UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PECO ENERGY COMPANY,

Employer Case: 04-RC-223713

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL 614

Petitioner

EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Karl A. Fritton, Esq.
REED SMITH, LLP
Suite 3100
Three Logan Square
1717 Arch Street
Philadelphia, PA 19103

Adam J. Weiner, Esq.
REED SMITH, LLP
10 South Wacker Drive
40th Floor
Chicago, IL 60606

Anne C. Bancroft, Esq.
Mary Cate Gordon, Esq.
Exelon Business Services Company
2301 Market Street
Philadelphia, PA 19103

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE SUPERVISORY QUESTION IS NOT MOOT AND SHOULD BE REVIEWED AND REVERSED 3

III. SUMMARY OF ARGUMENT 7

A. The D&DE is Clearly Erroneous Because it Ignores Overwhelming Relevant Evidence, Misconstrues Evidence, and Relies on Factual Conclusions Which are Not Based on Evidence in the Record. 7

i. Assignment of Work 7

ii. Responsible Direction 11

B. The Regional Director's Decision Raises a Substantial Question of Law Because of Departure from Board and U.S. Supreme Court Decisions. 13

C. There Are Compelling Reasons for the Board to Review its Approach in Utility Supervisor Cases and Supervisory Cases, Generally. 16

IV. FACTS 17

A. Background 17

B. The Organization of the Company's Operations. 18

C. Selection and Training of Foremen 21

D. Foremen Evaluation 23

E. Operational Responsibilities of the Foremen 24

i. Work Planning 24

ii. Assignment of Work 26

iii. Responsible Direction 28

V. ARGUMENT 31

A. Standard of Review 31

B. The Regional Director Ignored Record Evidence That the Foremen and Master Technicians Exercise Independent Judgment in Assigning Work, Determining the Need for Overtime, and Responsibly Directing Employees. 31

C. The Regional Director's Decision Departs From Board and Judicial Precedent. 38

D. Compelling Reasons Support the Board Reconsidering the Restrictive Approach in Supervisory Cases. 47

VI. CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases

American Commercial Barge Line Inc.
337 NLRB 1070 (2002) 41

Arlington Masonry Supply, Inc.,
339 NLRB 817 (2003) 46

Atlantic City Electric ,
04-RC-221319 (2018) 6

Atlantic City Electric,
04-RC-193066 (2017) 5

Berthold Nursing Care Center,
351 NLRB 27 (2007) 41

Buchanan Marine LP,
363 NLRB No. 58, Slip op. (December 2, 2015) 16, 48

Chafin v. Chafin,
568 U.S. 165 (2013) 6

Community Education Centers,
360 NLRB 85 (2014) and *WSI* 44

Croft Metals,
348 NLRB 717 .....3, 15, 39, 43

D&T Limousine Service, Inc.,
328 NLRB 769 (1999) 48

Dominion Nuclear Conn., Inc., No. 01–RC–106263, Reg'l Dir.'s Decision and
Direction of Election at 17 (May 5, 2014) 4

Entergy Gulf States, Inc.,
330 NLRB 196 (2000) 49

Entergy Gulf States Inc. v. NLRB,
253 F.3d 203 (5th Cir. 2001) 13, 14, 49

Entergy Mississippi, Inc.,
357 NLRB 2150 (2011) 15, 16, 46

Entergy Mississippi Inc. v. NLRB,
810 F.3d 287 (5th Cir. 2015) ..... *passim*

Essbar Equipment Company,
315 NLRB 461 (1994) 48

Exelon Generation Company LLC and IBEW Local 614,
D&DE Case 04-RC-20940 (2004).....3

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000).....7

GGNSC Springfield v. NLRB,
721 F.3d 403 (6th Cir. 2013) 41

Glenmark Associates, Inc. v. NLRB,
147 F.3d 333 (4th Cir. 1998) 43

Golden Crest Healthcare Center,
348 NLRB 727 (2006) 3, 15, 39, 43

Hobson Bearing International, Inc.,
365 NLRB No. 73, Slip op. (May 11, 2017).....16

Lakeland Health Care Associates, LLC v. NLRB,
696 F.3d (11th Cir. 2012) 32, 38, 46

LakeWood Health Center,
365 NLRB No. 10, slip op. (December 28, 2016) 16, 48

Maine Yankee Atomic Power Co. v. NLRB,
624 F.2d 347 (1st Cir. 1980).....42

Mississippi Power & Light Co.,
328 NLRB 965 (1999) 15, 40, 45, 47

Mountaineer Park, Inc.,
343 NLRB 1473 (2004) 46

NBC Universal Media LLC v. NLRB,
815 F.3d (D.C. Cir. 2016).....31

NLRB v. Kentucky River Community Care, Inc.,
532 U.S. 706 (2001).....3, 13, 39, 49

NLRB v. NSTAR Electric Co.,
798 F.3d 1 (1st Cir. 2015).....46

NLRB v. Prime Energy,
224 F.2d at 210 46

NLRB v. Prime Energy Limited Partnership,
224 F.3d 206 (3d Cir. 2000).....32, 42

Oakwood Healthcare, Inc.,
348 NLRB 686 (2006) ..... *passim*

PECO Energy Company,
4-RC-18718 (1997).....5

PECO Energy Company,
4-RC-20513 (2003).....5

PECO Energy Company,
4-RC-20802 Regional Director's Decision & Direction of Election June 25,
2004) 5

Providence Hospital,
320 NLRB 717 (1986) 39

RCC Fabricators Inc.,
352 NLRB 701 (2008) 41, 42

Savannah River Site,
363 NLRB No. 113, Slip op. (2016).....44

Sears Roebuck Company v. NLRB,
349 F.3d 493 (7th Cir. 2003) 32

Starwood Hotels and Resorts,
350 NLRB 1114 (2007) 38

Sutter West Hospital,
Case 20-UC-076774, 2012 BL 494115 (2012).....38

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017).....7

Westgate Gardens Care Center,
32-RC-183272, 2017 WL 1279563 (March 31, 2017) 16

Regulations

29 C.F.R. § 102.67 1

29 C.F.R. § 102.67(d) 31

29 C.F.R. § 102.67(g) 5

I. INTRODUCTION

This is a Request for Review filed by PECO Energy Company ("PECO" or "Company"), to Regional Director Dennis Walsh's Decision and Direction of Election, dated October 15, 2018 in Case Number 04-RC-223713. ("D&DE" attached as Exhibit A.). 29 C.F.R. § 102.67. The Regional Director concluded that the Foremen, Master Technician and related positions[1] who supervise the Company's field crews are not supervisors within the meaning of § 2(11) of the National Labor Relations Act ("the Act"). The filed crews construct and maintain the Company's gas and electric transmission and distribution system in the five-county Philadelphia area and are currently represented by Petitioner IBEW Local 614.

In reaching this conclusion, the Regional Director's decision erroneously applied, or completely disregarded, extensive testimony and documentary evidence that the Foremen regularly exercise independent judgment in planning, assigning and directing work and further misapplied court and Board precedent regarding supervisory status. Specifically, the Regional Director found that although the Foremen assign work in the "Employer's vast and varied utility operation, including emergent incidents resulting in widespread outages and other threats to public safety," they do not do so with "independent judgment" and exercise only "limited and routine judgment" based on "their experience, expertise, training, or education." (D&DE at 18). The Regional Director also found that while the Foremen monitor and direct the work of the field crews, they do not do so "responsibly" because they do not meet the "general requirement that putative supervisors must have the authority to evaluate performance standards," nor was it shown, in the Regional Director's opinion, that the Foremen are held accountable for employee

[1] Approximately 150 Foremen, Master Technicians, Instrument Specialists, Power System Specialists, Support Service Planners/Schedulers, and Corrosion Control Specialists are at issue. As in the D&DE, any reference to 'Foremen' shall include reference to the other job titles and "he/she" shall be used interchangeably.

performance. (D&DE at 20). Last, the Regional Director concluded that the Foremen do not effectively recommend the hiring, discipline or promotion of employees (D&DE at 21), and that the ratio of supervisors to employees, the higher pay of Foremen, and their shared characteristics with undisputed supervisors and managers do not support a finding that they are statutory supervisors. (D&DE at 22).

The Regional Director directed an election for October 25, 2018, in which the Foremen voted 93-56 against representation. No timely objections were filed and the Regional Director issued a Certification of Results on November 5, 2018.

PECO now requests review of the Regional Director's Decision for the following reasons:

1. The supervisory status and authority of the Foremen is critical to the Company's business model for the safe and efficient performance of work on its electric and gas transmission and distribution systems. The Regional Director's decision undermines the Company's operations and the ongoing authority of the Foremen. It will prejudice the Company in subsequent cases in Region 4 involving the status of the Foremen and therefore should be subject to review even though the Foremen did not elect the union;

2. The Regional Director's decision fails to address substantial factual evidence of the Foremen's exercise of independent judgment, their responsible direction of employees and their overall responsibilities in assigning and directing the safe and efficient performance of work, and prejudices the Company's right and ability to safely operate and fulfill its obligations as a public utility;

3. There is a substantial question of law raised because the Regional Director's finding on the lack of independent judgment is directly contrary to the Supreme Court's decision

in *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706 (2001) and substantially departs from the Board's decisions in *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006), *Croft Metals,* 348 NLRB 717 (2006, and *Golden Crest Healthcare Center,* 348 NLRB 727 (2006); and

4. There are compelling reasons for the Board to reconsider its approach in supervisory status cases, particularly in the utility industry. As former Chairman Miscimarra and former Member Hayes repeatedly pointed out, the Board's supervisory case law is increasingly at odds with the Supreme Court's decision in *Kentucky River*, and has become increasingly abstract and removed from the practical "realities" of the workplace.

II. THE SUPERVISORY QUESTION IS NOT MOOT AND SHOULD BE REVIEWED AND REVERSED

Although the election did not result in the imposition of a bargaining obligation on the Company, the Regional Director's supervisory determination is not moot. This decision undercutting the supervisory status of the Company's Foremen will have a significant impact on the Company's safe and efficient operations and there are compelling reasons for the Board to review the Regional Director's erroneous treatment of the issue.

