, they decide when any given scheduled outage will occur and do not need approval in making that decision. (Tr. 396-97.)

System Operations Coordinators also perform project management roles within the System Operations division. (Tr. 58, 383-87, 91, 400-01.) By way of recent example, this can include process improvement, implementation of new software, and recommending and writing system operating plans and procedures. (*Id.*) With respect to process improvement initiatives, System Operations Coordinators have the authority to make decisions on behalf of the Employer without approval of their manager. (Tr. 59, 61, 384, 397.) They have done so, for example, by way of advising an outside software contractor of changes to be made to a software program to make sure it runs effectively for the organization.[3] (Tr. 60, 386.)

A switch-qualified System Operations Coordinator can also substitute in for an Operations Shift Supervisor to fill scheduling vacancies. (Tr. 58, 279-80, 398-99.) System Operations Coordinator Gregory Yozzo has already done so for one shift, plus part of another shift, in the first three weeks of being a System Operations Coordinator in January 2015. (Tr. 399.)

The System Operations Coordinators, along with the Senior System Operator, have responsibility for maintaining Central Hudson's System Operating Plans. (Er. Ex. 1, p. 4.) Along with the Manager System Operations and Senior System Operator, the System Operations

[3] A System Operator, Scott Harrington, has also exercised that authority. (Tr. 386-87.)

Coordinators are authorized to approve deviations from Central Hudson's Control Room Management ("CRM") Plan, which, among other things, establishes the shift rotation and other fatigue management practices. (Er. Ex. 3, p. 3.) Operations Shift Supervisors are permitted to approve deviations from the CRM plan in the absence of the Manager System Operations, Senior System Operator, and the System Operations Coordinators. (*Id.*)

ARGUMENT

I. The Acting Regional Director's Determination That the Petitioned-For Positions Are Not Statutory Supervisors Is Contrary to the Evidence in the Record.

The Acting Regional Director's Decision is clearly erroneous in that he did not consider all of the relevant testimony in the record.

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 of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). An individual is a supervisor if he or she possesses any one or more of the Section 2(11) indicia.

The Acting Regional Director based his decision to include the petitioned-for positions in the unit because he incorrectly found that they do not exercise supervisory authority that requires the use of independent judgment. However, the record reveals that the positions have the authority to assign and direct work, the authority to discipline or effectively to recommend discipline, authority to evaluate their staff's performance which affects their pay, as well as the authority to participate in the hiring and promotion process. Further, the record reveals that they

exercise independent judgment in carrying out these supervisory tasks. Accordingly, they are supervisors under the Act and should have been excluded from the unit.

A. <u>The Petitioned-for Positions Assign Work.</u>

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board defined "assign" as: (1) the act of designating an employee to a place (such as a location, department, or wing); (2) appointing an individual to a time (such as a shift or overtime period); or (3) giving significant overall tasks to an employee. *Oakwood Healthcare,* 348 NLRB at 689. Supervisory authority to decide or effectively recommend only one aspect—place, time or overall tasks—is sufficient. *Id*. As established in the record, the Junior System Operators, Assistant System Operators, System Operators, and Operations Shift Supervisors regularly do all three.

With respect to the assignment of customer service telephone representatives, the Acting Regional Director misstated the record evidence and overemphasized the role of the ARCOS callout procedure and employer guidelines. Contrary to the Acting Regional Director's findings, the petitioned-for positions have a high amount of latitude and discretion in assigning customer service telephone representatives. (Tr. 124.) They alone exercise independent judgment in determining whether they need to call such employees in and decide how many employees they need. (Tr. 124, 589.) They also have the authority to determine that a vacancy does not need to be filled. (Tr. 590.) Although the ARCOS system is used to call employees in, that system does not get used unless and until one of the petitioned-for positions decides help is needed after considering all of the particular circumstances involved. (Tr. 264-65.) Moreover, if the ARCOS system does not result in the number of employees deemed necessary by the petitioned-for positions, they have several different options, including overriding the list. (Tr. 264-66.) The petitioned-for positions also have the authority to require these employees to work overtime. (Tr. 373.)

