UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

La Crosse, WI

MIDWEST NATURAL GAS, INC.

Employer

and **Case 30-RC-6711**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 953, AFL-CIO[1]

Petitioner

DECISION AND DIRECTION OF ELECTION[2]

I. SUMMARY

International Brotherhood of Electrical Workers, Local 953, AFL-CIO (Union) has filed a petition to represent all non-statutorily excluded employees of Midwest Natural Gas, Inc. (Employer). These employees include the Employer's district managers, service technicians, service technician/construction employees, seasonal construction workers, customer service

[1]The name of the Petitioner appears as amended at hearing.

[2] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Timely briefs from the Employer and Petitioner have been received and considered, and upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. The parties stipulated, and I find, that the Employer, is a corporation engaged in the public utility industry with multiple facilities located in western Wisconsin, headquartered in Whitehall, Wisconsin, and during the past calendar year, a representative period, the Employer had a gross volume of business in excess of $250,000, and during that same period, purchased and received goods and/or services valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

representatives, and the senior customer service representative.[3]

A hearing was held before a hearing officer of the National Labor Relations Board to determine two issues. The first is whether the customer service representatives (CSRs) and the senior customer service representative (senior CSR) should also be included in the unit. The Union maintains that the CSRs and senior CSR should be included in the unit because the Union is seeking a wall-to-wall unit and the Board has held that a systemwide unit is the optimum unit in the public utility industry. The Employer contends that the CSRs are clerical employees who do not share a community of interest with the technicians and other employees in the unit and that the public utility cases are inapposite. The second issue is whether Brad Mashak, the district manager in the Employer's Westby office, and Justin Jacobs, the district manager in the Employer's Somerset office, are supervisors as defined in Section 2(11) of the Act. The Employer contends that Mashak and Jacobs are supervisors because they have the authority to effectively recommend hiring, to discipline and discharge, and to assign and responsibly direct the work of service technicians. The Union contends that Mashak and Jacobs possess no supervisory indicia.

After considering the evidence produced during the hearing and the arguments of the parties, I conclude, for the reasons stated below, that: (1) the CSRs and senior CSR are properly included in the petitioned-for unit; and (2) Justin Jacobs and Brad Mashak are both supervisors and should not be allowed to vote. Accordingly, I find that the following employees of the

[3] The parties stipulated that the following employees are included in an appropriate unit:

> All full-time, regular part-time, and seasonal construction workers and technicians employed by the Employer at its La Crosse, Whitehall, Westby, or Somerset, Wisconsin offices, and all full-time or regular part-time area/district managers employed by the Employer out of its La Crosse and Whitehall/Mondovi facilities; excluding all guards and supervisors as defined in the Act.

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

> All full-time, regular part-time, and seasonal construction workers, technicians, customer service representatives, and senior customer service representatives employed by the Employer at its La Crosse, Whitehall, Westby, or Somerset, Wisconsin offices, and all full-time or regular part-time area/district managers employed by the Employer out of its La Crosse and Whitehall/Mondovi facilities; excluding all guards and supervisors as defined in the Act.

II. FACTS

A. Overview of the Employer's Operations

The Employer is a small public utility that provides natural gas to approximately 15,000 residential and commercial customers in western Wisconsin. The Employer is regulated by the Public Service Commission of Wisconsin (PSC). The Employer has four district offices located in La Crosse, Whitehall, Somerset, and Westby, Wisconsin. The Employer also has an area office in Mondovi, Wisconsin, which is organizationally part of the Whitehall office.

All of the Employer's senior managers, including the president, James Senty; vice-president, Paul Senty; chief financial officer (CFO), Rich Linton; and general manager of operations, Troy Dahlin, work in the La Crosse office. The following personnel also work in or out of the La Crosse office: the accounting supervisor, Glenn Stugelmayer; two district/area managers, Eric Loeding and Jim Feyen[4]; and a CSR, however, this position is currently vacant.

The Whitehall office is the Employer's headquarters for record keeping and PSC purposes. The chief manager in this office is Eliot Solsrud, the compliance superintendent.

[4] Eric Loeding testified that he considered himself a service technician and that prior to seeing the Employer's organizational chart, Employer Exhibit 1, he never knew of the district manager title. Loeding's and Jim Feyen's current business cards do not identify them as district managers, while Justin Jacobs' and Brad Mashak's do. However, because the Employer does identify Loeding and Feyen as district managers on its organizational chart, which was revised in April 2007, and because both the Union and the Employer stipulated that the two La Crosse district managers were included in the unit, I will refer to Loeding and Feyen as district managers.

Personnel working in or out of this office include: Justin Solsrud, service technician/construction; Lorraine Loken, senior CSR; Dawn Steig, CSR; and two seasonal construction employees, Charles Stenberg and Morris Amidon. The Mondovi satellite area office currently only has one employee, Charles Ashwell, a district/area manager, who reports to management in the Whitehall office.

The Somerset office has three employees: District Manager Justin Jacobs; Service Technician Mark Ball; and CSR Suzanne DeRosier. The Somerset office is located approximately 160 miles from La Crosse. The Westby office, likewise, has three employees: District Manager Brad Mashak; Service Technician Randall Olson; and CSR Dawn Haakenson. The Westby office is located approximately 25 miles from La Crosse.

Structurally, the Employer's business is divided into two components: a records and accounting side and an operations side. The CSRs and the senior CSR are organizationally part of records and accounting. The CSRs and senior CSR, even if they do not work in the La Crosse office, are all directly supervised by Accounting Supervisor Glenn Stugelmayer.[5] Stugelmayer, in turn, reports to the CFO, who is the top manager on the records and accounting side.

The technicians, construction workers, and district managers are organizationally part of the operations side of the business, which concerns the actual physical delivery of gas to customers. The top manager on the operations side is General Manager of Operations Troy Dahlin.[6] Below the general manager are two superintendents, the compliance superintendent and the construction and maintenance superintendent. The construction and maintenance

[5] The parties stipulated and I find that Stugelmayer is a supervisor as defined in Section 2(11) of the Act since he has the authority to responsibly direct and assign work, hire, and/or effectively recommend the hiring or discipline of employees.