First, in each previous NLRB-supervised election at PECO, the Foremen positions were excluded from the bargaining units by stipulation on the basis that they were supervisory.[2] Since 1998, PECO has structured its operations, and its management model, on the premise and expectation that the Foremen function as the first level of supervision in the field for the gas and electric crews who construct and maintain the Company's extensive transmission and distribution system throughout its 2,000 square mile service territory. The Regional Director's

[2] Moreover the previous Regional Director of Region 4, Dorothy Moore Duncan, found that the position comparable to the Foremen in Exelon's generating plants, the Lead Maintenance Technician, assigned and responsibly directed work within the meaning of the Act. *Exelon Generation Company LLC and IBEW Local 614*, D&DE Case 04-RC-20940, at pp. 12-13 (2004) (Lead Technicians adjust work assignments based on skill and qualifications of team members, priority of work assignments and change them based on call outs and emergent work; lead technicians responsibly direct the technicians in a manner that is more than clerical or ministerial particularly in the context of a nuclear power plant).

decision, based on a selective and erroneous reading of the facts and incorrect application of the law, has upset that model. It is critical for the stability of the Company's operations and the safety and integrity of its transmission and distribution systems, that the Board step in and correct the erroneous findings and conclusions of the Regional Director. *See Dominion Nuclear Conn., Inc.*, No. 01–RC–106263, Reg'l Dir.'s Decision and Direction of Election at 17 (May 5, 2014) (recognizing "the public's immediate and direct interest in the uninterrupted maintenance of the essential services that only (the public utility) industry can provide."

The D&DE as it stands forces both the Foremen and the Company to operate PECO's electric and gas transmission and distribution systems under the cloud of a decision that undermines and devalues the status and authority of its supervisors who are the first line of responsibility in ensuring that PECO provides safe and reliable gas and electric service to its more than 2 million customers. As the testimony of the 14 Foremen at the hearing demonstrated, they have daily supervisory responsibility and accountability for leading and directing their crews and ensuring the safe, proper, and efficient performance of their work.[3] The Foremen are the Company's essential management representatives in the field. The Company should not have to face the risk that their leadership is challenged by the Union, or the represented crews reporting to them, based on the erroneous findings of the Regional Director.

This damage is compounded by the risk that the erroneous decision will be used in a subsequent case to challenge the important role of the Foremen. While the Company recognizes that Regional Director decisions are not precedential, the Board's rules provide that a Regional

[3] The Regional Director ignored the testimony of Foremen clearly demonstrating their supervisory role, including: "As long as the work gets done, it's my prerogative when it gets done and how I do it." (Mercado N.T. 313); "I am the management representative on the backshift." (Coleman N.T. 955); "I'm in management and I'm the supervisor in the field." (Steger N.T. 1325). Even the Union witnesses candidly acknowledged: "I hold myself and others accountable to the highest safety standards." (Houlihan N.T. 1750); as the single point of contact "I'm totally responsible to make sure that everybody went home safely." (Schmitt N.T. 1678); "Part of my job is to ensure that the job is done safely and correctly and if it isn't - step in and fix it." (Houlihan N.T. 1750).

Director's actions are final unless a request for review is granted. 29 C.F.R. § 102.67(g). It has been PECO's experience in Region Four that when a Petition is filed for a unit in which a previous D&DE was issued, the Regional Director may rely on the previous decision unless there is evidence of changed circumstances. As a practical matter, therefore, the D&DE issued by Regional Director Walsh in this case is 'locked in' and will be the blueprint for any future petition involving the Foremen particularly if it is filed in the near term.

The Company's concern that the erroneous decision of the Regional Director will be the foundation for future cases is not speculative or unfounded. PECO has previously faced back-to-back election petitions in its generating stations (before its merger with Commonwealth Edison to form Exelon Corporation), and has had a string of elections over the Company's field employees, with the Union prevailing in the last election in 2004. In 1997, the field crews were the object of an organizing drive by the Utility Workers Union, *PECO Energy Company*, 4-RC-18718 *(1997)*. The Petitioner in the present case then filed a petition for the same group in 2002. *PECO Energy Company,* 4-RC-20513 (2003) and while a request for review in that case was pending, withdrew the petition and filed a new petition which ultimately resulted in the certification of the current bargaining unit. *See, PECO Energy Company*, 4-RC-20802 Regional Director's Decision & Direction of Election at pp. 2-3, June 25, 2004).

Indeed, recent back to back elections at PECO's sister utility, Atlantic City Electric Company ("ACE"), demonstrate the ongoing risk and uncertainty for an employer when supervisor status is not resolved.[4] There, IBEW Local 210 filed a Petition in 2017 to represent ACE's System Dispatchers. *Atlantic City Electric*, 04-RC-193066 *(2017)*. Regional Director Walsh found the System Dispatchers were not supervisors within the meaning of the Act and directed an election. The System Dispatchers voted against representation and no Request for

[4] Atlantic City Electric and PECO are both wholly-owned subsidiaries of Exelon Corporation.

Review was filed. A year later, Local 210 filed a second Petition to represent the same group of System Dispatchers. *Atlantic City Electric ,* 04-RC-221319 (2018*)* The parties stipulated to the factual record from the case the year before and the acting Regional Director adopted and incorporated by reference the Regional Director's findings of fact and conclusions of law from the prior case. *Case 04-RC-193066*. In the election directed by the Assistant Regional Director, the System Dispatchers voted in favor of Local 210 and the Union was certified on July 9, 2018. ACE's Request for Review is currently pending before the Board. *Case 04-RC-221319.* Notably, Local 210 has opposed the Request for Review, largely on the basis that ACE stipulated to the record in the prior case and did not file a Request for Review from the 2017 decision. *See Case 04-RC-221319, July 30, 2018 Statement in Opposition.* Although Local 210's opposition to the Request for Review on that basis is unfounded, it highlights and reinforces PECO's concern that an unreviewed and erroneous decision of the Regional Director will inappropriately form the foundation of a second case involving these critical positions of the Company.

In *Chafin v. Chafin,* 568 U.S. 165 (2013) the Supreme Court outlined when a case is moot:

> "There is thus no case or controversy, and a suit becomes moot, 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' *Already, LLC v. Nike, Inc.,* 568 U. S. ___, ___ (2013) (slip op., at 4) (quoting *Murphy v. Hunt,* 455 U. S. 478, 481 (1982) (per curiam). But a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.' *Knox v. Service Employees,* 567 U. S. ___, ___ (2012) (slip op., at 7; … '*As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot*.' *Knox,* supra, at ___ (slip op., at 7)."

568 U.S. at 172 (emphasis added).

Under this standard, this case clearly is not moot given the likelihood of a future challenge to the Foremen's supervisory status. In cases where an event (such as an attempted representation of PECO foremen) could reasonably be expected to recur, the Supreme Court

holds that "the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019, fn. 1 (2017) (cessation of a challenged practice does not moot a case unless 'subsequent events ma[ke] it absolutely clear that the action could not reasonably be expected to recur). Here, whether the challenged action will recur is in the Petitioner's hands and events show recurrence is likely. Petitioner cannot meet that burden and PECO unquestionably has a concrete interest in and legitimate concern over present and future application of the Regional Director's decision. Therefore, the impact of the D&DE is not moot and the Board should consider this Request for Review under its normal standards.

III. SUMMARY OF ARGUMENT

A. *The D&DE is Clearly Erroneous Because it Ignores Overwhelming Relevant Evidence, Misconstrues Evidence, and Relies on Factual Conclusions Which are Not Based on Evidence in the Record.*

i. *Assignment of Work*

The Regional Director found that the Foremen assign work, but do not exercise independent judgment in making those assignments. The Regional Director concluded the location of the outage or other service usually dictates the location of work of the crews and that Foremen are simply using their "common sense" following detailed Company procedures (which according to one Union witness are so numerous they could "fill a Mack truck" (N.T. 1556).[5]) (D&DE at 13, 20). In arriving at his simplistic and formulaic conclusion, the Regional Director blindly ignored the evidence from Foremen who testified that they have the authority—and are expected—to assemble and assign crews based on experience, training, location, ability to handle the particular job at issue, and personalities, among other factors; to move crews based on

[5] Citations to "N.T. __" refer to notes of testimony from the hearing held by Regional Director.

their assessment of conditions, the complexity of the job, and customer demands; and, to stop and reassign work based on the Foreman's assessment of conditions at the time the job was being done. (*See e.g.*, Mercado: Stop and reassign work based on conditions (N.T. 153-154); reassign crews and decide crew size (N.T. 161-163); put crews together based on assessment of experience, skills, and condition of the job (N.T. 157); Brown: Foremen pull employees from one job to another and do so "every day" (N.T. 357, 372); Gant: Make job assignments based on training and assessment of relative skills and qualifications (N.T. 529, 530, 532, 537); Braxton: "They are basically my technicians and what I do is I assign jobs to them" (N.T. 427); considers scope of job, severity of job, and whether person is right for the job (N.T. 444-45) and uses knowledge of employee's strengths in making job assignments (N.T. 475); Doherty: Prioritizes work (N.T. 919), regularly makes changes in emergent work, stops jobs based on conditions (N.T. 797), noting even within individual job classification there are variations of skill and ability which he takes into account in making assignments (N.T. 903 910); takes personalities into consideration (N.T. 941); McHugh: Negotiates with the Operations Control Center ("OCC") over whether work is in fact priority (N.T. 1082-83); will evaluate whether a job is critical or can be postponed or rescheduled (N.T. 1090-1091); staffs jobs based on assessment of employee experience, skills, and need for training (N.T. 1086-88); moves employees from one location to another as needed (N.T. 1095); Steger: Decides how many Technicians at each location, requires employees to work together (N.T. 1013); transfers employees as he sees fit (N.T. 1227-28); reassigned an employee from Berwyn to Baldwin based on workload (N.T. 1228); discusses transfer and movement of Technicians with other foremen(N.T. 1238); assigns work to specific Technicians (N.T. 1240); has forced employees to work together on numerous occasions (N.T. 1271-1273); Thomas: Makes changes after work is assigned based on

assessment of changing conditions (N.T. 1449-1450); Quigley: Decides how many crew to assign based on assessment of job; Houlihan: Takes into account how adept linemen are when putting crews together for emergent work (N.T. 1743); Coleman: Looks at skill sets, qualification, personality, and compatibility in making assignments particularly in emergency situations (N.T. 953-955); can force crew members to work together (N.T. 1012); Collozza: Decides whether to adjust staffing level based on operating conditions, has authority to call Technicians back in for additional support (N.T. 1166); will pull employees as needed to assist on jobs (N.T. 1173)).

