

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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WOLF CREEK NUCLEAR OPERATING CORPORATION,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 14-RC-160836
	)	
UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, INTERNATIONAL UNION AND ITS LOCAL 252,	)	
	)	
Petitioner.	)	
	)	

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**EMPLOYER’S BRIEF ON REVIEW OF REGIONAL DIRECTOR’S  
DECISION AND ORDER**

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## **EMPLOYER’S BRIEF ON REVIEW**

Pursuant to § 102.67 of the Board’s Rules and Regulations, the Employer, Wolf Creek Nuclear Operating Corporation (“Wolf Creek” or “Employer”), files this brief in support of the Regional Director’s Decision and Order dated October 14, 2015, finding that the Employer’s (four) Security Instructors are “managerial employees” under the National Labor Relations Act (“Act”). (10/14/15 D&O, p.17).<sup>1</sup>

### **STATEMENT OF THE CASE**

Wolf Creek operates a nuclear power facility located in Burlington, Kansas. There are approximately 1,100 employees employed at the facility, 400 of whom are represented by the International Brotherhood of Electrical Workers Local Union 225 (“IBEW”), and approximately 100 security officers who are represented by the Petitioner, United Government Security Officers of America, International Union and its Local 252 (“Union”). (10/14/15 D&O, p.3).

### **Previous Case: 14-RC-158769**

On August 26, 2015, the IBEW filed an election petition seeking to represent the same unit as at issue in the instant case: all full-time and regular part-time Security Instructors employed by the Employer at its Burlington, Kansas nuclear power facility. A hearing was held on August 25, 2015 before Hearing Officer Carla Coffman. The sole issue in that case was whether, under Section 9(b)(3) of the Act, the IBEW could be certified as a representative of a unit of guards since the IBEW, admittedly, represents non-guard employees of the Employer. The managerial nature of the Security Instructors’ duties was not considered by the Regional Director. (10/14/15 D&O, p.1, fn.1). On September 11, 2015, the Regional Director issued his Decision and Order finding that the IBEW was statutorily precluded from representing the

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<sup>1</sup> References to “(10/14/15 D&O)” are to the Regional Director’s Decision and Order in this case.

Security Instructors under Section 9(b)(3) of the Act. (9/15/15 D&O, p.1).<sup>2</sup> The IBEW did not file a request for review in that case and, under Section 102.67(g) of the Board's Rules and Regulations, the Regional Director's actions in that case are final. 29 C.F.R. § 102.67(g).

**Current Case: 14-RC-160836**

Two weeks later, on September 28, 2015 Petitioner filed an election petition seeking to represent the same unit: all full-time and regular part-time Security Instructors employed by the Employer at its Burlington, Kansas nuclear power facility. (10/14/15 D&O, p.1).

A hearing was held on October 6, 2015 before the same Hearing Officer, Carla Coffman, to determine whether the Security Training Instructors are managerial employees excluded from coverage under the Act. Significantly, at the hearing, Petitioner stipulated that the "transcript, exhibits and Decision and Order" in the previous case (14-RC-158769) "may be considered in this matter, as they accurately reflect the duties" of the Security Instructors. (10/14/15 D&O p.1. fn.1) (emphasis supplied).

At the conclusion of the hearing, the parties made closing arguments. Regional Director Daniel L. Hubbel issued his Decision and Order on October 14, 2015, finding that the Employer's Security Instructors are managerial employees and are not covered under the Act. (10/14/15 D&O, p. 17).

Petitioner on October 8, 2015 filed with the Board a petition for review of the Regional Director's Decision and Order. Wolf Creek opposed Petitioner's request for review. On February 9, 2016, the Board issued an Order granting the petition in part, stating that a substantial issue was raised solely with respect to whether the Employer's security training instructors are managerial employees. In all other respects, the request for review was denied.

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<sup>2</sup> Reference to "(9/15/15 D&O)" are to the Regional Director's Decision and Order in the previous case.

