

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**ATLANTIC PARATRANS
OF NEW YORK CITY**

Employer

and

Case No. 29-RC-10316

**TRANSPORT WORKERS UNION
OF AMERICA, AFL-CIO**

Petitioner

**LOCAL 1181, AMALGAMATED
TRANSIT UNION, AFL-CIO**

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Emily Cabrera and Tara O'Rourke, Hearing Officers of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officers' rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that Atlantic Paratrans of New York City, herein called the Employer, an independently operated subsidiary of Atlantic Express Transportation Group, with its principal place of business located at 58-75 Maurice

Avenue, Maspeth, New York 11201, provides transportation services to disabled individuals, and those individuals who, due to a physical ailment or impediment, cannot utilize public transportation, throughout the five boroughs of New York City. During the preceding twelve months, which period is representative of its operations in general, the Employer, in the course and conduct of its business operations, derived revenues in excess of \$250,000 and purchased and received at its facility, goods and services valued in excess of \$5,000 directly from points located outside the State of New York.

Based on the stipulation of the parties and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Transport Workers Union of America, AFL-CIO, herein called the Petitioner, seeks to represent a unit of all full-time and regular part-time dispatchers, but excluding all other employees, managers and supervisors as defined in Section 2(11) of the Act.

The Employer contends that the dispatchers are ineligible to participate in a Board election because they are supervisors as defined in Section 2(11) of the Act. The Petitioner asserts that the dispatchers are statutory employees. Without taking a specific position on the issue, Local 1181, Amalgamated Transit Union, AFL-CIO, herein called

the Intervenor or Local 1181, seeks to participate in the election in the event that the Board finds the dispatchers to be non-supervisory employees. Local 1181 intervened in the proceedings on the basis of its collective bargaining agreement with the Employer, covering the Employer's drivers.

The Employer's witnesses were Allyn Keller, its project manager and general manager, Robert Schiffman, the assistant project manager, Sean Conroy, an operations manager and former dispatcher, Eric Campbell, a new dispatch supervisor who was previously a dispatcher for four and a half years, and dispatchers Harry Ryttenberg and Raquel Cook. The Petitioner's witnesses were dispatchers Letesha Rogers and Chris Lewis. The Employer and Petitioner submitted briefs.¹

FACTS

OVERALL OPERATIONS

The Employer has a contract with the New York City Transit Authority, herein called the TA, to provide transportation services to passengers with disabilities or other medical conditions, who are unable to use public transportation. It operates 365 days per year, from 4:00 a.m. to 10:00 p.m. The daily routes are set by the TA, in response to customer requests. The TA uses another outside contractor, First Transit, to operate its command center.

The Employer employs about 25 or 26 dispatchers and 400 drivers. The Employer's managerial and supervisory personnel, whose non-employee status is

¹ The parties were granted an extension of time in which to file their briefs, until February 18, 2005, pursuant to the Employer's request. Nonetheless, the Employer failed to meet this new deadline. The Employer faxed a copy of its brief on February 18 at 5:34 p.m., and the original brief, postmarked February 18, was received in the Region on February 22, 2005. The Board's Rules and Regulations provide that facsimile transmissions of briefs "will not be accepted for filing." Section 102.114(g). Further, documents "*postmarked on the day before* (or earlier than) *the due date*" are timely filed, but documents "*postmarked on or after the due date* are untimely." Board's Rules and Regulations section 102.111. Nevertheless, I have considered the Employer's submission.

undisputed, include the project manager and assistant project manager, operations managers, six dispatch supervisors and nine field supervisors.

DISPATCHERS' JOB DUTIES

Assign/Direct

The dispatchers' job duties include dispatching the drivers, maintaining contact with the drivers and with the TA, monitoring the progress of the routes and ensuring the timeliness of pick-ups and drop-offs, and extensive clerical, data-entry and report-writing functions. If drivers are lost, the dispatchers give them directions on how to get to their destinations. In addition, they provide the drivers with other types of "directions" and "instructions" that were not specifically described. Each dispatcher is assigned a complement of 20 to 25 drivers, and a fairly consistent set of routes. The daily routes are set by the TA, and the operations managers handle the scheduling of the individual drivers.

