UNIVERSAL TELEVISION PRODUCTIONS LLC
Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, STUDIO TRANSPORTATION DRIVERS, LOCAL 399
Petitioner

DECISION AND DIRECTION OF ELECTION

On August 28, 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 Universal Television Productions LLC (Employer). 1

On September 7 and September 10, 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 in the event that the DOT Administrators are not guards, managerial employees, confidential employees, or supervisors, the unit is an appropriate unit for the purpose of collective bargaining based on the similar work duties, similar skill set, and common supervision of the employees in the petitioned-for unit.

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 share a sufficient

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.
community of interest to 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.

I. Facts

1. General Background

The Employer is one of various entities nationwide that is under the NBC Universal Media, LLC umbrella (NBC Universal). The Employer produces television series and television motion pictures. Annually, it produces about 12 to 13 productions nationwide. On its productions, the Employer employs, among others, a classification of employees referred to as drivers. Drivers are responsible for transporting vehicles which carry a variety of things including people, props, equipment, sets, animals, and other materials. Drivers operate vehicles on the lot or set where the Employer’s production is being filmed and on routes to and from the production locations.

The Employer, including its drivers, must act and operate in accordance with rules and regulations established by certain entities including the federal Department of Transportation (DOT) and state department of transportation, the Federal Motor Carrier Safety Administration, and the State of California. The Employer also maintains its own internal rules and policies for the purpose of ensuring compliance with these legal requirements and that its equipment and assets are transported in a timely, safe, and cost effective manner. 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 laws applicable to its vehicles such as the DOT regulations; then the Employer could be assessed fines or its DOT number could be suspended. Accordingly, by complying with the transportation-related laws, the Employer protects its DOT number from being in jeopardy.

2. Overview of DOT Administrators’ Job Duties

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, whose hours of work are usually from about 8:00 a.m. to 5:00 p.m., work out of the production offices of each individual production to which they are assigned. They also go directly to the set of the production and work from the transportation trailer. On some productions, the DOT Administrator will never meet the drivers in person because all interactions can be performed over text message, phone calls, and using certain computerized databases that will be described below. As explained below, DOT Administrators are responsible for collecting and reviewing various assorted transportation documentation relevant to establishing that the Employer is in compliance with all applicable law and regulations. The Employer’s drivers, moreover, are themselves responsible for understanding the applicable laws and following all requirements, including sending the Employer all necessary documentation and inspecting their vehicles.

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2 In connection with the DOT Administrator title, “DOT” stands for state and federal departments of transportation. The parties stipulated that there are no distinctions between the job position DOT Administrator/Specialist and DOT Administrator.
DOT Administrators perform the following functions: (a) qualifying drivers, which involves checking that drivers are qualified to operate commercial vehicles, ensuring all proper documentation is received, helping drivers correct application mistakes, and notifying the Employer if a driver is ineligible; (b) confirming and ensuring that drivers do not exceed the maximum hours of service allowed under applicable law; and (c) collecting vehicle inspection paperwork. Related to these functions, while on the production set, DOT Administrators watch for driver behaviors that appear inconsistent with the applicable transportation-related laws.

DOT Compliance Supervisor Jessica Hammeke (Supervisor Hammeke) supervises the Employer’s DOT Administrators. Supervisor Hammeke previously worked as a DOT Administrator for about one year before becoming DOT Compliance Supervisor in March 2015. Supervisor Hammeke works in a department called Department of Transportation and is responsible for all DOT compliance for NBC Universal, including the Employer.

As it pertains to meeting its transportation needs, on a typical production set, in addition to drivers and DOT Administrators, the Employer employs a captain, transportation coordinator, and dispatcher or multiple dispatchers. The transportation coordinator’s job is to ensure that the production is compliant with the applicable law and gives orders to the driver. The transportation coordinator is authorized to pull a driver off of a job and suspend a driver.

3. DOT Administrators’ Role in Qualifying Drivers

The below-described qualification process can occur before or after the Employer hires the driver, depending on the driver’s position and equipment to be used. The Employer’s policy is to complete the qualification process and qualify the driver before the driver operates a commercial vehicle. As explained below, DOT Administrators are responsible for ensuring that the Employer possesses the necessary documentation to establish the driver’s eligibility to operate equipment, including a completed application, driver’s license, medical card, drug and alcohol test statement, driving record, and other paperwork.

On a daily basis, the captain, coordinator, or dispatcher provide a DOT Administrator with names of the drivers that are being hired to work on a particular production. The DOT Administrator then looks up the drivers by name in a third-party database called CSATF. In many cases, each driver will have previously submitted to CSATF certain driver eligibility requirements, including a driver’s license and documentation showing safety classes are complete. If a driver’s file is missing documentation, the DOT Administrator will ask the driver for it and enter it into the system once received.

As part of the qualification process, the Employer uses a qualification packet. The packet’s cover page has blank spaces and check mark boxes that the DOT Administrator fills out to state the driver’s name, reporting level, start date, ID, the type of driver (existing, new, etc.), and what types of documents that particular driver needs to furnish. The driver receives the qualification packet, presumably from a DOT Administrator, and then submits the supporting documentation.

