

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

AVISTA CORPORATION

Employer,

And

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 77,
AFL-CIO

Petitioner.

Case No. 19-RC-15234

AVISTA CORPORATION'S PETITION
FOR REVIEW

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APPENDIX

I. DECISION AND DIRECTION OF ELECTION

I. BASIS FOR REQUEST FOR REVIEW

Pursuant to 29 CFR section 102.67 (b), Avista Corporation (“Avista” or the “Employer”) requests review of the September 4, 2009 Decision and Direction of Election (“DDE”) in which The Regional Director concluded that Avista distribution dispatchers (“Dispatchers”) were not supervisors within the meaning of the National Labor Relations Act (“Act”). The bases for the Request for Review are 29 CFR Section 102.67 (c)(2) and (4). Based on the Regional Director's decision, there are compelling reasons for reconsideration of an important National Labor Relations Board rule. Additionally, the Regional Director's decision contains substantial factual findings that are clearly erroneous based on the record and such errors prejudicially affected Avista's rights.¹

II. BACKGROUND

On August 10, 2009, the International Brotherhood of Electrical Workers, Local Union 77, AFL-CIO (“the Union”) filed a RC petition, seeking a representation election for “[a]ll full time and part time central distribution Dispatchers at the Avista, Spokane WA location.” On August 29, 2009, a hearing on the petition was held in Spokane, Washington. At the hearing, Avista asserted that the petition should be dismissed because its Dispatchers are not "employees" within the meaning of section 2(11) National Labor Relations Act, 29 U.S.C. Section 152(11).

On September 4, 2009, the Regional Director issued a DDE, concluding:

Based on the foregoing, the entire record, and having carefully considered the parties' briefs, I conclude that the Employer's distribution dispatchers are not statutory supervisors because they

¹ Avista’s Request for Review is limited to the issue of whether the dispatchers “assign” work or personnel utilizing independent judgment as required by Section 2(11) of the Act.

do not assign or responsibly direct employees using independent judgment, or possess or exercise any other indicia of section 2 (11) status. (DDE at 12)

While the Regional Director's decision relied to a large extent upon *Oakwood Healthcare*, 348 NLRB 686 (2006), it also discussed what Avista believes is the real issue in the case: whether or not *Mississippi Power and Light Company*, 328 NLRB 965 (1999) remains viable law. *Mississippi Power and Light Company* represents departure from years of prior precedent on the issue of dispatcher supervisory authority. See, *Big Rivers Electric Corp.*, 266 NLRB 380 (1983).

As more fully discussed below, the policies in *Mississippi Power* have been rejected by the Supreme Court, (see *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)), have been abandoned by the Board (see *Oakwood Healthcare, Inc.*, supra), not to mention that the case has been abrogated by at least two circuit courts of appeal. (See *Public Service Company of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001) (denying enforcement and holding dispatchers are supervisors); *Entergy Gulf States, Inc. v. NLRB*, 253 F. 3d 203 (5th Cir. 2001) (same)).

III. ISSUE PRESENTED

Whether the Board should reverse the Regional Director's conclusion that Avista's Dispatchers are not supervisors under Section 2(11) of the Act?

IV. REQUEST FOR REVIEW SHOULD BE GRANTED

A. Substantial Factual Findings in the DDE Were Clearly Erroneous On the Record and Prejudicially Affect Avista.

The Regional Director made a number of clearly erroneous factual errors that are reflected in the DDE which prejudicially impact Avista on both the issues of “assign” and the exercise of independent judgment.

1. General Factual Errors

Page 2 of the DDE contains a description of Avista’s distribution dispatch department. The uncontroverted testimony established no supervisor was on duty in the department between 5:00 p.m. and 7:00 a.m. However, the DDE minimizes the significance of the lack of supervision by quoting Mr. Broemeling’s statement that he was always on call. The DDE fails to include that on redirect, Mr. Broemeling testified that by this term he meant "in case the dispatchers need me, I'm available." (Tr. 143) In his four months as supervisor, Mr. Broemeling has been called twice: once was notification only on a reportable gas incident, and the other time when he was to be called in for a mock gas emergency where his attendance was mandatory. (Tr. 143)

2. Factual Errors on the Issue of “Assign”

Without citation to the record, the DDE concludes that Dispatchers cannot assign field employees to areas, shifts or crews (DDE at 3 and 8). This is a major criterion for the finding of the ability to assign for the purposes of determining supervisory status. According to the DDE, the field employee's day-to-day assignments are determined by operations department personnel. (DDE at page 3)

Dispatcher Mr. McAllister's response to a question by the Hearing Officer concerning the dispatching of crews was overlooked. This testimony buttressed the earlier testimony concerning the dispatching of crews by the dispatchers. (Tr. 296 -297) Mr. McAllister also talked about dispatching crews on re-cross examination as well. (Tr.

300 - 301) Clearly, the DDE misapplied the dictates of *Oakwood Healthcare* in determining the Dispatchers do not assign work.

3. Factual Errors on the Issue of the Exercise of Independent Judgment

The issue presented with reference to Dispatchers is not whether their primary duty is assignment of personnel. The Dispatchers at issue do dispatch workers and do so on a regular basis. Mr. McAllister testified that some of the criticisms raised during incident reviews included "maybe you should've sent a crew in another direction on an outage that had been there for hours longer than the one you set them on, but through the chaos it's difficult to make those right decisions every time." (Tr. 266-267)

The DDE also erroneously finds that Avista failed to establish that dispatchers considered the availability and capability of complex equipment or the skill and availability of field employees to distinguish the circumstances here from those in *Mississippi Power & Light*. (DDE at 12, fn 19). This finding overlooks the testimony of Mr. McAllister, who testified in response to a question by the Hearing Officer that the type of equipment being utilized by a particular crew was a factor in the decision on who to call out to a given incident (Tr. 294-295).

Additionally, page 3 of the DDE contains a factual finding that the employer presented no examples of incidents where a Dispatcher overruled or modified a first responder's request for additional help. This finding is at odds with the testimony of Mr. McAllister, who testified in response to a question by the Hearing Officer that he can pull a crew off of the job and leave the job as it is on an event by event basis. (Tr. 294).

The DDE concluded that prioritizing multiple incidents occurred only 1% of the time. (DDE at page 4) However, the hearing transcript reveals that Mr. McAllister's

estimate was based upon a situation where he was controlling only one crew. (Tr. 291)

Mr. McAllister's testimony at the hearing also included the statement "you know, I constantly prioritize what I do." (Tr. 292)

The DDE at page 5 states that in practice, decisions to reassign field employees are made in conjunction with the general foreman of the affected field employees where possible. However, Mr. McAllister's testimony regarding notification to on-call supervisors contradicts this finding:

Q. And you talk to their on-call supervisor?

A. I think we're supposed to, but I am not sure I do. Probably, in fact, I'm sure I don't.

(Tr. 288)

The record reflects that the Dispatcher will utilize his or her discretion to bypass the automated call out system when it is necessary to get someone an incident immediately (Tr. 250) Additionally, the record contains multiple instances where Mr. McAllister acknowledged that Dispatchers assigned employees when he stated that he would track down another serviceman or get someone else to fill a position (Tr. 276 and 277). The record is clear that the Dispatchers also select the classification of employees that are necessary to respond to the incident. (Tr. 250)

The DDE also states that an example of an emergency switching procedure testified to by Mr. McAllister established that this was a collaborative process with the foreman on scene. (DDE at page 7) In fact, the testimony regarding the emergency switching procedure shows that Mr. McAllister was directing the activity, including writing the switching order, issuing the clearance to the foreman, mapping the foreman, asking him to remove his shorts and grounds, and to do other activities relating to the switching order. (Tr. 260-261)

