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Veolia Transportation Services, Inc. *and* Amalgamated Transit Union, Local 1637, AFL–CIO, Petitioner. Case 28–RC–071479

January 20, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On February 2, 2012, the Regional Director for Region 28 issued a Decision and Order, in which he found that a petitioned-for unit of all full-time and part-time road supervisors at the Employer's Las Vegas, Nevada facilities was inappropriate. He concluded that the road supervisors possess the authority to discipline and reward and therefore are supervisors within the meaning of Section 2(11) of the Act. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review. The Petitioner contends that the Regional Director erred in finding that road supervisors are supervisors within the meaning of Section 2(11). The Employer filed an opposition.

On March 19, 2012, the National Labor Relations Board granted the Petitioner's request for review. Thereafter, the Employer filed a brief on review.

The Board has delegated this case to a three-member panel.

The Board has carefully considered the entire record in this proceeding, including the Employer's brief on review.[1] For the reasons set forth below, we find, contrary to the Regional Director and our dissenting colleague, that the Employer has not established that road supervisors are supervisors within the meaning of Section 2(11).

Facts

The Employer operates a public bus transportation system in the greater Las Vegas area that provides fixed-route transportation services. As part of its operations, the Employer employs about 750 coach operators on three shifts. The Petitioner currently represents the coach operators (operators), and now seeks to represent a unit of the Employer's approximately 40 road supervisors.[2]

The Employer's Las Vegas operation is overseen by General Manager Larry Kucera, who reports to the Employer's project manager/regional vice president. The director of transportation (vacant at the time of the hearing) reports to Kucera. Trevor Halleran, the field supervision manager, also reports to Kucera, as does Ryan Neale, the Bus Operations Center (BOC) manager,[3] and the safety and training manager.[4] Neale supervises the communications senior supervisors (also known as the senior BOC supervisors), who in turn supervise the radio operators and dispatchers. Halleran supervises the senior road supervisors (including Kenneth Green) and the administrative senior supervisors (including Barry Goldsmith and Mark Bailey).[5] The senior road supervisors oversee the road supervisors. It appears undisputed that all of these positions—except, of course, the disputed road supervisors—are supervisors within the meaning of Section 2(11).

As one of their primary duties, road supervisors observe operators in the field and ensure that the operators are following the Employer's various rules, policies, and procedures. When a road supervisor observes a coach operator committing an infraction, the road supervisor is expected to fill out an observation notice (OBN); road supervisors have discretion to forego filling out an OBN and may simply talk to the operator about the infraction. In filling out an OBN, the road supervisor records the operator's information, as well as the date, time, and location of the observed infraction, and provides a brief narrative of what the road supervisor witnessed. The road supervisor may or may not obtain the operator's signature, depending on the situation. The OBN does not prompt the road supervisor to recommend that any action be taken against the operator, nor are there any examples of road supervisors making such a recommendation. Further, road supervisors ordinarily have no knowledge of an operator's disciplinary history. After filling out an OBN, the road supervisor submits it to the night operations assistant manager, who forwards it to an administrative senior supervisor. The administrative senior supervisor is responsible for administering all discipline to operators. In making that determination, they consult the operator's disciplinary record and—based on that record—decide what (if any) level of discipline to impose. If the OBN is connected to an accident or incident, the

[1] The Petitioner did not file a brief on review.

[2] Road supervisors have, in the past, been known as transit supervisors and/or transit services supervisors. Road supervisors are also referred to as yard, gate, or terminal supervisors when they are assigned to these areas during their shifts.

[3] The Employer's organizational chart indicates that the BOC manager is also referred to as the manager of CATCOM, but Neale usually referred to himself as the BOC manager.

[4] The Employer's organizational chart refers to this position as the manager of training, but the Employer's witnesses referred to the position as the safety and training manager. As noted below, the safety department plays an important role in discipline related to accidents.

[5] It appears that the administrative senior supervisors and senior road supervisors are collectively referred to as senior operations supervisors or just senior supervisors. The senior road supervisors are also referred to as field senior supervisors.

administrative senior supervisor reviews the associated accident or incident report.[6] The record contains examples of OBNs that have led to a coaching,[7] verbal warning, written warning, or suspension for the operator involved.[8] The administrative senior supervisor can also choose to discard the OBN.

The administrative senior supervisor meets with the operator to review each OBN. During these meetings, operators are allowed to present their version of events, which the administrative senior supervisor typically records on the OBN. At the end of the meeting, the administrative senior supervisor obtains the operator's signature for the OBN (if not already obtained by the road supervisor). If the OBN results only in a coaching, the fact that coaching took place is usually noted on the OBN. If the OBN leads to more than a coaching, the administrative senior supervisor will generate a disciplinary notice and ask the operator to sign it. The disciplinary notice indicates the nature of the violation, what specific work rule or policy was violated, who witnessed the violation, what and when corrective action must be taken, the consequences for failing to take corrective action, and the operator's previous violations (if any). The disciplinary notice also contains a series of check boxes to indicate the disciplinary action being taken (the OBN does not contain such check boxes). The record contains 27 examples of disciplinary notices issued over a 9-year period, and although most of these notices have similar formats, there are 6 variations with different check box options for the disciplinary action taken.[9] Significantly, 19 of the forms do not include "counseling" as a disciplinary option. The record contains no explanation for these variations, nor does there appear to be any discernible pattern to when a particular variation is used.[10] There are no examples of disciplinary notices on which "counseling" has been checked, and Administrative Senior Supervisor Goldsmith testified that disciplinary notices are not issued when an OBN results in coaching or counseling.

After the administrative senior supervisor meets with the operator, the administrative senior supervisor completes a disposition notice, which indicates the outcome of the OBN. Using a grid, the administrative senior supervisor can indicate that the operator was coached, given a verbal or written warning, suspended, or terminated. There is also a space where the administrative senior supervisor can indicate that the OBN was discarded and set forth the reasons for discarding the OBN. A completed disposition notice is sent to the road supervisor who initiated the OBN. The details of the OBN and its result are entered into a database,[11] and the OBN and disciplinary notice (if any) are placed in the operator's personnel file. There are about 176 examples of incidents that resulted in an OBN and/or a further document (disciplinary or disposition notice) in the record. Of these, about 113 resulted in counseling; for another 29, the outcome of the OBN is not clear, but it does not appear to have resulted in any discipline higher than coaching. The remaining 44 OBNs resulted in some form of discipline beyond coaching. In addition, the spreadsheet printed from the OBN database records 1170 OBNs. Of these, 98 had no recorded outcome, at least 715 resulted in coaching or counseling, and 260 resulted in a verbal warning, written warning, or suspension.[12]

Although the foregoing facts are uncontested (or, in the case of the variations among disciplinary notices, unexplained), there is conflicting evidence regarding the precise role of OBNs in the Employer's disciplinary sys-

[6] The BOC apparently generates these reports. The night operations assistant manager informs the administrative senior supervisor when the OBN is connected to an incident or accident.

[7] The record contains several OBNs that resulted in "counseling," as opposed to coaching. Halleran testified that counseling and coaching are interchangeable terms. In the absence of any evidence clearly distinguishing coaching from counseling, we assume, for the purposes of this decision, that the two terms are in fact interchangeable.

