On August 29, 2018, International Brotherhood of Teamsters, Studio Transportation Drivers, Local 399 (Petitioner or Union) filed a petition (the Petition) under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent all full-time and regular part-time DOT Administrators/Specialists employed by Warner Bros. Television (Employer). 1

On September 7, 2018, a hearing was held before a Hearing Officer of the National Labor Relations Board (Board). Four issues were litigated at the hearing: (1) whether the DOT Administrators/Specialists (DOT Administrators or Administrators) are guards within the meaning of Section 9(b)(3) of the Act; (2) whether the DOT Administrators are managerial employees and not statutory employees within the meaning of Section 2(3) of the Act; (3) whether the DOT Administrators are confidential employees; and (4) whether the DOT Administrators are supervisors within the meaning of Section 2(11) of the Act. The parties stipulated that if the DOT Administrators are not guards, managerial employees, confidential employees, or supervisors, then the petitioned-for unit is an appropriate unit for the purpose of collective bargaining.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. For the reasons set forth below, based on the record and relevant Board law, I find that the Employer has failed to meet its burden of establishing that DOT Administrators are guards within the meaning of Section 9(b)(3) of the Act, managerial employees, confidential employees, or supervisors within the meaning of Section 2(11) of the Act. Pursuant to the parties’ stipulation, I further find that the employees in the petitioned-for unit constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Accordingly, I shall direct an election in the petitioned-for unit.

1 At the hearing, the parties agreed to amend the Petition and other formal documents to correct the name of the Employer and the Petitioner as captioned herein, and I allowed that amendment.
I. Facts

1. General Background

The Employer produces television series and television motion pictures and employs, among others, a classification of employees referred to as drivers. Drivers are responsible for transporting vehicles, sets, equipment, performers, crew members, audiences, and other materials to and from the various locations where productions are being filmed. Over the course of a year, the Employer employs approximately 800 drivers and operates approximately 700 vehicles. Drivers are required to act in accordance with rules and regulations established by entities including the Federal Department of Transportation (DOT), the Federal Motor Carrier Safety Administration, and the State of California. Drivers are also responsible for acting in accordance with internal rules and policies maintained by the Employer. In general, the policies, rules, and regulations applicable to drivers are designed to promote the safe operation of commercial vehicles. If the Employer were to violate the DOT regulations, then the Employer could be assessed fines or the Employer’s DOT number could be suspended.²

To aid in ensuring that the Employer and its drivers are in compliance with the applicable rules and regulations, the Employer employs DOT Administrators. DOT Administrators are directly supervised and overseen by the Employer’s Director of DOT Compliance Joshua Newell (Director Newell). Director Newell oversees compliance with DOT regulations for all of the Warner Brothers entities in North America, including the Employer. As will be discussed further below, working under Director Newell’s supervision, the job duties of the DOT Administrators are geared toward ensuring drivers are in compliance with the various applicable rules and regulations.

2. Job Duties of the DOT Administrator

Around the time that a DOT Administrator is hired, he is assigned to a particular production by Director Newell. The DOT Administrator’s duties include providing the drivers working on that production with paperwork including a driver qualification application (application) and, when the driver is finished filling it out, collecting the application from the driver.³ As part of that process, for each driver, the Employer gives the DOT Administrator a document called a Motor Vehicle Report (MV Report), which is a report that the Employer obtains from the Department of Motor Vehicles (DMV) showing the driving record maintained by the DMV for a particular individual.

Once a driver’s application is collected, the DOT Administrator examines it to make sure that it is properly filled out and all dates and signatures are provided. Specifically, the DOT Administrator looks to see if the application contains blank spaces, contradictory information, or missing or incomplete information. The DOT Administrator further reviews a section of the

² There is no evidence showing that the Employer has ever incurred fines or had its DOT number suspended.
³ Employer Exhibit 5 is a copy of the application that the DOT Administrators give to drivers employed or hired by the Employer.
driver's application paperwork called “MVR Release” and checks the information provided by the driver against the MV Report to see if information is missing or if there are discrepancies.

