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.

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[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

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[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

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[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." *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006) (citing *Oakwood Healthcare*, 348 NLRB at 691). 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 692.

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.

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[19] The Employer argues that the dissent in *Mississippi Power,* 328 NLRB at 980, 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 (1966); *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, 361 (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. 20570. 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.nlrb.gov, but may not be filed by facsimile.[20]

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

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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.nlrb.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.nlrb.gov.