[8] As discussed below, an OBN may also lead to a termination, but there are no examples of an OBN resulting in a termination. (There is one OBN which indicates that the operator at issue was terminated, but it does not appear that the termination was based on the OBN in question.) In addition to these levels of discipline, operators have received a "condition of employment," under which the operator is subject to termination if he or she commits the same type of infraction within a certain period of time.

[9] The variations are as follows. Version 1 (16 examples): boxes for verbal warning, written warning, suspension, condition of employment, and termination. Version 2 (five examples): counseling, written warning, suspension, condition of employment, termination. Version 3 (two examples): verbal warning, final warning, suspension, condition of employment, and termination. Version 4 (two examples): counseling, final warning, suspension, condition of employment, and termination. Version 5 (one example): counseling, verbal warning, suspension, condition of employment, and termination. Version 6 (one example): verbal warning, written warning, suspension, and final warning.

[10] For example, there are seven disciplinary notices from 2011. Of these, five use version 1, two use version 2, and one uses version 6. Although version 2 is used on the two most recent disciplinary notices (dated December 6 and 12, 2011), the remaining examples of its use are from 2009. The different variations do not appear to be tied to particular types of violations: a 2009 disciplinary notice for a late pull-out uses version 2, whereas a 2011 disciplinary notice for a late pull-out uses version 1.

[11] The administrative senior supervisors consult this database to ascertain an operator's disciplinary history. The record contains a spreadsheet printed from this database that shows all OBNs issued in 2010 and 2011.

[12] Another 83 resulted in an outcome noted as "D." None of the witnesses could state what "D" stood for. Of the remaining 15 OBNs, 14 resulted in an outcome recorded as "CL" and one in an outcome recorded as "Sw," neither of which is explained in the record.

tem, as well as the exact nature of the disciplinary system itself. Regarding OBNs, BOC Manager Neale claimed that an OBN submitted by a road supervisor constitutes discipline, but Senior Road Supervisor Green (who, like Neale, testified for the Employer) stated that an OBN is not formal discipline, merely documentation of something that the road supervisor observed. The three current road supervisors who testified for the Petitioner all agreed with Green.[13] With respect to coaching, the Employer's witnesses testified that coaching is regarded as discipline and is the first step in a progressive disciplinary policy. By contrast, former operator Jeff Raske claimed that during a coaching session several years before, Goldsmith told him that coaching was not discipline and would not lead to discipline. Similarly, operator William Farmer testified when he has been coached—including on one occasion about a year before the hearing—he too was advised that coaching and counseling are not discipline. Consistent with Raske and Farmer's testimony, the collective-bargaining agreement that covers the operators states that discipline "is defined as the issuance of an adverse entry into the personnel record of the employee of a written warning, suspension or termination."[14] The collective-bargaining agreement refers to "counseling" as discipline only with respect to attendance infractions, and it is undisputed that road supervisors are not involved in attendance-based discipline. Elin Fehr, the Employer's human resources manager, also testified that when the Petitioner has requested all instances of discipline for a particular operator, the Employer does not turn over OBNs.[15]

The record contains various references to the Employer's "progressive" disciplinary policy, both in witness testimony and in several documents.[16] But there is no progressive disciplinary policy set forth in the Employer's handbook for represented employees, the road supervisor handbook, or the Employer's policies and procedures. The operators' collective-bargaining agreement does contain a progressive policy for attendance infractions, but this is a stand-alone policy and the road supervisors do not enforce attendance-based rules. Significantly, the collective-bargaining agreement does not set forth a comparable, progressive system for other types of infractions. Instead, it simply states—as noted above—that "[d]iscipline is defined as the issuance of an adverse entry into the personnel record of the employee of a written warning, suspension, or termination." The employee handbook that applies to operators contains a list of "serious" offenses and states that all such offenses "provide cause for immediate discharge." Among others, the handbook lists failure or refusal to follow supervisor instructions, discourteous or rude conduct, and "violation or disregard of a posted written, verbal or known . . . rule, policy, or procedure" as serious offenses. Nevertheless, Neale and Administrative Senior Supervisor Bailey both stated that discipline is progressive and testified that upon receiving an OBN, the administrative senior supervisor simply consults the operator's disciplinary history and based on that history issues whatever level of discipline is appropriate. According to Neale, the steps in the progressive policy are counseling, verbal warning, written warning, suspension, and termination. Goldsmith also testified that discipline is progressive, but he indicated that he has latitude in determining what level to impose. He stated that when he receives an OBN, he will "look up where we are at in the computer [with respect to the operator's disciplinary history], and then whatever *I have decided*, whether it is a coaching or a verbal or a written, then I would issue it" (emphasis added). Goldsmith provided an example where upon receiving an OBN and consulting the operator's history, he concluded that the operator had engaged in a pattern of "excessive" violations and that a 1-day suspension was appropriate, although he could have recommended termination or imposed a verbal warning.

In addition, there is evidence that discipline is not imposed in a consistent fashion. The spreadsheet summarizing OBNs from 2010 and 2011 appears to contain numerous examples of operators committing the same number of similar infractions, yet receiving different levels of discipline. For example, there are at least 12 examples of operators receiving coaching for what is listed as their second late pull-out violation, but there are

[13] Road Supervisor Susan Thomas also testified that OBNs are not used solely for recording operator infractions, but can also be used to document anything out of the ordinary, such as low hanging branches, potentially dangerous conditions at a bus stop, or other possible hazards along a bus route. The transit services supervisor procedures manual, which applies to the road supervisors, does not use the word "discipline" to describe OBNs, but instead states that an OBN "is a tool for behavioral change" that is used to "document violations."

[14] This statement is contained in the grievance procedures set forth in the collective-bargaining agreement.

[15] Fehr further testified that "[w]e . . . supplied written suspensions, [conditions of employment]. . . . We haven't supplied the observation notices. I don't know why. I can't answer the question why, but we haven't supplied that when they have requested" discipline. Fehr stated that OBNs are turned over when the Petitioner requests an employee's personnel file, as opposed to discipline.

[16] For example, road supervisors are rated on their understanding of "progressive discipline" on their performance evaluations. On a self-assessment, road supervisor Marcella Jackson indicated a desire for more training in "progressive discipline." Many of the disciplinary notices state that an operator's failure to correct the offending behavior will result in "progressive discipline." And all of the Employer's witnesses testified that the Employer uses progressive discipline.

also at least 8 examples of operators receiving verbal warnings for a second late pull-out and 1 example of an operator receiving a written warning. Likewise, although most coach operators appear to have received a verbal warning for their third late pull-out, there are also examples of operators receiving a coaching or written warning for the third late pull-out.[17] For other types of violations, certain operators received only coachings despite repeated violations: one operator received coachings for her 7th through 13th fare box policy violations, while another received coaching for his 10th excessive dwell violation. There is no testimony explaining these apparent inconsistencies in how similarly situated operators were treated with respect to the level of discipline imposed.[18] The individual OBNs and disciplinary notices in evidence similarly indicate that discipline is not consistently administered in a progressive fashion: for example, there are multiple instances of an operator receiving a written warning for what is expressly described as a first violation. There is also an example of one operator (with no previous violations) receiving a suspension for using an electronic device while operating a company vehicle, but another operator (also apparently with no previous violations) received a verbal warning for the same type of infraction.[19]