If the DOT Administrator finds that the driver’s application contains an error or discrepancy, the next step to resolve the issue depends on what type of error it is. For issues involving a violation of legal regulations, Director Newell has instructed DOT Administrators to bring that issue directly to him so that he may utilize his discretion to decide how to handle the issue. On the other hand, if the driver’s application does not have an area code for a phone number or a space is left blank, the DOT Administrator follows up with the driver and asks the driver to fill in that information. For these types of minor issues, DOT Administrators have authority to ask the driver to fix the issue. For more serious issues, however, such as the driver’s application stating he has had no accidents and the MV Report shows otherwise, the DOT Administrator will report such issues to Director Newell. To further illustrate, in situations where a driver’s application states that he has a “passenger endorsement,” but the driver’s license did not indicate that endorsement, the DOT Administrator could either talk to the driver and see if it was an inadvertent error, or he could report the issue to Director Newell. After a DOT Administrator notifies Director Newell concerning an issue with a driver’s application, Director Newell sometimes asks the driver about it himself or sometimes he asks the DOT Administrator to inquire with the driver about it, depending on how busy Director Newell is. If the driver does not have an explanation for an issue on his application, then Director Newell will take the issue to the labor relations department (Labor Relations).

In addition to furnishing, collecting, and reviewing the application paperwork for drivers, on a daily basis DOT Administrators collect forms from the drivers called driver logs and make sure that the logs are completed and accurate. They also collect the Captains’ Reports which show the drivers’ in and out times for the day. Because laws and regulations limit the number of hours that a driver may work in a day, driver logs enable the Employer to determine whether the driver abided by those legal requirements. If the DOT Administrator notices that the information on a driver log looks inaccurate or the penmanship does not appear to be the driver's handwriting, he will report the issue to Director Newell. The DOT Administrator may also compare the logs against the Captain’s Report to verify the information stated in the driver log. After collecting the driver logs, the DOT Administrator scans the logs and puts them on a website called the Motion Picture Compliance website. The original copies of the driver logs are kept at the transportation office.

DOT Administrators also collect vehicle paperwork for vehicles that the Employer rents or operates. The information provided in that paperwork enables a determination of whether the vehicle is safe and roadworthy by DOT standards. DOT Administrators check if the vehicle paperwork is expired. The inspection of the vehicle itself is usually performed by a mechanic.

To collect paperwork and inquire with drivers regarding errors and inconsistencies on the paperwork, DOT Administrators physically go to the production set or studio lot to meet in

4 Other examples of serious issues are when a driver does not have a license, has a suspended license, or refuses to fill out the paperwork.
5 Once the driver’s hiring packet is complete, the Employer’s DOT Compliance department files it with Warner Brothers Transportation.
person with drivers. When on a set, the DOT Administrator works out of a transportation trailer where the drivers come and gather. DOT Administrators may also work out of an office at which Director Newell assigns them to work.

Not all of the Employer’s productions have an assigned DOT Administrator. If the Employer does not assign a DOT Administrator to the production, the collecting of paperwork is performed by a dispatcher. When a dispatcher collects the paperwork, Director Newell will perform the auditing function.

3. Evidence of DOT Administrators’ Guard-Related Functions and Duties

DOT Administrators do not carry a weapon, club, or security devices. They do not wear uniforms or ID badges. They are not bonded, licensed, or deputized. At the time of hire, the Employer does not conduct a security or background check on prospective DOT Administrators beyond what it performs for any other employee working on the lot. When the DOT Administrators are on a studio lot, they wear a nametag that is the same type of nametag as is worn by the other employees on the lot. Director Newell has never instructed DOT Administrators to use force or to report information to police authorities. Further, DOT Administrators do not have any instructions from the Employer regarding their role in the event of a strike, nor do they have specific instructions concerning what to do in the event of a security threat. DOT Administrators are not involved in frisking individuals or performing shake downs. They do not travel outside of the production office or transportation trailer to monitor drivers, nor do they make rounds on the job site, monitor the entrances or exits of the set or lot, activate or deactivate security devices, or issue visitor’s passes. Regarding the drivers, the Employer does not use any monitoring devices to track or monitor them.

The Employer employs its own security guards who are stationed at all the exits and entrances to the lots and who wear security guard uniforms with a badge and patch. The Employer’s security guards check individuals who come into the lot by checking identification and inspecting the trunk of the vehicle.

4. Evidence of DOT Administrators’ Supervisory, Managerial, and Confidential Functions and Duties

Some of the information that DOT Administrators provide to Director Newell concerning drivers may be used with respect to the Employer disciplining drivers, but the record does not contain any specific examples of instances in which a driver was disciplined based on information provided to the Employer by a DOT Administrator. Further, DOT Administrators do not have any authority to discipline a driver. In addition, there is no record evidence that a driver has ever been terminated based on violating the DOT requirements.

