

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**UNITED WATER NEW YORK¹
Employer**

- and -

Case No. 2-RC-22963

**LOCAL 363, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO, CLC
Petitioner**

SUPPLEMENTAL DECISION ON REMAND

A Decision and Direction of Election in the above-captioned case was issued by the undersigned Regional Director on May 12, 2005. In this decision, I found that the SCADA team leaders and operators employed by the Employer were all employees within the meaning of the Act. Thus, I concluded they were all eligible to vote in an election to determine whether they wanted to be included in a unit with the Employer's employees presently represented by Local 363, International Brotherhood of Electrical Workers, AFL-CIO, CLC, pursuant to a certification of representative issued in Case No. 2-RC-14838. An election was conducted pursuant to the Decision and Direction of Election in this case on June 7, 2005, and the ballots were impounded. On August 16, 2005, the Board granted the requests for review of the Employer and the Petitioner. On September 30, 2006, the matter was remanded by Order of the Board for further appropriate action consistent with the Board's decisions in *Oakwood Healthcare*, 348 NLRB No. 37 (2006), *Golden Crest*, 348 NLRB No. 39 (2006), and *Croft Metals*, 348 NLRB No. 38 (2006).

By letter dated October 16, 2006, the undersigned requested that the parties submit their positions regarding the further processing of the petition, including whether the record is sufficient to proceed without a supplemental hearing. By letters dated October 24 and 25, 2006, Petitioner and the Employer respectively stated that the record evidence was sufficient and requested the opportunity to submit supplemental briefs focusing on the application of the Board's recent *Oakwood Healthcare* trilogy. By Order dated November 7, 2006, the undersigned granted the parties' request and thereafter, extended the deadline for submission of briefs to December 5, 2006, pursuant to Petitioner's request.²

¹ The name of the Employer was corrected at the outset of the hearing.

² By letter dated January 12, 2007, counsel to Petitioner, Jonathan Walters, clarified that any reference in its brief to Employer Exhibit 7 should be disregarded and that Petitioner is not relying on the rotational emergency supervisor roster in order to establish the supervisory status of the team leaders.

INITIAL DECISION AND DIRECTION OF ELECTION

As found in the initial Decision herein, United Water New York (“the Employer”) is engaged in the business of providing water to residential and commercial customers throughout the Rockland County area of New York State. Local 363, the International Brotherhood of Electrical Workers, AFL-CIO, CLC (“Petitioner”) filed a petition among all employees employed in the SCADA office³ as a residual unit, seeking to add these employees to a unit already covered by a collective-bargaining agreement between the Employer and Petitioner, which is effective by its terms from September 1, 2003, through October 29, 2007. The contractual unit, which was certified by the Board in Case No. 2-RC-14838, encompasses all of the Employer’s employees, including inspectors, special inspectors, field investigators, water waste inspectors, meter service and repairmen, maintenance men, special service and maintenance men, pump operators, laborers, bookkeepers, yardmen, systems operations clerks, commercial investigators, meter readers, typist-clerks, senior clerks, and teller-counter clerks, but excluding executives, professionals, confidential employees, and guards and supervisors as defined by the Act. It appears that in about 1984, the Employer created SCADA positions, but has refused to recognize the Union with respect to these employees.

In this petition, Petitioner seeks an election among SCADA operators employed in the SCADA office, but would exclude the two SCADA team leaders as supervisors under the Act. The Employer contends that the petition should be dismissed because both the SCADA team leaders and operators are supervisors under the Act.

I found in the initial decision that both the SCADA operators and SCADA team leaders are employees and ordered an election in the residual unit encompassing both classifications of SCADA employees.