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3 Supervisor Hammeke testified that the acronym CSATF stands for Contract Services Trust Fund Administration.
documentation to third party JJ Keller and/or the DOT Administrator so that the DOT Administrator can review the submission. The driver’s qualification packet includes an Acknowledgment of Responsibility, on which the driver confirms that he will abide by the Federal Motor Carrier Safety Regulations and company policy while on the road.4

After receiving the driver’s paperwork and supporting documents, the DOT Administrator checks to make sure both that the driver is eligible and that the driver’s application is complete and does not have any errors. As part of that process, the DOT Administrator uses the driver’s MVR, which is a Motor Vehicle Report issued by the Department of Motor Vehicles (DMV) that the Employer provides to the DOT Administrator after receiving it via third party service JJ Keller. The DOT Administrator cross-references the MVR to the driver’s license and the application on which the driver has stated what his proficiencies are.

As part of applying to work for the Employer, the driver provides a form authorizing a release of records showing his safety performance with previous employers. After receiving the records-release form, NBC Universal’s Department of Transportation uses the services of third party JJ Keller to conduct an initial investigation of the driver’s safety performance. Thereafter, the DOT Administrator compares the third party’s results against the MVR and the information provided by the driver to check for inconsistencies or issues.

Furthermore, as part of qualifying the driver, the DOT Administrator checks documents in the CSATF/Contract Services system that are related to determining whether the driver has ever tested positive for drugs when working for the Employer or possibly other employers. Supervisor Hammke is one of three Designated Employer Representatives who are authorized to receive records from prior employers concerning an employee or potential employee’s substance-testing history. The DOT Administrator is responsible for checking CSATF to determine whether the driver needs to take a drug test before operating a vehicle based on his employment record.

If, in qualifying a driver, the DOT Administrator finds minor typographical errors or mistakes in application materials, the DOT Administrator may be able to resolve those issues with the driver without involving higher authorities. For example, if a driver’s license is expired, the DOT Administrator may ask the driver about it and discover that the driver sent the wrong license. Once the driver sends the correct license, the issue is rectified. On the other hand, if the DOT Administrator has reason to believe the eligibility issue is not an easily cured error or the driver does not quickly corrected the issue, the DOT Administrator will notify the production’s

4 By signing this form, the driver confirms he will do the following: have valid driver’s license and comply with all traffic laws while operating any vehicle or equipment; inspect the vehicle before, during and after trips and complete the Daily Vehicle Inspection Report; ensure the vehicle has the proper paperwork. (e.g., registrations, insurance, inspections, etc); submit all required paperwork within the required time frame, including driver qualification paperwork, Logs, recaps, etc.; carry previous seven days of logs in his book and the log will be a true representation of the driver’s day and will reflect the hours worked. The qualification packet also includes a form regarding the driver’s previous alcohol and drug test results as well as a driver’s application providing basic eligibility information.
coordinator, captain, and/or Supervisor Hammeke, so that those individuals know the driver may not be eligible to drive based on the documents received at that time.  

In situations where the driver’s license is suspended or revoked, the DOT Administrator has the right to tell the driver that he cannot drive vehicles for the Employer. The DOT Administrator does not need permission before instructing a driver that he is not permitted to drive. If the Employer’s production wants to continue paying the driver while the eligibility issue is being resolved, the production may decide to do that. Alternatively, the DOT Administrator may inform Supervisor Hammeke about the licensing issue, and Supervisor Hammeke will tell the driver he cannot drive. Supervisor Hammeke has instructed DOT Administrators to tell the coordinator about suspended or revoked licenses so the coordinator can tell the driver not to drive. DOT Administrators are not authorized to tell drivers that they cannot work or are fired, nor are DOT Administrators authorized to physically extricate a driver from a piece of equipment.

Throughout the process of qualifying a driver, the DOT Administrator accesses systems maintained by the third-party service JJ Keller and a system called Motion Picture Compliance (MPC), which is another compliance agency. By reviewing and adding information within these systems, the DOT Administrator is able to determine what items are missing from the driver’s file. Sometimes the DOT Administrator will need the driver to sign off on certain forms or policies to complete the driver’s file. Once the driver’s qualification file is complete, the Employer maintains it for a certain period of time in its records, as the Employer may need to produce the file in response to an audit.

Supervisor Hammeke considers DOT Administrators to be the Employer’s first line of defense for identifying and correcting DOT compliance issues. If the DOT Administrator does not properly qualify the driver by overlooking certain requirements, the DOT Administrator may be disciplined. For instance, Supervisor Hammeke issued a final written warning to a DOT Administrator who failed to have seven drivers drug tested before they operated vehicles; the record does not provide further details regarding that DOT Administrator’s prior disciplinary record.

4. DOT Administrators’ Role in Checking Drivers’ Hours of Service

The Employer’s DOT Administrators are also responsible for reviewing drivers’ time spent working and ensuring that drivers’ hours of service are compliant with applicable law limiting the number of hours that a driver may drive in a certain time period. DOT

5 In reviewing a driver’s medical card, DOT Administrators make sure that the doctor who issued the medical card is in a particular national registry. If not, the DOT Administrator will tell the driver about the issue and help them find a doctor who can issue a valid medical card. This process can become argumentative or confrontational because sometimes drivers do not understand the reason why they the medical card is inadequate for purposes of qualifying them to drive. (Tr. 33.)