When a DOT Administrator is physically on the set or lot, if he were to witness a behavior such as the driver being aggressive or creating a hostile work environment, he may tell Director Newell about the behavior. There are no specific examples in the record, however, of DOT Administrators reporting such driver behavior, nor is there any evidence showing whether or how the Employer followed up on such a report.
DOT Administrators do not create training modules for employees or provide any training. One slight caveat concerns instances in which a driver, at the time of hire, is not familiar with how to fill out a driver log. In such an instance, the DOT Administrator may show the driver how to fill it out by showing the driver an example of the log. The Employer provides drivers with an example of a properly filled out driver log in the paperwork that DOT Administrators give to drivers when they begin working for the Employer.

DOT Administrators are not involved in the termination, hiring, transferring, suspending, laying off, promoting, or rewarding of employees. DOT Administrators do not direct employees in the performance of their work, nor do they assign employees tasks. According to Director Newell, the primary decision that DOT Administrators make in the performance of their job duties is whether to report errors and minor discrepancies to Director Newell or not report them.

With respect to labor relations, neither Director Newell nor the DOT Administrators who work under him are involved in the processing of grievances for drivers or any other employees. Neither Director Newell nor DOT Administrators participate in contract negotiations, collective bargaining, or the handling of employee grievances. In addition, DOT Administrators do not have access to the Employer's labor relations policy data nor do they have access to confidential material before that material is available to employees or the unions representing the employees. The policies that the Employer's DOT Compliance department follows are created by Director Newell and Labor Relations; DOT Administrators are not involved in the formulation of those policies.

At an unspecified time during the several weeks prior to the hearing, Director Newell became aware of issues that the Employer was having with caterers on the production sets; specifically, at least some caterers were not complying with certain regulations or rules. As a result, Director Newell wanted the caterers to be considered their own motor carrier. Director Newell asked individuals in the Warner Brothers Labor Relations department if caterers could be covered under a collective-bargaining agreement, but his request was rejected by Ruby Little. The record does not specifically reveal how Director Newell became aware of the issue with caterers or how he formed his recommendation to the Labor Relations department, but Director Newell did not discuss his recommended bargaining proposal with any DOT Administrators.

II. Discussion and Analysis

1. Guard Status

i. Legal Framework

Section 9(b)(3) of the Act defines a guard as “any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises.” Under Section 9(b)(3), the Board may not determine that a unit is appropriate for purposes of collective bargaining if the unit includes both guards and non-guards, and the Board may not certify a union as bargaining agent for guards if that union represents both guards and non-guards. The Board has interpreted the
legislative history of Section 9(b)(3) as indicating the intention of Congress to avoid conflicting
loyalties on the part of plant protection employees and to ensure an employer that it would have
a core of such employees to enforce plant rules during a period of unrest and strikes by other
employees. *The Boeing Company*, 328 NLRB 128, 130 (1999); *Burns Security Services*, 300
NLRB 298, 299 (1990), enf. denied 942 F 2d 519 (8th Cir. 1991); *Lion Country Safari*, 225
NLRB 969, 970 (1976).

The Board has found that employees with reviewing and auditing duties similar to the
DOT Administrators in this case are not statutory guards because they “perform duties ordinarily
associated with a clerical checking function and protect the Employer’s property solely as an
incident to such duties.” *Pepsi-Cola Bottling Co. of Cincinnati*, 189 NLRB 105, fn. 1 (1971).
See also *Tac/Temps*, 314 NLRB 1142, 1143 (1994). Similarly, in *55 Liberty Owners Corp.*, 318
NLRB 308 (1995), the Board found that doorpersons and elevator operators in condominium
buildings who continually monitored and regulated access to the building, denied entry to
unauthorized individuals, and observed and reported irregularities were not statutory guards.
The Board reasoned that their security-related duties were incidental to their primary function of
providing receptionist-type services to tenants of the building. *Id.* at 310-311.