There is also inconsistent testimony as to whether administrative senior supervisors independently investigate OBNs submitted by road supervisors. All three current road supervisors who testified denied that they recommend discipline by submitting an OBN. Jackson testified that she had never recommended discipline and did not know if her OBNs were independently investigated. Thomas similarly claimed that she had not used OBNs to recommend discipline, and stated that OBNs led to discipline only after an administrative senior supervisor investigated the underlying incident. And Road Supervisor Ila Myers maintained that her OBNs merely report what she has seen and that the reviewing administrative senior supervisors decides whether to impose discipline "100%" of the time. By contrast, Neale, Goldsmith, and Bailey stated that they accepted OBNs as written, did not independently investigate them, and simply imposed the appropriate level of discipline based on the operator's disciplinary history. That said, Neale admitted that he investigates OBNs that "seem[] a little strange" and that he might discard an OBN that was incorrectly written or failed to provide enough data. Neale also stated that when an operator's version of events differed from what was recorded on the OBN, he might take that "into consideration" and might accept the operator's account if the OBN was "totally crazy" or "defective." Similarly, Bailey indicated that he has discarded OBNs, albeit rarely, and that he will listen to operators' side of the story when he meets with them, although he denied having any intention to solicit an operator's side of the story going into the meeting. Goldsmith testified that he listens to the operator's version of events when offered, that such explanations "matter," but that he always accepts the road supervisor's account and never credits the operators. But at the same time, Goldsmith also stated that he may deviate from an OBN because there are times when the road supervisor "does not get the knowledge that I will get during the course of interacting with" the operator. Goldsmith said these situations are "very rare" and, like Bailey, denied actively seeking such additional knowledge when meeting with operators. Yet Goldsmith also admitted that he has an "open door" policy and that one reason for the policy "could be" to gain information a road supervisor did not have when issuing an OBN. Also, as noted above, Goldsmith indicated that he exercises some discretion in deciding the outcome of an OBN.

Aside from issuing OBNs, road supervisors may take action if they suspect an operator is under the influence of drugs or alcohol. In such situations, road supervisors may pull the bus over or call for a substitute bus to take over the operator's route. It is not clear, however, whether a road supervisor requires prior authorization to take these actions. Thomas and Jackson both stated that they can pull buses over for unsafe driving, but that they must first clear this with the BOC. Myers testified that

[17] Further, there is an example of one operator receiving verbal warnings for his second through fifth late pull-out violations, another receiving verbal warnings for his second through fourth violations and written warnings for his fifth through eighth violations, a third receiving a coaching for his second violation but written warnings for his third through sixth, and a fourth receiving coachings until receiving a verbal warning for his sixth. Yet another operator received a suspension for her fourth late pull-out. And in several instances, operators were coached for their second late pull-out but received a written warning for the third.

[18] The spreadsheet also seems to contradict several of the Employer's purported "zero-tolerance" policies. Goldsmith testified that there is such a policy for cell-phone use; although the spreadsheet indicates that many violations of this policy often result in suspensions, there are also examples of less severe discipline imposed for what are listed as cell-phone violations. Similarly, the handbook for road supervisors states that there is a zero-tolerance policy for coach operators running "hot" (i.e., ahead of schedule), but the spreadsheet contains many examples of running hot violations resulting in coaching, verbal warnings, or written warnings.

[19] The operator who received a verbal warning for using an electronic device received that warning less than 2 months after the operator received a suspension for the same type of violation. Although both examples took place in early 2009, the Employer does not contend that it has modified its disciplinary policy since that time. In 2005, another operator (again with no prior violations) received a written warning for using an electronic device.

she can pull an operator over, but having done so she must call the BOC, and at that point either the BOC or the safety department decides what to do with the operator. Myers also specified that road supervisors do not have the independent authority to remove an operator from a route, and also indicated that when a road supervisor suspects that an operator is under the influence, a dispatcher or senior supervisor must confirm the road supervisor's suspicion before the operator is removed from the route. By contrast, Neale claimed that road supervisors can pull over operators for erratic driving and put a substitute bus on the route, but Neale also agreed that road supervisors must contact the BOC when they suspect an operator is under the influence of alcohol or drugs. Finally, Green testified that a road supervisor can "arrange" to have an operator pulled from a route because of significant safety violations, but he offered no specifics. None of this testimony indicates how, if at all, such actions by road supervisors lead to discipline.

The BOC also dispatches a road supervisor whenever a bus is involved in an accident. Upon arriving at the scene, the road supervisor ensures that the operator, passengers, and anyone else involved in the accident are safe. The road supervisor then investigates the accident by taking witness statements, noting damage to the vehicles involved, taking measurements, and photographing relevant physical details. As part of the investigation, the road supervisor completes various forms in an accident packet, including an accident remediation form and a substance abuse decision document. According to Neale, road supervisors are empowered to excuse operators from drug and alcohol testing, and by virtue of the remediation form a road supervisor also determines whether the operator was at fault. The substance abuse decision document, however, contains defined criteria for whether an operator is subject to drug and alcohol testing.[20] The remediation form allows the road supervisor to advise the operator on ways to avoid a similar accident in the future, but the remediation form does not call on the road supervisor to determine who was at fault in the accident; it advises the operator that discipline may follow if the safety department decides that the accident was preventable. The master checklist for the accident kit contains a space for deeming the accident preventable or not, but the checklist specifies that this determination is made by the safety department. Aside from Neale, the Employer's witnesses were clear that accidents only result in discipline if they are deemed preventable. Although there is testimony suggesting that the safety department relies on the accident investigation kit completed by the road supervisor in reaching its preventability determination, no one from the safety department testified. The Employer's witnesses further indicated that the safety department consults video from the accident (when available) in reaching its determination. The record also contains testimony from a prior arbitration hearing in which Senior Supervisor Kelvin Manzanares stated that the safety department uses certain criteria to determine whether the accident was preventable. Goldsmith essentially corroborated this testimony, stating that neither the road supervisors nor the administrative senior supervisors were "educated" in how to make a preventability determination.

Although OBNs are most often used to document operator infractions, they also can be used to document exemplary behavior. A positive OBN is referred to as a "pat on the back" (POB). A POB uses the same form as the OBN, and is likewise submitted to the night operations assistant manager, who forwards it to an administrative senior supervisor. The administrative senior supervisor discusses the POB with the operator and fills out a disposition notice indicating on behalf of the particular road supervisor that the operator was thanked. The POB is then placed in the operator's personnel file, but it does not result in any further reward or recognition.[21] POBs may reflect favorably on operators who apply for a higher position within the Company, but POBs do not, by themselves, lead to any sort of promotion; indeed, there are no promotions available for operators.[22]

A POB may, however, double as a nomination for an "On-the-Spot" (OTS) award. OTS award recipients receive a certificate, a plaque, and $100. There is a separate nomination form for the OTS award, which states the nominations should be made "on behalf of employees who demonstrate exemplary execution of personal skills in line with going above and beyond skills required for their job in accordance with their job description." There is one example of an OTS award in the record. In that instance, the operator assisted a distressed man wandering in the street; it later turned out that this was a missing person, and the operator's actions reunited him with his family. Road Supervisor Myers issued the operator a POB, and in doing so recommended that the operator be considered for an OTS award. A communications senior

[20] Although the document calls on the road supervisor to determine whether the operator contributed to the accident, the document requires testing only if certain nondiscretionary criteria are present (e.g., the accident resulted in a fatality, certain types of injury, or a towed vehicle).