4. Summary Regarding Assertions of Factual Errors

It is respectfully asserted that this misreading of the transcript erroneously leads to the conclusion that the Dispatcher's functions do not include the assignment of work utilizing independent judgment. The record establishes that the Dispatchers regularly assign and exercise independent judgment concerning other employees within the meaning of section 2(11) of the Act. [needs to be rearranged; not clear]

B. Background

Avista generates, transmits and distributes electricity to customers in Eastern Washington and Northern Idaho. (Tr. 12) Avista also distributes natural gas in Eastern Washington, Northern Idaho and parts of Oregon. (Tr. 12, 13) Avista has approximately 350,000 electric customers and 310,000 gas customers. (Tr. 13)

Located throughout Avista's territory are ten (10) service centers to which the bulk of the Company's production and maintenance employees report to work. (Tr. 102) The service centers range from thirty-five (35) miles to over two hundred (200) miles from Central Dispatch in Spokane, owing to distribution of gas in Oregon, and electrical services throughout Eastern Washington and Northern Idaho. (Tr. 69 – listing different area offices)

C. Overview of Central Dispatch

More than ten years ago, Avista reorganized various aspects of its operations and, as a result, established a Central Dispatch Center at its Spokane, Washington office building. (Tr. 171, 218) The Dispatchers in Spokane are responsible for all service centers, for both electric and gas issues.

The Dispatchers are under the supervision of one (1) supervisor. (Tr. 19, 64, 218) Mike Broemeling, the chief distribution engineer, has ten (10) Dispatchers reporting to him. The Dispatchers he supervises have the latitude to operate the distribution system. (Tr. 19)

As a regulated utility, Avista's responsibility is to maintain service twenty-four (24) hours per day, seven (7) days per week, 365 days per year. (Tr. 17, 244-45) As a result, the dispatch area is a 24/7 operation. Most of the Dispatchers work rotating 12 hour shifts, (Tr. 18, 100, 219), although one Dispatcher works from 7:00 a.m. until 5:00 p.m. (Tr. 18)

Mr. Broemeling normally works from 7:00 a.m. until 5:00 p.m., Monday through Friday. (Tr. 19) Given the 24/7 operation, a manager is not present for the majority of the time. (Tr. 19)

On-duty Dispatchers have the undisputed ability to call in additional Dispatchers in their discretion, and to stay after the end of the normal shift without needing supervisory permission. (Tr. 27, 28, 157, 267-68) Like many of the duties of Dispatchers, there are no guidelines regarding calling in additional Dispatchers. (Tr. 157) One result of the decision to call in additional Dispatchers is that it results in the Dispatchers being able to authorize overtime pay. (Tr. 283)

D. Overview of Dispatcher Responsibilities

As discussed in greater detail below, the job duties of the Dispatchers include monitoring and directing the operation of the electrical distribution system as well as the gas distribution system. In performing such duties, the Dispatchers are required to handle a variety of functions, the most important of which are (1) monitoring, interpreting and

maintaining several types of systems, including the Outage Management System (OMS) and various maps of the service territory (Tr. 20); (2) receiving trouble and outage orders via the Company's Call Centers and taking whatever actions the Dispatcher, in his or her discretion and judgment, feels is necessary to protect the integrity of the electrical distribution system; and (3) assisting with power restoration efforts.

The Dispatchers are responsible for managing the Company's distribution system, including taking corrective action when a failure occurs in the system and overseeing the restoration efforts by other personnel. The restoration efforts include analysis of the potential issues and dispatching of various personnel to the site of the incident and the ongoing direction of their efforts to restore service in the most effective way possible. This may consist of reprioritizing incidents as more arise. (Tr. 286)

Dispatchers have “total discretion” to decide where and when to send responders as incidents occur because “they’re the ones running the show.” (Tr. 33) Al Fisher, Director of Operations, manages the responders. Mr. Fisher testified that the Dispatchers have the “full authority to override any of the construction manager’s general foremen or myself.” (Tr. 179) As the Operations Director with decades of service with Avista, Mr. Fisher is in the best position to testify as to the eligibility of Dispatchers to move the crews who are within his chain of command.

1. Switching Orders

During regular working hours, the Dispatchers monitor the operations of the distribution system and interpret Outage Management System notices. Additionally, thirty to forty times per year, a Dispatcher, either on day shift or night shift, will design and issue switching orders to crews in the field. (Tr. 259, 280)

The Dispatcher exercises independent judgment in implementing the pre-scheduled switching order in order to de-energize the lines, provide a safe working environment for crews and maintain electric service to customers. When the switching orders are issued to the field, the Dispatchers are responsible for monitoring the status of the line and have sole responsibility for releasing the line or allowing crews to work on the lines. With respect to crews working on de-energized lines, the Dispatcher issues a clearance for a line; crews are required to contact the Dispatcher prior to commencing switching and are not allowed to work on lines until a clearance has been issued. (Tr. 229) A Dispatcher has the discretion to stop a switching procedure (Tr. 93, 263). Additionally, a Dispatcher may modify approved switching orders (Tr. 94)

2. Trouble Calls

During regular office hours, the Dispatchers are responsible for handling “trouble calls” or “outage orders” forwarded from the call centers, analyzing and assessing the circumstances surrounding these calls, determining the appropriate number and types of personnel needed to restore electrical or gas service and/or directing those personnel in the restoration of service. (Tr. 22)

There is no manual or “cookbook” to explain how to manage an outage from the Dispatcher’s perspective. (Tr. 30) The Dispatchers handle approximately 24,000 incidents per year, or approximately 66 per day on average. (Tr. 290) Both Mr. Broemeling and Mr. Fisher testified that the primary function of Dispatchers is to manage outages. (Tr. 20, 186)

When there are limited numbers of incidents, there is no need to prioritize outages. However, in the presence of multiple incidents the Dispatchers need to

prioritize the order of responses to the events. The bulk of the Dispatcher's functions after hours is to be prepared to address incidents and respond as quickly as possible. (Tr. 244) Mr. McAllister agreed that when it was busy there is some analysis necessary to determine what workers are dispatched and in what sequence. (Tr. 252)

The number of decisions that have to be made by a Dispatcher in a 12-hour shift can be "literally thousands." (Tr. 266) Dispatcher McAllister testified that in the regular course of the day, he would make between 150 and 300 work related decisions. He qualified his answer as follows: "Like an independent judgment on what to do first, I mean it happens all day, every day for everyone, not just a Dispatcher." (Tr. 293)

After regular hours, the Dispatcher continues to monitor the operation of the distribution system, interpret and react to Outage Management System alarms, and monitor and prepare for bad weather. The importance of the judgment exercised by Dispatchers in the course of supervising the restoration of service cannot be understated. All witnesses testified as to the exercise of judgment in a weather-related event that occurred on August 21, 2009. (Tr. 23 -26) For example, Mr. Broemeling testified the prioritization a Dispatcher engages in during an event involves many factors such as how many crews to call out, prioritizing and reprioritizing the order in which to assign responders, and determining whether the situation is getting worse or better in a fluid situation. (Tr. 31-32)

For Avista, a guideline regarding the prioritization of incidents is public safety and employee safety first, then restoring power to as many customers as quickly as possible. (Tr. 32-33) However, the Dispatchers have total discretion to decide when they are going to send responders and where they are going to send responders. (Tr. 33).