ii. Discussion

In this case, the evidence shows that the DOT Administrators are essentially charged with
furnishing to and collecting from drivers certain paperwork (driver applications, driver logs, and
vehicle inspection paperwork), reviewing that paperwork for blanks, errors, or inconsistencies,
and filing the paperwork in the appropriate files. DOT Administrators determine whether there
are issues with the paperwork by reviewing and visually inspecting it for blank spaces or missing
information. Regarding driver applications, DOT Administrators compare the information stated
on the application against the MV Report from the DMV. For driver logs, the Administrators
may check the logs against the Captains’ Report. If the comparison reveals a discrepancy, the
DOT Administrator decides whether to ask the driver about it or report it to Director Newell.6
The evidence shows that DOT Administrators may directly confront a driver about issues with
his paperwork, but there is no evidence that DOT Administrators have authority to enforce
specific rules concerning theft or safety or authority to compel driver compliance with such
rules. Nor is there evidence of a DOT Administrator specifically enforcing a safety-related rule
against another employee or effectively recommending that the Employer enforce such a rule
against an employee. Instead, DOT Administrators play a primarily clerical and administrative
role of merely reporting discrepancies or issues to Director Newell.7 Director Newell and the
individuals to whom he reports decide how to handle discrepancies and if disciplinary action is

6 Regarding vehicle paperwork, the record indicates that DOT Administrators check whether it is expired.
The record does not establish what DOT Administrators do if the paperwork is expired.
7 Director Newell testified that if a DOT Administrator witnesses improper behavior on the part of a
driver, the Administrator may provide that information to him. However, there is no evidence that DOT
Administrators are required to report such behaviors as part of their job duties or that they may take any
action other than reporting it to Director Newell. Given these circumstances, the reporting of employee
behavior appears to be incidental to the DOT Administrator’s administrative and clerical function of
collecting paperwork.
warranted. DOT Administrators are not involved in the determination of what action is needed as a result of discrepancies on drivers’ paperwork.

Furthermore, the record establishes that DOT Administrators do not have the responsibilities that are usually associated with traditional police and security functions. In particular, DOT Administrators do not have training in weapons or security procedures. They do not carry weapons, are not bonded, do not participate in security rounds or patrols, do not monitor drivers or the Employer’s premises, do not control access to the Employer’s premises or security-monitoring systems, and do not wear a guard uniform or special badge identifying them as guards. DOT Administrators have not been instructed to report incidents to the police and do not have instructions regarding what to do in the event of a strike. To perform the traditional security functions of stopping and searching the individuals who want to enter the Employer’s premises, the Employer employs actual security guards who wear guard uniforms. There is no contention or evidence showing that DOT Administrators substitute for the Employer’s security guards.

In support of its position that the DOT Administrators are statutory guards, the Employer cites to Bellagio, LLC v. NLRB, 863 F.3d 839 (D.C. Cir. 2017). That case involved surveillance technicians who installed cameras, controlled access to the surveillance system, and helped investigate employees. In that case, the Court held that the technicians were statutory guards. Of significance, the technicians were able to turn video feeds on and off, add and delete cameras and users, restrict user access to footage, stop cameras from recording, delete footage from the server, and investigate situations of suspected tampering with the security system. Id. at 843. Here, the DOT Administrators do not monitor the Employer’s drivers using any tracking or security devices. Their primary role is the collection, review, and filing of paperwork related to operating a vehicle, which is quite unlike the essential role played by the Bellagio technicians in protecting “high-end jewelry, priceless art, stockpiles of cash and [the] personal safety of revelrous guests who are not always vigilant regarding their own wellbeing.” Id. at 851. Thus, with respect to the DOT Administrators, the potential for the sort and scale of “temptation” and “pressure” that concerned the court in Bellagio is lacking. Indeed, as compared to the technicians in Bellagio, the DOT Administrators’ role in securing the safety of the Employer’s property is significantly more limited, administrative, and clerical in nature.

Equally distinguishable from the DOT Administrators here are the maintenance employees who were found to be statutory guards in A. W. Schlesinger Geriatric Center, 267 NLRB 1363 (1983). The maintenance employees in that case were responsible for a broad range of security functions which the Employer in this case does not entrust to its DOT Administrators, such as locking and unlocking doors and gates, determining which employees were carrying packages, making hourly rounds, and checking for adequate lighting in the parking lot. Beyond requesting that drivers fill in blanks on paperwork or reporting to Director Newell discrepancies on paperwork, the DOT Administrators have no authority to take action on their own initiative to protect the Employer’s property.