DECISION ON REMAND

This case is on remand to the Region for further appropriate action consistent with *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); and, *Croft Metals, Inc.*, 348 NLRB No. 38 (2006). This remand is limited to the sole issue of whether the six SCADA employees⁴ are supervisors within the meaning of Section 2(11) of the Act because they exercise independent discretion in assigning and directing field employees. As mentioned above, the parties disagree with respect to the basis for finding that the two team leaders are supervisory. In that regard, the Union contends that the two SCADA team leaders are supervisory because they assign and direct the other SCADA employees. The Employer, however, takes the position that all six SCADA employees are supervisors because their job duties are “too similar to so distinguish the positions.”

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. For the reasons set forth more fully below, I find that the SCADA team leaders and operators are non-supervisory and are eligible to vote for inclusion in the certified unit. To provide a context for my discussion, I will first provide an overview of the Employer’s operations. Then, I will present the facts and reasoning that

³ SCADA stands for Supervisory Control and Data Acquisition.

⁴ The record indicates that while one of the SCADA positions was vacant at the time of the hearing, the Employer intends to operate this department with four SCADA operators and two team leaders.

supports my conclusions on this issue under the analysis set forth in *Oakwood Healthcare* and its progeny.

I. RELEVANT FACTUAL BACKGROUND

A. Employer Operations

The Employer's corporate office, located at 360 West Nyack Road in West Nyack, NY, provides water to more than 250,000 people in the Rockland area. The Union represents about sixty employees at this location, which is comprised of several departments: customer service, meter changing, meter reading, pumping, distribution and construction. SCADA ("Supervisory Control and Data Acquisition") is a computerized system that collects data regarding, among other things, tank levels and the flow and pressure of the water. The employees in the SCADA office monitor the data and analyze various text alarms to determine whether an alarm represents an instrumentation issue (false alarm) or whether an actual, physical problem has occurred at one of the Employer's wells, the treatment plant or the pumping station.

The SCADA office houses six employees, although only five employees were employed during the hearing conducted in 2005. Walter Bogushesky and Jeff Van Wagenen, the two most senior employees, are the team leaders.⁵ Robert Keller, Patrick Tuohy and Michael Joosten have the title "supervisor-system operations" and are referred to herein as SCADA operators.⁶ The team leaders and the operators report to Vito Spadavecchia, the manager of operations in charge of the pumping department, the distribution department and SCADA. Spadavecchia reports to Michael Pointing, the vice-president and general manager. The SCADA operators work 12 hour shifts from either 6 am to 6 pm or 6 pm to 6 am. The team leaders work normal business hours, Monday through Friday, 8:00 am to 4:30 pm, along with Spadavecchia and Pointing.

B. SCADA Job Duties

The major responsibility of the SCADA office is to supervise, control and monitor the regulation of the water supply and its distribution in the system. Based on tank levels, all SCADA employees make technical decisions, such as whether to start or stop wells, move water between districts, open or close a regulator, or increase production at the treatment plant. These tasks are accomplished through a series of commands inputted into the computer, which are set forth in the SCADA operations manual. The cost of water production is a major factor in managing the system and therefore, SCADA's determination to use a particular well is based largely on whether its utilization is less expensive. In that regard, the manual lists the relative operating costs of every well in each district. With respect to SCADA's oversight of the treatment plant, the operating manual sets forth all of the testing and sampling procedures used by the treatment plant operators to monitor water quality.

⁵ The team leader title was created in January 2005. It appears that the primary change in terms and conditions of employment for the team leaders is their shift schedule.

⁶ Joosten was hired in 2000. Tuohy started in 2002 and Keller was recently hired in October 2004.

No field employees report directly to SCADA operators or team leaders. Walter Bogushefsky, a team leader who has worked in the SCADA office for 21 years, testified in general terms that SCADA operators direct the work of employees in the pumping, distribution and construction departments. Typically, SCADA operators interface with a pumping department employee about two to four times per day; a distribution department employee about two or three times a week; and a construction crew only rarely and in emergency situations. Each department has defined jobs so that SCADA operators are not required to use any discretion in determining whether to reach out to a pumping department employee or a distribution department employee.