Foremen testified that no two jobs are the same and that it is their responsibility, based on training and experience and the authority vested in them by the Company, to decide who will perform the work, how the work will be performed, and in what order the work will be performed. (Mercado: "every pole hit is like a snowflake, different" (N.T. 282); "It's my prerogative how the work gets done (N.T. 313); Gant: "So the foremen direct it and the SDM's do it? Correct" (N.T. 519); Braxton: if observes issues in the field, he directs the crew to address it and they are obligated to fix it (N.T. 452); Doherty: directs techs on the job (N.T. 806); Coleman: gives instruction on job site including on personal protective equipment (N.T. 962); jobs are as different as "there are stars in the sky." (N.T. 1022); Steger: at job sites, directs work, answers questions, and authorizes additional cuts (N.T. 1244); Clark: directs how to do work and crew does it (N.T. 1355); Thomas: instructs crew to set up equipment (N.T. 1443); Schmitt: responds to issues crew encounters in the field and directs them how to do the work (N.T. 1643)) There was no testimony from any Foreman that procedures control in assigning all work. Indeed, no such procedures were named or put into evidence, or described in any detail by any witness, and none of the witnesses testified that he relies solely on procedures in making job

assignments or in directing a crew how to do a job. The testimony of Union witness Steven Quigley on this point was telling:

> Q. And, on a particular job, there may be any number of possible ways to do the job, correct?
>
> A. That's correct.
>
> Q. But, it is your responsibility as the Foreman, isn't it, to make sure that the optimal method is selected and that the method that is selected is the safest method?
>
> A. Yes, sir.
>
> Q. That's your job as the Foreman?
>
> A. Yes, sir.
>
> Q. And, if at the end of that discussion, there are competing ways to do the job, it's your decision which way the job is going to be done, correct?
>
> A. Yes, sir.
>
> Q. And, that's often an 'in the moment' decision you make on the job site?
>
> A. That's where this decision would be made, ultimately.
>
> Q. And, you would agree with me that that's an authority you are called upon to exercise on an, if not, daily, weekly, basis?
>
> A. I really have no guys pushing back on an idea I have from the beginning.
>
> Q. Right? They do what they're told when you tell them to do it, right?
>
> A. Yes. If…yes. (N.T. 1556-1558).

Similarly, the Regional Director's conclusion that the Foremen do not exercise independent judgment in assigning overtime, but rather simply follow the Collective Bargaining Agreement ("CBA"), ignores the threshold issues of *whether* overtime is needed in the judgment of the Foreman, *how many* employees will work the overtime, and *how long* the overtime will be worked. (D&DE at 19). The Regional Director failed to address extensive testimony demonstrating the Foremen's authority to make these determinations. (*See, e.g.*, Mercado: Holds

crews over when in his judgment it's necessary to get the job done (N.T. 172, 245); Brown: Foremen have authority to and are expected to decide whether to continue to work past the end of the shift as long as it takes to get the job done (N.T. 377-78); Gant: has authority to approve employees to stay overtime and to force them to stay overtime, if it's an emergency (N.T. 542, 556); Braxton: crews may call him to discuss whether to stay and finish the job, but, it's his judgment, based on the conditions at the time, whether they will (N.T. 434-435); McHugh: assigns overtime and borrows from other teams to complete it (N.T. 1092); Steger: schedules overtime based on conditions (N.T. 1247, 1248, 1276); Clark: authority to make crews stay for overtime until relief is called (N.T. 1361); Quigley: He makes the judgment based on status of the job, whether to close it up and complete it the next day or work overtime. (N.T. 1562)). Although there may be call out procedures in some regions that provide in what order overtime must be offered among represented employees, they do not dictate when, whether, and for how long overtime is needed. Those decisions are made in the independent judgment of the Foremen.

ii. *Responsible Direction*

In a cryptic one page 'responsible direction' analysis, the Regional Director completely ignored that the Foremen are responsible for walking down jobs to determine how to do the job and how to do it safely, ensuring that the work is done correctly, observing and checking the work of the crew, responding to questions about the right way to do a job and, generally, ensuring that workers perform safely and efficiently. (D&DE at 20). Similar to the analysis on "assignment," the Regional Director failed to consider evidence that did not fit his conclusion. (*See, e.g.*, Gant: "Foremen direct and the distribution mechanics do it." (N.T. 519); Braxton: If he observes an issue in the field, he directs the crew to address it and they are obligated to fix it. (N.T. 452); Doherty: directs Technicians on the job. For example, when it's appropriate for a

more junior tech to perform certain work (N.T. 806) and evaluates performance daily (N.T. 821); Steger: directs work at job sites, answers questions about particular ways to do the work, authorizes additional cuts (N.T. 1244), will pull employee off of job site if he is not following instructions on work or wearing PPE and give coaching (N.T. 1246); Clark: directs individual Technicians how to do the work and they do it (N.T. 1355); Thomas: instructs crews to set up cutting equipment, release the clearance order and communicate to C&M when they finish the job (N.T. 1428); Schmitt: responds to issues with crews on the field and directs them on how to do the work (N.T. 1643)).

Similarly, the Regional Director overlooked or misconstrued evidence that Foremen are held accountable for employee performance and face the prospect of adverse consequences if employees do not perform correctly. Specifically, the Regional Director failed to address that Foremen are selected, trained, and evaluated on their ability to ensure the quality and productivity of employees, and to ensure that each job is done according to the Company's standards and expectations. (Employer Exs. 23, 41, 42; N.T 1260, 1748-49) The Regional Director also ignored evidence that if employees fail to meet standards and expectations, the Foremen are responsible for correcting the employees and face the possibility of adverse consequences if the work is not corrected. (*See, e.g.,* Krick: "They are held accountable through looking at their safety records, their productivity, they are sticking to work plan. You'll see comments about making sure overtime is not abused…getting the work scheduled (N.T. 683); Foremen Nolan's discipline held him accountable for not stopping employees reporting to him from handling customer property or riding on the back of truck (N.T. 683-85); Doherty: Counseled for mistake of tech on digital monitoring equipment that had defective channels after tech worked on it (N.T. 808); (Employer Ex. 27).

The record testimony and documentary evidence unequivocally demonstrate Foremen daily use their independent judgment to plan, assign, change, and responsibly direct work; move crews and change schedules; address emergencies; and, decide whether overtime is needed and if so how much and how long. The Regional Director's clearly erroneous findings on these substantial issues of fact prejudicially impact the Company's right and ability to safely and efficiently operate its public utility business by unfairly, and without basis in fact or law, undermining and calling into question the critical supervisory role the Foremen have in the field every day.

B. *The Regional Director's Decision Raises a Substantial Question of Law Because of Departure from Board and U.S. Supreme Court Decisions.*

The Regional Director's decision fails to follow controlling Supreme Court and Board precedent in four ways. First, the Regional Director's conclusion that the Foremen's exercise of judgment is "limited and routine" because it is based on their "experience, expertise, training or education" (D&DE at 18) is directly contrary to the holding of the U.S. Supreme Court in *Kentucky River*, 532 U.S. at 714-15 (Court rejected Board's distinction that if judgment is based on greater experience or training it is not "independent."). Indeed, the Board case cited by Regional Director Walsh for his conclusion that judgment is not independent if it is based on experience, expertise, training or education (*Providence Hospital*, D&DE at 18) was expressly rejected by the Supreme Court in *Kentucky River*, 532 U.S. at 714, fn. 1. Similarly, the Regional Director's reliance on *Mississippi Power* for the same point is undercut by the Court's holding in *Kentucky River* and was expressly rejected by the Fifth Circuit in *Entergy Gulf States Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001); *see also, Entergy Mississippi Inc. v. NLRB*, 810 F.3d 287, 297-98 (5th Cir. 2015). In *Entergy Gulf States*, for example, the Fifth Circuit explicitly rejected the Board's attempt to look past evidence of independent judgment merely because the putative

supervisors "use their technical expertise and judgment to make complex decisions," noting that *Kentucky River* precluded such reasoning. 253 F.3d at 211. The Court's message to the Board was clear: "This argument is no longer viable." *Id*.

Second, the Regional Director's reliance on the regulated nature of the Company's business and the presence of Company procedures to support his conclusion that Foremen do not exercise independent judgment (D&DE at 18) is at odds with the Board's analysis in *Oakwood Healthcare*. The Regional Director's decision fails to recognize, as the Board pointed out in *Oakwood*, that "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between those extremes." *Oakwood Healthcare,* 348 NLRB at 693. "In determining the meaning of the term 'independent judgment' under Section 2(11), the Board must assess the *degree* of discretion exercised by the putative supervisor." *Id*. (emphasis in original). Here, the Regional Director engaged in *no* analysis of the degree of the Foremen's discretion but instead summarily concluded that because some Foremen referenced unspecified procedures (not produced in the record), *all* of their discretion was controlled by those unspecified procedures. The Regional Director's summary reliance on the existence of unidentified procedures cannot be squared with the Board's admonition that "the mere existence of company policy does not eliminate an independent judgment from decision making if the policies allow for discretionary choices." *Oakwood Healthcare*, 348 NLRB at 693. As the overwhelming record evidence establishes, each Foreman who testified regularly makes discretionary choices not only in deciding where and how to apply a procedure, but also regularly makes discretionary judgments when faced daily with the multitude of jobs and

situations or unexpected circumstances which are not addressed by or governed by a procedure. (N.T. 282, 397, 1022, 1566, 1643)