The Employer also cites Wright Memorial Hospital, 255 NLRB 1319, 1320 (1980), involving ambulance drivers who made security rounds during the shift and were “on the lookout for fire, theft, vandalism, and unauthorized personnel.” In finding the ambulance drivers to be
guards, the Board noted that they were the only security force present at the hospital. Id. Here, although the Employer's DOT Administrators are "on the lookout" for red flags in driver paperwork that could pose a safety threat if left unaddressed, the Administrators indisputably do not make security rounds of the lot or have authority to unilaterally compel compliance with Employer rules. And importantly, the Employer employs its own security force of guards who are stationed at the exits and entrances to job sites. As a result, the duties of the ambulance drivers in Wright Memorial Hospital are principally different from the Employer's DOT Administrators. 8

For the foregoing reasons, I find that the DOT Administrators are not guards within the meaning of Section 9(b)(3) of the Act because their auditing duties are clerical in nature and their limited role in ensuring the safety and security of the Employer's drivers' work is only incidental to their clerical functions.

2. Managerial Status

i. Legal Framework

Although the Act makes no specific provision for "managerial employees," under Board policy, this category of personnel has been excluded from the protection of the Act. See The Republican Co., 361 NLRB 93 (2014); NLRB v. Yeshiva University, 444 U.S. 672 (1980); Palace Dry Cleaning Corp., 75 NLRB 320 (1948). Managerial employees have been defined by the Supreme Court in NLRB v. Yeshiva University, as:

[T]hose who formulate and effectuate management policies by expressing and making operative the decisions of their employer. . . . These employees are much higher in the managerial structure than those explicitly mentioned by Congress, which regarded them as so clearly outside the Act that no specific exclusionary provision was thought necessary. . . . Managerial employees must exercise discretion within, or even

8 The other cases cited by the Employer during the hearing are similarly distinguishable, including MGM Grand Hotel, Las Vegas, 274 NLRB 139, 140 fn. 9 (1985) ("in contrast to employees who simply monitor alarms and report the receipt of signals to guards or the police [or DOT Administrators who only monitor and report issues with paperwork], J.C.-80 system operators, in addition to notifying security officers, deal directly with employees in other departments, such as the engineering department, and work with security officers to determine the cause of the disturbance and to correct it."); Broadway Hale Stores, Inc., 215 NLRB 46 (1974) (unlike DOT Administrators here, the primary function of employees when assigned as fitting room checkers was to prevent theft of merchandise, which is what the Board relied on to find such employees to be guards within the meaning of the Act); and McDonald Aircraft Co. v. NLRB, 827 F.2d 324, 329 (8th Cir. 1987) (the Court found firefighters in the case to be guards because they, unlike DOT Administrators, were "obligated to enforce rules regarding smoking in prohibited areas; the unauthorized removal of classified material, personal property of others or company or government property; the failure to safeguard classified materials; the failure to comply with instructions of those in authority; and the repeated violation of any rule including safety and security. The firefighters are authorized to issue Hazard-Incident Reports, which if filed against another employee, could adversely affect the employee's personnel file. Furthermore, in the event of a strike the firefighters perform additional rule enforcement activities such as crowd and traffic control, patrolling for striker misconduct, and clearing obstructions set up by strikers."
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 interests by taking or recommending discretionary actions that effectively
control or implement employer policy.

_NLRB v. Yeshiva University_, 444 U.S. at 682-683 (internal quotations and citations omitted).

The party seeking to exclude an individual as managerial bears the burden of proof.
_Southern Monterey County Hospital d/b/a George L. Mee Memorial Hospital_, 348 NLRB 327,
333 (2006); _LeMoyne-Owen College_, 345 NLRB 1123, 1128 (2005); _Waste Management de

The Board has held that individuals who formulate and implement safety programs,
provide instruction to other employees on safe work habits, effectively recommend disciplinary
measures, and express employer policies to other employees, are managerial employees with
interests more closely aligned with management than with other employees. 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); _Minnesota & Ontario Paper Co._, 92 NLRB 711, 714
(1950) (employee found to be managerial where his duties consisted of conducting safety and
training programs, including educating supervisors on plant safety, giving safety talks to new
employees, having access to personnel and medical files, and recommending discipline for safety
violations).

The Board has declined to find managerial status where the individual in question lacked
the authority to enforce guidelines against other employees and was not authorized to direct the
actions of other employees. See _George L. Mee Memorial Hospital_, 348 NLRB at 333
(utilization review nurse found not to be a managerial employee because her role in reviewing
patient charts to determine if the treatment provided and length of stay were consistent with
employer-provided guidelines did not constitute formulating or effectuating management
policies).

ii. Discussion

In this case, the evidence shows that DOT Administrators are not responsible for
formulating or effectuating management policies, as described by the Supreme Court in _NLRB v.
Yeshiva University_, supra.