[6] The parties stipulated and I find that Dahlin is a supervisor as defined in Section 2(11) of the Act since he has the authority to responsibly direct and assign work, hire, and/or effectively recommend the hiring or discipline of employees.

superintendent position is currently vacant. The compliance superintendent, Eliot Solsrud,[7] also functions as a district manager. With the possible exception of Charles Ashwell,[8] it appears that all the district managers currently report to General Manager of Operations Troy Dahlin. The two seasonal construction workers report to the construction and maintenance superintendent. The work of the service technicians in the Somerset and Westby offices is overseen by their respective district managers.

B. CSRs and Senior CSR

1. Duties and Terms and Conditions of Employment of the CSRs and Senior CSR

There is one CSR in each of the Employer's district offices, except the Whitehall office, which has one CSR and one senior CSR, Lorraine Loken. Loken[9] testified that the CSR duties are relatively the same at all the Employer's locations.[10] The CSRs work from 8 a.m. to 5 p.m., with an hour break for lunch. They are hourly employees earning between $10.75 and $11.65 an hour. The senior CSR earns $13.52 an hour. The parties stipulated that the CSRs have the same health insurance benefits and receive the same vacation as the service technicians and district managers.

The CSRs spend virtually the entire day in the office. They do leave the office each day to make the daily bank deposit and take and pick up mail at the post office.[11] Neither of these trips take much time, as the Employer's offices are generally located conveniently close to both

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[7]The parties stipulated and I find that Solsrud is a supervisor as defined in Section 2(11) of the Act since he has the authority to responsibly direct and assign work, hire, and/or effectively recommend the hiring or discipline of employees.

[8] The record only indicates that Ashwell reports to management in the Whitehall office.

[9] Loken has worked for the Employer for over thirty years and has worked at the Somerset, Westby, and La Crosse offices, filling in for vacations or illnesses.

[10] This testimony was not contradicted by any of the Employer's witnesses.

[11] In the La Crosse office, a courier takes the mail to the post office.

places. CSRs will also leave the office to go to the local courthouse to engage in small claims collections proceedings. CSRs will go to the courthouse for this purpose two to six times a year.

While the CSRs are in the office, they spend most of their time engaging in tasks related to billing and crediting payments to customer accounts, preparing deposits, filing, talking to customers on the phone, and attending to customers who walk into the office. For billing and crediting payments, the CSRs use an electronic accounting system which is centralized in La Crosse. The CSRs have their own computers which access the accounting system. The Employer also keeps some hard copy records, and the CSRs are responsible for filing these materials. The types of calls the CSRs receive from customers include: customers who are moving and want to start or discontinue service; customers who are calling to dispute a high bill; customers who are calling to report a gas odor or gas leak; customers who are calling to report a lack of gas pressure; and customers who are calling to pay their bills with a credit card, as the Employer takes credit card payments over the phone. CSRs also set up and review monthly billing amounts for customers on gas budgets, set up electronic billing and check debiting for customers, prepare paperwork related to disconnecting services for customers who are delinquent, and file some end of the month reports with the Whitehall office.

The senior CSR has additional responsibilities which include training new CSRs, handling miscellaneous billing, such as billing for excess footage, handling construction issues, and performing some payroll-related functions.

The CSRs do not wear uniforms, do not have business cards, do not drive a company vehicle, do not have a company-issued cell phone, and do not have on-call responsibility.

2. Duties and Terms and Conditions of Employment of the Service Technicians and District Managers[12]

Technicians spend most of their days—90-95% in summer and 70-80% or more in winter—outside in the field engaged in tasks such as periodic inspections and maintenance of the gas system infrastructure mandated by the PSC, meter reading, meter change-outs, locating,[13] checking gas odors and leaks, checking gas pressure, and performing procedures related to initiating or discontinuing service. The technicians are issued a comprehensive operations manual that governs how they are to perform their various jobs. As a condition of their employment, technicians are required to take and pass on-line operator qualification tests. Some of these tests are performed annually and some are performed semi-annually.

Technicians are hourly employees who earn between $14.40 and $17.57 an hour. It is unclear from the record exactly what their hours are, but they appear to start, like the CSRs, at 8:00 a.m. Technicians are required to be on call a considerable amount of time when they are not working. They are required to wear uniforms, have company-issued cell phones, drive company vehicles, and are given company-issued business cards.

3. Interchange between the CSRs and Technicians; Degree of Skill and Common Functions; and Supervision

There is no interchange between employees in the technician and CSR positions, as the positions have entirely different skill sets.[14] The CSRs do not engage in the on-line operator testing and do not utilize the technicians' operations manual. The CSRs do not share any

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[12] I will refer to the district managers and service technicians in the non-disputed unit, see footnote 3 above, collectively as "technicians." The discussion in this section does not encompass the duties of the disputed district managers in the Somerset and Westby offices, Justin Jacobs and Brad Mashak.

[13] Locating is something the technicians do in conjunction with the diggers hotline. When somebody calls the diggers hotline, a technician will go out and locate and mark where the gas service lines run on the property.

[14] A technician who is in the office may answer a phone if the CSR is tied up with another customer, but this is purely incidental, and technicians are not assigned to CSR work and vice-versa.

equipment used by the technicians and vice-versa. In the La Crosse and Whitehall offices, the technicians and CSRs have desks in different rooms or in different areas of the office. It is not clear from the record whether this is the case in the Westby and Somerset offices. As discussed above in the general background section, the CSRs and the technicians report to separate chains of supervision.