6 It has been a while, it is unclear in the record how long, since a DOT Administrator instructed a driver not to operate equipment.

7 In responding to an audit, Supervisor Hammeke performs the audit and the DOT Administrators provide support functions including making sure the Employer’s records are accurate and complete.
Administrators are responsible for ensuring the drivers’ logs are completed and accurate. DOT Administrators must be alert for situations where a driver does not have available hours to operate equipment. In those circumstances, the DOT Administrator will check if a correction can be made to allow the driver to drive, or she will let a higher authority know that the driver is out of hours.

To perform these functions, the DOT Administrator collects drivers’ hourly logs, enters the starting and ending times into a Captain’s Report, and submits the Captain Report to the coordinator for approval. In taking those steps, the DOT Administrator will conduct an initial review of the paperwork to check for errors or issues; if any are found, the DOT Administrator will contact the driver so he may correct it. Eventually, once the DOT Administrator has collected accurate hours of service paperwork, she submits it via computer to third-party service, MPC.

Sometimes, after the DOT Administrator sends the paperwork to MPC, that system bounces it back to the DOT Administrator stating that the paperwork lacked a signature or address. In those cases, the DOT Administrator contacts the driver to correct the issues.

If the MPC system detects an hours of service violation, meaning the driver worked beyond the hours allowed by law, a “notification” may be generated. A notification is a template form created by MPC; it is used to memorialize the driver’s violation. The DOT Administrator has authority to print the notification and request the driver sign it. If that happens, usually the DOT Administrator will provide the driver some coaching or training. A DOT Administrator explained at the hearing that when she generates an hours-of-service violation notification, she sends it to the driver with a statement that she is asking the driver to correct the log in a particular way, the driver provides her with a corrected log and signs and returns the notification, then she submits this documentation back to the computerized system. With respect to coaching, the same DOT Administrator explained that she might meet the driver in person to teach him how to fill out the logs so they stop having these types of errors, but she does not have the authority to tell the driver that discipline may result if the issue continues. Instead, the DOT Administrator brings such issues to the attention of the dispatcher, transportation coordinator, captain, and/or Supervisor Hammekke.

Supervisor Hammekke explained that a notification may be generated by MPC if there are documents missing. If those documents are ultimately retrieved, then the DOT Administrator does not consult Supervisor Hammekke regarding the notification because the problem was solved. But if the notification shows a driver committed an hours-of-service violation, then the problem has already occurred and cannot be corrected. In such cases, the DOT Administrator discusses the issue with Supervisor Hammekke, so that Supervisor Hammekke can ensure the driver knows what took place and how they got into the violation, and to find out who the involved parties were to see if the driver was under pressure from someone on the production to commit the violation. Supervisor Hammekke addresses hours-of-service violations with everyone involved.
Sometimes drivers are not pleased when a DOT Administrator notifies them concerning an hours-of-service violation, and sometimes drivers do not agree with the legal regulations or agree that the DOT Administrator is in a position to enforce those regulations. 

5. DOT Administrators’ Role in Vehicle Inspections

DOT Administrators also play a role in vehicle inspections. DOT Administrators are responsible for ensuring that each vehicle has a valid vehicle inspection before the Employer operates it. To do this, certain individuals working in dispatch keep a record of what vehicles the Employer is renting and the DOT Administrators receive those records. If the vehicle inspection is not valid, the DOT Administrators will notify other personnel on the production set and/or Supervisor Hammemeke to inform them that a piece of equipment cannot be moved until the Employer has the inspections. Similarly, DOT Administrators help keep track of what inspections or certifications are expiring during the length of time that the vehicles are in the Employer’s use. If the DOT Administrators notice that a certification is due to expire, they bring it to the attention of dispatch, the captain, or coordinator.

6. DOT Administrators’ Role in Discipline

The Employer uses a progressive discipline system for drivers. The disciplinary steps are verbal warning, written warning, suspension, and termination. Notifications generated for hours-of-service violations are not part of the established progressive discipline system. Supervisor Hammemeke testified that DOT Administrators can issue verbal and written discipline, but she clarified that she usually does written discipline. According to Supervisor Hammemeke, recently one of her DOT Administrators issued a verbal warning, documented on a written form, to a driver who was “adding drive times to a captain’s report without drivers.” However, this DOT Administrator is not in the petitioned-for unit at issue in this case. Furthermore, the record does not include a copy of the documented verbal warning or any other details regarding the warning, including any facts related to whether the DOT Administrator exercised independent judgment in issuing the verbal warning.

Supervisor Hammemeke testified that DOT Administrators have a hand in discipline because they create notifications, coach drivers, and provide the Employer with information that may lead to a driver being disciplined.

7. Other Duties of and Evidence Concerning DOT Administrators’ Duties and Functions

The Employer’s DOT Administrators send weekly reports to Supervisor Hammemeke. The reports give percentages showing how the production is going. On their report, DOT Administrators note any issues noticed on the production as it pertains to the Employer’s

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8 Supervisor Hammemeke once had a situation on a particular production where the drivers did not want the DOT Administrator in the transportation office, so the DOT Administrators were put in a separate trailer. The record does not clarify why the drivers did not want the DOT Administrator in the office, when this occurred, or whether it was one of the Employer’s productions or the production of another entity under the NBC Universal Media umbrella.
compliance with transportation-related laws. For example, a DOT Administrator testified that she will note any serious issues on her weekly report such as any hours-of-service violations in order to bring such issues to Supervisor Hammkeke’s attention. Because the various third-party compliance agencies that the DOT Administrators use can take time to upload documents, the weekly reports provide a more up-to-date picture of how productions are doing from a DOT compliance perspective.