## STATEMENT OF FACTS

Few, if any, facts in this case are in dispute. Indeed, at the hearing in this matter, Petitioner specifically stipulated that the “transcript, exhibits and the Decision and Order” in the previous case (14-RC-158769) “accurately reflect the duties” of the Security Instructors. (10/14/15 D&O p.1. fn.1). Additionally, in its Request for Review, Petitioner agreed with the “pertinent factual findings” made by the Regional Director in his October 14, 2015 Decision and Order in this case.

### **A. Security Department**

Because of the nature of the Employer's product, nuclear energy, its operations are strictly regulated by the Nuclear Regulatory Commission (NRC). (9/11/15 D&O, p.2). With respect to the security aspects of the Employer's operation, NRC Regulatory Guide 5.75 sets forth the guidelines for training and qualifying security personnel and security instructors at nuclear power reactor facilities. (*Id.*). Failure to comply with NRC guidelines can result in loss of the Employer's operating license. (*Id.*).

The Security Department is responsible for the overall security of the Employer's facility. (9/11/15 D&O, p.2). The Security Department is broken down into Security Operations and Security Support, each overseen by a superintendent. (*Id.*).

Security Operations employees consist of lieutenants, sergeants, and security officers, typically referred to as guards. (*Id.*). The guards are represented by Petitioner.

Security Support employees consist of a security instructor supervisor, a security support supervisor, a supervisor of access screening, an assistant procedure writer, two armorers, a locksmith, and four Security Instructors (“SI”). (*Id.*).

## **B. Security Operations – Security Officers**

The Security Operations superintendent oversees security officer Supervisors whose titles are military-type ranks of lieutenant and sergeant. (10/14/15 D&O, p.3). These supervisors oversee the Security Officers (“SOs”). (10/14/15 D&O, p.4). The SOs’ titles consist of armed response officers, senior security officers, access control officers, and watchpersons. (*Id.*). All of the above listed employees work from the Employer’s security building which is located just inside the entrance to the facility. (*Id.*).

SOs, including supervisors, work rotating 12-hour shifts, are hourly paid, and wear uniforms. (*Id.*). They monitor the entrances and exits to the facility; search property, visitors, vehicles, and employees seeking access to the facility; and patrol the Employer's grounds by manning posts throughout the facility. (*Id.*).

NRC Regulatory Guideline 5.75 requires the Employer to have a training program. (*Id.*). SOs must be certified, through this training program, to perform their duties as security officers. (*Id.*). When hired, SOs, initially classified as armed security officers (ASO), are assigned a security operations supervisor of record; however, during the orientation and training period the **ASO’s are assigned to a SI [Security Instructor] for supervision** and training. (*Id.*) (emphasis supplied). After an ASO is certified, the ASO is then assigned a post and a correlating supervisor lieutenant or sergeant from Security Operations. (10/14/15 D&O, p.5).

Certification is attained through classroom instruction implemented by SIs who verify completion of each element of training followed by on-the-job training implemented by SO lieutenants and/or sergeants. (*Id.*). Training subjects are extensive and dictated by the NRC Guideline 5.75, Appendix B, and provide for training in 28 specific job functions, although additional training can be required by the Employer. (*Id.*). For example, SOs are trained on the

use of pepper spray, handcuffs, protective gear, suspect control and restraint tactics, performance of duties while wearing a gas mask, and other SO-related duties. (*Id.*). SOs also receive firearms training and certification which is paid for by the Employer. (*Id.*).

SOs, including SO supervisors, go through a quarterly training cycle to maintain certification of the Appendix B requirements. (*Id.*). Training is done through additional classroom instruction as well as small “tabletop” drills simulating various real life security-related scenarios on 3D models of the Employer’s facility. (*Id.*). Large force-on-force simulated security threat drills are conducted annually on the facility grounds. (*Id.*). The SOs are assigned to one of six blocks. (*Id.*). Accordingly, 24 quarterly training drills are conducted annually. (*Id.*). In addition, SOs, including SO supervisors, must be recertified in use of their firearms. (*Id.*). Failure to re-qualify may jeopardize retention; however, such SOs would be retrained by the SIs and brought up to appropriate levels performance. (*Id.*).