4. Functional Integration and Interaction between CSRs and Technicians

Eric Loeding, a district manager, testified that in the La Crosse office, as far as his daily work assignments go, there is a board in the office on which the CSR places work orders and meter data sheets.[15] The work orders reflect calls for service that the CSR has received from customers. Loeding testified that he normally arrives at work before 8:00 a.m. and leaves to go out in the field around 8:15 or 8:30 a.m. Every morning before going out in the field, he will ask the CSR if there is anything else that is not on the board that he should know about. The CSR may tell him that there is nothing that she knows of, or she might tell him about additional work that she has not completed the paperwork for. Loeding further testified that occasionally there are changes or additions once he is out in the field and that these are normally communicated to him through the CSR.

When service technicians do tasks out in the field, such as investigate a reported gas leak, they often need to complete paperwork. Loeding testified that he will turn in all his paperwork the following morning to the CSR. If he has omitted something on a form, the CSR will put the form back into his basket with a highlight or she will contact him directly and ask about the missing information. Technicians can also deliver forms from the CSR to a customer. When a customer requests new service, the forms are assembled for him or her by the CSR, and the

[15] A CSR will hang a meter data sheet on the board when a customer calls to say they are moving out of their residence and the technician needs to go and physically read the meter out that day.

customer can come into the office to fill the paperwork out or the CSR can give the forms to the technician who will take it the customer's residence.

Technicians get calls during the day while out in the field from CSRs in which the CSRs pass along customer issues to the technicians. CSRs communicate with technicians by calling the technicians on their cell phones or by two-way radio. Eric Loeding testified that the number of calls he receives from the CSR varies from season to season--in winter he gets calls from the CSR a couple of times a day at most, and in summer from five to fifteen times a day.[16] The types of matters the CSR will call the technician about include complaints about gas leaks or odors,[17] customer complaints about low pressure, and customer complaints about a high bill, for which the technician will do an investigation. The CSRs also receive calls during the day from the technicians in which the technician may ask the CSR about a customer location, customer contact information, or meter number or location. The CSRs can answer these questions from information they have on their computers or in the company's manual files. Calls between CSRs and technicians are normally short, and often last only a minute or two.

There is also interaction between CSRs and technicians with regard to delinquent customers. If a customer is delinquent in payment, the CSRs are responsible for determining, based on policies and procedures, whether his or her gas should be cut off. If it is during the wintertime, when there is a moratorium on turning off gas service, the CSR will give the technician a notice for the technician to hang on the customer's door, advising the customer to contact the CSR about the delinquency. In the non-winter months, the CSR will direct the

[16] Lorraine Loken testified in response to a leading question on cross by the Employer's attorney that on average over the course of the year it was definitely true that the CSRs and technicians communicate two to three times a day by phone or radio.

[17] Lorraine Loken testified that in the Whitehall office they receive complaints about gas odors anywhere from zero to two to five times a week.

technician when to turn off a customer's gas. In this situation, the technicians will sometimes collect payments directly from the customer and bring it back into the office. If the customer cannot pay in full, but contacts the CSR and makes an acceptable payment arrangement, the CSR will instruct the technician to not turn off the gas. If such an arrangement cannot be made, the CSR will instruct the technician to turn off the gas.

The CSRs and technicians also have functionally coordinated roles with respect to billing. The Employer has an electronic meter reading system. A CSR will download data from the electronic billing system onto a disk and give the disk to a technician. The technician will put the disk into an MMI machine on his truck. The technician will then drive his truck down streets in the areas where meters are to be read, and the meters will send an electronic signal to the MMI machine. The technician will then give the disk back to the CSR who uploads the information on the disk into her computer. The CSR reviews the readings to see if there are any abnormalities. If there are any abnormalities, the CSR will then give the technician a list of meters to go back to and read manually. The technician will then report back his findings to the CSR either over the phone or by filling out a form. An abnormality shows up maybe two or three times out of a thousand.

Finally, because the CSR relays customer orders and requests to the technicians, the CSR needs to have some understanding of what service technicians do and of their availability. Eric Loeding testified that a year and half to two years ago, there were some issues with a CSR having this understanding and that a supervisor, he believed it was Warren Satterlee,[18] decided that the CSR should ride with Loeding in his truck. Loeding described the purpose of the trip as follows:

[18] Satterlee is a former general manager of operations with the Employer.

> We had been having some communication issues with a customer service rep understanding, you know, what our job is and how we can't just drop what we are doing and go somewhere else so she rode with me for about a day and a half just to kind of get an idea of what we are doing in the field so she would better understand…

Loeding's testimony contemplates that there needs to be a certain synergy in CSR—technician functions in order for the Employer to provide efficient service and responses to customers.

C. Disputed District Managers Brad Mashak and Justin Jacobs

1. General Background

As noted above, Brad Mashak is the district manager in the Employer's Westby office, and Justin Jacobs is the district manager in the Somerset office. A service technician and a CSR also both work in each of these respective offices. General Manager of Operations Troy Dahlin described Mashak and Jacobs as being "in charge" of their respective offices. No other managers or supervisor work in either office. Jacobs admitted that when then-General Manager of Operations Warren Satterlee informed him that he was making Jacobs district manager, Satterlee did tell him it was a supervisory position. Both Mashak and Jacobs report directly to Dahlin. Dahlin stops by each of the offices once a week for about one to two hours. Mashak and Jacobs also check in with Dahlin by phone about once a week. Dahlin testified that the responsibilities of Mashak and Jacobs are essentially the same in each office.[19] Justin Jacobs testified that he spends about 90% of his day doing tasks that the service technician also performs.[20]

[19] This testimony was not contested by any of the Union's witnesses.
[20] Brad Mashak did not testify at the hearing.

2. Assignment and Responsible Direction of Work[21]

Troy Dahlin testified that the primary responsibility of the district managers is setting the priority of work in their offices to ensure that it is all completed. Jacobs, too, acknowledged that when Warren Satterlee informed him that he was being made district manager, Satterlee told him that with respect to the position being supervisory, it entailed "[m]aking sure things get done on a timely basis in the office, deadlines are met, and, you know, maintenance – general maintenance schedule's completed so there are no violations."