As concerns field employees, the petitioned-for positions assign them to a **place** by identifying where on the system switching or other field work will occur, relocating employees during the execution of switching orders and other assignments, and moving employees from one task to another, with full authority to do so. (Tr. 316, 371.) The Acting Regional Director recognized that "the petitioned-for positions can route field employees to [a] trouble location," but then noted that the record lacked any instances where a field employee or field supervisor has ever overridden an operator's request to move a field employee." (DDE pg. 10). The Act, however, requires only the possession of authority in any of the Section 2(11) areas, it does not require the actual exercise of such authority. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) (emphasis added). Consequently, the Acting Regional Director's requirement that this authority be exercised imposes a standard that is inconsistent with the Act. Further, the Acting Regional Director minimized the role of the petitioned-for positions as relates to unplanned system outages by stating that they were rare. The record does not support that conclusion. Conversely, the evidence established that it was possible to "go a couple of nights with no outages." (Tr. 419.)

The petitioned-for positions assign employees to a **time** by deciding when work in the field will begin, end, or be delayed and by deciding if and when employees need to stay on a job, including when that may incur overtime costs. (Tr. 326, 371, 416-23, 425-26, 431.) Again, the Acting Regional Director noted that there was no evidence of the petitioned-for positions having exercised the authority to override an on-call foreman. However, as noted above, supervisory status is dependent upon *possession* of authority, regardless of exercise of such authority. The Acting Regional Director also incorrectly found that the record did not establish that the petitioned-for positions can require field employees to work overtime. In fact, the record was

quite clear that the petitioned-for positions can and do exercise such authority, even though the need does not typically arise. (Tr. 373.)

The petitioned-for positions assign **overall tasks** by creating and implementing switching orders executed by field employees. (Tr. 70-74.) With respect to this item, the Acting Regional Director failed to appreciate the significance of the switching orders as well as the role the petitioned-for positions have in creating the switching orders. The System Operations personnel do more than merely relay instructions to the field employees, they are responsible for actually determining what those instructions should be and then preparing the instructions. (Tr. 456-58, 470-74.)

In sum, Junior System Operators, Assistant System Operators, System Operators, and Operations Shift Supervisors ultimately decide which jobs are done, when, and how. Thus, in rejecting the contention that the individuals were statutory supervisors, the Acting Regional Director oversimplified and underestimated their role in assigning field employees.

B. <u>The Petitioned-For Positions Responsibly Direct Employees.</u>

The *Oakwood Healthcare* decision explained that "responsibly to direct" requires a showing "that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary," and further that "there is a *prospect* of adverse consequences for the putative supervisor," arising from the employee's direction of other employees. *Oakwood Healthcare,* 348 NLRB at 692 (emphasis added).

It is clearly "direction" when the petitioned-for positions plan the work, decide which tasks to schedule and complete, determine the appropriate sequence of the work, instruct employees where to go, what to do, when to start and stop, and dictate each step using independent judgment throughout. In fact, the Board has already found that electric utility dispatchers who "have the authority to direct field employees in the step-by-step instructions of a

switching order" meet the *Oakwood Healthcare* definition of "direction." *Entergy Miss., Inc.*, 357 NLRB No. 178, slip op. at 7 (2011).

Nevertheless, the Acting Regional Director again diminished the petitioned-for positions' responsibility with respect to switching orders as merely "an exchange of information." (DDE p. 16). As previously noted, their responsibility goes far beyond that. Indeed, OSS Hudak testified at length regarding the detailed process involved in executing switching orders. (Tr. 470-485.) To be clear, the petitioned-for positions are not simply reciting a list of instructions, they are determining what those instructions should be and relaying them to the employee who will perform them. At the same time, the petitioned-for positions must monitor progress and make adjustments if unanticipated contingencies arise.