Concerning DOT Administrators’ role in keeping an eye out for improper driver behaviors, the DOT Administrators receive reasonable suspicion certification by taking an online course. The course teaches DOT Administrators how to identify signs of impairment and perform an observation of the potentially impaired individual. If a DOT Administrator is on a production set and notices that a driver looks ill or fatigued, the DOT Administrator could advise the driver not to operate commercial or heavy equipment. Supervisor Hammkeke testified that DOT Administrators can send a driver in for a drug test if the driver meets all the requirements of the reasonable suspicion observation, but the DOT Administrator needs to seek guidance from Supervisor Hammkeke, the transportation coordinator, and anyone else who is around to ensure that the production can continue while the driver is not there. DOT Administrators have not had to do reasonable suspicion observations of any drivers in a really long time; the record does not specify how long it has been. Furthermore, a DOT Administrator explained at the hearing that if she sees a driver who looks impaired, she would tell Supervisor Hammkeke or her boss, as well as the captain and coordinator on the set, so that those individuals could determine whether to send the driver to have a drug test. The DOT Administrator also testified that sending drivers to take drug tests is not part of her job.

The Employer’s DOT Administrators do not carry weapons, clubs, or other security-type devices. They do not monitor the entrances or exits of the set or issue passes or access permits to the Employer’s facilities. They are not bonded or deputized. They do not wear uniforms or badges that identify them as guards or security personnel. They may wear badges in certain settings; if so, the badge is similar to the badges other employees wear except it may be a different color. They are not expected or instructed to use force ever on the job. They do not frisk people or instigate shake downs. Regarding whether the DOT Administrators report activities to the police, if they feel someone who is about to drive a vehicle is under the influence of drugs, they have the right to call the police. Although Supervisor Hammkeke does not require it, she has asked the DOT Administrators to walk around the sets while they are there to know which vehicles are present and which drivers are going into those vehicles, and she has asked them to do that as often as possible.

DOT Administrators do not have keys to restricted areas. However, if a particular production has a locked room in which the DOT Administrators are assigned to work, the DOT Administrator may have a key to open the lock.

Supervisor Hammkeke is not involved in handling grievances filed under any collective-bargaining agreement between the Employer and a union. Further, Supervisor Hammkeke does not participate in labor negotiations and has never had bargaining proposals in her possession. In the course of her duties, Supervisor Hammkeke has some contact with the labor relations department that handles the Employer’s labor relations issues and adjusts employee grievances.
(Labor Relations). Labor Relations will ask for Supervisor Hammeke’s opinions. For instance, Labor Relations recently asked Supervisor Hammeke about caterers on the sets. Sometimes Labor Relations will ask her if she has heard anything from the drivers, coordinators or DOT Administrators, or if she herself has encountered any issues. Supervisor Hammeke testified that she has access to policy data regarding the Employer’s operations and groups of employees, but she clarified that she does not have access to information about employee benefits or salaries for the organization. Rather, Supervisor Hammeke can reach out to Labor Relations or Human Resources (HR) to ask for their input as it may relate to Supervisor Hammeke updating the workplace guidelines for employees in the transportation department.

According to Supervisor Hammeke, DOT Administrators are not involved in layoffs, recall of laid off employees, giving out bonuses or performance awards, or deciding who to promote. DOT Administrators can suggest that the transportation coordinator move an unqualified driver to a different piece of equipment for which the driver is qualified. The coordinator has final say regarding transfers. DOT Administrators do not terminate employees, but if they find evidence that a driver is doing something wrong, they could investigate, give the Employer information, and provide an opinion. If that happened, the Employer would continue investigating, starting with Supervisor Hammeke investigating, then the issue would progress to HR, Labor Relations, or Supervisor Hammeke’s superior depending on the severity. HR and Labor Relations make the final decision on terminations.

Concerning assignment of work, DOT Administrators have authority to tell drivers to fill out paperwork. They can also tell drivers that they are being pulled from a piece of equipment or that they have been called for a substance test. They can additionally tell drivers that a piece of equipment cannot move until it has had its inspections. DOT Administrators are not authorized to decide what piece of equipment a driver will use or assign a driver to a piece of equipment. If a driver is not securing a load properly, performing daily inspections, or adhering to the hours of service rules, the DOT Administrator can suggest that the driver take those actions.

DOT Administrators are not involved in deciding what shows the Employer will produce or what schedule the Employer will follow. However, if the DOT Administrator finds problems with a production’s DOT compliance, those findings may influence how the production operates. DOT Administrators do not pledge the Employer’s credit, make financial transactions on behalf of the Employer, or hold a majority of stock in the Employer. DOT Administrators are authorized to purchase general office supplies, placards for the trucks, or things of that nature.