Third, the Regional Director's analysis of the Foremen's "responsible direction" (D&DE at 20) misapplies the Board's decisions in *Croft Metals,* 348 NLRB 717 (2006), *Golden Crest Healthcare Center,* 348 NLRB 727 (2006), and *Oakwood Healthcare*. Those cases, and subsequent Courts of Appeals decisions, emphasize that a review of whether the putative supervisor is providing responsible direction depends on the overall circumstances, the existence of company policies setting forth the expectations and authority of the supervisor, and whether the putative supervisor in fact engages in that responsible direction. Here, the Regional Director undertook no meaningful analysis of these points and improperly concluded that the Foremen must in fact have *actually suffered* an adverse consequence based on the conduct of their crews, and not just accountable. The Board's cases, however, require only that the putative supervisor face the *prospect* of adverse consequences. Here, the evidence established that Foremen not only face the prospect of adverse consequences, but that they in fact have faced adverse consequences for the conduct of their crews. (Employer Ex. 23, 27; N.T. 808)

Fourth, the Regional Director inexplicably relied on the Board's system dispatcher cases and extrapolated from those cases that they represent the Board's supervisory jurisprudence in the utility industry. (D&DE citations at pp. 5-6, 18-19 to *Mississippi Power & Light Co.,* 328 NLRB 965 (1999) and *Entergy Mississippi, Inc.*, 357 NLRB 2150 (2011)). While the Company believes those cases were improperly decided, the Regional Director's analysis conveniently overlooks several key factual differences. For example, one of the significant foundations of the conclusion in *Mississippi Power & Light Co.* that the system dispatchers were not statutory supervisors was because the supervisors *in the field* were the ones who, in the Board's judgment,

actually assigned and directed the work on a day-to-day basis. At PECO, the Foremen are the only individuals in the field responsible for assignment and direction of work, a critical and uncontroverted fact the Regional Director disregarded.

C. *There Are Compelling Reasons for the Board to Review its Approach in Utility Supervisor Cases and Supervisory Cases, Generally.*

As former Chairman Miscimarra repeatedly pointed out, the Board's supervisory case law is increasingly divorced from reality and its cookie cutter 'check the box' approach ignores the manner in which many modern businesses are organized and function. See, *Buchanan Marine LP*, 363 NLRB No. 58, Slip op. at *4-5 (December 2, 2015) (Miscimarra, dissenting). Former Member Hayes similarly questioned the Board's application of "independent judgment" in the utility context. *See, e.g.*, *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2159-60 (2011) (Hayes, dissenting) (giving examples of judgment exercised by system dispatchers). The Board itself has also discussed the need to address "practical realities" in some of its recent cases. See, *Hobson Bearing International, Inc.*, 365 NLRB No. 73, Slip op. at *1, fn. 1 (May 11, 2017); *Westgate Gardens Care Center*, 32-RC-183272, 2017 WL 1279563, Slip op. at *1 (March 31, 2017); *LakeWood Health Center*, 365 NLRB No. 10, slip op. at *4-5 (December 28, 2016) (Miscimarra, dissenting).

Therefore, the Board should review whether its analysis in this and other supervisory cases should take into account the nature of the employer's operations, the work performed by undisputed statutory supervisors, and whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute. Indeed, in this case, there is no discussion from the Regional Director about what the Foremen's supervisors do and no discussion about whether the Company can safely and efficiently fulfill its responsibilities as a public utility if the Foremen are not considered supervisory.

IV. FACTS

A. *Background*

PECO transmits, distributes, and sells electricity to approximately 1.6 million customers in the City of Philadelphia and the surrounding Pennsylvania counties of Delaware, Chester, Montgomery, Bucks, and a portion of York. It also distributes and sells natural gas to more than 500,000 customers in the counties of Delaware, Chester, Montgomery and Bucks. The PECO service territory is 2,000 square miles. (Employer Ex. 28). PECO employs approximately 2,500 employees.

Petitioner IBEW Local 614 ("Petitioner" or "Union") represents 1,300 company employees in two bargaining units: approximately 1,100 craft, technical and plant clerical employees employed under a CBA dated April 1, 2015 to March 31, 2021 (Joint Ex. 1) and a unit of approximately 200 call center employees employed under a separate CBA. In this case, the Petitioner sought an *Armour-Globe* election among approximately 150 Foremen and related positions who function as field supervisors of the craft and technical employees. The Foremen, were excluded from the certification issued in 2004 by Region Four. (See Board Ex. 4, Case No. 4-RC-20802). The exclusion of these positions was based on the parties' stipulation that the positions are supervisory within the meaning of the Act. (N.T. May 13, 2004, pp 256-257; Joint Exs. 1 and 2). The certification is incorporated into the CBA between the parties. (Ex. J-1, p. 6).[6]

The Regional Director conducted eight days of hearings in this case in which 19 witnesses testified, including 14 Foremen and Master Technicians. The hearing generated over 2,000 pages of testimony and over 80 exhibits. The relevant evidence, much of which is overlooked or mischaracterized by the Regional Director, is set forth below.

[6] The parties similarly excluded the positions from an election conducted by Region Four in 2003.

B. ***The Organization of the Company's Operations.***

The Company has five main operating groups responsible for specific aspects of the Company's electric and gas transmission and distribution systems:

1. **Construction and Maintenance – Electric (aerial and underground)**: Responsible for the construction and maintenance of aerial and underground electric distribution facilities throughout the PECO system.

2. **Construction and Maintenance – Gas**: Responsible for the construction, maintenance and testing of the Company's gas pipelines and facilities throughout the counties where PECO distributes and sells gas. The Gas operations include the West Conshohocken gas plant, which manufactures and stores liquefied natural gas, and the employees who are responsible for inspection and testing of gas facilities.

3. **Customer Response**: Responsible for responding to service disruptions on the system and other emergent work.

4. **Transmission and Substations**: Responsible for the installation and maintenance of the Company's transmission lines and substations throughout the system and the testing of that equipment.

5. **Field and Meter Services**: Responsible for installation, maintenance, and inspection of meters throughout the system.

The operating groups are divided into three geographic regions: City of Philadelphia, Bucksmont (covering Bucks and Montgomery Counties), and Delchester (covering Delaware and Chester Counties). Each Region has a number of service buildings:

- Philadelphia: G & Luzerne and Christian Street,
- Bucksmont: Doylestown, Warminster, Emilie in Bucks County and North Wales Perkiomen and Plymouth in Montgomery County
- Delchester: Baldwin in Delaware County and West Chester, Coatesville, West Grove, Plainbrook, and Phoenixville in Chester County. (Employer Ex. 28)

Each of the field personnel currently represented by the Union is assigned to and works out of one of these service buildings, although the Customer Response employees, (Energy Technicians and Aerial Line Mechanics or "Troublemen") may report directly from home to the job site depending on the nature of the work.

The petitioned-for Foremen are assigned to the following departments and supervise the following employees:

Department	Foreman Position	Position Supervised
Construction and Maintenance Electric - Aerial	Foreman Aerial	Lineman First Class Aerial Second-Class Line Mechanic Third-Class Line Mechanic Line School Apprentice
Construction and Maintenance Electric - Underground	Foreman Underground	Lineman First Class Underground Line Mechanic A Underground Line Mechanic B Underground Line School Underground Apprentice
Construction and Maintenance Gas	Operations Foreman Distribution	Senior Distribution Mechanic Gas Distribution Mechanic A Gas Distribution Mechanic B Gas Distribution Mechanic Apprentice
Gas System Control and Plant Operations	Instrument Specialist Gas Power Systems Specialist Gas Corrosion Control Specialist Support Svc Planner/Scheduler	Plant Operations Mechanic
Transmission and Substations (T&S)	Foreman T&S	Lineman First Class Aerial Technician Maintenance First Class Engineering Technician C Engineering Technician A Technician Maintenance Third Class Technician Maintenance First Class Underground Transmission Technician Maintenance Second Class

Department	Foreman Position	Position Supervised
	Master Technician	Engineering Technician A Engineering Technician B Engineering Technician C
Customer Response	Foreman Customer Response	Lineman First Class Aerial Technician Maintenance First Class
	ET Foreman	Energy Technician (Non-Entry) Energy Technician (Entry)
Field and Meter Services	Foreman Customer Response	Revenue Protection Technician Meter Technician

The number of employees a Foreman supervises depends on his or her work group and the nature of the work performed. Within the Construction and Maintenance Electric Organization, there is generally one Foreman for every six to eight field employees. (See generally Employer Ex 1, pp. 0020-0053). In the C&M Gas Organization, there is generally one Foreman for every eight to ten employees. (See e.g. Employer Ex. 1, pp. 0057-0063). The Foremen in the Customer Service organization have responsibility for significantly larger numbers—generally ranging from 12 to 23. (See Employer Ex 1, pp. 0005-0007, 0009, 0011 0012). Depending on the size of the organization, one to four Foremen may report to a single Supervisor, who is generally responsible for an entire service building or multiple crews. (Employer Ex. 1).[7]

[7] The Regional Director also misconstrued and took out of context the Pennsylvania PUC audit on the supervisory ratios at PECO. (D&DE at 22) At no time did PECO tell the PUC that the Foremen were not supervisors (N.T 693-94, 736) but rather conveyed the *reverse:* the Foremen function as supervisors in the field and therefore PECO was comfortable with its span of control at each level of its management. The PUC accepted that explanation of the role of the Foremen. (N.T. 694).

All the Foremen who testified in the case, whether on behalf of the Company or Union, noted that Supervisors spend very little time in the field and are occupied with "corporate" and administrative issues such as work management, budgeting, financial reviews, and coordination of work with other departments. Some of the Foremen also noted that their current Supervisor does not have a background or experience in electric or gas line work and, as a result, relies heavily on the Foremen in the field for the safe and efficient performance of work by the field crews who are under their direction. (N.T. 203, 1565-66). Gas Supervisor Selvyn Brown testified that he did not previously work as a Senior Distribution Mechanic or Foreman and that, in light of his other responsibilities, he could not safely oversee and direct the work of crews in the field without the Foremen, noting that they have a "greater understanding" of the work and employees than he does. (N.T. 339, 382). Foremen consistently testified that they do not need other supervisor approval to schedule and assign work (N.T. 350-1, 447, 779, 953, 955, 966, 1105, 1164, 1238, 1343, 1450, 1467).