When there are multiple events occurring at one time that involve safety issues, it is up to the judgment of the Dispatcher to determine to which event or events responders shall be sent first. (Tr. 52) Simply put, a Dispatcher's job is unpredictable "because it can go from really slow to chaos in a matter of minutes." (Tr. 50).

The existence of general guidelines are commonplace in today's industrial world. Supervisors, managers, and even chief executive officers are expected to operate within general guidelines. It would be unrealistic, if not impossible, for Avista to create a detailed "how-to" response prioritization guideline. Rather, Avista relies upon the independent judgment of the Dispatchers to formulate a response that promptly, safely and efficiently maintains or restore service.

If a customer reports an outage, the Dispatcher has the full authority to review available information, assess the situation and, using his or her independent judgment and discretion, determine whether electric service should be restored immediately on an overtime/call-out basis or whether the situation can wait until employees report for their next shift. (Tr. 19, 25, 269) This function would be especially critical when a customer relying on life support reports an outage. The Dispatcher must exercise his or her independent judgment in what literally could be a profound safety issue. (Tr. 138-39)

Because the majority of personnel responsible for handling the field work associated with restoring electricity are off-duty after regular business hours, the Dispatcher is responsible for determining the classifications of personnel needed to restore service quickly. The Dispatcher then activates ARCOS² to locate the necessary individuals and direct them to report to work. (Tr. 26, 77) The Dispatcher exercises

² ARCOS is a computerized system that the Dispatcher engages to automatically dial the telephone numbers of employees to respond to incidents. (Tr. 77-78)

independent judgment in making these determinations and is not required to contact any higher authority within the Company prior to calling out personnel, even if the employees are from different geographic areas. (Tr. 79)

The Dispatcher typically contacts a first responder to respond to an outage incident. (Tr. 33) This person could be a lineman, a gas serviceman, a foreman or a hot apprentice. (Tr. 77) These responders essentially serve as the Company's trouble-shooters and are the Company's first line of defense in responding to outages. These individuals are the people on site at the incident and "really have the eyes into the exact kind of damage that exists out there." (Tr. 122)

Dispatchers, alone, are responsible for assigning the responders to outage calls and have called in crews (Tr. 40) and have had crews held over. (Tr. 262) Mr. Fisher, to whom the responders and their supervisors report, testified that Dispatchers have done this over the objection of the General Foreman and manager. (Tr. 185-86)

Significantly, the Dispatcher has the authority to countermand a previous assignment given by an employee's supervisor. (Tr. 49, 123, 124) The Dispatcher has the final authority to pull crews off a job to go restore service where needed. (Tr. 186, 294)

Mr. McAllister explained that Dispatchers track where line personnel are working on the distribution system at any given time during the day. The purpose for this is to keep up with who is out working and exactly where they are on the system. (Tr. 222) If the Dispatcher anticipates that an emergency situation is developing prior to the time when most personnel are relieved from duty, he or she has full authority to direct the personnel he or she believes will be needed to remain at the job until the emergency

situation has abated. (Tr. 262) In exercising this authority to direct personnel using independent judgment, the Dispatcher is authorizing the payment of overtime wages, which may vary from time and one-half to double-time pay. (Tr. 42, 283, Employer Exhibit 1) The Dispatcher need not secure any other supervisory approval or permission to assign responders to overtime or to call out responders from their homes in the middle of the night. (Tr. 51, 117)

In the case of many trouble calls occurring simultaneously, the Dispatchers have the full authority to decide, in their independent judgment, which calls have priority and to direct personnel to address those "priority" needs first. (Tr. 32-34, 44-45) No concrete preset guidance or "cookbooks" for trouble calls exist; instead, the Dispatcher must evaluate all of the information available and, based on his or her analysis, direct the appropriate personnel to restore service in the order he or she determines. (Tr. 32-34, 53) In the context of safety issues, "[I]t's up to them to decide. There's nobody else to decide. They're the ones that are sitting in that chair, and they're the ones that have to decide to make the decision who is going where." (Tr. 84)

The only situation where a responder might be justified in refusing to follow the directions of the Dispatcher would be if the Dispatcher was asking them to do something they felt was unsafe. If there was a non-safety based reason for not doing what was directed by the Dispatcher, and management learned of it, discipline would depend on the reason for the refusal. (Tr. 207)

Typically, the Dispatchers are not dealing with only one trouble call at a time. (Tr. 31) Instead, Dispatchers routinely address several unique situations at once, analyzing each and determining the proper method for addressing each situation. (Tr. 31)

The Dispatcher must rely on and exercise his or her own independent judgment to carry out his or her responsibility and the objective to “keep the lights on” in the interest of Avista and its customers.

V. ARGUMENTS AND AUTHORITIES

A. The Board Should Reverse the DDE because the Dispatchers are “Supervisors” under Section 2(11) of the Act and Dismiss the Petition

Section 2(3) of the Act, 29 USC § 152(3) excludes any individual employed as a “supervisor” from the definition of “employee” and, consequently, from coverage under the Act. The defining criteria for supervisory status is set forth under Section 2(11) of the Act. Under Section 2(11), supervisory status exists if an individual possesses:

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

It is well settled that Section 2(11) is to be read in the disjunctive, and that the presence of any one of the 12 listed criteria/activities establishes supervisory status.

NLRB v. Health Care & Retirement Corporation of America, 511 U.S. 571 (1994). As the Court held in *Health Care & Retirement Corporation of America*, “[t]he Act is to be enforced according to its own terms.... Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board’s decision, not the other way around.” *Id.* at 580.

Under Section 2(11), “any individual who has the authority to use independent judgment in the execution or recommendation of any of the functions listed . . . is a supervisor.” *Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989).

Further, supervisory status requires only the existence of any of the enumerated powers/authorities and does not turn upon the frequency of its/their exercise. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), *cert. denied*, 338 U.S. 899 (1949); *West Penn Power Company v. NLRB*, 337 F.2d 993 (3rd Cir. 1964). *Morello v. Federal Barge Lines, Inc.*, 746 F.2d 1347 (8th Cir. 1984).

1. The Board Should Follow *Big Rivers* and the dissent in *Mississippi Power and Light*

For years the Board and the Courts of Appeal clashed over the application of Section 2(11) to those individuals who monitor the transmission and distribution of power. These individuals, known variously as distribution Dispatchers, system Dispatchers, system supervisors or operations coordinators, were routinely found by the courts to be supervisors under the “responsible direction” criteria. In 1983, the Board finally bowed to the weight of this established judicial precedent and found that “system supervisors” were Section 2(11) supervisors because, among other things, they responsibly directed field employees in the execution of complex switching orders. *Big Rivers Electric Corp.*, 266 NLRB 380, 383 fn. 2. (1983).

From 1983 until its decision in *Mississippi Power & Light Company*, the Board followed its policy set forth in *Big Rivers* and excluded individuals in the system supervisor/Dispatcher positions from utility company bargaining units because such individuals were Section 2(11) supervisors. The Board’s decision in *Mississippi Power & Light* overturned well established precedent which had been followed by the Board and relied upon by utility companies for nearly two decades. Further, the Board’s decision in *Mississippi Power & Light* is contrary to nearly half a century of Federal Courts of Appeal decisions and is in direct conflict with Section 2(11) of the Act.