Last year, DOT Administrators attended an unspecified number of meetings for a particular program referred to as “the electronic login device mandate,” which ended up not implemented. According to Supervisor Hammeke, DOT Administrators worked with the equipment to see if it worked for their industry, and they helped the Employer formulate policies around it. However, as noted, these policies and the program as a whole were not implemented.
II. 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 a 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.

Further, in cases where the alleged guards perform security-related duties for only a portion of their time, "[o]f central concern... is not a numerical accounting of the percentage of time employees spend on such duties but rather the specific nature of the duties themselves." Boeing Co., 328 NLRB at 130 (citing Rhode Island Hospital, 313 NLRB 343, 346 (1993)). The Board has defined guard responsibilities as those usually associated with traditional police and plant security functions such as the enforcement of rules directed at other employees, the authority to compel compliance with rules, monitoring and controlling access to the employer's premises, training in weapons and security procedures, possession of weapons, participation in security rounds or patrols, and wearing guard-type uniforms or displaying other indicia of guard status. Id. (citing Wolverine Dispatch, Inc., 321 NLRB 796, 798 (1996); 55 Liberty Owners Corp., 318 NLRB at 31). If charged with guard responsibilities that are not a minor or incidental part of their overall responsibilities, the employees are guards. Id. However, the Board has declined to find guard status where the duty to protect the employer's property was shared by all employees and incidental to the employees' clerical functions. See, e.g., Tac/Temps, 314 NLRB at 1143; Lion Country Safari, 225 NLRB at 969; Pepsi-Cola Bottling Co. of Cincinnati, 189 NLRB at 105 fn. 1.
ii. Discussion

Here, the evidence shows that the DOT Administrators are essentially charged with furnishing to and collecting from drivers certain paperwork (driver applications, driver hours-of-service logs, and vehicle inspection paperwork), reviewing that paperwork to ensure it is complete and accurate, and filing the paperwork in the appropriate files and/or databases.

The evidence shows that DOT Administrators may walk around the production sets when they are there to see what vehicles and drivers are present. They watch out for DOT compliance issues. However, DOT Administrators are not required to walk around the set or monitor it as part of their job and the record does not reveal how frequently this occurs on the Employer’s production sets. Moreover, 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, do not carry weapons, are not bonded, do not participate in security rounds or patrols, do not monitor drivers or the Employer’s premises as part of their assigned duties, do not control access to the Employer’s premises or security-monitoring systems, do not wear a guard uniform or special badge identifying them as guards, and have not been instructed to report incidents to the police. There is no evidence that the Employer provides DOT Administrators with instructions regarding what to do in the event of a strike. And DOT Administrators do not use force against employees.

In qualifying drivers, DOT Administrators are authorized to ask drivers to provide them with additional documentation or to correct paperwork errors. DOT Administrators can tell drivers that they cannot operate equipment until they are eligible, but they cannot use force to physically remove a driver from of a piece of equipment. Nevertheless, the record indicates that this process can become confrontational in the event that a DOT Administrator tells a driver he is not yet eligible and the driver disagrees or is displeased.

Both in the process of qualifying a driver and throughout the course of a driver’s employment, DOT Administrators can tell higher authorities such as Supervisor Hammeke, the captain, transportation coordinator, or dispatcher that a driver may need a drug test. The DOT Administrator may or may not relay that information to the driver as well. The drug test could be needed to qualify the driver based on the driver’s history or it could appear necessary if the DOT Administrator develops a reasonable suspicion that the individual is under the influence. In either situation, observing and reporting drivers who need drug tests is incidental to the DOT Administrator’s clerical functions of collecting paperwork. The evidence establishes that DOT Administrators may not independently force a driver to submit to a drug test. There is no evidence that a DOT Administrator has ever forced a driver to undergo testing for drugs, much less that they routinely do that as part of their job.

Furthermore, the evidence shows that a DOT Administrator may notice a driver exceeded the maximum hours of service or the driver is close to exceeding the maximum. In the former scenario, the DOT Administrator will send the driver a notification of the issue and request the

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9 The ability of DOT Administrators to call the police if a driver looks intoxicated and is about to drive is shared by all employees and individuals on the production set.
driver correct it, return the paperwork, and avoid the mistake again. The DOT Administrator will note the issue on a weekly report sent to Supervisor Hammke. In the latter scenario, the DOT Administrator will inform Supervisor Hammke and others on the set like the coordinator so that arrangements can be made to ensure the driver does not exceed his allowed hours.

Based on the foregoing discussion, although DOT Administrators may directly confront drivers about issues with their qualifying paperwork or hours of service, and although personal tensions may arise in the process, there is no evidence that DOT Administrators have authority to enforce 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, the evidence shows that the Employer’s DOT Administrators play a primarily clerical and administrative role of collecting paperwork, following up with drivers to correct incomplete or inaccurate paperwork, and reporting issues to Supervisor Hammke and/or the production’s transportation coordinator, captain, or dispatch personnel. Supervisor Hammke, Labor Relations, and HR are the ones who decide how to handle issues involving drivers’ violations of rules.

Accordingly, to the extent that part of DOT Administrators’ job involves monitoring and reporting improper employee behavior or non-compliance with transportation-related laws, these functions are incidental to the DOT Administrator’s administrative and clerical functions of collecting and reviewing paperwork. See 55 Liberty Owners Corp., 318 NLRB 308 (1995) (where the security-related duties of putative guards were more pronounced than the DOT Administrators’ duties here, and the Board found those employees were not statutory 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.