[21] Two witnesses testified that an operator who received a POB may also receive a pin or a pen, but there is no indication how often or under what circumstances such tokens are bestowed on POB recipients.

[22] The only opportunity for advancement is for an operator to apply for another position.

supervisor filled out and submitted the OTS nomination form, and the operator received the award. Myers testified that she did not know who decided to give the award, that she did not know how that decision was reached, and that she had no input beyond her initial recommendation.[23] Neale was the only other witness to testify about OTS awards in any detail, and although he claimed that road supervisor recommendations for OTS awards are "adopted," he admitted that not every nominee receives the award. Like Myers, he also testified that he did not know who decided whether to give the award.

The Regional Director's Decision

The Regional Director found that road supervisors possess the authority to effectively recommend discipline by issuing OBNs because they use independent judgment in deciding whether or not to complete an OBN, and because OBNs almost always result in some form of discipline. On this basis, the Regional Director found that OBNs constitute the "integral first step" in the Employer's progressive disciplinary policy. The Regional Director also found that the OBNs, prepared by the road supervisors, are accepted as true and are not independently investigated by the administrative senior supervisors, who determine only the appropriate level of discipline to impose. The Regional Director further found that road supervisors possess the authority to discipline operators because they can remove operators from their routes without prior authorization from upper management when they suspect the operator is impaired.

In addition, the Regional Director found that road supervisors possess the authority to effectively recommend reward by issuing POBs. Specifically, the Regional Director found that although POBs do not always lead to OTS awards, road supervisors exercise independent judgment in issuing POBs, there is a "direct link" between POBs and OTS awards because POBs are the sole means by which an operator can be nominated for an OTS award, and OTS awards "directly affect the wages" of recipients. The Regional Director also determined that various secondary indicia of supervisory status support the conclusion that road supervisors are supervisors within the meaning of Section 2(11).

Position of the Parties

The Petitioner argues that the road supervisors do not possess the authority to discipline, reward, or effectively recommend either discipline or reward. Regarding discipline, the Petitioner contends that coaching and counseling are not discipline and that the administrative senior supervisors independently investigate OBNs. In this respect, the Petitioner primarily relies on *DirecTV*, 357 NLRB No. 149 (2011), which it claims the Regional Director improperly distinguished. The Petitioner also argues that although road supervisors can pull over operators suspected of driving under the influence, the BOC must approve such actions and also determines what to do with the operator. More generally, the Petitioner contends that the Regional Director ignored conflicting evidence and accepted conclusory testimony, thereby failing to hold the Employer to its evidentiary burden. Regarding reward, the Petitioner argues that the OTS award cannot establish supervisory authority because it does not affect pay or result in a merit wage increase, and that in any event there is no "direct connection" between a POB and OTS award.

The Employer agrees with the Regional Director's findings. Regarding discipline, the Employer argues that several cases support the Regional Director's determinations. See *Sheraton Universal Hotel*, 350 NLRB 1114 (2007); *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004); *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003).[24] Further, the Employer maintains that coaching and counseling constitute discipline, that road supervisors directly discipline operators by issuing coachings in the field, and that coaching and counseling are the first step in its progressive disciplinary policy. The Employer adds that OBNs constitute disciplinary recommendations and denies that they are independently investigated. The Employer also asserts that road supervisors effectively recommend discipline by completing accident reports. Regarding the road supervisors' alleged authority to reward, the Employer agrees with the Regional Director's findings and contends that the criteria for establishing the authority to reward is not as narrow as the Petitioner argues. Finally, the Employer cites a number of cases in which the Board has found that employees with the job title of "road supervisor" are statutory supervisors.[25]

[23] Myers also indicated that this OTS nomination is the only such nomination she has ever made.

[24] The Employer also cites a decision in which an administrative law judge found that three "road supervisors" possessed the authority to discipline. The Board subsequently reversed those findings. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 1–3 (2014).

[25] In its posthearing brief to the Regional Director, the Employer also argued that road supervisors effectively recommend hiring of operators. The Regional Director did not address this argument. Although the Employer's subsequent filings incorporate the posthearing brief by reference, the Employer has not specifically renewed this contention to the Board, so this argument is not before us. But even were the argument is properly before us, our review of the record demonstrates that the hiring process that ostensibly involves road supervisor recommendations was instituted shortly before the hearing, and at the time of the hearing no operators had yet been hired as a result of the sole interview panel on which a road supervisor participated. Thus, the Employer has

Analysis

Legal Principles

Section 2(11) of the Act defines a "supervisor" as an individual who has the authority, inter alia, to discipline, reward, or effectively recommend such action, so long as the individual uses independent judgment in doing so.[26] The authority to effectively recommend generally means that "the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997). The burden to prove supervisory authority rests with the party asserting it. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (citing *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001)). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. Id. Purely conclusory evidence does not satisfy that burden. *Lynwood Manor*, 350 NLRB 489, 490 (2007). Lack of evidence is construed against the party asserting supervisory status. See *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). Supervisory status is not proven where the record evidence "is in conflict or otherwise inconclusive." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Discipline

To confer supervisory status based on the authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. See *Sheraton Universal*, supra, 350 NLRB at 1116 ("Contrary to the judge's speculation, nothing in the record suggests that upper management conducted an independent investigation before deciding to impose discipline. . . ."); *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003). Warnings that simply bring substandard performance to the employer's attention without recommendations for future discipline serve nothing more than a reporting function, and are not evidence of supervisory authority. See *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000) (warning merely reportorial where it simply described incident, did not recommend disposition, and higher authority determined what, if any, discipline was warranted); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings that are merely reportorial and not linked to disciplinary action affecting job status are not evidence of supervisory authority). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

Contrary to the Regional Director and our dissenting colleague, we find that the Employer has failed to carry its burden of proving that road supervisors discipline operators, or effectively recommend their discipline, within the meaning of Section 2(11) of the Act. More specifically, we do not agree with the Regional Director's findings that coaching and counseling constitute discipline, that the Employer uses a progressive disciplinary policy, or that the Employer has established that OBNs almost always lead to discipline without an independent investigation by higher management.

To begin, the Employer has not established that road supervisors discipline operators. Although Neale claimed that the mere issuance of an OBN constitutes discipline, no other witness corroborated this testimony and several flatly contradicted it, including one of the Employer's own witnesses. The conflicting nature of this testimony alone counsels against a finding that issuing OBNs constitutes discipline. See *Phelps Community Medical Center*, supra at 490.[27] Moreover, as discussed fully below, the OBNs are merely reportorial; they contain a description of what the road supervisors observed and do not contain any recommendation of discipline. Finally, because the OBNs do not constitute discipline, we reject the Regional Director's and the dissent's contention that the road supervisors' determination whether to issue an OBN is evidence of supervisory authority.