### **C. Security Support – Security Instructors**

Security Instructors (“SI”) are assigned to the Security Support side of the Security Department and are supervised by the SI supervisor. (*Id.*). The parties stipulated that the four SIs have similar duties, responsibilities, and authority; have similar wages, hours, and working conditions; and can be treated as one single group in order to determine whether they are managerial employees. (10/14/15 D&O, p.2).

#### **1. Hours, Pay and Uniforms**

SIs work Monday through Thursday, 6 a.m. to 4:30 p.m., are salaried employees (10/14/15 D&O, p.5), and earn higher wages than hourly paid guards. (911/15 D&O, p.4). All the current SI’s have at least 3 years prior SO experience and previously served as SO at the Employer’s facility. (10/14/15 D&O, p.4). Unlike the SOs, the SIs do not wear uniforms.

(10/14/15 D&O, p.5). SIs are not certified as SOs, and NRC guidelines preclude them from performing SO duties such as manning posts, performing people and vehicle searches, or monitoring the facility. (10/14/15 D&O, p.6). Also, SIs do not carry firearms except when conducting weapons training, nor do they carry pepper spray or handcuffs. (*Id.*).

## **2. Work Independently**

SIs are not assigned to specific posts; rather, they work at the security building performing classroom instruction or at the firing range overseeing its operation and performing firearm training and qualifying of the SOs and SO supervisors. (*Id.*). Because the SIs perform their duties at different locations, they are not directly supervised by the training supervisor on a day to day basis. (*Id.*). The SIs perform their training duties independently. (*Id.*).

## **3. Primary Role**

The SIs' primary role is to provide initial and continuing educational training to the SOs, including the SO supervisors, enabling them to implement physical security at the Employer's facility. (*Id.*). The SI job description, entered as Joint Exhibit 1 in Case 14-RC-158769, states SIs are responsible for "developing training materials utilizing the Systematic Approach to Training and conducting training to develop the knowledge, skills, and abilities of the security personnel in the performance of their job duties in the protection of the plant from theft or sabotage of special nuclear material." (*Id.*).<sup>3</sup> The Systematic Approach to Training requires the SIs to analyze, design, develop, implement, and evaluate. (*Id.*). The job description further states SIs "prepare lesson plans, tests, procedures and other support documents as necessary to implement assigned programs." (*Id.*).

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<sup>3</sup> Petitioner stipulated in this case that the exhibits in Case 14-RC-158769 "accurately reflect the duties of the SIs" (10/14/15 D&O, p.1, fn.1).

#### **4. Classroom Instruction**

The SIs are solely responsible for the classroom instruction of the SOs and SO supervisors based on the NRC guidelines. (*Id.*) SIs develop lesson plans, design training programs, and create rules for the protection of the Employer's property and personnel to satisfy NRC guidelines. (*Id.*) SIs utilize NRC regulation 5.75 as guidance for the creation of their lesson plans covering each of the NRC required subject areas. (*Id.*) SIs also utilize Operational Experience information obtained from similar facilities and incorporate it into their lesson plans if applicable to the specific demands of the Employer's operation and facility. (10/14/15 D&O, p.7). SIs also determine whether subject matter experts, someone with specific expertise in a particular security area, will be brought in to facilitate training. (*Id.*) The SIs also may reach out to contacts at other agencies or similar employers for additional teaching modules. (*Id.*) Lastly, SIs use their own occupational experiences as teaching material. (*Id.*)

SIs are responsible for revising their lesson plans to incorporate new or changed NRC regulations, changes in past practice, and changes in management expectations. (*Id.*) After an SI creates a new or updates an existing lesson plans it is possibly reviewed by an end-user such as an SO for technical accuracy, and then reviewed by the training supervisor and approved by the Security Support superintendent. (*Id.*) Lesson plans are expected to be complete when submitted for review and are typically approved with no, or only minor, changes. (*Id.*) If an SO has difficulty in a specific area, the SI can determine if his training in that area needs to be altered to address the specific SO's difficulty. (*Id.*) SIs can train SOs on areas above those required by the NRC, such as when the Employer has additional equipment for security use not covered by the NRC, but the SIs cannot train on fewer functions than the NRC dictates. (*Id.*)

However, as the Employer does not utilize shotguns, SIs do not train SOs on that NRC function. (*Id.*).