Further, the Record here reveals that the Junior System Operators, Assistant System Operators, System Operators and Operations Shift Supervisors are held accountable for field personnel as evidenced by the testimony that those positions are evaluated on their ability to assign field employees and on their direction to crews. (Tr. 84-87, 97). Indeed, the performance reviews contain metrics for "accountability" and various "management competencies." (Er. Ex. 14-16, 27-29, 31-34). For example, Operating Shift Supervisor Keith Hudak's 2011 performance review contains the following entry: "Keith is responsible for supervising Angel Velazquez (System Operator). Angel is a top performer in the Control Center and this is a result of Keith's direct supervision." (Er. Ex. 27.) Similarly, the employees' self-assessments reflect their understanding of accountability for work in the field. For example, Operating Shift Supervisor Adam Secor wrote in his 2011 self-assessment that "accountability" was one of his strengths. (Er. Ex. 36.) More specifically, he wrote the following: "I hold myself and my crew to a high level. I do not take any task lightly and even the smallest mistakes are unacceptable." (*Id.*). A

negative evaluation based on a petitioned-for position's failure to effectively assign employees would be an adverse consequence because compensation is directly related to the employees' performance reviews. (Tr. 101-02, 624.) Despite all of this evidence, the Acting Regional Director found that the petitioned-for positions are not accountable for their actions in directing field employees. Indeed, he did not even address these material facts in his decision.

The above examples demonstrate various ways in which the petitioned-for positions are held accountable for both bargaining unit employees and other Systems Operations personnel. Thus, Central Hudson presented sufficient evidence to demonstrate that the petitioned-for positions "responsibly direct" those employees.

C. <u>The Petitioned-For Positions Use Independent Judgment in Carrying Out the Above Duties.</u>

With respect to "independent judgment," the *Oakwood Healthcare* Board stated:

> [T]he mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices . . . if the hospital has a policy that details how a charge nurse should respond in an emergency, but the charge nurse has the discretion to determine when an emergency exists or the authority to deviate from that policy based on the charge nurse's assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment.

348 NLRB at 693-94.

The Acting Regional Director rejected Central Hudson's position that the petitioned-for positions are supervisors largely on the basis that they did not exercise independent judgment in performing their duties. Central Hudson maintains that the Acting Regional Director's reasoning is contrary to the Board's concept of independent judgment as articulated in *Oakwood Healthcare*, which was consistent with the Supreme Court's concept of independent judgment as articulated in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). The Supreme

Court held that regardless of whether the judgment was professional or technical, and despite any loose constraints placed on the exercise of such judgment by the employer, it qualifies as "independent judgment" sufficient to prove supervisory status, *as long as the judgment is significant*. *Kentucky River*, 532 U.S. at 714.

The most repeated example of the Acting Regional Director's departure from established precedent is his conclusion that the assignment of work and direction of field employees by the petitioned-for positions did not require independent judgment because they followed Central Hudson "guidelines" in carrying out these tasks. However, this is the type of "loose constraint" that the Supreme Court held must be ignored. Rather, the relevant test is whether the employee's judgment is "significant." As explained above, the record evidence clearly established that the petitioned-for positions exercise significant judgment in assigning and directing employees. While the jobs do involve some use of guidelines, those guidelines are not binding and are meant simply to aid the petitioned-for positions in carrying out their duties. Indeed, several of the guidelines themselves state that the petitioned-for positions are to use their judgment or discretion. (Tr. 752.) *See* U. Ex. 5 ("Again, your discretion is required based on various conditions."; U. Exs. 7 and 8 ("Use judgment to assess number of customers based on the number and location of calls.").) Moreover, certain guidelines were created in part by some of the petitioned-for positions. (Tr. 19-20, 29; Er. Ex. 1, 7.) Finally, the guidelines typically are not even used until the petitioned-for positions decide that particular action needs to be taken, i.e., deciding that more customer service representatives are needed. (Tr. 264-65.) This is precisely the type of significant judgment anticipated by the Act.

Further, one of the primary functions of the petitioned-for positions is to manage outages, a function that inherently requires the exercise of independent judgment. The petitioned-for

positions must analyze and assess the circumstances surrounding the outage, determine the appropriate number and classifications of employees needed to restore electrical or gas service, and direct those employees throughout the process of restoring service. (Tr. 133.) In the event there are multiple outages, the petitioned-for positions must analyze the situation using their independent judgment to determine which workers are to be assigned, where and when. (Tr. 369, 410.)