Bogushefsky testified regarding a normal work day in the SCADA office and his various interactions with field employees. As an example, a “power” alarm flashing on the SCADA computer screen may prompt the SCADA operator to call the electric utility to inquire about a power outage in that area. Alternatively, he may call a pumping department employee, who has been pre-selected by the pumping department supervisor Christopher Berke, to verify that a power failure has occurred and if so, directs the pumping department worker to rectify the situation.⁷ Similarly, a “low temperature” alarm requires the SCADA operator to interpret the data and consider a number of possible responses. Bogushefsky explained that a low temperature alarm on a warm day would likely indicate an instrumentation malfunction for which scheduling routine maintenance would be an appropriate. If, however, a low temperature alarm occurs on a cold winter day, Bogushefsky would immediately contact the designated pumping department employee to investigate whether the alarm is broken or the heat is actually off. While the record demonstrates that the SCADA operator exercises discretion in his response to various alarms, SCADA operators do not select a specific field employee based on an assessment of the employee’s ability or skill. In the unusual circumstance that a job requires more than one field employee, Bogushefsky contacts Berke to select and assign another employee to this job.

With respect to SCADA employees’ less frequent interaction with the distribution department, the communication between SCADA employees and field employees is even more remote. Like the assignment by Berke, the distribution department supervisor designates the employee who is available to respond to SCADA inquiries. In the event that the SCADA operator determines that an alarm warrants investigation, however, the SCADA operator informs the customer service bureau (CSB) and CSB contacts the distribution employee to respond to and correct the problem.⁸

Regarding interaction with the construction crew employees, Bogushefsky described the exceptional situation of a water main break that occurs after normal working hours. As a threshold matter, the SCADA operator determines whether an on-site inspection by a distribution department employee is required based on consideration of several factors: the time of year, the time of day, the volume of water leaking, etc. As stated above, where an on-site assessment is necessary, the SCADA operator contacts CSB which in turn, calls the designated distribution department employee. Based on the inspection, the SCADA operator may decide to

⁷ While no testimony was elicited regarding the criteria that he uses to select the employee, Berke corroborated that he assigns a pumping department employee to be available to take field calls from SCADA.

⁸ It appears that the CSB employees are encompassed in the wall-to-wall unit.

call out a construction crew. In that regard, the manual provides uniform procedures and guidelines for the operating personnel to properly disinfect any main installations prior to being placed back in service. If the SCADA operator is unsure whether immediate remedial action is necessary, he may call an emergency supervisor for an on-site assessment. In the event that several emergencies occur simultaneously, then the emergency supervisor decides the appropriate order of response.

With respect to assignment of overtime, SCADA operators may determine that pumping department employees have to work additional hours. In that regard, the SCADA operator uses an on-call list to select the pumping department employee and the overtime expense is attributed to the pumping department budget.⁹ During the winter months, the SCADA operator calls whoever is available and makes an attempt to equalize the overtime. It appears from the record that overtime occurs maybe once during the entire winter season. No evidence was adduced regarding the SCADA operator's response to an employee's refusal to accept overtime.

Another infrequent situation occurs when a well stops pumping. The SCADA operator dispatches an on-site pumping employee to inspect the well. It appears that the SCADA operator determines whether to start another well as a replacement in the event that the pump is broken.

Regarding the treatment plant, the SCADA operators monitor chemical levels, along with the employees at the treatment plant who also have access to the same information. Accordingly, Bogushefsky's first assumption is that the treatment plant employees are attending to any problems indicated on the SCADA system. If a problem persists, however, the SCADA operator calls and directs the treatment plant employee to correct the chemical levels. In that regard, the protocol for adjusting chemical levels is set forth in the treatment plant operating manual in a detailed and extensive fashion.