Similarly, the Employer has not established that coaching and counseling constitute discipline. Although the Employer's witnesses stated that coaching and counseling are regarded as discipline, both Farmer and Raske testified they had been told coaching and counseling were not discipline. The relevant documentary evidence supports Farmer and Raske. The provision in the collective-bargaining agreement covering the operators that

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not established that road supervisors effectively recommend hiring, because there is no way to assess whether any hiring recommendation was independently investigated. The Employer did not advance any other contention regarding the remaining indicia of supervisory authority in Sec. 2(11).

[26] As in *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015), the dissent would apply a new test for supervisory status that focuses on the "practical realities of the workplace." For the reasons set forth in *Buchanan Marine*, supra, slip op. at 2, we disagree with the dissent's proposed standard, which is not grounded in the text of the Act and does not appropriately consider the enumerated indicia of supervisory status set forth in Sec. 2(11).

[27] The fact that there is a disciplinary notice separate from the OBN, and the undisputed fact that not every OBN results in a disciplinary notice, also casts serious doubt on the Employer's argument.

defines discipline does not include coaching or counseling. Counseling only appears as a disciplinary option on certain variations of the Employer's disciplinary notice, and there are no examples of disciplinary notices being issued in conjunction with coaching or counseling.[28] On this last count, Goldsmith stated that coaching and counseling do not result in disciplinary notices. Fehr testified that when the Petitioner requests an operator's discipline, the Employer does not turn over OBNs.[29] For all of these reasons, the Employer has not established that coaching and counseling constitute discipline. As such, the fact that the road supervisors can issue coaching and counseling in the field also does not establish that the road supervisors possess the authority to discipline.[30]

Next, the Employer has not established that its disciplinary system is progressive. The Regional Director appears to have simply accepted witness testimony describing the system as progressive, but in doing so he did not hold the Employer to its evidentiary burden. A warning may qualify as disciplinary within the meaning of Section 2(11) if it "automatically" or "routinely" leads to job-affecting discipline, by operation of a defined progressive disciplinary system. See *Oak Park Nursing Care Center*, 351 NLRB 27, 30 (2007) (finding employee counseling forms disciplinary, where each form corresponded to a step in the employer's progressive disciplinary process and "routinely result[ed] in actual discipline" including suspension and termination); *Ohio Masonic Home*, 295 NLRB at 393–394 (finding warnings not disciplinary, where employer failed to establish that it had a "defined progressive disciplinary scheme" under which the warnings would "automatically affect job status or tenure"). The Employer bears the burden of proving the existence of such a system, and the role that warnings play within the system. *Republican Co.*, 361 NLRB No. 15, slip op. at 7 (2014).[31]

Although several of the Employer's witnesses testified that the Employer has a progressive disciplinary system, the documentary evidence fails to substantiate it. The collective-bargaining agreement that covers the operators does not set forth any progressive disciplinary policy (except for the attendance policy, which road supervisors do not enforce). Similarly, neither the road supervisor handbook, the operator handbook, nor the Employer's work rules makes any reference to a progressive disciplinary policy. Instead, the operator handbook simply sets forth a list of "serious" offenses warranting discharge. The breadth of this list is striking, as it includes violations of any posted or known rule, policy, or procedure. The Employer has made no effort to square this list—which appears to reserve the right to discharge an employee for virtually any offense—with its supposedly progressive disciplinary policy. Under these circumstances, we find that the Employer has not established that discipline is, in fact, progressive. Cf. *Lucky Cab*, supra, 360 NLRB slip op. at 3 (record did not establish progressive policy where handbook stated that employer "may exercise its discretion in utilizing forms of discipline" and that "no formal order or system is necessary" and steps could be skipped).

Even if the Employer's disciplinary system is progressive, the documentary evidence shows that it is not consistently applied, in that certain "steps" may be skipped or repeated. As set forth above, Neale claimed that the progressive steps consist of counseling, verbal warning, written warning, suspension, and termination. But the OBN spreadsheet contains various examples of operators receiving different forms of discipline for the same offense despite receiving the same number of prior OBNs for the same type of offense. In several instances, operators received coaching for their second late pull-out, but then received a written warning for their third. One operator received verbal warnings for his second through fourth late pull-out violations, and then written warnings for his fifth through eighth. By contrast, another operator was suspended for her fourth late pull-out. If there are aggravating or mitigating circumstances that explain these examples of seemingly inconsistent treatment, the Employer has made no effort to identify them or otherwise explain the OBN spreadsheet. In any event, the spreadsheet indicates that there is no fixed relationship between the OBNs road supervisors issue and the level of discipline imposed. Accordingly, the Employer has not established that it utilizes a progressive disciplinary system. See *Republican Co.*, supra, 361 NLRB slip op.

[28] Nor is there any explanation of why 19 of the 27 disciplinary notices in the record do not present coaching or counseling as a disciplinary step.

[29] The record does not establish that disposition notices are turned over when the Petitioner requests discipline, and the OBN spreadsheet also contains numerous examples of OBNs that apparently did not result in disposition notices. Thus, there is no evidence that the Petitioner is otherwise made aware of coaching or counseling when it requests an operator's disciplinary records.

[30] The Employer appears to suggest that road supervisors coach and counsel—and therefore discipline—operators even when they do not submit an OBN. But in such circumstances, there is no record of the coaching or counseling having even occurred. Thus, in such circumstances there is no personnel action on which to base a finding of disciplinary authority.

[31] See also *Jochims v. NLRB*, 480 F.3d 1161, 1169–1170 (D.C. Cir. 2007) (writeups documenting infractions merely represented the possibility of discipline, given lack of evidence they were prerequisite to discipline or routinely resulted in discipline where employer did not maintain progressive disciplinary system), reversing *Wilshire at Lakewood*, 345 NLRB 1050 (2005).

at 7 fn. 8 (progressive discipline not established where, inter alia, testimony indicated employees had been suspended without prior warning, but that other employees received multiple verbal warnings without any escalation of discipline); *Ken-Crest Services*, 335 NLRB 777, 777–778 (2001) (finding verbal warnings not disciplinary, notwithstanding purported progressive disciplinary system, because an employee could receive numerous counselings and verbal warnings without further discipline); *Ten Broeck Commons*, 320 NLRB at 809 (finding warnings not disciplinary, where there was no showing of "predetermined discipline based solely on the receipt of a certain, set number of warnings").

Having found that the issuance of OBNs is not discipline, that coaching and counseling do not constitute discipline, and that the Employer has not established that it follows a progressive disciplinary policy, we do not agree with the Regional Director's findings that OBNs almost always result in some form of discipline and are an "integral first step" in the Employer's disciplinary policy or the dissent's view that OBNs "lay the foundation for further discipline under the Employer's system."[32] The OBN spreadsheet and the OBNs in evidence indicate that OBNs result in discipline less than a third of the time.[33] Similarly, the Regional Director's finding that OBNs are an "integral first step" relies on cases that, unlike this case, involved progressive disciplinary systems. See *Oak Park Nursing*, 351 NLRB at 27; *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), cert. denied 549 U.S. 1338 (2007).[34]

Just as the Employer has not shown that OBNs constitute discipline, we find that it has not shown that they constitute the effective recommendation of discipline. As noted above, a recommendation is only effective if it is not independently investigated, but the Employer has not established that OBNs are not independently investigated. Although the Employer's witnesses claimed that administrative senior supervisors always follow road supervisor recommendations and only rarely discard them, the current road supervisors understood that OBNs are independently investigated. The Employer's own witnesses gave testimony that indicates an independent investigation takes place. Thus, Neale admitted that he takes the operator's side of the story "into consideration" and may adopt it over that of the road supervisor on occasion; Goldsmith stated that operator's explanations "matter" and that at times he accepts an operator's version of events over what the road supervisor relates on the OBN because the road supervisor did not have "the knowledge that I will get during the course of interacting with the [o]perator"; Goldsmith also admitted that he has an "open door" policy, one purpose of which "could be" to gain information not available to road supervisors.