In order to ensure timely completion of the work, the district manager has to do two things. He needs to prioritize and juggle the various tasks the office needs to perform or oversee, including work that comes in from customers, locates, meter readings, construction of new lines, periodic inspections and maintenance work mandated by the PSC set forth in the General Maintenance Schedule, gas leaks, cut lines, and other potentially hazardous or emergency situations. The district manager also needs to determine which tasks he should do himself and which tasks he should delegate or assign to the service technician in his office. If the district manager delegates certain items, such as various General Maintenance Schedule inspections or keeping track of on-going or planned construction and tasks related thereto, and these items are not performed properly or in a timely fashion by the service technician, the district manager will still be held accountable and will face possible disciplinary consequences.

[21] In this and the ensuing sections of the factual portion of this Decision, when I use the term "district manager(s)" I am referring to Jacobs and Mashak collectively and only, and not to the district managers in the La Crosse and Whitehall/Mondovi offices.

Troy Dahlin testified that in setting priorities, the district managers do not rely on a manual or any sort of guidelines. Instead, they "set priorities based on their work load, what is going on in the district, their own experience." Further, the determination on any particular day of which tasks the district manager should do and which he should delegate to the service technician is made by the district manager himself, and not by anyone above the district manager in the supervisory hierarchy.

As noted above, district managers are responsible for ensuring that the General Maintenance Schedule inspections and maintenance work are completed and that the completion of these items is documented. The General Maintenance Schedule merely sets forth time frames, such as quarterly or yearly, in which the work needs to be done. Consequently, there is flexibility within the time frame as to when the work can be completed. Troy Dahlin testified that it is up to the district manager to determine on what day the inspections and other required work are done. Jacobs, himself, testified that he is in charge of assigning the specific jobs within the General Maintenance Schedule and is responsible for making sure they get done.

3. Hiring

Troy Dahlin has been employed in the General Manager position for four months, and the Employer has not hired a service technician in either the Somerset or Westby offices during this time. Dahlin testified that if the Employer needed to hire a service technician in these offices, the respective district managers would be involved in the interviewing process, and he would take the district manager's recommendation on who to hire unless there was "some glaring reason not to." When subsequently asked what a glaring reason could be, Dahlin replied that he could not think of one off hand. At

another point in the record, the Hearing Officer went through a hypothetical hiring process involving Dahlin and Jacobs. The Hearing Officer asked Dahlin, "But again you would take Mr. Jacobs' recommendation even if you disagreed with who you thought was the top candidate?" Dahlin replied, "His recommendation would be the first priority. He has to work with him every day." Dahlin further testified that he would never impose a service technician on either Mashak or Jacobs if either of these district managers did not want the hire.

The Employer has hired four employees in the Somerset office while Justin Jacobs has been District Manager: Service Technician Josh Spies; Meter Reader Gregory Ray; Meter Reader Christine Peterson; and Service Technician Mark Ball. Warren Satterlee was general manager of operations at the time Spies, Ray, and Peterson were hired. With regard to the interviews that Justin Jacobs participated in with Satterlee, Satterlee testified that, generally, he first asked the questions utilizing a formal questionnaire that he had devised, and after this portion of the interview was completed, Jacobs could then ask his own questions.

Regarding the hire of Josh Spies, Satterlee testified that he knew of Spies, who was at the time a student at Northeast Technical College in Green Bay where Satterlee taught. Satterlee and Compliance Superintendent Eliot Solsrud interviewed Spies in Mondovi when Spies was on his way back to school in Green Bay at the conclusion of Spring Break. Satterlee testified that after the interview, he talked with Justin Jacobs about Spies and recommended that they hire Spies, and Jacobs agreed. Satterlee testified that he talked to Jacobs to see if Jacobs had any reason to disagree with the selection, as he would have taken this into account. Jacobs conceded that he was contacted before

Spies was hired and that he was told about Spies' background. Jacobs further admitted that he was asked if he had any objections to the Employer hiring Spies and that he had no objections. Satterlee also testified that the Employer had run an ad for the service technician position Spies was hired for and that Jacobs did participate in interviews of other candidates for the position. These interviews were held in Somerset and Eliot Solsrud was not involved in them.

Satterlee further testified that he and Jacobs hired Gregory Ray as a meter reader.[22] An ad for the position, which was probably placed by someone in the Somerset office, was placed in the local paper. According to Satterlee, Satterlee and Jacobs went through the applications and picked out about three candidates to interview, which they did. After the interviews, Satterlee and Jacobs agreed on the primary candidate, and Satterlee, probably, made the offer to the candidate. When Satterlee was asked if Jacobs had not agreed on the candidate, would he have made the offer to the candidate anyway, Satterlee testified, "No." When asked why, Satterlee testified, "Justin is the manager that is going to have to work with that employee, so it's – he has a significant vested interest in the selection process."[23]

It turned out that Gregory Ray remained employed for the Employer for less than two months. The Somerset office, consequently, placed another ad in the local paper for a meter reader. Satterlee testified that Jacobs and he went through the applications submitted in response to the ad and agreed, he believed, on three candidates to interview. Satterlee and Jacobs then conducted the interviews with the three candidates. Satterlee

[22] The Employer subsequently eliminated the meter reader position when it converted to an electronic meter reading system.
[23] When Jacobs testified, he did not give any testimony which conflicted with Satterlee's account.

testified that at the conclusion of one of the interviews, "Justin indicated that he did not want to provide further consideration to that candidate, so we didn't." Satterlee recalled that Jacobs voiced the objection because Jacobs did not feel "that it would be a good fit in with him in the Somerset office." Satterlee further testified that further consideration was not given to the candidate because, "I wasn't going to inflict on Justin a situation that he would feel uncomfortable with." Jacobs, when he testified, conceded that when they were going through the process of hiring for the meter reader position Christine Peterson was ultimately hired for, there was a candidate they interviewed that Jacobs told Satterlee he did not want to further consider. Jacobs explained that he was acquainted with the applicant from high school, and he thought it would create a conflict if a disciplinary situation arose. Jacobs further admitted that after his explanation to Satterlee, the applicant was not further considered.