During classroom instruction, the SIs teach from the created lesson plans. (*Id.*). The SIs decide whether other documents will be handed out to the SOs, if and what instructional videos will be shown, and whether subject matter experts will lecture. (*Id.*). While the NRC guidelines dictate the various subject areas in which instruction needs to be provided, the SIs determine the format and content of each lesson and can supplement the training with additional subjects. (*Id.*).

## **5. Exams**

After completion of classroom and on-the-job training, SOs take written exams covering each subject area. (10/14/15 D&O, p.8). The SIs write the various exams by drawing from a database of exam questions ensuring that there are questions covering each subject area. (*Id.*). The questions drawn from the database were initially written and submitted by SIs. (*Id.*). SO supervisors and SOs may also write questions for potential use in an exam. (*Id.*). All questions are approved by the training supervisor before being uploaded into the database. (*Id.*). If an exam is considered of poor quality, the SI is accountable. (*Id.*). If an SO does not qualify in a particular area, the SI decides whether remedial training is necessary and if so, conducts that additional training. (*Id.*). SIs also provide continuing education instruction to SOs and SO supervisors. (*Id.*). SIs spend approximately 60 percent of their time instructing the SOs and SO supervisors, and 40 percent developing and preparing for training. (*Id.*).

## **6. Firearms Qualifications and Firing Range**

In addition to classroom training, SIs also train and certify SOs and SO supervisors on firearm qualifications. (*Id.*). The Employer pays for the SIs certification every 3 years to instruct and certify the SOs and SO supervisors on firearms usage. (*Id.*). In addition to firearm training

and qualifying, the SIs are solely responsible for the operation of the firing range, including giving users a safety briefing, explaining the qualifying agenda and course of fire, checking out/in of weapons, adjusting of sights on the weapons, ensuring proper maintenance of weapons, and control of participating students. (*Id.*). The SIs maintain the keys to the weapons locker at the firing range. (*Id.*). Malfunctioning weapons are sent to the Employer's armory for repair. (*Id.*). Outside agencies may also utilize the Employer's firing range and the SIs are responsible for ensuring the safe conduct of the outsiders on the range. (10/14/15 D&O, p.9). The SIs are responsible for enforcing firing range safety rules and procedures both on the range and in the range classroom. (*Id.*). If a participant is disruptive or fails to follow safety rules, the SI may instruct the participant to leave the range. (*Id.*). When a new ASO is being initially trained on the firing range, the ASO is still under the direct supervision of an SI. (*Id.*). When SOs return to the firing range for requalification, their SO supervisors accompany them. (*Id.*). If an SO engages in misconduct on the range, the SI is responsible for reporting the SO to the SO's direct supervisor. (*Id.*). SIs are also responsible for the target systems used in firearm target practice which is used in training the SOs and their supervisors. (*Id.*). SIs establish the program of pop-up targets for target practice and evaluate SOs' performance through a laser system known as MILES. (*Id.*). SIs also provide feedback to SOs on their firearm skills and readiness, and certify them when they have met all qualifications. (*Id.*). SOs are permitted more than one attempt at firearm qualification. (*Id.*). After each failed attempt, the SI notifies the training supervisor as well as the SO's supervisor of record. (*Id.*). The SI determines whether retraining is required before permitting additional attempts to qualify. (*Id.*). After failing a third attempt, the SI can recommend whether the SI believes the SO will succeed. (*Id.*). The SI job description sets forth the specific details of the SIs' responsibilities with respect to firearms, and these are to

include: “safe handling of firearms, safe operation of firing range, test fire, functions test, operability, check accuracy, adjustment of sighting systems, trouble-shoot firearms malfunctions, accountability and inventory of equipment and firearms at the firing range.” (*Id.*).