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 unaddressed, the Administrators indisputably do not make security rounds of the lot or have authority to unilaterally compel compliance with Employer rules. As a result, the duties of the ambulance drivers in *Wright Memorial Hospital* are principally different from the DOT Administrators.10

Accordingly, I find that the Employer failed to establish that its DOT Administrators are guards within the meaning of Section 9(b)(3) of the Act because the evidence establishes that 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.11

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10 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], 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); *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.”); and *Blue Grass Industries*, 287 NLRB 274 (1987) (unlike DOT Administrators, watch and sweep employees were statutory guards because they were “required to make a circuit of the premises, checking that the doors are secure and that everything is in order,” they possessed “the authority to prevent unauthorized persons from entering the plant,” and they were expected to call the police if an intruder arrived).

11 In so finding, I observe that the responsibility to ensure compliance with the applicable transportation laws and to observe and report infractions is not necessarily unique to the DOT Administrators; rather, in many respects, the responsibility is shared by all individuals on the production set including the transportation coordinator, line producer, UPM, drivers, and others. All of these individuals play a role in ensuring that the governmental regulations are followed because if the DOT number were suspended or revoked, the production would shut down.
2. Managerial Employee 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 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 Puerto Rico, 339 NLRB 262, 279 (2003).

   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 Employer did not establish that DOT Administrators are responsible for formulating or effectuating management policies, as described by the Supreme Court in *NLRB v. Yeshiva University*, supra. There is no evidence here that the DOT Administrators exercise or recommend any “discretionary actions that effectively control or implement employer policy.” *Allstate Insurance Co.*, 332 NLRB 759 fn. 2 (2000) (quoting *NLRB v. Yeshiva University*, supra at 683 (1980).

The evidence shows that last year, DOT Administrators attended meetings related to the electronic login device mandate and to some extent helped the Employer formulate its policies for that mandate. However, the record provides no other details showing that DOT Administrators utilized discretion during their participation in those meetings, nor that they had any significant authority to make decisions concerning the device mandate or any other policies that apply or may apply to the Employer. Moreover, the DOT Administrators did not ultimately have any impact in the Employer’s policies as the program was ultimately not implemented.

The record further establishes that DOT Administrators are authorized to use their reasonable-suspicion training skills to identify potentially impaired employees on the production set and report those behaviors to Supervisor Hammke, the transportation coordinator, or even the police in cases where the driver is about to get into a vehicle and drive. In observing and reporting such conduct, however, DOT Administrators do not utilize a managerial level of discretion, nor do they have final authority to decide what happens to an apparently impaired driver. The record shows that DOT Administrators rely on established criteria provided in an online training course to identify behaviors that warrant reasonable suspicion and they are in close contact with higher managerial personnel in dealing with potentially impaired employees. Thus, DOT Administrators do not have authority to independently decide how the Employer will react to drivers whose behavior warrants reasonable suspicion. Thus, this aspect of the DOT Administrators’ jobs does not align them so closely with the Employer’s management such that they are managerial employees.

Moreover, DOT Administrators do not have any involvement in developing or selecting the processes or third-party compliance systems that the Employer uses to collect and audit paperwork. Nor do they help formulate policies on how the Employer will respond to DOT compliance issues. Additionally, DOT Administrators are not involved in the development of training programs on how to ensure compliance with the law. Certainly DOT Administrators may show a driver how to properly fill out an hourly log, but examples of how to do that are created by the Employer and provided to the driver in the qualification packet. Thus, no discretion or independent judgment is used in teaching drivers how to fill out paperwork.12 In the event that a driver has made a mistake on his paperwork or committed an hours-of-service

12 DOT Administrators receive training when they are hired; the Employer instructs them regarding how to complete a driver’s qualification packet and how a drive fills out forms. DOT Administrators do not formulate these policies.
violation, there is no evidence that DOT Administrators exercise managerial discretion in
deciding how to react to it. To be sure, determining whether paperwork is completely filled out,
whether documents listed on a form have been submitted, whether drivers’ licenses’ are expired
or valid, and whether drivers’ statements of hours worked exceeded a legal maximum are
routine, clerical, and administrative matters that do not require an exercise of discretion. All of
this evidence points toward finding that DOT Administrators are not managerial employees. 13

For the foregoing reasons, I find that the Employer failed to meet its burden of proving
that DOT Administrators are 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.” NLRB v. Hendricks County
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
information is made known to those affected by it. Intermountain Rural Electric Association,
277 NLRB 1, 4 (1985); Rhode Island Hospital, 313 NLRB 343, 351 (1993).

The Board has emphasized that the confidential category is “a narrow one.” Dun &
Bradstreet, Inc., 240 NLRB 162 (1979). Merely handling confidential records is by itself
insufficient to establish confidential status. Id. In addition, the party asserting that an individual
is a confidential employee bears the burden of proving that claim. Crest Mark Packing Co., 283

ii. Discussion

The record here shows that the DOT Administrators are not confidential employees. The
evidence is clear that the DOT Administrators do not have access to the Employer’s labor
relations policy data and do not have access to confidential material before that material is
available to employees or the unions representing employees. While DOT Administrators may
have a key to enter a locked office, there is no indication that the information kept in that office
is confidential or sensitive labor relations policy data. Accordingly, the Employer failed to
present evidence establishing that DOT Administrators assist the Employer in a confidential
capacity with labor relations issues.