C. *Selection and Training of Foremen*

In 1998 in response to the deregulation of the power generation industry and in an effort to improve the safety and efficiency of the work performed on it transmission and distribution systems, the Company established the current Foremen position to replace the previous "crew leader" or "job leader."[8] As part of this transition, all incumbent crew leaders who wished to be considered for the new Foreman position were required to apply and selections were based on merit according to the following criteria: safety, judgment, planning and organizing skills, technical skills, leadership, core values and business literacy. (Employer Ex. 4, Doc. 3). The job description that accompanied the new Foreman position listed major responsibilities as:

[8] The crew leader worked as part of the crew, akin to the position of a lead man, and did not have responsibility or accountability for planning work or assigning or directing the performance of work in the field.

responsibility for employees assigned to him or her to follow all work practices; to monitor technical development of employees; assure the quality of work; responsible for productivity; participate in employee performance evaluations and complete craft appraisals; make decisions on hiring and promotions; overtime and granting time off; participate in upfront planning of large jobs and be accountable for on-time delivery. (Employer Ex. 4, Doc. 6). Following selection, the Foremen underwent what was then an eight day training program on Foremen responsibilities.

The current gas and electric Foreman job descriptions reflect the criteria set forth in 1998. (Employer Exs. 6 and 7). The Transmission & Substations, Energy Technicians, and Field & Meter Service Foremen positions were added in the ensuing years. (Employer Exs. 8, 9, and 10). The Company continues to select Foremen using the same criteria established in 1998 and holds them to the same job expectations.

Foremen are required to undergo a three-day training program on leadership, management essentials and MARC labor relations. The current version of the Program has been in place, with some modifications each year, since 2013. The Program includes sessions on managing employees and transitioning from line worker to supervisor/leader. The labor relations portion includes understanding the CBA, managing and leading in a union environment, and fact-finding. (N.T. 553, 454-67, 648-58, 947, 1099-1100, 1184, 1320, 1463). (Employer Exs. 14-20).[9] None of this background on selection and training of Foremen was considered by the Regional Director.

[9] Foremen also participate in additional leadership programs open only to management personnel of the Company, including Leader as Coach (Employer Exs. 14, 15, 21), and participate in management training designed to address specific issues as needed. (See, e.g., Employer Ex. 22). Foremen also regularly attended management meetings, including First Line Supervisor meetings. (Exs. 032-36, N.T 219-20).

D. *Foremen Evaluation*

Although the DD&E notes Foremen are paid 10.5% more than the highest rate of the classifications they supervise, receive management benefits and are eligible to participate in the PECO-wide annual incentive plan, it fails to note payment may be reduced or eliminated based on Foreman performance. (N.T. 642). The Decision also fails to consider Foremen are not subject to the Employer's disciplinary Employee Standards of Conduct that are applied to bargaining unit employees (Employer Ex. 5) and are not subject to the same system of progressive discipline set forth in the Standards of Conduct. Rather, Foremen, like other management and supervisory employees, are subject to the Company's Code of Business Conduct. (Exs. 059-100). If the need arises, Foremen are placed on a performance improvement plan ("PIP") rather than being subject to progressive discipline for performance issues. (N.T. 644-45). Individual performance affects a Foreman's eligibility for the annual incentive bonus, promotional opportunities, and retention in his position as a Foreman.

The Decision also fails to address in any meaningful way that Foremen are evaluated under the same criteria as undisputed supervisors and are held to the same "Lead, Coach and Engage" goals (N.T. 651, Employer Exs. 23-25, Exs. Confidential 1-120[10]) and are held accountable for the performance of their crews. This includes holding the Foremen accountable for on the job injuries, OSHA recordable accidents, PUC complaints, the rate at which jobs were completed and closed out on schedule and use of overtime – all factors that go to the performance of the crews the Foremen supervise. (Employer Exs 23-25, 42; N.T. 1748-49,

[10] "Embrace and champion greater emphasis on HOW people work, to ensure that our employees feel respected, engaged and inspired"; "Act as a role model for your team and hold employees accountable for HOW they work and for demonstrating Exelon's core competencies and values"; "Support the organization in support of financial goals by . . . trying to keep overtime under control"; "Provide recognition and feedback to promote appreciation, development and communication"; "Work to improve the workplace and respond to the needs of employees in order to create an engaged workface and environment that drive results." (Confidential Exs. 0002, 00013, 00015-16).

1751, 1840-1841). Individual manager comments on the Foremen year end reviews clearly establish they are evaluated on and accountable for the performance of their crews. (See, e.g., "In emergent situations, [REDACTED] has displayed exceptional management abilities and is effective in planning and executing the tasks at hand" (Confidential Ex. 0027; "As a SCADA Master Tech [REDACTED] also feels accountable for the SCADA groups, he mentors all the techs on safety and ensures all work is performed correctly" (Confidential Ex. 00045); "He is always prepared and has his team prepared. He holds the team accountable for their actions and is always ready to provide feedback to improve their performance" (Confidential Ex. 0055); "[REDACTED] ensures that the schedules are filled, often takes care of timesheets, attends and participates in Safety Slices, Foremen Forums, Aerial Forums and other meetings" (Confidential Ex. 0095); "[REDACTED] is fair to all front line staff. He listens to the needs of others, yet understands the needs to also focus on safety. The team trusts his judgment and they look to him for guidance" (Confidential Ex. 0103; "Sharp vision and strategy – focus on field time, always accountable for results of the team" (Confidential Ex. 0108)): "does not abuse OT and makes MR's for all jobs, focused on accounting" (Employer Ex. 23); "very good at proper accounting and works to minimize excessive overtime" (Employer Ex. 25)

E. ***Operational Responsibilities of the Foremen***

i. *Work Planning*

With the exception of the Foremen assigned to the Customer Response organization, Foremen in the Construction & Maintenance Electric and Gas groups and T&S are responsible for the planning of the work performed by their crews. The Foremen participate as members of the work management team developing the work schedule five weeks out and reviewing the status of the planned work each week until the week in which it is scheduled to be performed. The Foremen decide whether the planned job can be accommodated in the schedule, what

equipment and personnel will be needed, and identify the necessary clearances to do the work. The Foremen participate in this process during weekly calls leading up to the performance of the work. (N.T. 189, 201-02, 423, 429, 528-29, 776, 969-73, 1080-81) (Exs. 037, 042-50).

Once the work is planned and placed on the schedule, the Foreman then decide which sites to 'walk down' to ensure that the physical condition of the job site does not present any impediment or obstacle that was not built into the schedule or whether the job needs to be changed based on his assessment of the conditions. (N.T 193-94, 312-13, 423, 797, 802, 1080-83, 1164, 1522, 1571, 1586).

The Foremen review the manpower and skill sets needed, determine how to set the job up and what they will need in equipment, materials, and personnel. The Foremen are responsible for working with local municipalities and police departments as they deem necessary and have the authority to purchase needed equipment and supplies with their Company issued credit card (known as a "P card") and whether an outside contractor is needed. (N.T. 347-49, 363-64, 551)

Foremen report to work each day before their crews to plan, prioritize, and staff work. The Foremen daily make changes to planned work and schedules to address emergent work and adapt to other changes in circumstances (such as a job taking longer than expected). In making these decisions, Foremen consider factors including customer impact, location, skills, experience, available employees, need for training, and types of vehicles and equipment. (N.T. 177, 189-94, 440, 535-36, 803, 952, 969, 1080-82, 1088-89, 1233, 1239-40, 1346, 1444, 1449, 1547, 1730) (Exs. 001-008). These discretionary decisions determine the work the bargaining unit employees perform every day.

ii. *Assignment of Work*

Within the C&M groups, once the job is placed on the schedule to be performed that week, it is the Foreman's responsibility to decide how many personnel are needed to do the job and which employees will be assigned to it. (N.T. 157, 162, 427, 778, 903, 1227). While the schedule includes an estimated or suggested number of people needed to do the job, Union witness Foremen Quigley testified that it is at best a "guesstimatation." (N.T. 1522). Indeed, the number of people needed and the duration of the job is ultimately up to the Foreman to determine on a real time basis based on conditions as they exist at the time the job is to be performed. Foremen regularly decide among themselves if crews need to be reassigned where additional resources are needed. (N.T. 161, 439, 1088-89, 1238). Foremen have the authority to delay or reschedule a job and frequently do so. They then decide which job to put in its place and reassign employees to perform that job. (N.T. 153, 163, 349, 372, 440, 793, 867, 1086-87, 1095, 1561); Employer Exs. 29-30).

Even among the first class journeyman mechanics, some have greater strengths than others and the Foreman will take those into account on a particular allocation of crew members to a job, particularly keeping in mind the number of employees in progression (i.e. apprentice, second class, or third class mechanic) who may be assigned to it and who in his judgment could benefit from additional exposure or training. (N.T. 157, 475, 529-32, 903, 910, 941, 1742-43).

Once the C&M crews are in the field performing their assigned jobs, if conditions change, or if one job requires more personnel than another, the Foreman has the authority and responsibility to move the needed number of employees from one job to another to ensure that each job is done safely and properly. (N.T 357, 372, 797, 1095, 1227-28). If employees don't want to work together, the Foremen can direct them to do so. (N.T. 856-58, 867, 1012, 1271-73).

Foremen Steger described a specific example of requiring two employees to work together despite a personality conflict. (N.T. 1271-73).

Work assigned to the Ariel Line Mechanics in Customer Response (known as trouble mechanics or troublemen) originates in the Operations Control Center ("OCC") of the distribution center organization ("DSO"). For the Energy Technicians, the work generally originates in the Call Center. The work order coming out of the OCC or the Call Center describes the nature of the work and its location but does not address who is going to do the work or how many people will be assigned to it. That is the Foreman's responsibility.

Depending on the priority or complexity of a job, the Foreman will assign an employee from one job to another or assign an employee to assist a trouble man on a more complex job. He also has the authority to decide to call in extra personnel if the volume of work requires. Similarly, Foremen regularly move crews based on the Foremen's assessment of the priority of the work, their crew's skill sets, and the ability of the crew to work together based on personality. All of the Customer Response Foremen who testified indicated that while the work originates in the OCC, the dispatcher does not dictate which employee does which job. (N.T. 945, 953, 954, 1166, 1173-74).