Mississippi Power & Light was decided by a 3 to 2 vote majority of the Board. In their well reasoned dissent, Members Hurtgen and Brame clearly demonstrate that the majority's reversal of *Big Rivers* was unwarranted and legally unsupported. As Members Hurtgen and Brame noted in their dissenting opinion in *Mississippi Power & Light*, 328 NLRB No. 146, p. 11-12 (1999), “[f]or nearly half a century, Federal courts of appeals have overwhelmingly found that individuals who monitor the transmission and distribution of power for utility companies are supervisors within the meaning of Section 2(11) of the Act.”³

At least two Courts of Appeal have abrogated *Mississippi Power & Light*. See, e.g., *Public Service Company of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001) (denying enforcement of Board order and holding Dispatchers are supervisors under Section 2(11)); *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001) (same). These well-reasoned decisions further buttress Avista's position in this case that the Dispatchers are supervisors under the Act.

2. Recent Supreme Court and Board Decisions Confirm the Supervisory Status of Dispatchers

The Board endeavored in its recent *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) decision to reexamine and clarify its interpretations of the term “independent judgment” as well as the term “assign” as those terms are set forth in Section 2(11). The Board proffered the following elaborations:

³ See, e.g., *Southern Indiana Gas & Electric Co. v. NLRB*, 657 F.2d 878 (7th Cir. 1981), denying enf. of 249 NLRB 252 (1980); *Maine Yankee Atomic Power Co. v. NLRB* 624 F.2d 364 (1st Cir. 1980), denying enf. of 239 NLRB 1216 (1979); *Monongahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981), denying enf. of 252 NLRB 715 (1980); *NLRB v. Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1976), denying enf. of 216 NLRB 1022 (1975), *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971), denying enf. of 182 NLRB 505(1970). See also *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), denying enf. of 80 NLRB 1334 (1948).

The Board defined “assign” as the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.* tasks, to an employee.” Consistent with the Supreme Court's decision in *Kentucky River*, the Board adopted an interpretation 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.

The Board defined the statutory term “independent judgment” in relation to two concepts. First, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently “independent” under the Act. The Board further found that the degree of discretion exercised must rise above the “routine or clerical” in order to constitute “independent judgment” under the Act.

In the DDE, the Regional Director correctly concluded that Dispatchers called in responders, granted overtime by calling in employees, send responders to a particular outage locations, prioritized incident calls, designed emergency switching orders, and assigned work during outages. (DDE at pages 2, 3, 4, 5, and 6)

Nonetheless, the Regional Director concluded Dispatchers are not "supervisors" on the grounds that they do not exercise "independent judgment," and do not make assignments within the meaning of *Oakwood Healthcare, Inc.*, *supra*. As set forth below, the Regional Director's conclusions rest upon erroneous factual determinations and unwarranted simplification of complex processes.

B. Contrary to the Regional Director's DDE, Avista's Dispatchers Regularly Assign Work to Other Personnel in the Course of their Supervision of Avista's Distribution System.

The Regional Director concluded that the prioritization by Dispatchers followed unwritten guidelines, and any discretion is based on commonsense considerations and occurs rarely. (DDE at 9) These factual conclusions overlook significant testimony given at the hearing.

With respect to the Dispatcher's ability to reassign field employees from regular work to an outage as constituting conclusory testimony, the DDE is in error. Specifically, Mr. McAllister testified that crews could be reassigned by a Dispatcher. Mr. McAllister testified that the Dispatcher would cancel the priority of the one order and reassign personnel to a higher priority incident. (Tr. 286)

In response to a question by the Hearing Officer, Mr. McAllister also testified that what appears to be the most important incident at one time could drop on the list of priorities and that "you constantly reprioritize incidents as they come in." (Tr. 286) It is respectfully submitted that this testimony is not conclusory; rather it reflects the nature of the Dispatcher's job.

It is well-settled that the authority to assign employees, using independent judgment, is sufficient to confer supervisory status, regardless of how often that power is exercised. *George C. Foss Co. v. NLRB*, 752 F.2d 1407 (9th Cir. 1985); *NLRB v. Metropolitan Petroleum Co., Div. of Pittston Co.*, 506 F.2d 616 (1st Cir. 1974). Likewise, it is well-settled that regardless of whether such authority is given expressly or

by implication, the authority has been vested and supervisory status is thereby conferred. *NLRB v. Adco Electric, Inc.*, 6 F.3d 1110 (5th Cir. 1993).

The method or tools used by a Dispatcher to contact individuals is also irrelevant. In using the automated call list, the Dispatchers are acting as supervisors and using the same tool used by other supervisors when additional personnel are needed. It is untenable to argue that such use somehow diminishes or negates the Dispatcher's authority to direct employees. The Dispatcher still must exercise independent judgment to determine if individuals on the call list are needed and/or if additional personnel (beyond those on the call list) are required.

Section 2(11) requires that the exercise of authority not be “merely routine or clerical.” The Dispatchers are seldom involved in situations that are routine or clerical, and operate in an environment with too much activity and risk for their decisions to be deemed “routine.” Instead, the Dispatchers work under circumstances in which each problem is unique and requires its own independent analysis using independent judgment.

At the hearing, there was an effort to minimize the critical nature of the work performed by the Dispatchers. While the DDE stated Dispatchers performed clerical or record-keeping duties in conjunction with their responsibilities, the importance of these functions minimize the value of the duties (DDE at page 3). Mr. Broemeling testified that he "wouldn't necessarily call it clerical functions, but it would -- they do have those functions that I, you know, like I said in terms of when the crew reports an outage back from the field, then they're are the ones that are inputting that right into our OMT system." (Tr. 46-47) Mr. Broemeling also testified to the important nature of the record keeping being performed, as outage information must be reported to the State

Commissions and also is used for planning purposes and maintaining the distribution system. (Tr. 46-47) Clearly then, the "clerical functions" are not routine.

The Dispatchers work in an environment that, for the most part, leaves them without a supervisor in their work area. The distribution area is staffed twenty-four (24) hours a day, seven (7) days a week; however, Manager Broemeling's normal working hours are Monday through Friday from 7:00 a.m. to 5:00 p.m. (Tr. 19) Accordingly, for an area that is manned for a total of 168 hours a week, direct supervision above the Dispatcher level is available only about twenty-five percent (25%) of the time. As noted above, the Dispatcher alone has the authority to direct the work of responders in the restoration of power through complex switching orders. This sole authority to direct work is a hallmark of supervisory status that has been confirmed by appellate Courts and the Board in recent cases.

The DDE assumes constant oversight of the Supervisors exists (DDE at 10.) However, the record testimony is that Dispatchers handle outages until the Dispatchers are unable "to manage it independently". (Tr. 265) This testimony is clearly at odds with the findings of constant oversight.

Admittedly, the Dispatchers have access to information regarding the status of lines on the system and have the capability and responsibility (as necessary) to advise others of that status. The Dispatchers also have access to information through the Outage Management System. However, to categorize the dispatch area as merely an information gathering point, or to suggest that Dispatchers just move people around, greatly underestimates the authority and capabilities of the Dispatchers.

Dispatchers are also required to use independent judgment when prioritizing the order of restoration of service. Incidents can occur in which multiple different types of customers are without electrical service. For example, it is possible that a hospital, nursing home, large industrial customer, and residential areas all may be affected simultaneously. When this occurs, the Dispatcher must take into account several different factors, including the “criticality” of the customer, the impact of lost service to the customer, and the Dispatcher's ability to return service to the largest number of customers as quickly as possible.

Without question, the Dispatchers play a critical role in Avista’s control of its operations and business. Accordingly, in light of the supervisory authority to “assign” possessed by the Dispatcher (and supported by the Record) and the use of independent judgment in carrying out that authority, the Dispatchers employed by Avista are statutory supervisors.