In addition, the fact that the Employer's disciplinary policy is not progressive, and that escalation of discipline is inconsistent, strongly suggests that the administrative senior supervisors conduct an independent investigation upon receiving an OBN in order to decide what level of discipline to impose. That OBNs for the same number and type of infractions result in different outcomes for different operators further suggests that administrative senior supervisors inquire into the particular circumstances underlying a given OBN.

But even assuming administrative senior supervisors do not independently investigate OBNs, we find that road supervisors' submission of OBNs does not constitute the effective recommendation of discipline, because the OBNs are merely reportorial. In this regard, this case is analytically identical to *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997). In that case, the RNs used forms to document incidents or problems with employees, but (1) the form did not prompt the RNs to make any recommendation; (2) there was no evidence that the RNs otherwise recommended whether discipline should

[32] We note that our dissenting colleague does not contend that the Employer has a progressive disciplinary system. Instead, he states his disagreement with Board precedent and emphasizes that, under his proposed standard, the existence of a progressive disciplinary system would not be essential to a finding that a coaching, counseling, or warning qualify as discipline. In the dissent's view, these should be viewed as discipline if they are issued in connection with a disciplinary system of "shared authority" and are relied on by employers in imposing discipline for further misconduct. For the reasons stated above, we adhere to the Board's traditional analysis, which holds that warnings qualify as disciplinary only if they routinely lead to job-affecting discipline by operation of a progressive disciplinary system. See, e.g., *Oak Park*, supra at 30.

[33] As noted above, the spreadsheet records 1170 examples of OBNs, of which 715 resulted in counseling and 98 had no recorded outcome. The spreadsheet shows that only 274—about 23 percent—of the OBNs recorded on the spreadsheet resulted in discipline (the figure rises to about 31 percent if the 83 OBNs that resulted in "D" are included). Of about 176 individual OBNs and related documents in evidence, only about 44—25 percent—resulted in discipline.

[34] The same is true of the cases cited by the Employer. See *Sheraton Universal*, supra at 1117; *Progressive Transportation*, supra at 1044. The Employer also cites *Mountaineer Park*, supra. Although *Mountaineer Park* does not expressly state that the disciplinary system at issue was progressive, the Board relied on *Progressive Transportation* in finding that the disputed individuals effectively recommended discipline. See id. at 1475. Further, in *Mountaineer Park* the Board found that the disputed individuals triggered the disciplinary process by writing proposed disciplinary recommendations, and that when they turned in such recommendations, discipline ensued. See id. Here, as just discussed, perhaps one in four OBNs results in discipline. Thus, the road supervisors in this case do not, like the individuals at issue in *Mountaineer Park*, necessarily trigger discipline by turning in OBNs.

be imposed; and (3) the employer did not follow a progressive disciplinary system, and there was no evidence that a particular offense would necessarily lead to any particular form of discipline. See id. at 890. The RNs submitted the forms to the director of nursing, who did not independently investigate the incidents, but who decided based on the employee's personnel file what if any level of discipline to impose. See id. The Board therefore found that the forms submitted by the RNs were merely reportorial. Although the director of nursing did not independently investigate the incidents, the Board stated that in the absence of an established system, such as a progressive disciplinary system, the director of nursing did not decide whether discipline should be imposed based solely on the RNs' submissions, but instead based the decision on her independent assessment of the employees' personnel history. See id.

Like the RNs in *Illinois Veterans Home*, supra, the road supervisors in this case are not prompted to make any recommendation on the OBN, nor does the record establish that they otherwise recommend any particular level of discipline, or whether to impose discipline at all. Further, the Employer has not established that it follows a progressive disciplinary system, or that a particular offense necessarily leads to a particular form of discipline. As noted above, in a majority of cases OBNs do not even lead to discipline. Instead, the administrative senior supervisors, like the director of nursing in *Illinois Veterans Home*, decide whether to impose discipline (as well as what level to impose), and they do so based on their assessment of the operators' personnel history, not solely on the basis of the road supervisors' submissions. And like the director of nursing, the administrative senior supervisors exercise independent judgment in assessing the operators' disciplinary history, as demonstrated by Goldsmith's testimony that he determined that an operator's past violations were "excessive" and elected to give him a suspension, rather than a verbal warning or a termination. The road supervisors' submission of OBNs is therefore merely reportorial, regardless of whether the administrative senior supervisors independently investigate the OBNs. See also *Jochims*, 480 F.3d at 1170 (supervisory authority not established where evidence did not show that written reports of employee misconduct "routinely resulted" in discipline or "inevitably resulted in the initiation of discipline" but created, at most, only the possibility of discipline).

The remaining arguments for finding that the road supervisors discipline coach operators are easily dealt with. Regarding the road supervisors' authority to pull over operators, we do not agree with the Regional Director's finding that road supervisors can do so without prior authorization. The Regional Director appears to have relied solely on Neale's testimony that road supervisors need no prior authorization, but the Regional Director did not explain why he disregarded conflicting testimony that road supervisors do in fact require prior authorization from the BOC. Nor did the Regional Director address the testimony that once an operator is pulled over, the BOC or the safety department—not the road supervisor—decides what happens next. Moreover, there was no testimony as to how, or whether, such actions lead to discipline. There is no evidence establishing that the act of pulling an operator over or removing an operator from a bus is discipline, nor is there any indication that discipline (or any adverse personnel action) inevitably follows from such actions. In any event, pulling an operator over out of suspicion that the driver is under the influence does not involve the exercise of independent judgment. See *Phelps Community Medical Center*, supra at 492 ("to tak[e] action in response to flagrant violation of common working conditions, such as being drunk, is insufficient by itself to establish supervisory status" (internal quotations omitted)). Thus, even if road supervisors do not require prior authorization to pull over an operator who they suspect is impaired, they do not exercise independent judgment in doing so.

Similarly, the Employer has not shown that road supervisors exercise disciplinary authority based on their role in accident investigations. The undisputed testimony is that an accident results in discipline only if the safety department deems the accident preventable. There is no place in the accident investigation packet for a road supervisor to offer his or her opinion on the matter. The Employer's witnesses also stated that the safety department routinely consults video of the accident, where available. In the instances when there is no video of the accident, the Employer claims that the safety department's determination is based solely on what the road supervisor has included in the accident investigation kit. But there is no testimony as to how often video is unavailable, and even in these instances, the road supervisors are still fulfilling only a reportorial function, as the preventability determination, on which any issuance of discipline hinges, remains in the hands of the safety department.[35] Further, the Petitioner introduced Kelvin Manzanares' arbitration testimony, which states that the

[35] Thus, even if the safety department does not independently investigate the road supervisors' accident report, here too the road supervisors fulfill a merely reportorial function because they simply relate the facts of the accident without making a recommendation, and the safety department apparently exercises independent judgment in deciding whether the accident was preventable (and therefore whether discipline will result). Cf. *Illinois Veterans Home*, supra.

safety department uses certain criteria in determining whether an accident is preventable or not. There is nothing in the record specifying what those criteria are. Indeed, no one from the safety department testified, so there is no direct testimony about how the safety department reaches its preventability determinations. Goldsmith, for his part, admitted that neither administrative senior supervisors nor road supervisors are "educated" in making preventability determinations.[36] Accordingly, the available evidence fails to establish that the road supervisors' role in accident investigations constitutes discipline or the effective recommendation of discipline.