## **7. Tactical Response Drills and Force-on-force Exercises**

In addition to classroom instruction, and firearms training and certification, SIs also design, instruct, implement, and evaluate the quarterly “tabletop” tactical response drills and annual force-on-force exercises mentioned above. (10/14/15 D&O, p.10). The SIs design the drills and exercises to comply with the NRC guidelines. (*Id.*). Tactical response drills are limited to specific security issues while the force-on-force exercises are plant-wide and may involve other non-security personnel and outside sources, including employees from other employer facilities. (*Id.*). The SIs act as the lead controllers for the adversary role and they determine the placement and duties of the various players in the drill scenarios. (*Id.*). The tactical exercises may last from 1 to 6 hours and occur quarterly in each of the 6 security operation blocks. (*Id.*). The force-on-force exercises occur 6-8 times per year. (*Id.*). Local law enforcement is notified of all force-on-force exercises to eliminate any fears of a real security threat. (*Id.*).

These drills and exercises are conducted by the SIs to ensure the Employer’s security operations can keep the employees, public, and the facility safe from internal and external threats. (*Id.*). After each drill, the SIs, as well as the training supervisor, the Security Support superintendent and the Security Department manager, then critique the performance of the players in the drill. (*Id.*). The SIs conduct the critique by asking questions designed to address NRC guidelines and record the results. (*Id.*). Every third year, the NRC attends and evaluates the force-on-force exercise and determines whether the facility passes its review. (*Id.*).

Individual personnel are not critiqued. (*Id.*). The SIs serving as lead controllers in the force-on-force exercise will critique their opponent's performance. (*Id.*). Lessons learned from the exercise are then incorporated by the SIs into their lesson plans for classroom instruction. (*Id.*).

## **8. "Safeguards" and Defensive Security Strategy**

Lastly, SIs serve as "custodians" of the "Safeguard" cabinets in the security building which is where the Employer's security defense plan is kept. (10/14/15 D&O, p.11). This security plan is the Employer's defensive security strategy to protect and defend the plant, its employees, and the public from internal or external threats and attacks. (*Id.*). Only the "custodians" have the combination to the secured cabinet and no other trainers or personnel have access to the security department's "Safeguard" cabinet. (*Id.*). The security custodians are also responsible for determining what personnel have a "need to know" basis for reviewing or accessing the "Safeguard" cabinet. (*Id.*). The "custodians" are responsible for allowing appropriate access and return of the security plan documents to the cabinet. (*Id.*). The custodian's release of the "Safeguard" documents to inappropriate persons or groups is subject to civil and criminal penalties. (*Id.*). While other departments also have "safeguard" cabinets containing documents related to the operation of their departments in compromised situations, only security "custodians" have access to the security "Safeguard" cabinet housing the security plan. (*Id.*). None of the SOs serve as "custodians" for the security "Safeguard" cabinet. (*Id.*).

## **ARGUMENT**

### **A. Managerial Employees are Not Covered by the Act**

It is well-settled that managerial employees are not covered by the Act. Indeed, over 40 years ago, the U.S. Supreme Court held:

In sum, the Board's early decisions, the purposes and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent

construction of the Act for more than two decades, and the decisions of the courts of appeals all point *unmistakably to the conclusion that “managerial employees” are not covered by the Act.*

*NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 289; 94 S.Ct. 1757, 1769 (1974). (emphasis supplied).

In *NLRB v. Yeshiva, Univ.*, 444 U.S. 672, 682-83; 100 S.Ct. 856, 862 (1980), the U.S. Supreme Court defined managerial employees and set forth the following test:

Managerial employees are defined as those who “*formulate and effectuate management policies by expressing and making operative the decisions of their employer.*” *NLRB v. Bell Aerospace Co., supra* (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323, n.4 (1947)... Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management... Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he *represents management interest by taking or recommending discretionary actions that effectively control or implement employer policy.*

(Emphasis supplied).

In *Yeshiva*, the Court explained that managerial employees, like supervisors, “are excluded from the categories of employees entitled to the benefits of collective bargaining” under the Act, because “both exemptions grow out of the same concern: that an employer is entitled to undivided loyalty of its representatives.” 444 U.S. at 682.