13 I also rely on evidence showing that DOT Administrators do not hold a financial stake in the Employer
or have authority to pledge the Employer’s credit or make financial transactions. In this regard, I find
DOT Administrators’ authority to order certain supplies insufficient to confer managerial status.
In making this finding, I observe that Supervisor Hammeke is the direct supervisor of the DOT Administrators. Supervisor Hammeke is not herself involved in processing employee grievances or negotiating labor contracts. Concerning her involvement with collective bargaining, Supervisor Hammeke has never come into possession of the Employer's contract bargaining proposals. Labor Relations may ask her opinions, but there is no evidence that Supervisor Hammeke formulates labor relations policy, much less that DOT Administrators perform confidential functions to assist Supervisor Hammeke or the Employer in connection with its labor relations policies.

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

4. Supervisory Status

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

At the hearing, the Employer argued that the DOT Administrators are supervisors based on of their authority to coach, direct, and discipline drivers. But because the Employer also presented some evidence regarding the authority of DOT Administrators to responsibly direct, assign, and hire employees, I will assess each of these purported supervisory indicia.14

As discussed below, the Employer has not met its burden of establishing that DOT Administrators possess any supervisory authority 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 beyond reporting issues that they may observe. Moreover, there is no evidence of DOT Administrators making recommendations to which the Employer gave force and effect without an independent investigation of the underlying employee conduct.

Accordingly, as further explained below, the evidence does not support finding that the Employer has met its burden of establishing that DOT Administrators have the authority to discipline, responsibly direct, assign, or hire employees, or to make effective recommendations regarding the same, using independent judgment.

14 In this case, there is no evidence that DOT Administrators have the authority to layoff, recall, reward, promote, adjust employee grievances, suspend, or transfer employees, or to effectively recommend such personnel actions.
a. 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); *Willamette 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).

The Board has declined to find supervisory status where counselings, warnings, or reports issued by a putative supervisor were not an initial step in the employer’s progressive disciplinary system, and thus did not demonstrably impact job status. E.g., *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999). Where an employer maintains a progressive disciplinary system, an individual who has the discretion to bring infractions to the attention of management effectively recommends discipline if the recommended discipline is in fact imposed as a matter of course. See *Oak Park Nursing Care Center*, 351 NLRB at 28-30 (finding employee counseling forms disciplinary where LPNs independently decided whether to issue a disciplinary form without consulting a superior, each form corresponded to a step in the employer’s progressive disciplinary system, and such forms “routinely result[ed] in actual discipline” including termination and suspension); *Ohio Masonic Home*, 295 NLRB 390, 393-394 (1989) (finding warnings not disciplinary where no evidence showed that employer had a “defined progressive disciplinary scheme” under which warnings would “automatically affect job status”).

In this case, the DOT Administrators at most perform a reporting and information-gathering function that is not supervisory in nature. Supervisor Hammekke, Labor Relations, and/or HR will independently investigate potential discipline situations that may be identified in the course of DOT Administrators’ work. This finding is supported by the DOT Administrator testimony that she does not discipline drivers and does not think she has authority to discipline drivers.\(^\text{15}\) Further, although DOT Administrators can generate “notifications” for hours-of-service violations, no independent judgment is needed to create the notification. Rather, a computerized system creates the notification and the DOT Administrator prints it out, possibly filling in some details. Moreover, the record does not explain what impact, if any, those notifications have on a driver’s job or disciplinary record. And in issuing notifications, Supervisor Hammekke is in the loop with the DOT Administrator in correcting the problem at issue in a notification.

\(^{15}\) I observe Supervisor Hammekke’s limited testimony that her husband is a driver and that a DOT Administrator was placed in the middle of them to remove potential conflicts. However, the record does not establish that this DOT Administrator has authority to discipline any drivers or effectively recommend their discipline.
Further, DOT Administrators’ role in coaching drivers does not require independent judgment. Often, the third-party computer system will identify or confirm the error or problem on the drivers’ paperwork, and the DOT Administrator will simply ask the driver to correct it or show the driver, based on the Employer-provided examples, how to fill out a driver log. Such a role is not one involving use of independent judgment. Moreover, simply pointing out deficiencies is not adequate to confer supervisory status.

In addition, there is no evidence that DOT Administrators 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. The weekly reports that DOT Administrators submit are merely a recap of the current state of affairs on a particular production; there is no evidence that these reports contain disciplinary recommendations. Lastly, the Employer failed to demonstrate that information collected by DOT Administrators leads to discipline under its progressive discipline system, insofar as Supervisor Hammke testified that she will investigate discipline-related situations and involve Labor Relations and HR in making any final disciplinary decisions. Thus, the Employer did not present specific evidence that it automatically disciplines drivers, without its own investigation, based on information relayed to it by DOT Administrators.