DSO Foremen and other Customer Response Foremen also rotate every 12 weeks as the On-Call Supervisor position, which is staffed on a 24/7 basis for the Customer Response organization. The On-Call Supervisors are responsible for responding to any inquiries from trouble mechanics in the field, addressing and resolving any problems or safety issues with a particular job, or the need for additional personnel or equipment. If the On-Call Supervisor cannot handle the issue over the telephone, he reports to the job site(s) to trouble shoot the issue and direct the employees in the best and safest way to resolve the problem. As On-Call

Supervisors, they have the authority to direct the OCC to call in additional personnel who are then assigned to the Foreman in the field. There is no other supervisor present. (N.T. 1638-45).

Foremen testified and provided specific examples supporting that they have the authority to incur overtime and direct employees to remain on the job until a particular job is completed. The Foreman also has the authority to decide whether to (1) hold the employees on the job over, (2) have the work completed by the on-coming back shift, or (3) shut down the work for the day and have the crew resume the following day. If the Foreman decides to hold the crew over, the length of time varies to some extent by work group (for example, in Customer Response, the length of time necessary to get the job done). (N.T. 172, 206, 245, 431, 434, 470, 542-556, 800, 1092, 1247-48, 1361, 1562).

If the Foreman decides that the best course of action is to keep the crew on the job, he has the authority to permit an employee to leave if the employee cannot stay for one reason or another. The Foreman then decides whether the position needs to be replaced by transferring an employee from another job or calling someone in. (N.T. 542, 556)

iii. *Responsible Direction*

In addition to the responsibilities outlined above, throughout the day, Foremen independently decide which job site to visit to check on progress and safe performance of the job, direct how the job will be performed, and answer questions about the work. (N.T. 153, 313,452, 519, 572, 801, 806, 950, 961-62, 1093, 1173, 1237-38, 1245, 1355, 1453, 1462, 1643; Exs. 396-469). These are not rote decisions dictated by procedure. In fact, Foremen testified that no two jobs are alike and that there is frequently more than one way to do a job. (N.T. 282, 952, 1022, 1556-7). As Foreman Mercado explained: "Every pole hit is different. You've got different loads. A car can be trapped under a pole….You cannot write a scenario for that.

Everything's different when you pull up to a job…every pole hit is like a snowflake, different." (N.T. 282). Jobs are as different as "there are stars in the sky." (Coleman N.T. 1-22). Union witness Foreman Quigley acknowledged "[t]here's no typical storm." (N.T, 1559). The Foremen are responsible for overseeing the work and, as needed, instructing crew members on the best way to do it safely and efficiently. The Foremen are responsible for ensuring that the work packages and clearance orders are accurate and complete at the start of a job and are responsible for signing off on the job after the work is completed. (Exs. 133-172).

Foremen are responsible for conducting monthly safety and vehicle observations and reporting them in monthly observation reports or the weekly manager condition report. (N.T. 170, 1253, 1467, Employer Ex. 32; Exs. 009-0031). Foremen review and provide initial approval of their employees' timesheets, which reflect straight and overtime hours worked as well as the job codes to which work should be charged. (N.T. 1248, 1671; Exs. 051-58, 502-504). Foremen approve vacation requests and changes. (N.T. 216, 262, 491, 825-27, 891, 1261, 1466). Foremen are responsible for ensuring that their employees' qualification and training remain up-to-date. (N.T. 472, 529-32, 778, 1087-88).

Foremen are also assigned to run and oversee special projects. Union witness Quigley testified that he is responsible for a large substation retirement and conversion project which started in June 2018 and which was scheduled to be completed by October 2018. Quigley is responsible for overseeing three different crews totaling 15 employees for the day-to-day work. He has authority "to give as much overtime as possible to get the job done." Quigley acknowledged that I am "responsible for the project" and "if it goes bad, I am responsible, my neck is on the line." (N.T. 1568-73). Union witness Smith runs the outage work performed by the T&S group each year at the Peach Bottom Nuclear Generating Station. Smith acknowledged

that he is responsible for total oversight of the crews, assigning overtime as necessary and ensuring that the work gets done within the timeframe allotted by the Peach Bottom outage window. (N.T. 1826-38).

Foremen are also designated as the Single Point of Contact ("SPOC") for certain jobs, particularly during large disruptions on the system. As SPOC, the Foreman is responsible for overseeing all staffing and communications, including with third parties such as the PUC and first responders. (N.T. 166-70, 1464, 1674).

Finally, Foremen can and have suffered adverse consequences if the employees under their direction perform poorly or violate Company policies while under their supervision. Master Technician Doherty was verbally counseled by his supervisor for defective work that was done by an inadequately trained technician under his direction. More recently, on April 13, 2018 Foreman Tim Nolan received a written reprimand for two instances involving the poor performance of crews under his direction where he was the Foreman on a job where two of his crew walked onto a PECO customer's property and handled personal property of the customer and then an employee rode in the bed of a pick-up truck unsecured, creating a safety hazard. In both instances, the Foreman was held accountable for the conduct of his crew, even though he did not engage in the infraction himself. (Employer Ex. 27).

Consistent with their responsibility and authority to responsibly direct their crews, the Foremen either complete the performance evaluations for the crews under their direction or, in conjunction with the other Foremen and Supervisors for the building, rank order all of the employees on their teams. Foremen also grade the performance of new mechanic candidates and the Line School assessments and evaluate their readiness to progress from one step to the next. (N.T. 1255, Exhibits 173-208; 221-395; 470-501).

V. ARGUMENT

A. *Standard of Review*

Under Section 102.67(d) of the Board's Rules and Regulations, a Request for Review should be granted on the following three grounds, each of which is present in this case: (1) the Decision is clearly erroneous on the record in a manner that prejudicially affects the Company's rights; (2) the Decision raises a substantial question of law or policy because of the absence of or the departure from officially reported Board precedent; and (3) there are compelling reasons for reconsideration of an important Board rule or policy. 29 C.F.R. § 102.67(d).

B. *The Regional Director Ignored Record Evidence That the Foremen and Master Technicians Exercise Independent Judgment in Assigning Work, Determining the Need for Overtime, and Responsibly Directing Employees.*

The Regional Director acknowledged that the Foremen "assign" other employees within the meaning of the Act but erroneously concluded they do not exercise independent judgment in doing so. (D&DE at 18-19). The Regional Director also erroneously concluded the assignment of overtime is dictated by the CBA and that the Foremen do not responsibly direct employees because the evidence did not establish that they are held accountable for the performance of the employees they direct. (D&DE at 19). These findings are contradicted by overwhelming evidence in the record, much of which the Regional Director failed to address or inappropriately minimized.

Numerous Courts of Appeals have admonished the Board, and its Regional Directors, for selectively citing evidence in the record, not fully addressing all the evidence in the record, and drawing inferences which are not supported by or are contradicted by evidence in the record. *See e.g. NBC Universal Media LLC v. NLRB*, 815 F.3d, 821 (D.C. Cir. 2016) (NLRB not entitled to enforcement of order where Court finds that Board adopted Regional Director's unit clarification decision without applying relevant precedent to the facts of the case); *Entergy*

Mississippi v. NLRB, 810 F.3d 287, 297-298 (5th Cir. 2015) (a decision of the Board that ignores a portion of the record cannot survive review . . . the Board ignored significant portions of the record that show how dispatchers arguably exercise independent judgment when deciding how to allocate field workers); *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d, 1332, 1339 (11th Cir. 2012) (Board's conclusion that putative supervisors do not exercise independent judgment "cannot be squared with the record as a whole" and "disregards compelling and uncontradicted evidence to the contrary"); *NLRB v. Prime Energy Limited Partnership*, 224 F.3d 206, 211 (3d Cir. 2000) (rejecting Regional Director's conclusion that assignments were "pursuant to a routine and predetermined priority classification" where record evidence showed that putative supervisors "weighed the relative urgency of immediate unforeseen problems and directed plant operators to undertake necessary tasks.") The Seventh Circuit summed up the Board's (and its Regional Directors') obligation this way:

> The primary lesson of this case is that facts matter. In many instances, the Board or ALJ made important findings of fact that were unsupported by substantial evidence or were clearly incompatible with the record. In still other instances, the Board or ALJ simply ignored strains of evidence that did not mesh with their ultimate conclusions. On yet other occasions, the Board or ALJ failed to make crucial findings of fact. It is difficult, in light of these discrepancies, to avoid the conclusion that the Board and ALJ were striving to reach a predetermined result. For our part, having viewed the record in its entirety—including the body of evidence opposed to the Board's view—we cannot conscientiously find that the evidence supporting the Board's decision is substantial.

Sears Roebuck Company v. NLRB, 349 F.3d 493, 517 (7th Cir. 2003).

The Regional Director's decision here similarly overlooks substantial evidence that the decisions made by the Foremen are far from routine, are not dictated or controlled by procedures or directed by other supervisors, and allow and indeed require the Foremen to make choices or decisions based on their assessment of the facts and circumstances. The Regional Director

overlooked or ignored evidence of the Foremen using independent judgment in assigning jobs, assigning overtime, and responsibly directing employees.

Regarding the day-to-day assignment of work, the Regional Director's decision unjustifiably minimizes the judgment Foremen exercise in planning, prioritizing and staffing each job. As highlighted in the Summary of Argument and Facts, the Foremen determine the staffing on the job based on their assessment of its complexity, customer demands and conditions at the time the job is to be performed. They make judgments on when and how to do the work, whether to cancel or reschedule it, how to staff the job based on their assessment of employee skill levels, level of experience, need for training, and compatibility. Although the Regional Director concluded that there was no independent judgment used in assessing whether a particular job was a "P10" or an emergency, that conclusion is not supported by the evidence. (D&DE at 11). The Foremen make independent assessments on whether a job is an emergency in consultation with the OCC and then balance the performance of emergent work with planned work taking into account the impact of any potential outage.