**B. The Regional Director Correctly Found the Security Instructors (SIs) “Formulate and Effectuate Policies”**

In the instant case, the Regional Director applied *Yeshiva* and correctly found that the SIs “formulate and effectuate management policies in the creation, implementation, and enforcement of the Employer’s security training.” (10/14/15 D&O, pp. 13-14).

The failure to comply with the Nuclear Regulatory Commission (“NRC”) guidelines “for training and qualifying security personnel” can result “in loss of the Employer’s operating

license.” (9/11/15 D&O, p.2). Thus, the Regional Director properly concluded that the “Employer’s need to comply with the NRC’s security training requirement makes the security training program a significant Employer policy. (10/14/15 D&O, p.14).

In addition, it is undisputed<sup>4</sup> that:

- “SIs develop lesson plans, design training programs, and create rules for the protection of the Employer’s property and personnel to satisfy the NRC guideline.” (9/11/15 D&O, p.9).
- SIs “are solely responsible for the classroom instruction of the SOs and SO supervisors.” (10/14/15 D&O, p.6).
- SIs are “solely responsible for the operation of the firing range,” including “enforcing firing range safety rules and procedures both on the range and in the range classroom.” (10/14/15 D&O, pp. 8-9).
- SI’s also “design, instruct, implement, and evaluate quarterly tactical response drills and annual force-on-force exercises.” (9/11/15 D&O, p.5).
- SI’s “serve as ‘custodians’ of the ‘Safeguard’ cabinets” and are the only ones who “have the combination” to the “Employer’s defensive security strategy to protect and defend the plant, its employees, and the public from internal or external threats and attacks.” (10/14/15 D&O, p.11).

Thus, the Regional Director correctly concluded that “the SIs classroom instruction, firearm qualification, tactical training exercises, and custodial care of the Employer’s ‘safeguard’ defense strategy” effectuate management policies as “defined by the Court in *NLRB v. Yeshiva University*.” (10/14/15 D&O, p.14).

**C. The Regional Director Correctly Found the Security Instructors (SIs) Exercise Discretion**

The record is replete with evidence of the SIs exercise of discretion within, or even independently of, established employer policy, including:

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<sup>4</sup> Petitioner stipulated that the Decision and Order in the previous R-case “accurately reflect the duties of the SIs” in the instant case. (10/14/15 D&O, p.1, n.1.).

- “While the NRC guidelines dictate various subject areas in which instruction needs to be provided, the SIs determine the format and content of each lesson and can supplement the training with additional subjects.” (10/14/15 D&O, p.7).
- SIs also “determine whether subject matter experts” will be brought in to facilitate training, “may reach out to contact at other agencies or similar employers for additional teaching modules;” and “are responsible for revising their lesson plans to incorporate new or changed NRC regulations, changes in past practice, and changes in management expectations.” (10/14/15 D&O, p.7).
- SIs decide whether “documents will be handed out to the SO, if and what instructional videos will be shown, and whether subject matter experts will lecture.” (*Id.*).
- SIs “are not directly supervised” on a “day to day basis” and “perform their training duties independently.” (10/14/15 D&O, p.6).
- SIs also write the various exams. Although the exam questions are drawn from a database, all the questions “were initially written and submitted by SIs.” (10/14/15 D&O, p.8).

The record is clear that “lesson plans are expected to be complete when submitted for review and are typically approved with no, or only minor changes.” (10/14/15 D&O, p.7). The Regional Director found that the SIs have discretion, and correctly noted that the “fact that upper management occasionally suggests a minor change does not diminish the SIs’ effective power in formulating and implementing the Employer’s training program.” (10/14/15 D&O, pp. 14-15) (citing *The Republican Co.*, 361 NLRB No. 15, slip op. at 4 (2014); *NLRB v. Yeshiva University*, supra at 684, fn. 17).<sup>5</sup>