While Central Hudson provides guidelines regarding the prioritization of incidents, which essentially memorialize the experiences of employees in the petitioned-for positions over time, the petitioned-for positions have total discretion in every instance to decide when and where they are going to send field personnel. The petitioned-for positions, alone, are responsible for assigning the field personnel to problem calls. When carrying out this duty, the petitioned-for positions rely on their independent judgment to determine whether to call in additional crews or whether to hold crews over. (Tr. 371, 426.) They have full authority to direct the personnel they believe will be needed to remain at the job until the emergency situation has abated. (*Id.*) As noted above, this may be done even over the objection of the line supervisors and foremen. Thus, contrary to the Acting Regional Director's conclusion, there is ample evidence that the petitioned-for positions exercise sufficient independent judgment in carrying their duties.

D. <u>The Petitioned-for Positions' Have Authority to Take or Effectively Recommend Other Supervisory Actions.</u>

Manager System Operations May provided examples of at least two Operations Shift Supervisors recommending that certain employees be hired. Mr. May stated that within the past year, OSS William Kuhnle recommended Ryan Rosa and OSS Adam Secor recommended Bradley King. (Tr. 258-62.) Mr. May explained that he discussed with Mr. Kuhnle, Mr. Kuhnle's recommendation of Mr. Rosa and that Mr. D'Amato discussed with Mr. Secor his

recommendation of Mr. King. (Tr. 262.) Mr. May recalled that during his conversation with Mr. Kuhnle, Mr. Kuhnle indicated that Mr. Rosa had a "solid background and would be an excellent operator." (*Id.*) Mr. May further testified that both Mr. Rosa and Mr. King were hired by Central Hudson as Assistant System Operators. (Tr. 261.) This shows that Operating Shift Supervisors have effectively recommended hiring. *See Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel*, 350 NLRB 1114, 1115 (2007) (hiring authority established by manager's testimony that he followed the recommendations). Director Dispatch Operations Hawthorne similarly testified that other petitioned-for positions have effectively recommended hiring. (Tr. 594-96.) Mr. Hawthorne recalled that Assistant System Operators Carissa Thomas and Vincent Morris had recommended Assistant System Operator Benjamin Compain, who was recently hired. (Tr. 595-96.) These facts demonstrate that Assistant System Operators also have exercised the authority to effectively recommend hiring. With respect to each of these instances, the Acting Regional Director downplayed the significance of the recommendation simply because the recommended individuals were personal references. However, the fact remains that the people who made the recommendations have extensive knowledge concerning the jobs involved and made recommendations for those specific jobs based on their evaluations of the individuals who were ultimately hired.

The evidence that the petitioned-for positions have effectively recommended hiring supports the conclusion that they can also make recommendations concerning layoffs, recall promotions, discharge, rewards and discipline. Indeed, because the Company views the petitioned-for positions as supervisors and, for a majority of its operations, relies upon them as the only supervisors on duty, it is expected that the petitioned-for positions would make

recommendations concerning layoffs, recall promotions, discharge, rewards and discipline, etc., should the circumstance warrant such actions.

E. <u>Central Hudson Established Secondary Indicia of Supervisory Status.</u>

The Acting Regional Director's DDE is further flawed because it fails even to acknowledge the substantial evidence in the record of secondary indicia of the petitioned-for positions' supervisory status. In addressing this issue, the Acting Regional Director discussed only the petitioned-for positions' job descriptions and concluded that they "are mere paper conveyances that do not impart actual supervisory authority." (DDE p. 25.) As a preliminary matter, witnesses Hulse and Yozzo testified that the supervisory duties contained in their job descriptions accurately reflected the nature of the JSO, ASO and SOC jobs. (Tr. 339, 376-77, 401.)