Similarly, the Regional Director's conclusion that "although Foremen and Master Technicians may conclude that overtime work is necessary, they simply follow the CBA or the Employer's callout procedure in determining which employees work overtime" is misleading and a misstatement of the record. (D&DE at 19). The overwhelming weight of the evidence supports the conclusion that Foremen decide based on the status and urgency of the job whether employees will work overtime at all, whether the work will be completed on an overtime basis, whether it will be held over for the oncoming back shift, or whether it will completed by the same crew the following day based on his assessment of the conditions of the time. If the Foreman decides that the work will be performed on an overtime basis, he decides how many

employees will be needed and for how long. If an employee on the crew needs to leave, the Foreman has the authority to transfer and assign an employee from another crew. Alternately, if in the Foreman's judgment there is an emergency, he has the authority to direct the employee to remain until sufficient relief is available. All of those decisions require the Foreman to exercise judgment based on his assessment of the scope and complexity of the job and other demands on the system and then assign employees accordingly.

In the same manner, the Regional Director overlooked uncontradicted evidence from each of the Foremen—including the Union witnesses— establishing that they exercise independent judgment in responsibly directing employees and that procedures do not dictate or compel every particular course of action. Foremen testified that the procedures do not address every event and circumstance, that each job is different, each interruption on the system presents a different set of variables, and it is the Foreman's responsibility to assign and direct the work so that it performed safely and efficiently in light of those specific conditions. If the crew on the job cannot solve the problem or encounters an unexpected obstacle, it is the Foreman's responsibility to troubleshoot the problem and decide on and direct the crew on the appropriate course of action. Procedures do not govern every aspect of work, and do not address every conceivable situation. It is the scope of the job, the Foreman's assessment of the complexity and the conditions at the time that guide his decisions.

The Regional Director's decision also fails to address, much less analyze, the unquestioned independent judgment Foremen are required to exercise when they function as the On-Call Supervisor for the entire system, when they serve in the role as the single point of contact during storms and other disruptions on the system, and when they run major projects.

In order to ensure a prompt response to any disruptions on the distribution system (from a vehicle hitting a pole to a major storm in the Philadelphia area), PECO's Customer Response organization maintains an "On-Call Supervisor" 24 hours a day, seven days a week. This role is staffed interchangeably in 12 week rotations by Supervisors and Foremen in the Customer Response organization. When a Foreman is functioning as the On-Call Supervisor, he is responsible for responding to any inquiries from trouble mechanics in the field, addressing and resolving any problems or safety issues with a particular job, and for determining the need for additional personnel or equipment. If the On-Call Supervisor cannot handle the issue over the telephone, he reports the issue to the job site to troubleshoot the problem and directs the employees on the best and safest way to resolve the problem. The On-Call Supervisor has the authority to direct the OCC to call in additional personnel who are then assigned to the Foremen in the field. There is no other supervisor present. The following testimony from Foreman Schmitt exemplifies the record evidence on this issue that was not addressed by the Regional Director:

> Q. One of your roles as the on-call Foreman is to respond to issues that a crew out in the field encounters to walk them through and direct their work to ensure that the work is done properly and safely, correct?
>
> A. Yeah.
>
> Q. Are there occasions when you're the on-call Foreman when the issue is so complex or challenging that you need to report to work and report to the job?
>
> A. I've reported to jobs when I've been on-call . . .
>
> Q. When you receive these calls and you provide direction how do you handle the issue, do you need to check with your supervisor before providing the direction and guidance?'
>
> A. No.

Q. Before you decide whether you can handle the issue over the phone or whether you need to go in, in person to troubleshoot the issue, do you need to consult with your supervisor?

A. No.

Q. In fact, that's the responsibility of the on-call person isn't it, to make those judgments and those decisions independent to ensure that the work is done properly and safely?

A. That's a small part of it. That's a small part of the being on-call . . .

Q. And when you're the on-call Foreman over the course of a weekend there's no supervisor on duty, correct?

A. No.

Q. And when you're on-call at night there's no supervisor on duty is there?

A. No.

(N.T. 1643-1645)

Similarly, the Regional Director chose to ignore testimony about the independent judgment and authority exercised by a Foreman when serving as the "single point of contact" or "SPOC" on behalf of the Company during a storm or other disruption on the system. Foremen and Supervisors receive special training on the responsibilities of the SPOC, and when functioning in that capacity serve as the final authority for the Company in dealing with conflicting or competing demands on the system, work priorities, dealing with local police departments and other public safety agencies, and speaking on the Company's behalf with the Pennsylvania Public Utility Commission.

The Regional Director similarly chose to ignore testimony regarding the responsibility and authority of Foremen when one functions as a Foreman in overseeing and managing large and complex jobs. Foreman Quigley testified about his responsibilities in planning, staffing and

overseeing the replacement of three electric substations in the City of Philadelphia over the course of a nine-month period in 2018. Quigley described it as "a complex job" in which he is responsible for overseeing three separate crews conducting the work. Quigley stated that the project has been broken down into 14 different packages "and it keeps growing." Quigley explained the impossibility of fully planning projects in advance, noting that "what goes on paper can not necessarily be done on the street. . . . I'm ahead of every crew making sure that everything is going to go properly." Quigley testified that if the job went poorly or was not completed properly it would be his responsibility. Nowhere in his testimony did he even suggest that his responsibilities in overseeing three separate crews' work and its timely completion was routine or dictated by a procedure. To the contrary, he described it as an enormously complex job with a number of moving parts that required him to use his experience and judgment as a Foreman to ensure that the work is done properly and in a timely fashion by the three crews assigned to the job.

Similarly, Foreman Smith testified that among his responsibilities as a Foreman in the Transmission & Substation group is to assign and direct the annual overhaul and maintenance of the substations at the Peach Bottom nuclear plant. Smith testified that the job typically involves 30 work orders that take weeks to plan. Smith testified that based on the scope of the Peach Bottom work, the size of the crew would range from a minimum of nine to as many as 20, plus contractors. Smith testified that he runs the job and that it's his responsibility to make sure that the job gets done each year within the outage window allocated by the power plant. Smith further testified that it is his responsibility to ensure that the job is performed correctly by his crews and it is his responsibility to sign off on it. Nowhere in his testimony did Smith in any way suggest

or imply that the judgments in running this complex job at the Peach Bottom substation are "routine" or dictated by procedure.

The Regional Director's decision did not take into consideration overwhelming evidence that PECO's Foremen regularly exercise independent judgment in the assignment of work, the assignment of overtime, and in responsibly directing work. As a result the decision prejudices the Company's right and obligation to safely operate its power transmission and distribution systems. Therefore the Board should grant the Company's request for review and reverse the decision and determination of the Regional Director.[11]

C. *The Regional Director's Decision Departs From Board and Judicial Precedent.*

The Regional Director's decision misconstrues and misapplies the controlling law in four significant ways. First, the Regional Director's conclusion that the Foremen's judgment is based on their "experience, expertise, training or education" and therefore is not independent is expressly contrary to the Supreme Court's holding in *NLRB v. Kentucky River Community Care Inc.* and cannot in any way be reconciled with the Court's ruling. Second, the Regional Director's decision that the Foremen's judgment is not independent because "they perform and oversee the difficult and critical work of the crews based upon heavily prescribed procedures" is a misapplication and misinterpretation of the Board's decision in *Oakwood Healthcare* and subsequent Board cases dealing with the issue of independent judgment. (D&DE at 18). Third,

[11] Moreover, there was no acknowledgement or analysis in the DD&E of the Foremen's exercise of independent judgement in other contexts. Testimony and documentary evidence clearly demonstrated that Foremen design assessments to evaluate candidates; conduct assessments; review resumes; complete and sign off on evaluations; and, approve readiness for progression. *Sutter West Hospital*, Case 20-UC-076774, 2012 BL 494115 (2012) (unpublished) (degree of control over hiring necessarily involves the exercise of independent judgment). Moreover, Foreman Steger testified that he can escalate "super offenders" of safety and other rules and has the authority to recommend discipline. *Starwood Hotels and Resorts*, 350 NLRB 1114, 1116 (2007) (fact that employee has the authority to initiate discipline in and of itself suggests independent judgment); *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1338-40 (11th Cir. 2012) (authority to decide level of discipline based on assessment of infraction evidence of independent judgment).

the Regional Director's analysis of the Foremen's "responsible direction" misapplies the Board's decisions in *Croft Metals*, 348 NLRB 717 (2006); *Golden Crest Healthcare Center,* 348 NLRB 727 (2006); and *Oakwood Healthcare.* (D&DE at 20-21). Fourth, the Regional Director's reliance on what he describes as the "utility industry" supervisory cases (D&DE at 5, 19) is misplaced because those cases are factually distinguishable from the present case in critical ways.

In *Kentucky River* the Supreme Court rejected the Board's position that judgment based on an employee's professional or technical qualifications and experience is not "independent" and expressly rejected the Board's holding in *Providence Hospital*, 320 NLRB 717, 729 (1986) that "Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training or position." The Court dismissed the Board's distinction that the source of the judgment determines whether it's independent:

> "The Board, however, argues further that the judgment even of employees who are permitted by their employer to exercise a sufficient *degree* of discretion is not 'independent judgment' if it is a particular *kind* of judgment, namely, ordinary professional or technical judgment in directing less skilled employees to deliver services. … [T]he Board's categorical exclusion turns on factors that have nothing to do with the degree of discretion an employee exercises. … [T]he breadth of this exclusion is made all the more startling by virtue of the Board's extension of it to judgment based on greater experience as well as formal training [brief citation omitted]. What supervisory judgment worth exercising, one must wonder, does not rest on 'professional or technical skill or experience'? If the Board applied this aspect of its test to every exercise of a supervisory function it would virtually eliminate 'supervisors' from the Act."

532 U.S. at 714-15. 532 U.S. at 714. The Court held independent judgement may be based on an individual's technical education, training and experience and expressly rejected *Providence Hospital*, where the Board held otherwise. *Id.* at 714, fn. 1.