Even more significantly, SIs have discretion in creating the tabletop drills and force-on-force exercises – including “designing the drills and exercises,” acting as the “lead controllers” in the drill scenarios, and conducting the post-drill “critiques.” (10/14/15 D&O, p.10). As a

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<sup>5</sup> Petitioner’s reliance on *Roofing, Metal & Heating Assoc.*, 304 NLRB 155, 161 (1991) is grossly misplaced, in that the instructor in that case retained his membership in the Union, the curriculum “was already in place” when he was hired, and he “had virtually no power or authority to act autonomously in any meaningful sense.” Similarly, *Rockspring Development, Inc.*, 353 NLRB 1041, 1043 (2009), cited by Petitioner, is inapposite, in that the individual in that case “merely uses materials suggested to him” or taken from “agencies websites” and “does not independently compose” training materials.

result, the Regional Director properly concluded that the “SIs discretion in creating and implementing the various drills and exercises that serve as precursors to the three year NRC review, failure of which could mean the Employer losing its operating license, are indicative of managerial employee status.” (10/14/15 D&O, p.15) (citing *Tops Clubs, Inc.*, 238 NLRB 928 fn. 2 (1978), quoting *Bell Aerospace*, supra.).

#### **D. The Regional Director Correctly Found SIs Interests are Aligned with Management**

There is overwhelming evidence in the record that the SIs interests are aligned with management, including:

- All aspects of the classroom and firing range security training program for the approximately 100 SOs and the SO supervisors are created and implemented by the 4 SIs. (10/14/15 D&O, p.16).
- During orientation and training, armed security officers “are assigned to a SI for supervision and training.” (10/14/15 D&O, p.4) (emphasis supplied).
- If a SO does not qualify in a particular area, the SI decides whether remedial training is necessary (10/14/15 D&O, p.8), and can recommend whether the SI believes the SO will succeed. (10/14/15 D&O, p.9).
- SIs also provide continuing education instruction to SOs and SO supervisors. (10/14/15 D&O, p.8). In addition, recertification of SOs, including SO supervisors, are the responsibility of the SIs. (10/14/15 D&O, p.16). See, *Miller Electric Co.*, 301 NLRB 294, 298-299 (1991) (employee found to be managerial where the work performed in the training department and the actual training of employees and supervisors came under the employee’s responsibility); *Peter Kiewitt Sons’ Co.*, 106 NLRB 194, 196 (1953) (“lecturers” who “plan and present the indoctrination program for all employees and the training program for all supervisors...have interests more closely aligned with management than with employees”).
- SIs maintain the keys to the weapons locker at the firing range (10/14/15 D&O, p.8) and are responsible for ensuring the safe conduct of the outsiders on the range (10/14/15 D&O, p.9). If a participant is disruptive or fails to follow safety rules, the SI may instruct the participant to leave the range. (*Id.*). And if an SO engages in misconduct on the range, the SI is responsible for reporting the SO to the SO’s direct supervisor. (*Id.*).
- Unlike SOs, SI do not work 12-hour shifts (only days), do not wear uniforms, do not carry firearms, pepper spray or handcuffs, and are assigned to the Security Support

section of the Security Department rather than the Security Operations section to which the SOs are assigned. (10/14/15 D&O, p.17).

Thus, the Regional Director correctly found that the “functions and interests of the SIs are more closely aligned with management than with the SOs, and therefore, they are less like ‘employees’ as defined in the Act. (10/14/15 D&O, p.16) (citing *North Arkansas Electric Cooperative*, 185 NLRB 550 (1970), quoting *Bell Aerospace*, supra; *The Republican Co.*, supra citing *Allstate Insurance Co.*, 332 NLRB 759, 762 (2000).

### **CONCLUSION**

As demonstrated in the record, including the transcript, exhibits and Decision and Order in the previous case that was stipulated to by the Petitioner, there is ample evidence that the SIs in this case are managerial employees and are not covered by the Act. Accordingly, the Regional Director’s Decision and Order in this case should be upheld.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The foregoing Employer's Brief on Review of Regional Director's Decision and Order, was electronically served on the following on February 23, 2016:

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