Contrary to the Employer’s argument at the hearing, the evidence shows that DOT
Administrators do not provide input on policies applicable to the Employer’s workforce, and the
DOT Administrators do not have any involvement in developing the processes used by the
Employer to collect and audit paperwork. Additionally, DOT Administrators are not involved in
the development of training programs that educate other employees on how to ensure compliance
with various safety-related laws and regulations. There is no evidence of a DOT Administrator
recommending that the Employer take a particular personnel action against another employee,
disciplinary or otherwise, as a result of circumstances witnessed or observed by the DOT Administrator. As such, DOT Administrators do not possess the potentially managerial function of effectively recommending disciplinary measures.\(^9\)

Further, DOT Administrators are not tasked with formulating labor policy or developing legal or regulatory compliance programs. The record shows that they lack authority to enforce the Employer’s policies beyond simply requesting that drivers fill in incomplete paperwork or provide a justification for a discrepancy. In the event that a driver refuses to fill out a required form or correct a mistake, the primary authority that DOT Administrators possess is to report the issue to Director Newell. Thus, the evidence shows that DOT Administrators do not have authority to independently resolve personnel issues that they identify or witness. All of this evidence points toward the conclusion that DOT Administrators are not managerial employees.

Furthermore, DOT Administrators do not exercise a sufficient degree of discretion in performing their duties to be considered managerial employees. The primary decision that a DOT Administrator makes arguably requiring independent judgment or discretion is whether or not to report issues found on paperwork to Director Newell, such as incomplete or inaccurate paperwork. There is no evidence that DOT Administrators make recommendations to the Employer concerning what to do in response to issues reported by the DOT Administrators. Critically, the Employer tells DOT Administrators when they are hired that minor issues like blank spaces on paperwork should be returned to the driver to complete but major issues should be reported to Director Newell. Hence, the DOT Administrators follow the Employer’s commonsense guidelines for when to report issues to Director Newell – they do not create the guidelines or give input on what the guidelines should be – and their decision in this connection does not require a managerial level of independent judgment or discretion.

For the foregoing reasons, I find that the DOT Administrators are not managerial employees who are precluded from the definition of employee under Section 2(3) of the Act.

3. Confidential Employee Status

i. Legal Framework

The Board has, with Supreme Court approval, defined confidential employees as “persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” \(\textit{NLRB v. Hendricks County Electric Membership Corp.}, 454 U.S. 170, 188-189 (1981)\) (quoting \textit{B.F. Goodrich Co.}, 115 NLRB 722, 724 (1956)). The Board will find an individual is a confidential employee if he has a close work relationship to an individual who formulates, decides, and effectuates management labor policy, and if he assists that individual in a confidential capacity by his being regularly entrusted with decisions and information regarding the employer’s labor policy before that

\(^9\) DOT Administrators further lack traditional managerial authorities such as the authority to make purchases, pledge the employer’s credit, or create a production schedule, and there is no evidence that they hold a financial stake in the Employer that would arguably align their interests more with management than other employees.
information is made known to those affected by it. \textit{Intermountain Rural Electric Association}, 277 NLRB 1, 4 (1985); \textit{Rhode Island Hospital}, 313 NLRB 343, 351 (1993).

The Board has emphasized that the confidential category is "a narrow one." \textit{Dun \\Bradstreet, Inc.}, 240 NLRB 162 (1979). Merely handling confidential records is by itself insufficient to establish confidential status. \textit{Id}. In addition, the party asserting that an individual is a confidential employee bears the burden of proving that claim. \textit{Crest Mark Packing Co.}, 283 NLRB 999 (1987) (citing \textit{International Rural Electric Association}, supra).

\textbf{ii. Discussion}

The record here shows that the DOT Administrators are not confidential employees. To be sure, the DOT Administrators do not have access to the Employer's labor relations policy data. The DOT Administrators also do not have access to confidential material before that material is available to employees or the unions representing employees. Accordingly, I find no evidence establishing that DOT Administrators assist the Employer in a confidential capacity with its labor relations issues.

In making this finding, I observe that Director Newell is the direct supervisor of the DOT Administrators. Director Newell is not involved in processing employee grievances or negotiating labor contracts. Concerning his involvement with collective bargaining, Director Newell once recommended that the Employer modify its treatment of caterers under the existing collective-bargaining agreement. Director Newell's recommendation was rejected by Labor Relations. Accordingly, the record does not support finding that the DOT Administrator's superior, Director Newell, formulates labor relations policy, much less that DOT Administrators perform confidential functions to assist Director Newell or the Employer in connection with its labor relations policies.