The Employer's contention that the dispatchers exercise supervisory authority in the assignment of employees rests primarily on two interrelated functions: their ability to reschedule and reassign "trips"² among the drivers, and their ability to authorize overtime. The need to reassign trips arises under a variety of circumstances. For example, trips may have to be reassigned when routes are running late as the result of traffic, weather or road conditions, mechanical breakdowns or accidents. In addition, if a dispatcher discerns that the schedule created by the TA does not allow enough time for a driver to get from one location to the next, the dispatcher may have to move trips to a different driver. During the course of the day, the TA may add another trip, or "insert," to the day's schedule, which must be assigned to a driver.

² Each pick-up stop along a route is referred to as a "trip."

When a trip has to be reassigned, the dispatcher looks through the routes assigned to him to identify a driver who can assist with the trip. The factors involved in identifying likely candidates are: (1) whether the driver has any slack time on his route, such as a gap resulting from a customer cancellation, (2) whether the stops on the driver's route are geographically proximate to the trip that has to be reassigned (or assigned in the event of an insert), (3) whether the driver is running on time, and (4) if the trip involves overtime work, whether the driver has expressed a willingness to perform overtime work. The dispatcher then contacts the driver and asks him to assist with the additional trip. If the trip does not involve overtime, the driver is required to accept the assignment.

In identifying substitute drivers, Campbell testified that he "may try to use suggestions in the computer to see if there's any slack time" on any of the routes. In addition, the dispatcher may ask other dispatchers whether any of the drivers they are dispatching have slack time in their routes and are available to assist. In this regard, the dispatch supervisors may "act as a liaison" among the dispatchers, helping to identify dispatchers and drivers with slack time on the routes to which they are assigned. The dispatch supervisors may either require another dispatcher and driver to assist with the trip, or assign a standby driver. The Employer employs 10 to 15 standby drivers, who relieve other drivers when necessary.

If reassigning a trip involves overtime work, the dispatcher is empowered to authorize overtime.³ In addition, when a driver is running late on his route, a dispatcher can authorize him to make up the time by working during his lunch break, or past the end

³ There was conflicting evidence as to whether a dispatch supervisor must sign off on overtime work before a driver can get paid for it.

of his shift, for which the driver receives overtime pay. The dispatcher also has the discretion to ask another driver to help out with the late route.

However, a dispatcher cannot require a driver to work overtime. A driver can turn down work if it is past the end of his shift, or during his lunch break. In managing the routes, the dispatcher must try to minimize the amount of overtime worked, because of economic considerations. In addition, U.S. Department of Transportation (“DOT”) rules limit the number of hours a driver can be behind the wheel of a bus. Overtime scheduled in advance, such as assigning a driver to work an extra day to fill in for an absent co-worker, is under the exclusive control of the operations managers and project manager, who are in charge of scheduling.

Discipline

Disciplinary Reports

The record reflects that a dispatcher’s job duties include writing up “disciplinary reports” on misconduct by drivers, such as the refusal to perform work or follow a dispatcher’s instructions. These reports set forth the dispatcher’s version of the facts, but they do not include disciplinary recommendations. There was conflicting testimony as to whether a dispatcher needs a dispatch supervisor’s authorization before writing up such reports.

After writing up a disciplinary report, the dispatcher forwards the report to the assistant project manager, who confers with the dispatcher to clarify what occurred but does not generally ask for the dispatcher’s recommendation on whether to take

disciplinary action.⁴ The assistant project manager then meets with the driver. In some instances, if the assistant project manager deems it necessary, the dispatcher attends these meetings, and provides his version of events (as does the driver). The project manager may also attend these meetings.

After the meeting with the driver, the assistant project manager and project manager may conduct a further investigation before deciding whether to impose discipline, or merely “reinstruction” or counseling. The assistant project manager writes a separate disciplinary report, including his disposition of the case, and the project manager signs off on it. If there is a grievance or arbitration hearing, the dispatcher who observed the driver’s misconduct may be called to testify.

Removing Drivers from their Routes

The record reflects that in certain instances, dispatchers have removed new, probationary drivers from their routes.⁵ This occurs when the driver is running far behind schedule, is hopelessly lost, is not performing in a safe manner, is not following instructions, and/or has a language problem. Although the dispatcher writes up the incident, the write-up does not include a disciplinary recommendation. The assistant project manager reviews the dispatcher’s write-up and then speaks with the driver and conducts his own investigation. The assistant project manager and project manager decide whether to reinstruct, warn, discipline, or discharge the driver, on the one hand, or

⁴ Of the six dispatchers and former dispatchers who testified, dispatcher Raquel Cook was alone in testifying that she has made disciplinary recommendations. Her testimony was not corroborated by Schiffman, to whom she claimed to have made the recommendations.