Moreover, despite the fact that they were completely ignored in the Acting Regional Director's analysis, Central Hudson provided undisputed evidence concerning several other secondary indicia. Specifically, Central Hudson established that the petitioned-for positions routinely attend management-only meetings and participate in supervisory training, including the Cornell Supervisory Training and Central Hudson's internal training on drug and alcohol abuse awareness. (Tr. 164-66, 381, 401-02; Er. Ex. 26.) Both of these factors constitute secondary indicia of supervisory status. *See J.C. Brock Corp.*, 314 NLRB 157, 159 (1994) (attendance at supervisory meetings is secondary indicia); *Maine Yankee Atomic Power Co.*, 624 F.2d at 347. *See McClatchy Newspapers, Inc.*, 307 NLRB 773 (1992) (attendance at management meetings and training sessions is indicative of supervisory status). The Acting Regional Director also failed to consider the fact that the petitioned-for positions require a working knowledge of the labor agreements because they must consider contract compliance when giving orders or making an assignment. (Tr. 331-32, 579, 582-83.) Further, all employees in the petitioned-for positions

are salaried, exempt employees who are eligible for market match and merit-based increases unlike the bargaining unit employees who are paid negotiated hourly rates pursuant to the collective bargaining agreement. (Tr. 619-20, 623-24; Er. Ex. 17.) Finally, Central Hudson presented evidence that the petitioned-for positions are relied upon by bargaining unit employees as supervisors. (Tr. 297-98, 363.) *See The Bama Co.*, 145 NLRB 1141, 1143 (1964) (how others view individual as supervisor is relevant secondary indicia). Each of these secondary indicia support a finding of supervisory status, none of which were addressed by the Acting Regional Director in his decision.

F. <u>The Operations Shift Supervisors Have Additional Unmistakable Supervisory Authority.</u>

In addition to the supervisory duties exercised by all of the petitioned-for positions described above, Operations Shift Supervisors also have supervisory authority with respect to certain of the other petitioned-for positions. As several of the witnesses testified, the Operations Shift Supervisors have ultimate responsibility for Central Hudson's operations during nonbusiness hours and directly supervise the Assistant System Operators and System Operators on their shift. (Tr. 68, 122, 141, 256, 271.)

Operations Shift Supervisors assign Assistant System Operators and System Operators because they determine whether those employees will work in the control room or on the floor. (Tr. 198, 446.) They also responsibly direct Assistant System Operators and System Operators and may be held accountable for their subordinates' errors. (Tr. 192.) For example, Operations Shift Supervisor William Kuhnle was issued a verbal warning and had the incident included in his performance review after he failed to "adequately supervise the work product that he allowed his shift staff to perform" and because he "did not completely focus or take full control of the situation" as the OSS "in charge as [the] event unfolded." (Tr. 86-87, Er. Exs. 9-10.) The Acting

Regional Director acknowledged that Kuhnle was reprimanded for failing to review his subordinate's work. If that was his conclusion, it should follow that he would also find sufficient evidence of "responsible direction" as defined in *Oakwood Healthcare*. Unlike in *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (2011), where the dispatchers were held accountable for their own work deficiencies, here there is evidence of accountability for, in essence, failing to oversee the employees whom the Operations Shift Supervisor was directing.

The Operations Shift Supervisors also effectively recommend various other supervisory actions. For example, they have effectively recommended promotions by suggesting to their supervisor the individuals whom they deem "ready" to take the switching test. (Tr. 66, 258-62, 486-88.) Further, two of the current Operations Shift Supervisors have effectively recommended that specific employees be placed on their teams. (Tr. 207-08, 258.) The Acting Regional Director acknowledged this point but summarily dismissed it, noting that the senior system operator and the manager of system operations ultimately created the schedule incorporating these requests. (DDE p. 18, n. 10.) The fact that upper level supervision implemented the Operations Shift Supervisors' recommendations is not a proper basis for concluding that the Operations Shift Supervisors lack the authority to effectively recommend assignments.

The Operations Shift Supervisors also prepare the performance reviews (which directly impact wage decisions) of the Engineering System Operators and Assistant System Operators on their shift and provide feedback as part of the review process of the Customer Services ASOs/SOs they supervise. (Tr. 66, 90-92, 101-02, 222-25, 287, 374-75, 486, 624; Er. Ex. 14-16, 27-29, 31-34.) *See Gestamp South Carolina, LLC*, 357 NLRB No. 130 (2011) (employer's quality engineer was statutory supervisor where he had authority to recommend performance evaluations for two employees and such performance evaluations affected the employees'

compensation). (Tr. 101-02, 624.) Additionally, as previously noted, the Operations Shift Supervisors' own performance reviews demonstrate that they are held accountable for other personnel as contemplated by *Golden Crest Healthcare Center*, because they are evaluated based on "accountability" and "management competencies." (Er. Ex. 14-16, 27-29, 31-34.)