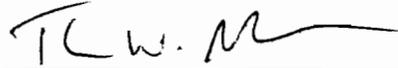
VI. CONCLUSION

The Regional Director's decision that Avista's Dispatchers do not assign work is incorrect. As documented on pages 1, 3-6, 10, 12 and 17-18 the DDE’s statements on multiple substantial factual issues are clearly erroneous and lead to the conclusion that the Dispatchers lack the ability to assign employees within the meaning of the Act, utilizing independent judgment. The DDE's conclusory finding that the Dispatchers did not exercise independent judgment is belied by the record. The DDE reflects legal conclusions concerning the supervisory status of dispatchers that have been almost uniformly rejected by the Federal Courts of Appeal that reviewed decisions concerning the supervisory status of dispatchers.

Avista respectfully requests that the Petition for Review be granted and that the pending representation petition be dismissed.

RESPECTFULLY SUBMITTED this 18 day of September, 2009.

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STATEMENT OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 18th day of September, 2009, addressed to the following:

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Washington, D.C. 20570

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APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

AVISTA CORPORATION

Employer

and

Case 19-RC-15234

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION 77

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended ("the Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("the Board").¹ 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, I make the following findings and conclusions.²

I. SUMMARY

Avista Corporation ("the Employer") provides electricity to customers in Eastern Washington and Northern Idaho and provides natural gas to customers in those areas as well as parts of Oregon. The Employer's Spokane, Washington location is the only facility involved in this petition. International Brotherhood of Electrical Workers Local Union 77 ("the Petitioner") is a labor organization which currently represents employees in several of the Employer's operating units.³

The Petitioner seeks, by this petition, to represent a unit of all full-time and part-time central distribution dispatchers employed by the Employer at its Spokane, Washington location, excluding all other employees. The Employer opposes the petition, asserting that the distribution dispatchers (hereafter, "dispatchers") are supervisors under Section 2(11) of the Act because they have authority to assign and responsibly direct other employees, using independent judgment.

¹ The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 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 labor organization involved claims to represent certain employees of the Employer and 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.

² The Employer and Petitioner submitted timely briefs, which I have carefully considered.

³ No other labor organization seeks to represent the employees covered by the instant petition.

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. I find that the dispatchers are not supervisors under Section 2(11) of the Act.

Below, I have set forth the record evidence relating to the Employer's operations. Following my summary of the relevant record evidence is my analysis of the applicable legal standards, and their application to the facts of this case. Given my conclusion that there is no basis to dismiss the petition, the final section sets forth the direction of election and the process for requesting review of this decision.

II. RECORD EVIDENCE

A. The Employer

The Employer provides electricity and natural gas in Eastern Washington, Northern Idaho, and parts of Oregon. The Employer has approximately 350,000 electric customers and 310,000 gas customers. The Employer's operations are separated into three regions, encompassing ten areas. The Employer is organized into several departments, including Operations and Distribution Dispatch. Operations includes field employees, such as construction managers, operating engineers, foremen, linemen and gas servicemen. Several of the job classifications in Operations, including linemen and gas servicemen, are represented by the Petitioner and covered by a collective-bargaining agreement.

B. The Distribution Dispatch Department

The Employer's Distribution Dispatch Department (also referred to as "Central Dispatch") monitors its electric and natural gas distribution systems year-round, 24 hours a day. The Distribution Dispatch Department is currently staffed by ten dispatchers. From Monday through Friday, two electric dispatchers and one gas dispatcher work the day shift (6:00 a.m. to 6:00 p.m.)⁴ and one electric dispatcher and one gas dispatcher work the night shift (6:00 p.m. through 6:00 a.m.). During the weekend, both shifts are staffed by one electric dispatcher and one gas dispatcher. All ten dispatchers rotate shifts, so that each works every shift and both the electric and gas desks. Dispatchers are supervised by Mike Broemeling, the Chief Distribution Dispatcher.⁵ Broemeling, who has held this position for approximately 4 months, works Monday through Friday, 7:00 a.m. to 5:00 p.m. No dispatch supervisor is present when Broemeling is absent, but Broemeling testified that he is "on-call all the time."

C. The Distribution Dispatchers

Dispatchers are responsible for monitoring various computer systems and dispatching appropriate field employees in response to electric and gas trouble calls. They direct field employees in executing "switching" orders (defined below) during scheduled

⁴ One of the two electric dispatchers works from 7:00 a.m. to 5:00 p.m. from Monday through Thursday, and 7:00 a.m. through 3:00 p.m. on Friday.

⁵ The parties stipulated at hearing that Broemeling possesses authority to hire, among other Section 2(11) supervisory indicia, and is thus a statutory supervisor. Accordingly, he is excluded from the unit found appropriate herein.

maintenance and emergencies. Dispatchers also perform clerical or record-keeping functions in association with these responsibilities, as well as other duties.⁶

The record shows a wide disparity in the background and experience of the current dispatchers. Among the ten current dispatchers are employees with the following backgrounds: meter reader; customer service/design; mapper; lineman; 911 operator; and gas compliance. These backgrounds reveal that experience in the Employer's field operations is not a requirement for the dispatcher position.

Dispatchers, moreover, are not required to undergo training in field work upon hire. Specifically, dispatchers receive on-the-job training in dispatching by working alongside experienced dispatchers, but they are not required to obtain proficiency in the field work performed by the employees they dispatch (and purportedly supervise). The testimony indicated that some training related to field work is available to dispatchers, but the record does not show that such training is mandatory. In this regard, Broemeling testified that dispatchers may take a "switching and tagging" class – taught by field employees – but he does not know whether that class is required. Dispatcher Michael McAllister, the only dispatcher to testify, has been working as a dispatcher for approximately 12 years. McAllister does not believe that the switching and tagging class is mandatory.

1) The Field Employees

The dispatchers' alleged supervisory status rests on their role in sending field employees to trouble calls and directing switching orders, both of which are discussed below. However, before addressing such tasks, I note that dispatchers do not assign field employees to areas, shifts, or crews. Rather, a field employee's day-to-day assignments (e.g., maintenance, repair, executing planned switching orders, reconnecting customers who were disconnected for nonpayment of a bill) are determined by Operations Department personnel, such as the construction manager or general foreman.

Further, dispatchers are not trained to, and do not, evaluate the performance of field employees. Nor, as discussed above, is there any indication that dispatchers must possess the technical knowledge that would render them competent to evaluate the field employees. Similarly, there is no evidence that dispatchers have the authority to take corrective action against field employees or that dispatchers are held accountable for the performance of field employees. Indeed, the Employer produced no documentary evidence of the Employer disciplining and/or evaluating dispatchers in connection with directing the Employer's field employees.

2) Trouble Calls

The Employer operates a call center year-round, 24 hours a day. Reports of power outages or other incidents relating to the system (e.g., a wire on the ground) are usually received at the call center, where they are logged in the Customer Service System (CSS). CSS sends the information obtained from the caller to other corporate computer systems, including the Outage Management Tool (OMT). Another computer system, known as SCADA (Supervisory Control and Data Acquisition), automatically tracks the distribution

⁶ Dispatchers also issue clearances and hot-line holds pursuant to requests by field employees.

system and, in the case of an outage, issues an alarm. Dispatchers are responsible for monitoring the OMT and SCADA and dispatching appropriate field employees in response to trouble calls or "incidents." In the last year, the Distribution Dispatch Department handled approximately 24,000 "incidents."⁷ Broemeling testified that managing outages/handling trouble calls is a dispatcher's primary role.