⁵ There was conflicting testimony as to whether they can do so without authorization from a dispatch supervisor or operations manager.

to forego any discipline and merely reassign him to another route, or use him as a spare driver for the day.

Campbell, a former dispatcher, testified that he pulled a new driver off his route on two occasions in his four and a half years as a dispatcher. Ryttenberg indicated that he did so twice in 19 months.

Accidents

The Intervenor's collective bargaining agreement with the Employer provides for an accident review board to evaluate accidents and decide on appropriate penalties, based on such factors as whether the accident was preventable and whether the driver has a history of past accidents. The accident review board does not include dispatchers. However, all available information enters into the evaluation, including any reports by the dispatcher, the driver and the field supervisor.

Discharge

The record reflects that the project manager has the authority to terminate employees.⁶ Certain violations result in immediate discharge, such as alcohol and drug abuse on the job, and theft.

Decisions on whether to retain new drivers beyond their 90-day probationary periods, or to discharge them at that point, are made by the assistant project manager and project manager. Assistant project manager Schiffman testified that during the drivers' probationary periods, he meets with them and reviews their work, directs, and counsels

⁶ Campbell testified that in one instance, without being asked for his opinion, he volunteered a "negative evaluation" of a driver in a conversation with Schiffman, whom he identified as being the project manager. According to Campbell, this resulted in the driver's discharge. Schiffman did not corroborate this testimony. The record does not reveal whether Campbell's verbal "evaluation" included a recommendation that the driver be discharged, or whether management conducted an independent investigation.

them. In addition, he obtains information about their performance from the dispatchers, primarily Michael Parham, a dispatcher to whom most of the probationary drivers are assigned. The record reflects that the dispatchers do not submit written evaluations of new employees, and do not make specific recommendations regarding the retention of probationary employees.⁷ Keller testified that the decision to retain a probationary employee is not reduced to a writing. Rather, “if he continues on, then he just continues to be an employee.”

Other Supervisory Indicia

There is no evidence that the dispatchers exercise supervisory authority with respect to any other supervisory indicia set forth in Section 2(11) of the Act.

DISCUSSION

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866 (2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *See Chicago Metallic*, 273 NLRB 1677, 1688, 1689 (1985). Accordingly, when “there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria.” *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. at 7 (2003).

⁷ The Employer’s attorney contended that the dispatchers make recommendations regarding the retention of new drivers after their 90-day probationary periods. Through leading questions, the Employer’s attorney elicited Keller’s and Campbell’s agreement with this contention. This testimony was not corroborated by other witnesses. When asked to elaborate on the meaning of “recommend,” Campbell testified that if a probationary driver “was doing good performance and no-shows, I will recommend to my project manager how good he was doing. If he wasn’t doing well, I would let the project manager know his weaknesses and his strengths.”

In enacting Section 2(11) of the Act, Congress intended to distinguish “between true supervisors who are vested with ‘genuine management prerogatives,’ and ‘straw bosses, lead men, and set-up men’ who are protected by the Act even though they perform ‘minor supervisory duties.’” *S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)*, quoted in *Providence Hospital*, 320 NLRB 717, 725 (1996). Accordingly, Section 2(11) provides that employees are statutory supervisors only if (1) they hold the authority to engage in (or make effective recommendations with respect to) one of the twelve supervisory functions set forth in the Act, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” See *Kentucky River*, 121 S.Ct. at 1867. The use of “independent judgment” must be demonstrated through evidence of “particular acts and judgments,” *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995), rather than through “general, conclusory claims.” *Crittenton Hospital*, 328 NLRB 879 (1999). Independent judgment must be established with respect to each and every supervisory function exercised by the alleged supervisor. *Property Markets*, 339 NLRB No. 31, slip op. at 6.

Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. See *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999). The Board and federal courts “typically consider assignment based on assessment of a worker’s skills to require independent judgment and, therefore, to be supervisory,” except where the “matching of skills to requirements [is] essentially routine.” *Brusco Tug & Barge Co.*, 247 F.3d 273, 278 (D.C. Cir. 2001) (citing *Hilliard*

Development Corp., 187 F.3d 133, 146, 161 LRRM 2966 (1st Cir. 1999)); *see also Franklin Home Health Agency*, 337 NLRB 826 (2002). Merely telling employees to fill in for one another, *Los Angeles Water and Power Employees' Association*, 340 NLRB No. 146, slip op. at 3 (2003), or “shift[ing] employees around ... to get projects done,” *Hexacomb Corp.*, 313 NLRB 983, 984 (1994), does not entail the use of independent judgment. Similarly, the assignment of tasks in accordance with an Employer’s set practice, pattern or parameters, or based on routine or obvious factors, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. *See Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). For example, a dispatcher who assigns a pickup to “the driver with a suitable truck closest to the customer’s place of business,” or to a driver whose workload is light, is exercising his authority in a routine manner that does not require independent judgment. *Bay Area-Los Angeles Express*, 275 NLRB at 1075.