Finally, the Board's treatment of similarly titled "road supervisors" in other cases is of no relevance to the particulars of this case. See, e.g., *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (employees are not transformed into supervisors merely by virtue of their job titles or job descriptions (citing *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 458–459 (2001)).

For all of the foregoing reasons, we reverse the Regional Director and find that the Employer has not established that road supervisors possess the authority to discipline or to effectively recommend discipline.

Reward

We also reverse the Regional Director's finding that the Employer has established that road supervisors effectively recommend reward. There appears to be no dispute that the issuance of POBs is insufficient to establish the authority to reward, and the Employer does not contend otherwise. The Regional Director, however, found that POBs serve as nominations for OTS awards and are the only way an operator can be nominated for an OTS award. The parties differ on whether the OTS award is sufficient to establish the authority to reward, insofar as it is a one-time $100 reward. However, it is unnecessary to resolve this issue because the Regional Director's findings regarding the relationship of POBs and OTS awards are not supported by the record. Thus, it is not clear that every POB serves as an OTS nomination, and there is no evidence suggesting that POBs are the only way an operator can be nominated for an OTS award. Even setting these factual errors aside, it is undisputed—and the Regional Director in fact found—that not everyone who is nominated for an OTS award receives it.[37] There is no testimony as to how frequently OTS nominations result in an OTS award.

More importantly, neither witness who testified about the OTS award was able to identify who determined whether a nominee would receive the award or how that determination was made. Under these circumstances, there simply is no evidence supporting the Regional Director's finding of a "direct link" between POBs and the OTS award.[38] Similarly, there is no evidence whatsoever to support Neale's conclusory testimony that administrative senior supervisors "adopt" road supervisor recommendations regarding OTS awards. As the evidence does not indicate who determines whether to grant an OTS award or how that determination is reached, the Employer has not established that road supervisors effectively recommend reward without an independent investigation by whoever actually decides to grant the award. We therefore reverse the Regional Director and find that the Employer has not established that road supervisors possess the authority to reward.

Conclusion

In view of the foregoing, we reverse the Regional Director and find that the Employer has not established that its road supervisors possess the authority to discipline, reward, or to effectively recommend discipline or reward. In the absence of such evidence, the secondary indicia of supervisory authority on which the Regional Director relied are immaterial. See *Ken-Crest Services*, 335 NLRB at 779 (secondary indicia are insufficient by themselves to establish supervisory status). For all these

[36] In its posthearing brief to the Regional Director, the Employer argued that the remediation form and the substance abuse decision document contained in the accident investigation kit establish that the road supervisors exercise discretion in determining whether the operator was at fault (and therefore effectively recommend discipline if they find that operator was at fault). In the absence of any evidence as to how, if at all, these forms factor into the safety department's preventability determination, they do not assist the Employer's argument that road supervisors effectively recommend discipline based on their role in accident investigations. Moreover, as explained above, it is not clear how much discretion road supervisors have in filling out the substance abuse decision document. As for the remediation form, it contains a space for suggestions as to how to avoid similar accidents, but it also specifies that discipline may follow if the *safety department*—not the road supervisor—determines that the accident was preventable.

[37] The Employer emphasizes that Road Supervisor Myers admitted that her OTS recommendations have been followed "100% of the time." This testimony carries little significance in view of Neale's admission that not every OTS recommendation results in an OTS award, as well as the fact that Myers testified that she has only ever made one OTS recommendation.

[38] In finding a "direct link" between POBs and OTS awards, the Regional Director cited *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535 (1999). *Elmhurst*, however, explains that in *Bayou Manor Health Center*, 311 NLRB 955 (1993), the Board found that charge nurses were supervisors because the employer allocated merit increases to LPNs based solely on the charge nurses' numerical evaluation of the LPNs' skills and performance. See *Elmhurst*, supra at 537. As explained above, the evidence in this case does not establish that OTS awards are given out based solely on the action of the road supervisors, so there is no "direct link" within the meaning of *Elmhurst* present here.

reasons, we find that the road supervisors are not supervisors within the meaning of Section 2(11) of the Act.

ORDER

The Regional Director's finding that road supervisors are supervisors within the meaning of Section 2(11) of the Act is reversed. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. January 20, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Unlike my colleagues, I believe the record supports the Regional Director's finding that the Employer's road supervisors are supervisors under Section 2(11) of the Act because they have the authority to discipline coach operators and/or to effectively recommend that they be disciplined. The road supervisors serve as the Employer's "eyes and ears" on the ground, tasked with monitoring whether coach operators are adequately performing their job duties, adhering to bus schedules, driving safely, and otherwise conforming themselves to the Employer's panoply of policies. As part of those duties, the road supervisors play an important and essential role in the Employer's disciplinary process. Upon witnessing employee misconduct, the road supervisors use independent judgment to decide between orally counseling the coach operator and taking the more drastic step of issuing a written observation notice (OBN), which details the employee's infraction and initiates the formal disciplinary process. As found by the Regional Director, the OBNs "constitute a necessary and integral first step of the discipline meted out to employees." Moreover, the OBNs issued by the road supervisors are retained in employees' personnel files, and it is undisputed that the Employer relies on previously issued OBNs when deciding the level of discipline to mete out for later acts of misconduct by an employee. Thus, an OBN issued by a road supervisor functions as a written warning or demerit, which is retained on file and negatively impacts the recipient. Based on the Employer's proof of such disciplinary authority vested in road supervisors, I would affirm the Regional Director's dismissal of the election petition.[1]

The majority opinion sets forth the facts in detail. I find it necessary to emphasize and comment on a few. The Employer operates a large public bus transportation service in the Las Vegas metropolitan area. The Employer employs approximately 750 coach operators (i.e., busdrivers), who are responsible for transporting passengers. The coach operators are dispersed throughout the metropolitan area during the bulk of their working hours. The Employer's Las Vegas operations are overseen by the general manager. Among those reporting directly to the general manager is the field supervision manager, who is responsible for overseeing 4 administrative senior supervisors, 4 senior road supervisors, and the disputed classification of approximately 43 road supervisors.

The road supervisors have several responsibilities, including disseminating safety and traffic information to coach operators, making minor repairs to buses and fare boxes, removing disruptive passengers, and conducting accident investigations. Importantly, the Employer also tasks the road supervisors with monitoring the coach operators to ensure that they are adequately performing their duties and complying with the Employer's policies. Driving vans marked "supervisor," the road supervisors follow the buses to determine whether the coach operators are making timely stops, abiding by speed limits, and driving safely. As part of these duties, the road supervisors use radar guns to monitor a driver's speed.