Finally, the record indicates that SCADA operators occasionally "float" as temporary supervisors in the pumping, distribution and construction departments "as necessary." Bogushefsky vaguely recalled that SCADA operator Joosten "floated" for three days in the distribution department. No further evidence was elicited regarding the temporary assignment of SCADA operators as departmental supervisors. The record fails to elaborate on what functions the operators perform as temporary supervisors with respect to direction and assignment of work.¹⁰

⁹ It appears that Berke writes an on call schedule for the pumping department employees to rotate through on a weekly basis during the summer. Notably, the collective-bargaining agreement provides in Article X, section 10.4 that: "during the term of this Contract the Union will provide to the SCADA Supervisor a list of employees who will be subject to emergency call out (when a hand crew is needed)". This may refer to emergency construction crews, however, no testimony was adduced regarding this provision.

¹⁰ The testimony offered in this area is the following:

Q: Does it happen from time to time that when the pumping supervisor is either on vacation or not in, off-site for different reasons, that SCADA supervisors get involved and actually then assigning more tasks, not just those that SCADA want but regular pumping tasks to the pumping employees?

A: Yes.

C. SCADA Team Leaders

The team leaders are responsible for training the SCADA operators, usually in an informal, on-the-job manner. Bogushefsky created guidelines which were incorporated into the operating manual for the procedure for peak activated rate demand days. Since January 2005, the SCADA operators have been treated as hourly employees who are eligible for overtime pay. The team leaders, on the other hand, are salaried employees.¹¹ Thus, apart from job experience, it appears that the main distinction between SCADA operators and team leaders is the provisional shift structure which ensures that the SCADA operators do not exceed forty-hour weeks. Specifically, the SCADA operators work six, twelve-hour shifts and two, four-hour shifts over eight consecutive days and then they have seven days off.¹² In contrast, the team leaders work normal business hours, Monday through Friday, as do Spadavecchia and Pointing.

The team leaders also participate in a rotating, weekly roster of supervisors scheduled for emergencies.¹³ Bogushefsky testified that he has served as an emergency supervisor but gave no further details regarding the frequency or regularity of this assignment. While it appears that Van Wagenen is on the emergency schedule, he has not been called out as yet. None of the SCADA operators rotate on the schedule as emergency supervisors; however, it appears that Joosten (who is not a team leader) has served as an emergency supervisor notwithstanding that he does not appear on the schedule.

Bogushefsky makes up the work schedule for the SCADA operators which he described as a routine, clerical function. "The work schedule is basically a calendar with people's names on it. It's a repetitive schedule. It can be made up by anyone."¹⁴ While the team leader job description states that the four SCADA operators report to the team leaders, the record indicates that the team leaders do not evaluate or otherwise enforce company rules with respect to the SCADA operators. In that regard, all of the SCADA operators receive incentive pay based on performance reviews completed by Spadavecchia. The incentive pay is based on achieving personal objectives that are in line with the Employer's goals. Bogushefsky testified that SCADA operators were only indirectly involved in discussions regarding the company's objectives. For the most part, his personal goals were drafted by Spadavecchia. For time off requests and vacation schedules, both the team leaders and the SCADA operators seek approval from Spadavecchia.

¹¹ No evidence was elicited regarding wage differences between the team leaders and the SCADA operators.

¹² This shift structure was implemented in January 2005 and will be reviewed by management prior to becoming a permanent arrangement. Neither party has provided any additional evidence regarding whether the review actually occurred or the recommendations that resulted.

¹³ It appears that the schedule also includes managers and might include engineers who may be unit employees. The schedule was not offered in evidence. The job description for the SCADA operators indicates in the summary: "serves on 24-hour emergency call duty on a rotating basis."

¹⁴ The record indicates that team leader Van Wagenen has not participated in writing the schedule for the SCADA operators.