For the foregoing reasons, I find that the DOT Administrators are not confidential employees.

\textbf{4. Supervisor Status Under Section 2(11) of the Act}

\textbf{i. Legal Framework}

Section 2(11) of the Act defines the term "supervisor" as:

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

An exercise of any one of the indicia listed in Section 2(11) of the Act may warrant a finding of supervisory status. Section 2(11) of the Act also contains the "conjunctive
requirement that the power be exercised with ‘independent judgment,’ rather than in a ‘routine’ or ‘clerical’ fashion.” *Chevron U.S.A.*, 309 NLRB 59, 61 (1992). To demonstrate independent judgment, the putative supervisor “must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare*, 348 NLRB 686, 692 (2006). The putative supervisor must hold the authority in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 US 706, 712-13 (2001). Finally, when the putative supervisor exercises supervisory authority on a sporadic or isolated basis, the Board will not find supervisory authority. *Billows Electric Supply of Northfield, Inc.*, 311 NLRB 878, 879 (1993).

The party asserting supervisory status has the burden of proving its assertion by a preponderance of the evidence. *Oakwood Healthcare*, 348 NLRB at 694. While the party asserting supervisory status need not show that the authority has been exercised, it must show that the employee “actually possesses” the authority at issue. *Mountaineer Park*, 343 NLRB 1473, 1474 (2004). “[P]urely conclusory” evidence is not sufficient to establish the existence of supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson*, 348 NLRB 1056, 1057 (2006). “Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

When evidence of any of the Section 2(11) indicia is established, the analysis shifts to whether the individual exercises that authority using independent judgment. *Oakwood Healthcare*, 348 NLRB at 692; *El Vocero de Puerto Rico*, 365 NLRB No. 29, slip op. at 9 (2017). Independent judgment means that “an individual must at minimum act, or effectively recommend action, free of the control of others.” *Oakwood Healthcare*, 348 NLRB at 693. “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Id.* Finally, the Board has clarified that a judgment is not independent “[i]f there is only one obvious and self-evident choice.” *Id.*

The exercise of supervisory authority may be direct or may be evinced through the exercise or effective recommendation of any one of the supervisory indicia. *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1115 (2007). Regarding the authority to effectively recommend, the Board has held that effective recommendation “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).

**ii. Discussion**

In this case, the Employer presented evidence regarding the following supervisory indicia: the authority to discipline and effectively recommend discipline, the authority to hire and effectively recommend hire, and the authority to fire and effectively recommend firing.

As discussed below, the Employer has not met its burden of establishing that DOT Administrators possess any supervisory authorities under Section 2(11) of the Act. Lacking from
the record is evidence sufficient to establish that DOT Administrators exercise independent judgment or that they make suggestions or recommendations to the Employer on personnel actions. There is no evidence, moreover, of DOT Administrators making recommendations to which the Employer gave force and effect without an independent investigation of the underlying employee conduct. Instead, the DOT Administrators use a routine visual inspection to determine if information on paperwork is blank or incomplete, compare information stated on paperwork against supporting documents, and report to higher management non-minor issues as well as inappropriate driver behavior witnessed at the job site.

Accordingly, as further explained below, the burden of establishing that DOT Administrators use independent judgment or make effective recommendations in connection with any of the supervisory authorities enumerated in Section 2(11) of the Act has not been met in this case.

a. Discipline or Effectively Recommend Discipline

A putative supervisor has the authority to discipline when his or her exercise of disciplinary authority leads to personnel action without independent investigation by upper management. *Veolia Transportation Services, Inc.*, 363 NLRB No. 98 (2016); *Starwood Hotels*, 350 NLRB 1114, 1116 (2007). Recounting misconduct to senior management without recommending future discipline serves nothing more than a reporting function, and is not evidence of supervisory authority. *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007); *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001). The authority to verbally reprimand or “point out deficiencies in the job performance of other employees does not establish the authority to discipline.” *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002). However, when the putative supervisor utilizes independent judgment to issue verbal reprimands, and those reprimands impact the job status of the disciplined employee or are part of the Employer’s progressive discipline system, the reprimand is likely an exercise of supervisory authority. See *Aftercare of Wadsworth Ctr. for Rehab.*, 355 NLRB 565, 565 (2010).