Finally, to the extent that Supervisor Hammke testified that DOT Administrators can issue verbal and written discipline, such “purely conclusory” evidence is not sufficient to establish the existence of supervisory authority. Golden Crest Healthcare Center, 348 NLRB at 731; Avante at Wilson, 348 NLRB at 1057. Similarly, with respect to the lone example that Supervisor Hammke provided of one DOT Administrator recently issuing a verbal warning, this single example is not sufficient for the Employer to meet its burden of establish that DOT Administrators in the petitioned-for unit are statutory supervisors because: (1) the example involved a DOT Administrator who is not in the petitioned-for unit; (2) even assuming that the example did involve a DOT Administrator in the petitioned-for unit, there is no evidence to show that the DOT Administrator exercised independent judgment in issuing the verbal warning; and (3) in any event, such limited evidence shows – at most – only sporadic or isolated exercise of authority, which the Board will not find sufficient to establish supervisory authority. Billows Electric Supply of Northfield, Inc., 311 NLRB at 879.

Accordingly, I find that the Employer has not established that DOT Administrators possess supervisory authority to discipline or effectively recommend discipline.

b. Responsibly Direct and Assign

Responsible direction is exercised by persons who have rank and file employees under them and who decide what job shall be undertaken next or who shall do it, provided the direction is “responsible.” Oakwood Healthcare, 348 NLRB at 691. Direction is “responsible” if the putative supervisor is accountable for others’ performance of the tasks, such that some adverse
consequences may befall the putative supervisor if the tasks are not performed properly. *Id.* at 692. In addition, responsible direction must involve the exercise of independent judgment. *Id.*

The Board interprets the authority to “assign” to mean the act of “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee . . .” *Oakwood Healthcare*, 348 NLRB at 689. It is well settled law that merely having the authority to assign work or tasks does not confer supervisory status and “not every act of assignment constitutes statutory supervisory authority.” *King Broadcasting Co.*, 329 NLRB 378, 382 (1999). The Board has explained:

As with every supervisory indicia, assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). Similarly, even the exercise of substantial and significant judgment by employees in instructing other employees based on their own training, experience, and expertise does not translate into supervisory authority responsibly to direct other employees.

*Id.* (citations omitted). As noted above, in *Oakwood*, the Board held that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* at 693. Further, “[i]f there is only one obvious and self-evident choice….or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.” *Id.*

Here, the Employer failed to meet its burden of establishing that DOT Administrators have supervisory authority to responsibly direct or assign. Clearly, asking drivers to fill out applications, provide paperwork, or correct mistakes on paperwork, does not require independent judgment. Nor is independent judgment needed for a DOT Administrator to request that a driver alter the manner in which he is securing a load or adhering to hours of service, as the applicable laws and internal policies dictate proper driver behaviors in those situations. Furthermore, there is no evidence in the record to support finding that any such direction or instructions by DOT Administrators is “responsible” insofar as there is no evidence to show that the Employer holds DOT Administrators accountable if drivers fail to follow any such directions by DOT Administrators.

Concerning assignment authority, DOT Administrators are authorized to suggest to the transportation coordinator that a driver who is ineligible to operate certain equipment be assigned to operate other equipment. The DOT Administrator’s decision in this regard, however, does not involve independent judgment free from the control of others, because the transportation coordinator has final say. Further, there is no dispute in the record that DOT Administrators are not authorized to decide what piece of equipment a driver will use or assign a driver to a piece of equipment.
For these reasons, I find that the Employer failed to meet its burden of proving that the DOT Administrators have the authority to responsibly direct or assign.

c. Hire

The Employer did not present evidence showing that DOT Administrators have the authority to hire or effectively recommend hiring. To be sure, Supervisor Hammeke testified that the transportation coordinator – not DOT Administrators – hires drivers. The evidence reveals that DOT Administrators collect the paperwork necessary for the Employer to ensure that its vehicles are operated by qualified individuals, and this process may occur before a driver is hired. However, to the extent that a DOT Administrator determines, prior to the Employer hiring a driver, that the driver is not qualified to operate certain equipment, such determination does not require independent judgment. Instead, it is based on a basic review of the documents provided and whether they satisfy the Employer’s qualification requirements. Moreover, DOT Administrators do not decide which drivers will be hired or even make recommendations regarding who to hire.

In light of the evidence, I find that the DOT Administrators do not possess the authority to hire or effectively recommend hiring within the meaning of Section 2(11) of the Act.

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.16

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.17

16 At the hearing, the Employer attempted to ask a witness whether a Teamsters driver had ever threatened or pressured her regarding compliance matters. The Petitioner objected based on relevance. The Employer argued that the testimony was relevant to the analysis of whether a conflict of interest existed between Union members and the petitioned-for Unit. The Hearing Officer sustained the objection on grounds that the information was not relevant to the guard analysis and was prejudicial.

17 The Employer, Universal Television Productions LLC, 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 has received goods valued in excess of $50,000 directly from outside the state of California.
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.

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: 18

   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 12, 2018 from 12:00 p.m. to 2:00 p.m. at the Bud Westmore Building 4250, 3rd Floor Conference Room located at 100 Universal City Plaza, Universal City, CA 91608-1002.

18 At the hearing, as noted at the outset of this Decision, 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 based on the similar work duties, similar skill set, and common supervision.
B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Friday, September 28, 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 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 beenrehired 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 9, 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.

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. 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 9, 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: October 4, 2018

BRIAN GEE
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
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