Upon observing an operator violating a company policy, a road supervisor uses independent judgment to decide whether the situation can be remedied with a simple verbal counseling session on the spot or whether it is necessary to complete an OBN. The record indicates that the road supervisors issue approximately 6 to 12 OBNs total on a daily basis.

After a road supervisor completes an OBN, it is reviewed by an administrative senior supervisor, who, relying upon the OBN, determines the appropriate level of discipline to impose. The level of discipline issued by the administrative senior supervisor depends on a number of factors, including whether the operator has been the subject of a prior OBN for the same or similar conduct, the length of time since the last violation, and the severity of the violation committed. The record demonstrates that administrative senior supervisors routinely accept the road supervisor's account of the violation as established fact. Additionally, the record

[1] Consequently, I find it unnecessary to pass on the Regional Director's finding that the road supervisors are Sec. 2(11) supervisors by virtue of their authority to reward employees or to effectively recommend reward.

shows that only in rare circumstances, e.g., where an OBN is challenged by the operator with convincing evidence or where the OBN is inadequately completed, does the issuance of an OBN by a road supervisor not result in a counseling, warning, suspension, or termination.

To establish that the road supervisors are statutory supervisors, the Employer must show by a preponderance of evidence that (1) the road supervisors hold the authority to engage in any one of the supervisory functions enumerated in Section 2(11) (which include the authority to discipline and to effectively recommend discipline); (2) their exercise of such authority was not routine or clerical, but required independent judgment; and (3) their authority was held in the interest of the employer. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Section 2(11) requires only possession of authority to carry out a supervisory function, not its actual exercise. See, e.g., *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007).

I have previously criticized the Board's application of that analytic framework as increasingly abstract and out of touch with the practical realities of the workplace. *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 4 (2015) (Member Miscimarra, dissenting from majority's finding that tug boat captains were not statutory supervisors). As I explained in *Buchanan Marine*, when evaluating supervisor status under Section 2(11), I believe the Board in every case should take into account (i) the nature of the employer's operations; (ii) the work performed by undisputed statutory employees; and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.[2] I have explained: "In plain English, this final factor essentially asks 'if one accepts the Board's finding that the disputed employees are *not* supervisors, does that produce a ridiculous, ludicrous or illogical result—for example, where *nobody* has the authority to hire, discharge, discipline, assign, or direct employees (or to exercise the other indicia of supervisory authority set forth in Section 2(11)?'"[3] In other words, the Board is responsible for applying "the general provisions of the Act to the complexities of industrial life."[4] These "complexities" include the reality that most businesses cannot operate, and many business functions cannot be performed, unless a reasonable number of people exercise supervisory authority regarding a particular facility, shift or function.

Here, the road supervisors are the Employer's only agents in the field observing coach operators and policing the Employer's policies. The Employer has shown that the road supervisors possess and exercise authority to issue written OBNs to coach operators for dereliction of duty or other misconduct. Acting in the Employer's interest, the road supervisors make judgments about whether particular misconduct can be adequately addressed with an informal counseling session or whether further action needs to be taken via issuance of an OBN. As noted by the majority, the road supervisors do not themselves decide the particular level of additional discipline that an operator will receive. That decision is made by the administrative senior supervisors. However, the record shows that the administrative senior supervisors—who have not witnessed the coach operator's misconduct—defer greatly to the road supervisor's factual findings and determination that an infraction has been committed. In other words, the Employer's disciplinary system is one of shared authority in which the road supervisors play a critical role.

Currently, the Board finds that a putative supervisor's authority to coach, counsel, and/or warn an employee for misconduct or dereliction of duty constitutes Section 2(11) disciplinary authority only when such coaching, counseling, or warning is a step in a rigid progressive disciplinary policy, thereby laying the foundation for further disciplinary action against an employee. See, e.g., *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 3 (2014); *Oak Park Nursing Care Center*, 352 NLRB 27, 28 (2007). I disagree with that line of precedent. In my view, the Board has too narrowly construed the word "discipline" in Section 2(11) to exclude these forms of punishment where an employer lacks an inflexible, lockstep disciplinary policy, at least where an employer proves that it relies on such warnings when imposing discipline for further instances of misconduct. In my view, the Board's current requirements are incongruent with a common sense understanding of the term "discipline."

[2] I previously articulated these factors in *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 5 fn. 9 (2015) (Member Miscimarra, dissenting), in which the Board majority held, over my dissent, that tugboat captains failed to qualify as statutory supervisors. As I explained in my dissent in *Buchanan Marine*, these factors do not comprise a new test for supervisory status, but rather constitute a guide to how the Board should *apply* the indicia of supervisory status that Congress listed in Section 2(11). *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 10 (Member Miscimarra, dissenting) (emphasis in original).

[3] *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 10 (Member Miscimarra, dissenting) (emphasis in original).

[4] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (citation omitted). See also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

Under the circumstances of this case, I would find that the road supervisors have Section 2(11) disciplinary authority. The Employer maintains an electronic spreadsheet of all OBNs issued by road supervisors, and it is undisputed that those OBNs lay the foundation for further discipline under the Employer's system. Cf. *Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1045 (2003) (finding that disputed individual effectively recommended discipline by bringing rule infractions and misconduct to the employer's attention, thereby initiating the discipline process). Thus, the nature of the Employer's operations include a shared system of disciplinary authority (between the 43 road supervisors and 4 administrative senior supervisors), necessitated by the fact that the 750 coach operators are spread throughout the Las Vegas metropolitan area driving buses outside the presence of the 4 administrative senior supervisors. Under the majority's view, the ratio of statutory employees to statutory supervisors is roughly 100-to-1, a ratio that stands out as disproportionately high.[5] See, e.g., *Formco, Inc.*, 245 NLRB 127, 128 (1979) (finding that ratios of 30-to-1 and 70-to-1 were disproportionately high and supported a finding that disputed leadmen were statutory supervisors ineligible to vote in election). Under the circumstances, I find it implausible to conclude that all Section 2(11) disciplinary authority is vested in persons (eight senior supervisors) other than the road supervisors.

Congress exempted supervisors from the Act based on its judgment that "an employer is entitled to the undivided loyalty of its representatives." *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). It is noteworthy that the Petitioner already represents the 750 coach operators, and now it seeks to represent the 43 road supervisors who are vested with significant disciplinary authority over them. If the Petitioner prevails in the election directed by my colleagues, and if a collective-bargaining dispute occurs between the coach operators and the Employer, would the 43 road supervisors turn a blind eye to a concerted slowdown committed by their union brothers and sisters? Or, can the Employer rest assured, even during heated negotiations, that is has the undivided loyalty of the road supervisors and that they will continue issuing OBNs if and when operators fail to adhere to bus schedules or violate other policies? In my view, the majority's ruling that the road supervisors are statutory employees creates a risk that the Employer's first-line disciplinarians, feeling divided loyalties, may not be counted on to adequately perform their duties.

For these reasons, I would affirm the Regional Director's dismissal of the election petition.

Dated, Washington, D.C. January 20, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[5] Under the majority's view there are approximately 793 statutory employees (the 750 coach operators and the 43 road supervisors), and only 8 statutory supervisors (the 4 administrative senior supervisors and the 4 senior road supervisors).