II. ANALYSIS

A. Legal Principles

Before analyzing the specific duties and authority of the SCADA operators and team leaders, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term 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.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) of the Act is sufficient to establish supervisory status, even in this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649, at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the individuals at issue here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Indeed, such “minor supervisory duties” should not be used to deprive such individual of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, it is noted that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington*

Masonry Supply, 339 NLRB No. 99, slip op. at 2 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047(2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (September 29, 2006) and two companion cases, *Croft Metals, Inc.*, 348 NLRB No. 38 (September 29, 2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (September 29, 2006). In these decisions, the Board refined its analysis in assessing supervisory status in light of the Supreme Court’s decision in *Kentucky River*, supra. In *Oakwood*, the Board addressed the Supreme Court’s rejection of the Board’s definition of Section 2(11) in the healthcare industry as being overly narrow by adopting “definitions for the term ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” *Oakwood*, supra, slip op. at 3.

With regard to the Section 2(11) criterion “assign,” the Board considered the fact that this factor shares with other Section 2(11) criteria the “common trait of affecting a term or condition of employment” and determined to construe the term assign “to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” *Id.*, slip op. at 4. The Board reasoned that, “It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.” *Id.* The Board clarified that, “...choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” *Id.*

The Board defined the parameters of the term “responsibly to direct” by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986). In this regard, the Board quoted the following language from in *NLRB v. KDFW-TV, Inc.*, supra at 1278:

To be responsible is to be answering for the discharge of a duty or obligation...In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs...Thus in *NLRB v. Adam [&]Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a

Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department.” *Oakwood*, slip op. at 6 – 7.

In agreeing with the circuit courts that have considered the issue, the Board found that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.*, at 7.

In *Kentucky River*, the Supreme Court rejected the Board’s interpretation of “independent judgment” to exclude the exercise of “ordinary professional or technical judgment in directing less skilled employees to deliver services.” *NLRB v. Kentucky River Community Care, Inc.*, 532 US at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted a definition of the term “independent judgment” that “applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise....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).” *Supra*, slip op. at 7. The Board noted that the term “independent judgment” must be interpreted in contrast with the statutory language, “not of a merely routine or clerical nature.” *Id.*, slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* (citation omitted) However, “...the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Id.*

B. Application

Based on the record evidence, I conclude that the evidence is insufficient to establish that the SCADA operators and team leaders are supervisors as defined by Section 2(11) of the Act. The sole issue presented is whether the SCADA operators and team leaders assign and responsibly direct the work of the filed employees and whether independent judgment is required in doing so.

1. The SCADA Operators do not Assign Work

In the instant case, SCADA operators are charged with overseeing and maintaining a system, not a department. No record evidence supports a finding that SCADA operators assign field employees to a particular department, the shift on which they work, or the significant overall duties performed. Rather, field employees report to their respective departmental supervisors who have authority over them in personnel matters. Field employees may perform a few tasks at the request of the SCADA operators, however, the departmental heads select the field

employee designated to respond to SCADA inquiries and assign the filed employees' overall duties. The Board in *Oakwood Healthcare*, supra, held that the *ad hoc* instruction of an employee to perform a discrete task is not to be considered an assignment as encompassed within the enumerated authorities listed in Section 2(11) of the Act.

Finally, any overtime assignment to unit employees by SCADA operators is constricted by the summertime rotation schedule promulgated by the Employer and by an attempt to equalize distribution of additional hours among the unit. *Golden Crest*, supra; *Halpak Plastics, Inc.*, 287 NLRB 700 (1987). In that regard, it appears that pumping department supervisor Christopher Berke creates his department's overtime schedule. Further, the "emergency call-out" procedures are circumscribed by the terms of the collective-bargaining agreement. Thus, based on this record, the Employer has failed to meet its burden to establish that the SCADA operators can require a field employee to report to work for overtime assignments, rather than merely request their appearance. *Golden Crest*, supra. Accordingly, applying the test for assignment of work, I find that the SCADA operators do not possess the authority to assign work to field employees.