Despite this extensive evidence, the Acting Regional Director found that Operations Shift Supervisors do not have the authority to effectively recommend reward largely because their evaluations are reviewed by upper management and human resources. The Acting Regional Director's analysis is flawed both legally and factually. As Sharon McGinnis, Central Hudson's Director of Human Resources testified, performance appraisals are handled consistently across the entire organization. (Tr. 629.) Consequently, all performance appraisals are reviewed through upper management and Human Resources whether initiated by Operations Shift Supervisors or some other supervisor within the company. (Tr. 618, 629-30.) Indeed, the Operations Shift Supervisors' evaluations which are initially prepared by the Senior System Operator are also reviewed by upper management and human resources. (Er. Exs. 10, 27-29, 31-32.) Consequently, the Acting Regional Director's finding that involvement of upper management and human resources in reviewing and signing off on evaluations removes supervisory status would effectively eliminate the authority to recommend reward for all but the highest level of supervisors.

In addition, and more significantly, the Acting Regional Director's analysis eliminates the distinction between *recommending* action and *making the decision* to act. If a recommendation must be acted upon without review by anyone else, then the person making the recommendation becomes the actual decision maker. Thus, if an independent review is conducted, then there is no effective recommendation at all. In either scenario, the outcome is that there is no such thing as

effective recommendation. In sum, the Acting Regional Director essentially reads "effectively to recommend" out of the Act, at least with respect to rewards. Certainly, that is not what the drafters of the Act intended.

II. **The Acting Regional Director Essentially Ignored the Evidence of Managerial Status.**

The Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. 672, 682-83 (1980), described managerial employees in the following manner:

> Managerial employees are defined as those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' These employees are 'much higher in the managerial structure' than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.' Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

(Internal citations omitted.)

The Junior System Operators, Assistant System Operators, System Operators Operations Shift Supervisors and System Operations Coordinators have obvious discretion and authority of a managerial employee in that they have responsibility for ensuring that the gas and electric systems are stable, by: assessing and determining the appropriate course for responding to countless emergencies; regularly altering work sequences on the transmission system; reorganizing projects to ensure that the work is performed efficiently and safely; cancelling, postponing, and re-ordering jobs; deciding what work field personnel will perform and when; participating in the creation of operating procedures; and regularly participating in high-level management meetings and trainings. *Cf., O.G.S. Technologies, Inc.*, 347 NLRB 299, 303 (2006)

(die engineers are *not* managerial because they attend no management meetings, are extensively supervised, have no role in production schedules or changes, and no training responsibility). Additionally, at least some of the individuals in the petitioned-for positions across various job titles are involved in creating Operating Procedures on behalf of Central Hudson. (Tr. 19-20, 29; Er. Ex. 1, 7.) Thus, the Acting Regional Director's conclusion that there is no evidence that any of the positions are involved in policymaking is actually contrary to the record. Further, while the Acting Regional Director appeared to recognize the managerial nature of the task assigned to OSS Harris, he improperly noted the fact that the task is not yet completed in finding that it did not meet managerial status. Again, the Acting Regional Director imposed standards higher than that required by the Act.

The Acting Regional Director's finding concerning managerial status is also flawed to the extent it is based on the improper conclusion that the petitioned-for positions' attendance at managerial meetings was based on a "generalized open invitation." (DDE p. 26.) Not only is that conclusion inaccurate, but it is a distinction without legal significance.