The authority to discipline employees does not confer 2(11) status unless it leads to personnel action, without independent investigation or review by management. *Franklin Home Health Agency*, 337 NLRB at 830; *Quadrex Environmental Company*, 308 NLRB 101 (1992). Thus, an employee with the authority to order co-workers with performance problems to leave a work-site is not a supervisor if he has no authority to effectuate ultimate personnel decisions, and management “determine[s] independently, after its own investigation, what, if any, action should be taken.” *Quadrex*, 308 NLRB at 101. Writing reports on incidents of employee misconduct is not a supervisory function if the reports do not contain disciplinary recommendations. *Schnurmacher Nursing Home*, 214 F.3rd 260, 265 (2^d Cir. 2000)(citing *Meenan Oil Co.*, 139 F.3d 311 (2^d Cir. 1998));

Illinois Veterans Home at Anna L.P., 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). Even if the reports contain the word “warning,” merely recording the facts surrounding a potential disciplinary incident, without further inquiry or recommended disposition, does not establish disciplinary authority as defined in Section 2(11) of the Act. *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000); *see also Illinois Veterans Home*, 323 NLRB at 890.

In the instant case, the dispatchers’ assignment decisions merely involve “shift[ing] employees around” and telling employees to fill in for one another. *See Los Angeles Water and Power*, 340 NLRB No. 146, slip op. at 3; *Hexacomb Corp.*, 313 NLRB at 984. The dispatchers do not make assignment decisions based on an assessment of a worker’s skills. *See Brusco Tug & Barge*, 247 F.3d at 278. Rather, they rely on routine, obvious factors such as the driver’s geographical proximity to the trip that has to be reassigned, and whether a driver has slack time on his route. *See Bay Area-Los Angeles Express*, 275 NLRB at 1075. Further, the dispatchers’ assignment decisions are limited by set parameters, such as DOT rules. *See Express Messenger Systems*, 301 NLRB at 654. They do not have the authority to compel overtime work. *See Loyalhanna*, 332 NLRB at 934. Moreover, most assignment and scheduling decisions are made by the operations managers and project manager.

With regard to the dispatchers’ asserted authority to discipline employees, the record reflects that with few exceptions, the dispatchers merely record the facts surrounding potential disciplinary incidents, rather than making disciplinary recommendations. *See, e.g., Loyalhanna Health Care Associates*, 332 NLRB at 934. Although the dispatchers occasionally remove inexperienced drivers from their routes,

this does not always lead to disciplinary action. Rather, ultimate personnel decisions regarding drivers who have been removed from their routes are made by the project manager and assistant project manager, after independent investigation. See *Quadrex*, 308 NLRB at 101. Similarly, the dispatchers do not make recommendations or ultimate personnel decisions regarding drivers involved in accidents.

Finally, the record reflects that personnel decisions regarding the discharge of employees, and the retention or discharge of new employees after their probationary periods end, rest with the project manager and assistant project manager. Although the dispatchers provide input regarding the drivers' job performance, there is no evidence that they make recommendations regarding their discharge or retention.

In sum, the Employer has failed to meet its burden of establishing that the dispatchers exercise supervisory authority with respect to any of the supervisory indicia set forth in Section 2(11) of the Act. Secondary indicia of supervisory status, which are not specifically set forth in the Act, "are insufficient by themselves to establish statutory supervisory status." *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. at 7 (2003). Therefore, I conclude that the Employer's dispatchers are not supervisors, but statutory employees. I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

All full-time and regular part-time dispatchers, but excluding all other employees, managers and supervisors as defined in Section 2(11) of the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by Transport Workers Union of America, AFL-CIO, by Local 1181, Amalgamated Transit Union, AFL-CIO, or by neither labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **March 10, 2005**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days

prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

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. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 17, 2005**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: March 3, 2005, Brooklyn, New York.

Alvin P. Blyer
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