In this case, the DOT Administrators at most perform a reporting function that is not supervisory in nature. As a threshold matter, Director Newell unambiguously testified that DOT Administrators do not have authority to decide to discipline an employee. In addition, no evidence shows that DOT Administrators reprimand employees, issue disciplinary warnings, or provide disciplinary recommendations to the Employer’s management personnel. Although the paperwork and information that DOT Administrators collect and verify in the course of performing their duties may be used by the Employer to make disciplinary decisions, there is no evidence – in the form of testimony or otherwise – showing that DOT Administrators make recommendations to the Employer concerning discipline. Lastly, the Employer even failed to demonstrate that information collected by DOT Administrators leads to discipline under its progressive discipline system, insofar as the Employer failed to present any specific evidence of such discipline occurring or evidence that discipline has automatically resulted based on particular reports without further investigation by the Employer.10

10 In this regard, the record only reflects that the Employer’s hours of service policy provides for progressive discipline based on a driver’s increasing number of violations related to hours of service. However, the policy is silent as to how any such progressive discipline decision is made, namely whether
Accordingly, I find that the Employer has not established that DOT Administrators possess supervisory authority to discipline or effectively recommend discipline.

b. Hire, Fire, or Effectively Recommend Hiring or Firing

The Employer has not established that DOT Administrators have the authority to fire or effectively recommend firing. Director Newell testified that DOT Administrators do not terminate employees and no employees have ever been terminated for failing to abide by a policy related to DOT compliance. Accordingly, I find that the DOT Administrators do not possess the authority to fire or effectively recommend firing within the meaning of Section 2(11) of the Act.

Concerning hiring authority, the record shows that the drivers with whom the DOT Administrators most directly interact have already been hired by the Employer by the time that the DOT Administrator arrives to collect paperwork. There is no evidence that a specific DOT Administrator has recommended the Employer hire any employee, or that the Employer accepted such recommendation without its own review. In light of the evidence, I find that the DOT Administrators do not possess the authority to hire or effectively recommend hire within the meaning of Section 2(11).

III. Conclusions and Findings

Based upon the entire record in this matter, including stipulations by the parties, and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. 11

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or any other bar, to this proceeding.

DOT Administrators’ reporting of any such violation automatically results in the corresponding discipline or whether the Employer investigates any such reported violation before issuing any discipline.

11 The Employer, Warner Bros. Television, a California corporation with its primary place of business in Burbank, California, is engaged in the production of television programs. In conducting its operation in the last 12 months, a representative period, the Employer’s gross revenue exceeded $1,000,000. During that same time period, the Employer purchased or received goods valued in excess of $50,000 directly from outside the state of California.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The Employer has failed to meet its burden of presenting sufficient evidence to establish that DOT Administrators/Specialists are guards within the meaning of Section 9(b)(3) of the Act, managerial employees, confidential employees, or supervisors of the Employer within the meaning of Section 2(11) of the Act.

7. The following employees of the Employer constitute an appropriate unit (the Unit) for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:  

   **Included:** All full-time and regular part-time DOT Administrators/Specialists. 

   **Excluded:** All office clericals, managers and supervisors as defined by the Act.

   Accordingly, I direct an election in the Unit above, which includes approximately 4 employees.

**DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the Unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Brotherhood of Teamsters, Studio Transportation Drivers, Local 399.**

**A. Election Details**

The election will be held on **Friday, October 5, 2018,** from 9:00 a.m. to 11:00 a.m. at Stage 15 Conference Room on the Employer's premises located at Warner Bros. Studios, Building 34, Conference Room 15, 4000 Warner Blvd., Burbank, CA 91522.

**B. Voting Eligibility**

Eligible to vote are those in the Unit who were employed during the payroll period ending **Saturday, September 22, 2018,** including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well

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12 At the hearing, as noted at the outset of this Decision, parties stipulated that if the DOT Administrators are not guards, managerial employees, confidential employees, or supervisors, then the petitioned-for unit is an appropriate unit for the purpose of collective bargaining.
as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board’s Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the Regional Director and the parties by **Tuesday, October 2, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee’s last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this Decision. The list may be electronically filed with the Region by using the E-filing system on the Agency’s website at [www.nlrb.gov](http://www.nlrb.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.
D. Posting of Notices

Pursuant to Section 102.67(k) of the Board’s Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the Unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the Unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. Therefore, the copies of the Notice of Election must be posted by 12:01 a.m. on Tuesday, October 2, 2018. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board’s Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board’s Rules and Regulations.

A request for review may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board’s granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: September 28, 2018

BRIAN GEE
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
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Los Angeles, CA 90064-1753