A dispatcher's response to a trouble call may require an initial analysis or assessment. McAllister testified that normally dispatchers can dispatch incidents as they come in, but in some cases the dispatcher may have to decide which incidents should be responded to first. McAllister estimated that he has to prioritize multiple incidents only 1% of the time.

In prioritizing multiple incidents, dispatchers act according to the following unwritten guidelines; their first priority is to respond to incidents where public or employee safety is at risk. Their second priority is to restore power to as many customers as possible, as quickly as possible. Within these guidelines, dispatchers exercise discretion. The guidelines do not instruct dispatchers on how to prioritize multiple safety incidents occurring at the same time. Also, although an incident impacting 500 customers will normally take priority over an incident impacting 5 customers, a dispatcher has discretion to direct a field employee to a smaller incident under certain circumstances. For instance, if a field employee is in the area of an incident impacting 10 customers, the dispatcher has discretion to dispatch him to that incident before dispatching him to a power outage affecting 30 customers an hour away. Broemeling testified that dispatchers possess total discretion when prioritizing incidents, unless the number of outages warrants a transition from the Employer's Emergency Operating Plan ("EOP") Level 1, the base operating level, to EOP Level 2, a rare occurrence. In the event that an EOP Level 2 is declared, Broemeling and other supervisors or managers would be called-in to assist the dispatchers.⁸

The employee dispatched to an incident is called the "first responder." The first responder could be a foreman, lineman, or gas serviceman. During the day shift, the dispatcher usually sends a single first responder to an incident. To identify the first responder, the dispatcher checks the area Operations foreman or manager's assignment sheet (markup) for that day. The markup will state who is on duty in the area and available for trouble calls.⁹ During the night shift, the response to trouble calls differs by location. In Spokane, there are field employees on duty after hours and, if they are available, the dispatcher will assign incidents to such personnel. In other outlying areas serviced by the Spokane dispatchers, there are no dedicated Operations crews working the night shift. In such areas, an incident occurring during the night shift requires the dispatcher to call-out personnel.¹⁰ On any shift, if the first responder determines that additional personnel are needed, he will contact the dispatcher and they will "collaboratively" decide whether additional personnel will be sent to the scene. Indeed, it is the first responder, based on his

⁷ The record is not clear, but it appears that a single event, such as a storm, may result in multiple "incidents."

⁸ There was conflicting testimony as to whether dispatchers may declare EOP Level 2. McAllister, an experienced dispatcher, testified that dispatchers do not declare Level 2. This testimony indicates that supervisors are available to the dispatchers in order to declare Level 2 when warranted.

⁹ Again, there is no evidence that dispatchers are involved in the scheduling of field employees. Rather, the foreman or general manager determines field employees' work schedule, including shift assignments.

¹⁰ At night, the collective-bargaining agreement may require 2 first responders.

assessment of the incident with his technical skill and experience, who initially proposes the extent and nature of any additional help required.

The Employer contends that dispatchers have final authority to dispatch personnel in response to a trouble call, but the Employer provided no specific examples of incidents in which a dispatcher overruled or modified a first responder's request for additional help. As Broemeling testified, the dispatcher "can't see into the field what kind of damage is done, so [the decision to bring in more field personnel is] a collaborative decision between the field and the dispatchers." Indeed, McAllister testified that such collaboration means that the first responders ordinarily get the resources they ask for: "[W]e tell [linemen] where the incidents are, and they respond. But how to do the work or what type crew, they usually tell us what is needed. What pieces of equipment are needed if we need to set a pole. If it's an underground fault, they tell us if we're going to need locates, depending on the area. But that usually comes from the field." Deference to the employee in the field would be expected not just because they are on the scene, as Broemeling testified, but additionally because, as stated above, the record does not show that dispatchers are required to possess the technical skill or experience they would need to overrule the field employee on scene.¹¹

Circumstances may require dispatchers to reassign field employees from their regular work to a trouble call. But the practice, particularly on day shift, is for such decisions to be made in consultation with the general foreman of the affected field employees where possible.¹² The Employer's Director of Operations, Fisher, testified that the dispatcher would have final authority in the case of a disagreement with the general foreman over whether to reassign a crew. Fisher, however, did not know of any specific instance when such a disagreement occurred. Moreover, Fisher qualified this authority by testifying that in the event a manager, general foreman, or crew refuses the dispatcher's instruction, and that refusal is brought to management's attention, management will review the matter to determine whether there was a legitimate reason for the refusal. Fisher's testimony suggests that there will be no consequences for refusing a dispatcher's assignment for legitimate reasons: "If there wasn't a legit reason for [refusing to pull off a job and go where a dispatcher instructed], then ... we'd be talking to them about that." Moreover, McAllister testified that the crew "can always say no" to the dispatcher.

Circumstances may also require a dispatcher to initiate a call-out to bring in off-duty personnel. The process for initiating a call-out is substantially automated and conducted in accordance with well-established procedures. After the dispatcher determines the number of employees required by classification (which is decided "collaboratively" with the first responder or, in some circumstances, dictated by a collective-bargaining agreement), he will use a computerized system (ARCOS) to contact the pool of employees (for electric

¹¹ When asked what he expected the dispatcher with experience as a 911 operator to do when talking to a field employee about an outage, Broemeling testified that he would expect her "to talk intelligently and decide collaboratively" with the field employee. Assuming that the dispatcher could "talk intelligently" about the matter based on "her experience and sitting with the other dispatchers for the time that she took to train for the job," as Broemeling continued, the fact remains that the ultimate decision is a collaborative one.

¹² Contacting the general foreman appears to be the Employer's general practice. Field employees fall under the Operations Department. Alan Fisher, the Employer's Director of Operations, testified that he has asked that the general foreman be notified if a crew is going to be moved to a different location and that "in most cases" the dispatcher informs the general foreman or the construction manager.

calls, the pool of field employees consists of more than 100 employees).¹³ On ARCOS, the dispatcher selects the number of employees needed by classification (i.e., 2 journeymen linemen) and then ARCOS automatically begins dialing employees in that classification in the area of the incident, beginning with the employee(s) with the least amount of overtime.¹⁴ Employees have 4 minutes to respond. If they do not respond in that time, ARCOS will move on to the next employee and continue calling until it receives call-backs from the necessary number of employees. If the call-out process is unsuccessful in that area, the protocol is for the dispatcher to call the on-call supervisor in that area to tell him that, having exhausted attempts to call-out personnel from that supervisor's area, the dispatcher will be calling-out personnel in the adjacent area.¹⁵ Field employees may earn overtime by responding to a call-out, but the dispatcher cannot compel any field employee to respond to a call-out. Thus, the decision to respond to the call-out is voluntary.

In some cases, such as a major storm peaking at the end of a dispatcher's shift, a dispatcher may hold himself over, even if that means he will be paid overtime. Dispatchers also have the authority to call-out other dispatchers, in which case the reporting dispatcher will be paid overtime. However, dispatchers, like field employees, are not required to report to work in the event of a call-out.

3) Switching

"Switching" is a term used to describe the sequential opening and closing of electric switches (which turns power off and on) to isolate power at a certain location for maintenance or repair by field employees. Switching is done in the normal course of work as part of planned maintenance (planned switching) and in emergency situations (unplanned switching).