A. <u>System Operations Coordinators Have Additional Managerial Responsibilities.</u>

The System Operations Coordinators are quintessential managerial employees as contemplated by *Yeshiva University*. In addition to the managerial duties described above, System Operations Coordinators coordinate all planned transmission system work activities. Thus, System Operations Coordinators set employer policy by deciding what Central Hudson will build or repair next, and what will not be built or repaired. They coordinate Central Hudson's work directly with outside entities, including government offices, with the authority to commit Central Hudson to a course of action, while also ensuring that the Central Hudson transmission system can handle the workload. System Operations Coordinators have unilateral authority to cancel outage requests if, in the System Operations Coordinators' judgment, there

would be an unacceptable risk to safety or to the transmission system. (Tr. 382-83.) They must account for financial considerations when making these decisions on behalf of Central Hudson. This is managerial authority. *See Simplex Indus., Inc.*, 243 NLRB 111, 113 (1979) (transportation manager is managerial where he is "responsible for accomplishing [work] in the most cost-efficient manner possible" and can make the necessary decisions to achieve this end.).

In addition, the System Operations Coordinators also formulate Central Hudson's written policies and procedures and are responsible for performing various project management roles within the System Operations division. (Tr. 58.) By way of recent example, this can include process improvement, implementation of new software, and recommending and writing system operating plans and procedures. (Tr. 58.) With respect to process improvement initiatives, System Operations Coordinators have the authority to make decisions on behalf of the Employer without approval of their manager. (Tr. 59, 61.) They have done so, for example, by way of advising an outside software contractor of changes to be made to a software program to make sure it runs effectively for the organization. (Tr. 60.)

The System Operations Coordinators also are responsible for developing "Operating Procedures and compliance documentation associated with NERC Electric Reliability Standards and the DOT Control Room Management Rule." (Er. Ex. 7.) As in *Yeshiva* System Operations Coordinators squarely raise the issue of divided loyalty, because Central Hudson relies upon them to formulate and apply crucial policies.

The Acting Regional Director largely ignored the undisputed evidence of the System Operations Coordinators' project management responsibilities in summarily concluding that they are not managerial employees. For example, the DDE does not even address the SOCs' significant project management roles.

For all of these reasons, as well as the secondary indicia outlined above, the SOCs are managerial employees whose interests are closely aligned with management.

III. **The Acting Regional Director Improperly Ignored the Evidence of the Union's Waiver.**

As a final matter, the Acting Regional Director should have found that the Union waived its right to represent the petitioned-for positions. There is no dispute that Local 320 reached the following written agreement with Central Hudson:

> System Operators are to be omitted from the bargaining unit and considered for purposes of seniority as though they had been promoted to first line of supervision.

(Tr. 512-13; Er. Ex. 17, p. 369, item +7.)

Moreover, the subsequent bargaining history between the parties demonstrates that Petitioner has long recognized that this Digest Item +7 barred the Union from representing the Employer's system operators. It also represents an admission by the Union that the petitioned-for positions are supervisors. Consistent with its express understanding that it did not have the right to do so, Petitioner never petitioned to represent the Employer's system operators for more than 66 years from 1948 until January 2015. For that reason, the Acting Regional Director should have held Petitioner to the terms of the existing collective bargaining agreement that contains Petitioner's long standing agreement not to represent these employees because they are supervisors.

CONCLUSION

For the reasons set forth above, the petitioned-for positions are statutory supervisors or, in the alternative, managerial employees and should not be included in any unit found appropriate. Moreover, the Union has already waived its right to represent them. Therefore, the Board should grant the Request for Review and reverse the decision of the Acting Regional Director.

DATED: Buffalo, New York
March 11, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott P. Horton, Esq., hereby certify and affirm that on the 11th day of March 2015, I electronically filed Central Hudson Gas & Electric Corporation's Employer's Request for Review of Regional Director's Decision with the National Labor Relations Board using the Board's electronic filing system, and I further caused same to be served upon the following parties by electronic mail and U. S. Mail at the e-mail addresses designated for these purposes:

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CERTIFICATE OF SERVICE

I, Scott P. Horton, Esq., hereby certify and affirm that on the 11th day of March 2015, I electronically filed Central Hudson Gas & Electric Corporation's Employer's Request for Review of Regional Director's Decision with the National Labor Relations Board using the Board's electronic filing system, and I further caused same to be served upon Region 3 of the National Labor Relations Board by electronic mail on March 12, 2015.

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