With regard to the two remaining candidates for the meter reader position, both Jacobs and Satterlee agreed on Christine Peterson because she did better in the interview and because she performed better on a meter reading test they gave her. When Satterlee was asked about what would happen if he and Jacobs did not agree on the top candidate, Satterlee testified as follows:

> Q: If Justin wanted to hire the other candidate instead, would he have had the authority to do that?
> A: I think that if he proved to me the reasons, his reasoning for preferring the other candidate, I would have certainly taken his recommendation, assuming that I agreed his reasons were appropriate.
> Q: Rational.
> A: Rational.
> Q: Would you have taken the recommendation if you thought his reasons were rational, but you didn't entirely agree with the final conclusions?
> A: Yes.
> Q: Why is that?

A: He is the one that's going to have to work with that person. He's going to be the one that is going to be supervising that person.

With regard to the hire of Mark Ball,[24] Jacobs testified that he reviewed the applications for the position and that he and then-General Manager of Operations Jeff Gunvalson agreed to interview a certain number of candidates. Jacobs testified that he believed he only sat in on the second interview of Ball, although he was not sure why the second interview was necessary. Jacobs also testified that he believed he sat in on all the second round interviews and that there were two or three candidates in this round.[25] Gunvalson and Jacobs were the only persons conducting the second round of interviews, and the interviews were conducted in the Somerset office. When questioned by the Employer's attorney, Jacobs acknowledged that Ball was his favorite candidate. When asked if he told Gunvalson this, Jacobs, replied, "I – I would say we did discuss it." When asked if Gunvalson had a candidate he preferred more, Jacobs stated that he did not remember 100 percent but he believed that Ball was also his number one candidate. When subsequently questioned by the Hearing Officer, Jacobs affirmed that he was asked which candidate he wanted in the position during the second round of interviews and that he and Gunvalson agreed on Mark Ball.

The record contains evidence of only one hire involving Brad Mashak in the Westby office.[26] Accounting Supervisor Glenn Stugelmayer testified that when the Employer was hiring a CSR for the Westby office, he interviewed a group of four or five candidates and then narrowed it down to three. Once it was narrowed down to three,

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[24] Ball replaced Spies.

[25] It is unclear from Jacobs' testimony, but it appears that Gunvalson may have done a preliminary first round of interviews or that Jacobs was busy working the first time Ball was interviewed.

[26] I do not rely on President James Senty's hearsay and rather scant testimony regarding the hire of Service Technician Randall Olson.

Stugelmayer met with Mashak and went over what Stugelmayer thought were the qualifications of the individuals. Stugelmayer met with Mashak because Mashak is from the Westby area and Westby is a small community. Stugelmayer thought Mashak, therefore, would have knowledge of the candidates because most of the candidates that applied were from Westby and the surrounding area. When they met and discussed the candidates, Mashak informed Stugelmayer that his number one pick was Dawn Haakenson. Haakenson was Stugelmayer's number two pick. Stugelmayer then decided to make the offer to Haakenson, and she was hired.

4. Discipline

Justin Jacobs testified that he has not disciplined anyone while he has been district manager, and there is no other record evidence of any actual discipline issued by a Somerset or Westby district manager. When Troy Dahlin was hypothetically asked what he would do if either Mashak or Jacobs told him that a service technician was not doing what he was told, Dahlin responded, "I would take that under advisement and look into the situation. Potentially reprimand that employee." When Dahlin was asked what he would do if Mashak or Jacobs told him that a service technician had not done what he was directed to do and if Mashak or Jacobs also specifically told him they wanted to give the technician a written reprimand, Dahlin testified that he would rely on the district manager's recommendation and not conduct an independent investigation. Dahlin also testified that if a district manager reported a discipline situation, the district manager would issue the reprimand and give it to the employee.

Justin Jacobs testified that he had not been instructed on how to give reprimands to employees and that he had not been informed by his supervisors that he is expected to

reprimand employees whose work is substandard. He further testified that he did not "recall" if he had been told that he had authority to reprimand. On the other hand, Jacobs also provided testimony that indicated that he was actually aware that he did have authority to discipline or to effectively recommend the discipline of employees. For instance, when Jacobs was asked to elaborate on why he told Warren Satterlee that he did not want to give further consideration to the rejected applicant for the meter reading position, Jacobs testified:

> I just knew him as –he wasn't necessarily a friend of mine. He was an acquaintance and if an issue arose at work where, you know, if he needed to be reprimanded, I'd be – that'd be a hard decision –

Jacobs subsequently testified that his concern was about having to turn in the applicant and that it would be the general manager doing the reprimanding. However, at a different place in his testimony, Jacobs admitted that he had decision making authority with respect to discipline, and not merely just a reporting role:

> …I've never formally been told what [Service Technician Mark Ball] is responsible for and what he isn't. Like I said,… I'm in the management position, in the district manager position and I can delegate work to him…and if that work isn't completed, then ultimately it's my decision then, if there needs to be a reprimand or not.

5. Secondary Indicia

When employees are hired they sign acknowledgement forms concerning the Employer's physical and drug screen policies and concerning receipt of the employee handbook. Justin Jacobs signed these forms for Meter Reader Christine Peterson as Peterson's manager or supervisor. Jacobs signed as the "Manager/Supervisor" approving the hire of Christine Peterson on a form in which Peterson gave the Employer authorization to access her driving record. Brad Mashak signed acknowledgement forms

for CSR Dawn Haakenson and Service Technician Randall Olson on the supervisor or manager lines of the forms. However, Glenn Stugelmayer, the accounting supervisor, also signed below Mashak's signature on Haakenson's form, and Jim Baker, the general manager of operations at that time, signed below Mashak's signature on Olson's form.

Brad Mashak's business card identifies him as "District Supervisor," while Randall Olson's card has no title on it at all. Justin Jacobs' business card identifies him as "District Manager," and Mark Ball's business card identifies him as "Service Technician."