Dispatchers do not design planned switching orders. Planned switching orders are designed and issued by employees outside the Distribution Dispatch Department (usually one of the three area engineers) and sent to the Distribution Dispatch Department and field employees for execution. The switching order states the date and time the switching procedure will begin and includes a step-by-step sequence to be followed by the dispatcher, the field employee, and anyone else involved (i.e., a system operator). The dispatcher's responsibility in the case of planned switching is to coordinate the switching, via radio, with the field employees and any other employees responsible for performing steps on the switching order, and making sure that the steps on the switching order are completed in the proper order and documented. According to McAllister, the dispatcher acts as an "overseer and a logger of times on the switching order."

Dispatchers do not design planned switching operations, but they may stop or modify one. Dispatchers have the authority to stop a switching procedure at any time if, for instance, they believe the order is inaccurate. Dispatchers may also modify a switching order, but a field employee can insist that the proposed modification be reviewed by an

¹³ ARCOS is clearly used for the shifts outside normal operating hours but also is available for use during normal weekday hours.

¹⁴ It is unclear whether the parties' collective-bargaining agreement dictates such opportunities for employees with the least amount of overtime. Regardless, Broemeling confirmed that ARCOS automatically begins by calling the employee with the least amount of overtime.

¹⁵ The process is essentially the same for a gas incident.

engineer before proceeding, in which case the procedure would be deferred. Thus, dispatchers cannot compel field employees to comply with a modified switching order that has not been reviewed by an engineer. Field employees can also modify switching orders. In that case, McAllister testified that the field employee and the dispatcher will confer and mutually make a change or contact the engineer to rewrite the order.

Most switching procedures are planned. But in the event of an emergency, which McAllister testified occurs a few times a year for him (30-40 times per year for the whole department), a dispatcher may design a switching order (i.e., to divert power and restore power to customers without actually fixing the cause of the outage). McAllister testified that an engineer in the Dispatch Department is supposed to review switching orders written by a dispatcher. In any event, there is no evidence that the process of executing an unplanned switching order differs in any way from the execution of a planned switching order. That is, there is no evidence that a dispatcher can compel a field employee to comply with a switching order designed by a dispatcher (whether or not it has been reviewed by an engineer). Indeed, McAllister's summary of a recent event in which he designed a "very simple" switching order indicates that the emergency switching order was a collaborative effort between him and the foreman on scene.

III. LEGAL ANALYSIS

A. Section 2(11) and the Relevant Statutory Criteria

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

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

Pursuant to this definition, individuals are statutory supervisors if:

- (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" or "responsibly to direct") listed in Section 2(11);
- (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."

Oakwood Healthcare, 348 NLRB 686, 687 (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001)).

As reiterated in *Oakwood Healthcare*, the burden of proving supervisory status rests on the party asserting that such status exists. *Oakwood Healthcare*, 348 NLRB at 694 (citing *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003)). "Purely conclusory"

evidence is not sufficient to establish supervisory status; a party must present evidence that the employee "actually possesses the Section 2(11) authority at issue." *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

The parties stipulated at hearing that dispatchers do not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward other employees, or to adjust their grievances, or effectively to recommend such actions. In its post-hearing brief, the Employer does not contend that dispatchers have authority to discipline employees, or effectively to recommend discipline.¹⁶ The Employer contends only that dispatchers have authority to assign or responsibly direct other employees, using independent judgment. I address these contentions below.

B. "Assign"

The Section 2(11) term "assign" means "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." *Oakwood Healthcare*, 348 NLRB at 689. For purposes of the Act, the assignment must be a designation of significant overall duties and not simply an ad hoc instruction that the employee perform a discrete function. *Id.* at 689. Here, the record reveals that on a day-to-day basis, field employees are assigned areas, shifts, and tasks by their supervisors in the Operations Department. Thus, the record suggests that a dispatcher's role in relation to trouble calls and switching orders, particularly on the day shift, are ad hoc instructions that the employee perform a discrete function, and not "assignment" as that term is used in Section 2(11). Even assuming, arguendo, that dispatchers "assign" work to field employees, I find that the Employer failed to prove that dispatchers exercise such authority with independent judgment and thus failed to prove their supervisory status.

As set forth above, the party alleging supervisory status has the burden of proving not only that the putative supervisor possesses at least one of the supervisory authorities enumerated in Section 2(11) of the Act, but also that the putative supervisor uses "independent judgment" in the exercise of that authority. "[T]o 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*, 348 NLRB at 692-693. "[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.* at 693. "On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the *Oakwood Healthcare* Board stated that "[t]he authority to effect an assignment ... must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Id.* (citations omitted).

¹⁶ I note that the record contains no evidence establishing that dispatchers have authority to discipline other employees or effectively to recommend discipline.

1) Setting Priorities

Dispatchers must sometimes prioritize incidents. In prioritizing incidents, however, dispatchers follow the Employer's guidelines. Although these guidelines are unwritten, and dispatchers exercise some degree of discretion within those guidelines, I find that such decisions are based on commonsense considerations not unique to supervisors. *Mississippi Power & Light Company*, 328 NLRB 965, 973 (1999).¹⁷ Moreover, McAllister testified that prioritization occupies only 1% of his time. Such rare occurrences are not enough to render dispatchers statutory supervisors. *Oakwood Healthcare*, 348 NLRB at 694 (stating that the party asserting supervisory status must prove that the putative supervisor spends a "regular and substantial" part of work time performing supervisory functions).

2) Dispatching First Responders

With regard to dispatchers' authority to dispatch field employees to respond to trouble calls, the identity of the first responder is usually predetermined by a foreman or manager (or the collective-bargaining agreement). Although dispatchers have the final say on whether to grant a first responder's request for additional personnel, the record establishes that this decision is a "collaborative" one between the field employee and the dispatcher and is generally, if not always, based on the first responder's assessment of the problem. Further, the testimony regarding dispatchers' authority to reassign field employees from their regular work to an outage, as in the case of a storm that causes multiple incidents, was conclusory. Nevertheless, the record shows that such reassignments are usually made in consultation with the general foreman and pursuant to the Employer's guidelines regarding the prioritization of incidents. Given that such assignments are made pursuant to well-established policies or protocols, and are generally, if not always based on the judgment of the field employees, and with their consent, such limited authority does not render dispatchers statutory supervisors.

3) Calling-In Field Employees and Dispatchers

Similarly, on those occasions where employees must be called-in, dispatchers operate pursuant to well-established call-in procedures which mandate that the employees with the least amount of overtime be given the first opportunity for such work and, in executing the call-in, dispatchers use an automated process that selects employees by predetermined criteria (location, classification, and overtime hours). Although the dispatcher must input the number and classification(s) of employees to be called-in, the record shows that the decision concerning how many employees to call out is initially based on the first responder's judgment or the first responder's and dispatcher's collective effort. The dispatcher's role in the call-in process thus does not rise above the "routine or clerical." *Oakwood Healthcare*, 348 NLRB at 693 (citations omitted).

4) Overtime

Although an employee (field employee or dispatcher) who responds to a dispatcher's call-in may earn overtime, the record shows that the decision to report to work in response

¹⁷ *Mississippi Power* is discussed in greater length below.

to such a call-in is voluntary. Accordingly, there is no evidence that dispatchers possess authority to order mandatory overtime. In *Golden Crest*, the Board clearly held that "the authority merely to request that a certain action be taken" does not constitute the power to assign within the meaning of the Act. 348 NLRB at 729 (emphasis in original).