2. *The SCADA Operators Do Not Responsibly Direct*

The record establishes that the SCADA operators do not have employees who report to them, nor do they assess unit employees' ability to perform a job. Instead, the record is clear that SCADA operators are technical troubleshooters, acting much like a quality control operation, who dispatch pre-selected pumping and distribution employees to investigate and repair equipment. In some instances, the SCADA operators may decide that no immediate response to an alarm signal is warranted. In other circumstances, the SCADA operators may decide that an investigation is necessary; however, they exercise no discretion regarding which field employee to call. Moreover, the record is clear that the tasks to be performed by the filed employee are routine.

Further, no evidence was adduced to establish that the SCADA operators can take corrective action for the work of field employees. While it is true that SCADA operators play an important role in achieving the Employer's primary goal of providing quality water, the particular tasks of the field employees that indirectly contribute to fulfilling that goal are overseen by the departmental supervisors. SCADA operators do not discipline field employees and no evidence supports that they have input into the evaluations of field employees. Thus, the record does not support that SCADA operators can effect changes in the status of employees based on an employee's failure to carry out the requested task or take corrective action. *Northeast Utility Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994), cert denied 514 U.S. 1015 (1995).

Moreover, the record does not establish that the SCADA operators are held accountable for the performance of the tasks delegated to field employees. While the job description states that SCADA operators have "the full accountability to deploy appropriate resources," the Board insists on evidence supporting a finding of actual, as opposed to mere paper, authority. As the Board held in *Golden Crest*, where the prospect of adverse consequences for the putative supervisor is merely speculative, such evidence is insufficient to establish accountability. Here, the record fails to illustrate any examples of actual accountability as opposed to mere paper authority. Finally, no evidence was adduced to show that SCADA operators ensure that management policies and work rules are implemented. To the contrary, the personal objectives

for SCADA operators that were submitted in evidence demonstrate that the SCADA operators are primarily responsible for their own work performance, not the performance of the field employees. Accordingly, applying the test for responsible direction, I find that the SCADA operators do not possess the authority to responsibly direct the field employees.

3. The SCADA Operators do not Act with Independent Judgment

Finally, even assuming that SCADA operators' inquiries to field employees could be considered assignment and/or responsible direction under *Oakwood Healthcare*, I find that the record fails to demonstrate that SCADA operators exercise any significant discretion and independent judgment in assigning and directing the unit work. Instead, the tasks are of a merely routine nature and the operations manual specifically and in detail sets forth established procedures for correcting errors in the system. As stated by the Supreme Court in *Kentucky River*, supra at 713-714, there are, at one end of the spectrum, situations where there are detailed instructions for the actor to follow. At the other end, there are other situations where the actor is wholly free from constraints. The Board stated in *Oakwood Healthcare* that the term "independent judgment" must be assessed by the *degree* of discretion exercised by the putative supervisor. In the instant case, SCADA operators often merely follow protocols rather than use their own thought or discretion. *Dynamic Science Inc.*, 334 NLRB 391 (2001); *NLRB v. Meenan Oil Co.*, 139 F.3d 311 (2d Cir. 1998).

Further, in emergency situations, SCADA operators at times consult with an emergency supervisor to determine what course of action to follow. While SCADA operators may make an independent decision, like authorizing the use of a construction crew for a water main break, the Board has held that such responsibilities in isolated instances that are not part of their normal job duties are insufficient to confer supervisory status. *Exxon Pipeline Co. v. NLRB*, 596 F.2d 704, 706 (5th Cir. 1979) ("the [oil movement supervisor] is little more than a night watchman, who can hardly be said to supervise the police when he calls to report and request investigation of the burglary he has just discovered.") In the instant case, the record establishes that winter and other emergency situations requiring any action by SCADA operators occur rarely.

Similarly, any discretion as to overtime assignments made by SCADA operators to unit employees is constricted by a rotation schedule and the collective-bargaining agreement. Accordingly, I cannot conclude that the degree of discretion involved in assignment and direction of work rises above routine or clerical.