III. LEGAL ANALYSIS

A. Inclusion of the CSRs and Senior CSR in the Unit

Section 9(b) provides that the Board "shall decide in each case whether…the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In deciding whether a petitioned-for unit is appropriate, the Board starts with the premise that "the plain language of [Section 9(b) of] the Act clearly indicates that the same employees of an employer may be grouped together for purposes of collective bargaining in more than one appropriate unit." *Overnite Transportation Co*., 322 NLRB 723 (1996). Accordingly, it is well-established that "there is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be 'appropriate.'" *Morand Brothers Beverage Co.,* 91 NLRB 409, 418 (1950) (emphasis in original), *enf'd*, 190 F.2d 576 (7th Cir. 1951).

In making unit determinations, the Board first examines the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. *Dezcon, Inc*., 295 NLRB 109, 111 (1989). If the petitioned-for unit is not appropriate, the Board may examine the alternative

units suggested by the parties, and also has discretion to select an appropriate unit that is different from the alternative proposals of the parties. See, e.g. *Bartlett Collins Co*., 334 NLRB 484 (2001). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for classifications. *Overnite Transportation Company*, 331 NLRB 662, 663 (2000). However, "[i]t is well established that the Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis." *Seaboard Marine,* 327 NLRB 556 (1999) (citing *Colorado National Bank of Denver*, 204 NLRB 243 (1973)). A petitioner's desire as to a unit is always a relevant consideration, although not dispositive. *Marks Oxygen Co*., 147 NLRB 228 (1964); *Airco, Inc*., 273 NLRB 348 (1984).

Although traditional community of interest factors are normally examined in determining an appropriate unit, this case involves a public utility employer. In the public utility industry, the Board has long considered systemwide units to be optimal. *Baltimore Gas & Electric Co*., 206 NLRB 199, 201 (1973); *PECO Energy Co*., 322 NLRB 1074, 1079 (1997); *Colorado Interstate Gas Co*., 202 NLRB 847 (1973). In *Baltimore Gas & Electric Co*., the Board described the rationale for this view:

> As the parties are aware, the line of Board precedents developed for the public utility industry contains frequent expression of the Board's view that a system-wide unit is the optimal appropriate unit in the public utility industry and of the strong considerations of policy which underlie that view. *That judgment has plainly been impelled by the economic reality that the public utility industry is characterized by a high degree of interdependence of its various segments and that the public has an immediate and direct interest in the uninterrupted maintenance of the essential services that this industry alone can adequately provide. The Board has therefore been reluctant to fragmentize a utility's operations.* It has done so only when there was compelling evidence that collective bargaining in a unit less that systemwide in scope was a "feasible undertaking" and there was no opposing bargaining history.

206 NLRB at 201 (footnote omitted, emphasis supplied). The policy considerations against fragmentation articulated by the Board, based on the interdependence of functions in the utility industry, necessitate that the functional integration between employees be given paramount consideration in determining an appropriate unit.

In this case, there is significant functional integration between the CSRs and the technicians in the provision of natural gas to the Employer's customers. The CSRs, in fact, are essential conduits in the provision of gas services to customers. Customers contact the CSRs, inter alia, to start or stop service, to report a gas leak, or to dispute a bill. The CSRs, in turn, relay this information to the technicians so that they can turn on or turn off gas service, investigate a gas leak, or do a manual meter read and other tasks associated with a high bill inspection. Technicians, conversely, call the CSRs to obtain information about customers, such as their contact information or meter number. As Eric Loeding testified, it is through the CSRs that the technicians get a significant number of their daily work assignments that are not related to General Maintenance Schedule inspections. Moreover, CSRs and technicians are also functionally integrated with respect to billing, a significant aspect of the Employer's operation which does not involve direct customer contact or service. The technicians perform the electronic meter readings on which the bills are based, and, at the direction of a CSR, will go out and manually inspect any readings that appear abnormal. The CSRs could not perform the billing process without these contributions from the technicians.

I understand that the argument can be made that the actual interaction time between the CSRs and the technicians is small and that there may be days, particularly in winter, where there might be only one or two calls between them that last only a minute or two. However, the interactions and synergy between the CSRs and the technicians are essential to the provision of

gas service to customers and are essential components to the Employer's ability to respond to customer requests and complaints. Consequently, I find that the functional integration between the CSRs and the technicians is significant, and, given the public utility setting of this case, it, in and of itself, militates in favor of placing the CSRs in the unit.

There are however, additional factors that also support placing the CSRs in the unit. These are: the CSRs have the exact same vacation and fringe benefit plans as the technicians; an employer-wide unit is a possible appropriate unit contemplated by Section 9(b) of the Act; and it is the Petitioner's desire to include the CSRs in the unit.

In its brief, the Employer makes two arguments concerning the CSR inclusion issue. The first is that the public utility cases are inapposite because they merely hold that there is a presumption that a public utility's multiple districts should be combined into one unit. I disagree. In *Deposit Telephone Company, Inc*., 328 NLRB 1029 (1999), the Board analyzed and applied holdings from prior public utility cases to determine a *departmental/mutidepartmental* scope issue: whether customer service representatives and two other positions should be included in the petitioned-for unit of technicians. In *Deposit Telephone*, the Board applied the factors outlined in *PECO Energy Co*., supra, for determining when a less than systemwide unit was appropriate to their determination of whether a less than multidepartmental unit was appropriate. In so doing, the Board commented, "Although the Board has considered systemwide units to be 'optimal' in the utilities industry, this policy has not required multidepartmental units in all instances, particularly where no other labor organization seeks to represent a more comprehensive unit." 328 NLRB at 1030 (citing *Tidewater Telephone Co*., 181 NLRB 867 (1970)). This statement clearly implies that multidepartmental, or wall-to-wall, units are normally an appropriate unit at a public utility, especially in cases, as the instant case, where the

union is seeking a comprehensive unit. Moreover, I believe the policy considerations outlined in *Baltimore Gas & Electric Co*., supra, are equally as apposite to utility cases involving departmental scope issues as to those involving district scope issues.