5) Lack of Supervision

The Employer contends that the absence of supervision for large blocks of time indicates that dispatchers are supervisors. The record shows that supervision is on-site Monday through Friday, during the day shift, when most employees are on duty and most of the planned work is performed. On the night shift, where dispatchers deal primarily with unplanned events (emergencies), Broemeling is always on-call. The Employer's related argument, that finding all ten dispatchers to be employees would mean that "no one is in charge" of the distribution system for large blocks of time, is without merit. The record reveals that someone above the dispatchers is monitoring the system or is available to do so, as McAllister does not believe he or the other dispatchers have authority to declare EOP Level 2. Thus, it appears that routine dispatches generally occur during the weekend and hours outside the 12-hour weekday shift, but when extraordinary events occur outside normal business hours, others in the Employer's Operations or Distribution Dispatch departments are monitoring the system and/or are available to do so in order to ensure the Employer's quick response to such events.

C. "Responsibly to Direct"

Under Section 2(11), "assign" and "responsibly to direct" are not synonymous. The authority "responsibly to direct" arises "[i]f 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,' ... provided that the direction is both 'responsible' ... and carried out with independent judgment." *Groff Metals, Inc.*, 348 NLRB 717, 721 (2006) (citing *Oakwood Healthcare*, 348 NLRB at 891). The record reveals that the first element of this definition (the putative supervisor has "men under him" and that person decides "what job shall be undertaken next and who shall do it") is not met here. Aside from non-emergency work, the order of dispatched work is determined primarily by the trouble calls received at the call center. Further, dispatches during normal weekday hours are the result of a collaborative process between dispatchers and crew foremen. Dispatches after normal business hours and on weekends are largely dictated by an automated call-out system and/or the parties' labor agreement covering field employees. In light of the above and the record as a whole, the Employer has not met its burden of establishing that dispatchers actually decide "what job shall be done next or who shall do it."

The second element (the direction must be "responsible") is also not met here. The difference between assignment of work and responsible direction of work is a question of accountability: the Section 2(11) authority to "assign" can exist even when the putative supervisor is not accountable for how the staff performs their assignments. In contrast, the Section 2(11) function of "responsibly to direct" only exists when the putative supervisor is "accountable" for the proper performance of the task by other employees. *Oakwood Healthcare*, 348 NLRB at 892.

In *Oakwood Healthcare*, the Board defined accountability, in reference to the Section 2(11) function "responsibly to direct," as follows:

[F]or 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 employee are not performed properly. ... Thus, 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.

348 NLRB at 692 (Emphasis added). In determining whether accountability has been shown, the Board requires "evidence of actual accountability." *Golden Crest Healthcare Center*, 348 NLRB at 731.

Assuming, arguendo, that dispatchers direct field employees in responding to trouble calls and/or executing switching orders, the Employer did not present any evidence showing that dispatchers have authority to take corrective action against field employees or that dispatchers are subject to adverse consequences for the work performance of field employees. Moreover, the Employer produced no evidence to establish that field employees have been informed that they are required to follow the dispatchers' directions. The Employer also argues that "Dispatchers are accountable and responsible for their actions in connection with the restoration of power in the most efficient and expedient manner possible." (emphasis added). Accountability, for purposes of Section 2(11), requires proof that dispatchers are responsible for the performance of the field employees whom the Employer claims the dispatchers supervise. The Employer did not meet its burden on this element. While the dispatchers, such as McAllister, have been purportedly exercising their supervisory authority to responsibly direct field employees over the past 12+ years, and McAllister testified he is evaluated every year, the Employer did not produce any documentary evidence (e.g., positive or negative evaluations and/or disciplinary records) establishing that it holds dispatchers accountable for their direction of field employees. In short, the Employer has failed to meet its burden of establishing that the dispatchers "responsibly" direct field employees.¹⁸

D. *Big Rivers Electric Corp./Mississippi Power*

In arguing that its dispatchers are not statutory supervisors, the Employer relies, in part, on *Big Rivers Electric Corp.*, 266 NLRB 380 (1983). The Employer acknowledges that *Big Rivers Electric* was overruled by the Board in *Mississippi Power*, supra, but argues that latter Board decision is entitled to "no weight."

¹⁸ Moreover, dispatchers' role during switching procedures (planned or unplanned) does not render them statutory supervisors because communicating the sequence of a switching order to field employees, and verifying that each step is completed in the proper sequence, does not entail the use of independent judgment. Rather, the relay of such information is routine or clerical in nature.

I acknowledge that two federal courts have found that the Board's rationale in *Mississippi Power* was invalidated by the Supreme Court in *Kentucky River*, supra. See *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001); *Public Service Co. of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001). Nevertheless, the Board has not overruled *Mississippi Power* or otherwise returned to the rule set forth in *Big Rivers Electric*. Thus, *Big Rivers Electric* does not represent extant Board law. In any event, I rely primarily on *Oakwood Healthcare* and its progeny. The standard for supervisory status set forth in *Oakwood Healthcare*, a decision issued in response to *Kentucky River*, represents critical extant Board law on the indicia of supervisory authority at issue in the instant case.

Regardless, *Mississippi Power* supports the result reached herein. In that case, the Board found that an electric utility's distribution dispatchers were not statutory supervisors. The distribution dispatchers at issue in that case were responsible for monitoring the status of the distribution system to restore power after an outage; directing field employees in repairing faults and performing switching procedures; and completing associated paperwork. In addition, the distribution dispatchers were responsible for setting priorities for work requests and orders and coordinating the response of troubleshooting personnel. As is the case here, there the Employer argued that its distribution dispatchers were statutory supervisors because they assigned and responsibly directed other employees. The Board found that the distribution dispatchers directed field employees in what switching sequences to follow and assigned field employees in emergencies. Nevertheless, the Board determined that the distribution dispatchers were not supervisors under Section 2(11) of the Act because their assignment and direction did not require the use of "independent judgment." As the distribution dispatchers at issue in *Mississippi Power* had more authority than the dispatchers at issue here, that case supports my conclusion in this matter.¹⁹

IV. CONCLUSION

Based on the foregoing, the entire record, and having carefully considered the parties' briefs, I conclude that the Employer's distribution dispatchers are not statutory supervisors because they do not assign or responsibly direct employees using independent judgment, or possess or exercise any other indicia of Section 2(11) status.

Accordingly, I shall direct an election in the following appropriate Unit:

All full-time and part-time central distribution dispatchers employed by the Employer at its Spokane, Washington location; excluding all other employees, guards and supervisors as defined in the Act.

¹⁹ The Employer argues that the dissent in *Mississippi Power*, 328 NLRB at 880, written by Members Hurtgen and Brame, is better reasoned than the majority decision in that case and compels the conclusion that the dispatchers are supervisors. In making this argument, the Employer cites the following language of the dissent: "[W]here, as here, the dispatchers must use such independent judgment to make complex decisions when assigning and directing work - electing among a myriad of complex factors (including, [but] not limited to, the availability and capabilities of complex equipment, field employee skill and availability, weather and environmental factors, and the varying power needs of the affected customers) - they clearly are exercising supervisory authority." Unlike *Mississippi Power*, the Employer in this case presented no evidence that the dispatchers here consider the availability and capability of complex equipment or the skill and availability of field employees. Thus, the factors on which the dissent in *Mississippi Power* relied are absent here.

There are approximately ten (10) employees in the Unit found appropriate.

V. 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 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 that 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 Union 77.

A. 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 their 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*, 156 NLRB 1236 (1986); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 381 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before September 11, 2009. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of four copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. 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. 20670. This request must be received by the Board in Washington by 5:00 PM ET on September 18, 2009. The request may be filed through E-Gov on the Board's web site, www.nlr.gov, but may not be filed by facsimile.²⁰

DATED at Seattle, Washington, this 4th day of September, 2009.



Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

²⁰ To file a request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.