4. Insufficient Evidence to Establish Temporary Supervisory Status

Similarly, while some evidence suggests that the SCADA operators have "floated" as supervisors in various departments, the record does not elaborate on the frequency of such assignments or the nature of the work carried out by the "floater" supervisor. Therefore the record fails to establish that the SCADA operator spends a "regular and substantial" portion of his work time performing supervisory functions, as opposed to sporadic substitution. *Oakwood Healthcare*, supra.

In conclusion, I find based upon the record and in accordance with *Oakwood*, that the Employer has not met its burden of proving that the SCADA operators are supervisors within the meaning of Section 2(11) of the Act.

6. *The SCADA Team Leaders are Indistinguishable from the SCADA Operators*

While both parties claim that the team leaders are supervisors, neither party has provided the evidentiary basis to determine whether the team leaders possess primary supervisory indicia. The foregoing facts relating to the team leaders' duties and functions establish that they perform many, if not most, of the same functions as the SCADA operators. The record demonstrates that the team leaders based on their years of experience train the other SCADA operators, but no evidence was adduced to show that they are held accountable for the operator's failure to pass the training period. The team leader's terms and conditions of employment are different from the SCADA operators only by virtue of their recently revised work schedules. As to overtime assignments by the team leaders to the SCADA operators, the radical reorganization of SCADA operator shifts indicates that management has generally minimized and discouraged the use of overtime.

While the record indicates that the team leaders are part of a rotating emergency supervisor roster, the Employer offered only superficial evidence as to the regularity with which the team leaders rotate through the emergency supervisor schedule. Further, the record is unclear as to the nature and the quality of the responsibilities that are exercised by those on this roster or the frequency with which team leaders have served as emergency supervisors. Accordingly, because the record is vague and insubstantial with respect to the team leaders' authority over the operators, and in the absence of a factual stipulation between the parties, neither the Employer nor the Petitioner has met the burden of proof required to establish that team leaders are supervisors.

III. CONCLUSION

In conclusion, based upon my analysis on remand of the *Oakwood* et al standards, I conclude that the SCADA operators and team leaders are not supervisors within the meaning of Section 2(11) of the Act and constitute a separate residual unit. In this regard, neither the Employer nor Petitioner asserts that there are any other unrepresented employees eligible for the contractual unit employed by the Employer. Thus the following shall be part of the residual unit found appropriate for the purposes of collective bargaining:

Included: All full-time and regular part-time SCADA operators and team leaders employed by the Employer.

Excluded: All other employees in the contractual bargaining unit, and office clerical employees, confidential employees, executives, professional employees, and guards and supervisors as defined in the Act.

BALLOT COUNT

I hereby direct that the ballots impounded after the election conducted on June 7, 2005, be opened and counted.

If a majority of valid ballots are cast for Petitioner, they will be taken to have indicated the employees' desire to be included in the existing contractual unit set forth below currently represented by Petitioner. The contractual unit is set forth as follows:

Included: All full-time and regular part-time employees, including inspectors, special inspectors, field investigators, water waste inspectors, meter service and repairmen, maintenance men, special service and maintenance men, pump operators, laborers, bookkeepers, yardmen, systems operations clerks, commercial investigators, meter readers, typist-clerks, senior clerks, and teller-counter clerks.

Excluded: All other employees, including office clerical employees, confidential employees, executives, professional employees, and guards and supervisors as defined in the Act.

If a majority of the valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

IV. 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, D.C. 20570. This request must be received by the Board in Washington by 5:00 p.m. EST, on **January 30, 2007**. The request may not be filed by facsimile.

If a party wishes to file one of these documents electronically, please refer to "E-Gov" on the National Labor Relations Board website: www.nlr.gov.

Dated at New York, New York,
January 16, 2007

/s/ _____
Celeste J. Mattina, Regional Director,
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278