The Employer's second argument is that CSRs should not be included in the unit because they are clerical employees who do not share a community of interest with other employees in the unit. However, none of the cases excluding clericals cited by Petitioner in its brief are from the public utility industry. Further, the CSRs in this case are not traditional office clerical employees. In this regard, Lorraine Loken's testimony is rather telling. When Loken was asked who normally gives her her work assignments, she responded:

> To be honest I don't know how to answer that. I mean we work for the customers so the customers are the ones that are requesting certain things so basically it's the customers that are calling in and requesting certain things and we have to follow through with that in that respect.

The CSRs provide customer service first and foremost, and, as discussed above, this customer service function is integrated with the functions of the technicians in providing gas services to customers. For these reasons, I find the Employer's arguments based on clerical cases from outside the public utility industry to be unpersuasive.

Further, as the Employer points out, I acknowledge that many of the community of interest factors, when traditionally applied, militate toward excluding the CSRs. However, as discussed above, the public utility industry is unique, and, therefore, necessitates different considerations than are normally applied in more traditional contexts, such as manufacturing, retail, and construction. Moreover, even applying the community of interest factors without taking the public utility context into consideration, I do not find that circumstances between the CSRs and technicians are so disparate as to compel the placement of CSRs in a separate unit.

For the foregoing reasons, I find that the CSRs and the senior CSR are properly included in the petitioned-for unit.

B. Supervisory Status of Brad Mashak and Justin Jacobs

1. General Legal Standard

Section 2(11) of the Act defines a supervisor as follows:

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

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 *Golden Crest Healthcare Center,* 348 NLRB No. 39 (September 29, 2006). In *Oakwood Healthcare*, the Board reaffirmed that the burden of proving supervisory status rests on the party asserting it. See *Oakwood Healthcare*, supra, slip op. at 9 (citations omitted); and *Golden Crest Healthcare Center*, supra, slip op. at 5. The Board further held the party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Oakwood Healthcare*, supra; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

In *Avante at Wilson, Inc.*, 348 NLRB No. 71, slip op. at 2 (October 31, 2006), the Board specifically held that generalized or conclusory testimony will not satisfy the evidentiary burden. *Id.* (citing *Golden Crest Healthcare Center*, supra, slip op. at 5 (recognizing that "purely conclusory evidence is not sufficient to establish supervisory status," and pointing out that the Board "requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without

supporting evidence do not establish supervisory authority); *Sears Roebuck & Co.,* 304 NLRB 193, 193 (1991) (same)). There must be specific evidence regarding a purported supervisor's authority to take or effectively recommend one of the twelve supervisory indicia, as well as the individual's use of independent judgment in making those decisions. *Id.*

The Board noted in *Oakwood Healthcare*, supra, at fn. 27, that in considering whether the individuals at issue possess any of the supervisory authority set forth in Section 2(11) of the Act, Congress emphasized its intention that supervisors are above the grade of "straw bosses, leadmen, set-up men and other minor supervisory employees." Thus, the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). 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).

Regardless of which one (or more) of the twelve indicia the purported supervisor possesses, he or she still must exercise independent judgment in taking those actions, and the decisions cannot be merely routine or clerical. In *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), 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." Following the admonitions of the Supreme Court, the Board in *Oakwood Healthcare,* 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)." *Oakwood Healthcare*, 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.* The Board held as follows on the meaning of "independent judgment":

> To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. "Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

Oakwood Healthcare, supra, slip op. at 9.

As stated above, the statutory definition of supervisor includes those who "effectively" recommend such actions as hiring, rewarding, disciplining and transferring employees. The Board has consistently required that recommendations by alleged supervisors be shown to have some independent effect. In *Brown & Root, Inc.*, 314 NLRB 19 (1994), safety inspectors who issued safety "citations" were found not to be supervisors because the acknowledged supervisors

independently investigated the incidents before deciding whether to take disciplinary action. In *Children's Farm Home*, 324 NLRB 61 (1997), although the team leaders' evaluations of employees sometimes recommended whether to grant a wage increase, the undisputed supervisors conducted their own independent investigation before deciding on an increase. In *Training School at Vineland*, 332 NLRB 1412 (2000), the group home managers sometimes recommended that discipline be imposed on employees. However, the record showed that, in many instances, the employer either chose not to adopt the recommendations, or simply ignored the recommendations altogether. In those circumstances, "it cannot be said that the group home managers' recommendations are effective." *Id.* at 1417. Thus, in order for the Board to find recommendations to be "effective," there must be some evidence that the recommendations have some independent effect or, at the very least, that they are normally followed. See also *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001) (stores' meat manager and seafood managers found supervisors because they (1) interviewed candidates on their own and made recommendations that were accepted by the food managers without independent investigation, or (2) attended interviews with the food manager, and their resulting recommendations were "typically followed"); *Wal-Mart Stores, Inc.*, 335 NLRB 1310 (2001) (store's department manager "effectively" rewarded employees because the ratings he assigned in their evaluations directly affected their pay increase, without independent investigation by superiors).

2. Authority to Make Effective Recommendations with Regard to Hire

In addition to effectively recommending to hire, the Board has also held that the authority to effectively recommend *against* hiring a candidate can establish supervisory authority. *Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel*, 350 NLRB No. 84, slip op. at 5 (2007) (citing *Berger Transfer & Storage*, 253 NRLB 5, 10 (1980), enfd. 678 F.2d

679 (7th Cir. 1982), supplemented by 281 NLRB 1157 (1986); *HS Lordships*, 274 NLRB 1167, 1173 (1985)). In *Starwood*, a manager testified that recommendations made by supervisors in the disputed supervisor's position were "very key" and that if the disputed supervisor recommended that a candidate not be hired, that "would be fatal." The manager explained that the disputed supervisor's saying that he did not like a candidate would be fatal to the candidate because "we would not have proceeded with a candidate that does not have the support of their eventual Manager." The Board found that the manager's testimony, alone, was sufficient to establish that the disputed supervisor possessed the authority to make effective recommendations with regard to hiring, even though there was no record evidence of the disputed supervisor actually giving a negative hiring recommendation. *Starwood*, 350 NLRB slip op. at 5.

I find that *Starwood* is exactly on point with the instant case. Both Troy Dahlin, the current general manager of operations, and Warren Satterlee, a former general manager of operations, testified that they would not hire an employee for the Somerset or Westby offices who the district manager[27] did not want to hire. Moreover, in the instant case, there is an actual record example of a district manager, Justin Jacobs, recommending against a candidate—the acquaintance who applied for the meter reader position—and that candidate being removed from consideration. Thus, a district manager's authority to effectively recommend against hiring was actually exercised herein. Further, in every record instance where an employee was actually hired, the district manager was consulted with and his approval was given. Indeed, the record evidence tends to indicate that the district managers have the authority to effectively recommend their first choice over the general manager's or the accounting supervisor's first choice if this

[27] Again, when I use the term "district manager(s)" in this and the subsequent sections, I am referring to Jacobs and Mashak collectively and only.

person is not the same. Consequently, I find that the evidence establishes that Jacobs and Mashak have the authority to make effective recommendations with regard to hire.

3. Authority to Assign and Responsibly Direct

With regard to the Section 2(11) criterion "assign," the Board in *Oakwood Healthcare* construed the term "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." 348 NLRB, 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, however, 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 also defined the parameters of the term "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided the discretion is both 'responsible'…and carried out with independent judgment." *Oakwood Healthcare, supra,* at slip op. 7. 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.*

I find that that the record evidence establishes that the district managers have the authority to assign significant tasks to the service technicians under them. In fact, one of the district manager's primary responsibilities is to figure out how to divide up and delegate the work between himself and the service technician so that it all gets completed on time. As Jacobs himself admitted, "I've never formally been told what [Service Technician Mark Ball] is responsible for and what he isn't. Like I said,… I'm in the management position, in the district manager position and I can delegate work to him…." Further, the district managers exercise the authority to assign with independent judgment. The district managers make assignment and delegation decisions on their own without consulting with anyone higher up in the supervisory hierarchy. Moreover, the decisions are not based on any written guidelines and are not routine or clerical in nature, as the district manager needs to constantly juggle competing interests—such as work generated by customers who want service right way versus mandatory PSC inspections which also must be performed in a timely manner; deal with unpredictable changes in work loads—such as calls concerning gas odors and gas line breaks; and assess emergency situations.

Further, I find that district managers responsibly direct the work of service technicians when they delegate General Maintenance Schedule responsibilities to them. The record shows that the Employer will hold the district manager responsible, with possible disciplinary repercussions, if General Maintenance Schedule requirements delegated to the service technician are not completed in a timely fashion. Moreover, the district managers direct or oversee the work of technicians in this area with independent judgment. The oversight of the technician is carried out by the district managers on their own. Also, the General Maintenance Schedule merely

provides timeframes within which tasks must be done. The district manager has to prioritize these tasks in relation to the other work in the office, and, as explained above, such juggling is not clerical or routine in nature. For these reasons, I find that the evidence establishes that district managers have authority to assign work and to responsibly direct work with independent judgment.

4. Authority to Effectively Recommend Discipline

Although Justin Jacobs equivocated in his testimony about his authority to discipline, it appears on balance that he acknowledged that he had the authority to determine, on his own, that an employee should be disciplined and to recommend that an employee be disciplined to the general manager. This coupled with Troy Dahlin's testimony that if a district manager told him that he wanted to issue a written reprimand to an employee, he would rely on the district manager's recommendation and not conduct an independent investigation, establish sufficient evidence that the district managers possess the authority to effectively recommend discipline. *Starwood,* 350 NLRB at slip op. 5 ("Section 2(11) requires only possession of authority to carry out an enumerated function, not its actual exercise.")[28]

5. Secondary Indicia

In addition to the primary indicia discussed above, I find that certain secondary indicia also support a supervisor finding. The district managers are the only supervisors or managers in the Westby and Somerset offices. These offices are both located a significant distance from the

[28] In its brief, the Employer contends that the district managers have the authority to effectively recommend both discipline and discharge. However, the Employer did not develop any arguments with regard to discharge authority and merely cites to the pages of the transcript describing the scenario in which Service Technician Steve Wood was ultimately served with a notice of termination by Warren Satterlee. I find that Satterlee's testimony regarding the termination of Wood is insufficient to establish that Jacobs has authority to terminate. Satterlee testified that Jacobs only performed a reporting role regarding Wood's situation. Satterlee also specifically testified that he did not think that Jacobs recommended any particular action and, instead, left that determination up to Satterlee.

La Crosse office, where the next level of supervision is located. The Westby and Somerset offices appear to function rather autonomously on a daily basis as Troy Dahlin only visits each office once a week for an hour or two and only touches base by phone about once a week. Consequently, if the district managers are not found to be supervisors, it would appear that the service technicians would not be subject to any direct supervision. Further, the Employer holds the district managers out as managerial and supervisory employees. The district managers are identified as "District Supervisor" or "District Manager" on their business cards, and they sign new employee acknowledgement forms as the Employer's supervisory or managerial representative.

6. Conclusion as to Supervisory Status

Because Jacobs and Mashak have the authority to make effective recommendations with regard to hire, have the authority to assign and responsibly direct service technician work, have the authority to effectively recommend discipline, are the only managers in their offices, and are held out as supervisory employees, they are 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 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 those 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 may vote if they appear in person 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 shall vote whether or not they desire to be represented for collective bargaining purposes by International Brotherhood of Electrical Workers, Local 953, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203 on or before March 24, 2008.** No extension of time to file this

list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by March 31, 2008.**

OTHER ELECTRONIC FILINGS

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Signed at Milwaukee, Wisconsin on March 17, 2008.

/s/Irving E. Gottschalk

Irving E. Gottschalk, Regional Director
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