Despite the Supreme Court's express rejection of the Board's definition of independent judgment, the Regional Director inexplicably continued to rely on it by concluding the Foremen's judgment is not independent because it is based on technical skill and experience, and then compounded his error by citing *Providence Hospital*, the very case the Supreme Court called into question. (D&DE at 18). Similarly, the Regional Director cites for the same principle *Mississippi Power & Light Co.*, 328 NLRB 965 (1999) whose reasoning the Court also undermined in *Kentucky River*. While the Regional Director also cites, without discussion, *Oakwood Healthcare* on the issue of independent judgment, the Board's decision in *Oakwood Healthcare* does *not* support the conclusion that if judgment is based on the individual's experience, expertise, training or education it is not "independent." (D&DE at 18). The point was expressly rejected in *Kentucky River* and *Oakwood Healthcare* so held. *Oakwood Healthcare*, 348 NLRB at 692 (noting existence of "independent judgment" does not turn on whether the judgment uses professional or technical expertise).

Moreover the Regional Director's conclusion that Foreman oversight is "based upon heavily prescribed procedures" and therefore their judgment is not independent is a misapplication of *Oakwood*. (D&DE at 18). The Board has cautioned that an analysis of "independent judgment" under § 2(11) is not a 'yes you have it no you don't' determination. Rather, in *Oakwood,* the Board explained that "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." *Oakwood*, 348 NLRB at 693.

The Regional Director's knee-jerk reaction—that because PECO is a heavily regulated utility with numerous and substantial procedures (not identified in the record) Foremen must not

possess any independent judgment—fails to undertake any analysis on the Foremen's *degree* of independent judgment and is inconsistent with Board and judicial cases on the subject. *See e.g. RCC Fabricators Inc.*, 352 NLRB 701, 719 (2008) (adopting ALJ's determination that plant foremen were supervisors within the meaning of the Act where they made "complex and sophisticated judgments" and that the "breadth and complexity of his authority encompassed the power and duty to make independent judgments as to those assignments"; difficulty of the operation and the "potential hazard to employees" due to on-the-job dangers suggest that "assignment process required exercise of a highly significant degree of independent judgment in order to assure safe and efficient operations."); *Berthold Nursing Care Center*, 351 NLRB 27 (2007) (rejecting argument that LPNs do not have the authority to discipline because employee rules and personnel handbook dictated violations and level of discipline for each violation); *GGNSC Springfield v. NLRB*, 721 F.3d 403 (6th Cir. 2013) (putative supervisor's authority to select among options or choices sufficient evidence of independent judgment); *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 298 (authority to weigh various factors in making 2(11) judgments sufficient evidence of independent judgment);

The Regional Director correctly notes the Foremen are responsible for assigning and directing work in the "Employer's vast and varied utility operation, including emergent incidents resulting in widespread outages and other threats to public safety." (D&DE at 18). He then fails to explain, however, his conclusion that Foremen judgments made in that environment are nevertheless "limited and routine." This startling disconnect is contrary to numerous Board and court decisions where the level of complexity or hazard of the job supports the conclusion that the decisions that are made in that environment necessarily involve some level of independent judgment and discretion and are not merely routine or clerical. *See e.g.*, *American Commercial*

Barge Line Inc. 337 NLRB 1070 (2002); *RCC Fabricators Inc. supra; NLRB v. Prime Energy Limited Partnership,* 224 F.3d. 206, 211 (3d Cir. 2000) (shift supervisors at a cogeneration plant who "weighed the relative urgency of the immediate and unforeseen problems and directed Plant Operators to undertake necessary tasks" exercised independent judgment); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 357 (1st Cir. 1980) (rejecting Board's finding of insufficient independent judgment in light of "dozens of complex systems" falling under the putative supervisors).[12] Indeed in the Section 2(11) cases addressing indicia other than "assign" or "responsibly direct," the Board concludes from the fact that the employee possesses—for example—the authority to hire, discharge or discipline, the implementation of those decisions must necessarily involve the exercise of independent judgment. The Regional Director erred in not drawing the same conclusions here, particularly given the complex, dangerous, and remote environment in which the Foremen perform their responsibilities.

In short, the Regional Director disregarded the Board's admonition in *Oakwood* that "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Oakwood Healthcare*, 348 NLRB at 693. The Regional Director ignored overwhelming evidence that Foremen regularly make judgments in the assignment and direction of work in complex and potentially dangerous situations, and that the procedures do not address all circumstances or all incidents. The Regional Director failed to address those subtleties and simply concluded in effect: "PECO's a heavily regulated business with a lot of procedures so therefore the Foremen must not have any independent judgment."

[12] Indeed, the Court noted: "We fail to see how selecting the correct operating procedures, whether written or not, governing such a vast array of instruments and equipment in all possible permutations of emergency and more routine situations, directing the other employees in the performance of the procedures so selected, and coordinating all their efforts in a unified scheme of operation, can be said not to depend upon an exercise of independent judgment. That judgment is hopefully informed by strict training and written procedures, but it is judgment nonetheless; it is not simply the conditioned reflex of an automaton." *Maine Yankee*, 624 F.2d at 363.

Compare, Glenmark Associates, Inc. v. NLRB, 147 F.3d 333, 341 (4th Cir. 1998) (abrogated on other grounds) ("The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think.").

The Regional Director similarly misapplied the Board's cases on "responsible direction." Under the Act, "responsibly direct" includes instructing employees on how to perform jobs properly and in what order. *Croft Metals*, 348 NLRB 717, 722 (2006) (finding leads "instruct employees how to perform jobs properly, and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filled and production completed in a timely manner."). "Direction" encompasses both making discrete assignments of specific jobs and monitoring employee performance to make certain that tasks are performed correctly. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 (2006). Making discrete assignments has been defined as deciding what job will be performed next or who shall do it, provided the direction is both responsible and carried out with independent judgment. *Oakwood Healthcare*, 348 NLRB at 694. Although the preponderance of the evidence here showed that the Foremen responsibly direct the employees in the field under these definitions, the Regional Director—inexplicably without any factual analysis—concluded that PECO had not delegated to the Foremen the authority to direct the work and the authority to take corrective action if necessary.

The Regional Director also ignored that Foremen are selected and trained specifically to independently ensure the quality and productivity of employees, to ensure that each job is done according to the Company's standards and expectations, and to correct work that does not. They observe and check the work of the crew, respond to issues that arise on the job and issue instructions to address those issues. They may reassign an employee from one job to another or

from one crew to another as needed, coordinating with other Foremen. The Foreman is responsible for ensuring that each job is completed as required.

Each Foreman is required to perform and document safety and driver audits on the performance of the work by his employees, and to correct any behaviors he sees that are unsafe or not compliant with standards. The Regional Director's conclusion that this authority is "distinct from a general requirement that putative supervisors must have the authority to evaluate performance standards" has no basis in the case law. (D&DE at 20). Neither case cited by the Regional Director, *Community Education Centers*, 360 NLRB 85 (2014) or *WSI Savannah River Site*, 363 NLRB No. 113, Slip op. at *2 (2016) imposes a general requirement that putative supervisors must "evaluate performance standards". (D&DE at 20).

Moreover, the Regional Director completely misconstrued the cases on accountability and whether the Foremen may suffer adverse consequences if their employees perform poorly. Although the determination of accountability requires a review of the employer's written policies, job descriptions, performance evaluations and other documents, the Regional Director chose to mention only the performance evaluations and even there ignored the substance of the evaluations. He instead summarily concluded, notwithstanding the evaluations' specificity on the issue of accountability, that they were "inconclusive and include only vague references that do not demonstrate accountability for the work of others." (D&DE at 20). That conclusion cannot be reconciled with the goals and comments of every single Foremen evaluation produced. *See, supra*, pp. 23-24 and Confidential Exs. 0001-0120.

The Regional Director also misapplied the legal standard and facts on whether Foremen may face adverse consequences for the poor performance of their crew. While the Regional Director inappropriately dismissed the examples cited by the Employer (D&DE 20), the law does

not require that a Foreman *actually* have suffered adverse consequences, but only that he *may*. *Oakwood,* 348 NLRB at 692. (must be *prospect* of adverse consequences). Here, the selection, training, and performance evaluations—as well as the testimony of the Foremen—all establish that it is an expectation of the Foremen that their crews do their jobs correctly and safely and that it is the Foremen's responsibility to ensure that is accomplished.

Moreover, the uncontroverted evidence shows that at least two Foremen in fact were held accountable for the performance of their crews and were disciplined accordingly. Master Technician Doherty was verbally warned for defective work performed by a technician under his supervision and Foreman Nolan received a written reprimand for two instances involving infractions of two employees who were under his direction. The Regional Director's dismissive treatment of these examples as "hardly dispositive" and that any discipline must be "solely" for the deficiency of others is contrary to the case law. *See Oakwood,* 348 NLRB at 691-92. (D&DE at 20). The very reason Doherty and Nolan were reprimanded was because they were responsible for the performance and behavior of their crews.

The Regional Director's reliance on what he describes as the "utility industry" supervisory cases is misplaced because those cases are factually distinguishable in critical ways. (D&DE at 5, 19). The conclusion in *Mississippi Power & Light Co.*, 328 NLRB 965 (1999) that system dispatchers were not functioning as supervisors was based in part on the fact that the assignment and direction of field personnel was the responsibility of the field supervisors. Id. at 972. In this case, the PECO Foremen hold that exact responsibility. Moreover, unlike in *Mississippi Power*, PECO Foremen are actually held accountable for others, as evidenced by the Company's policies and discipline issued to two Foremen.

Similarly, *Entergy Mississippi, Inc.*, 357 NLRB 2150 (2011) focused on single outages, and the Board found that the crew already assigned to that area usually covered the outage. 357 NLRB at 2156. (D&DE at 5). By contrast, Gas Foremen, for example decide which crew will have its job curtailed and be reassigned to address a leak, and while Customer Response Foremen are told the location of the work order, they are not told who is going to do the work or how many people to assign. As the Regional Director admitted, Foremen often assign crew based on factors other than proximity. (D&DE at 19). As to overtime, unlike the putative supervisors in *Entergy Mississippi*, Foremen have the authority to direct the crew to stay, over their objection.[13]

As to being held accountable for the mistakes of others, in *Entergy Mississippi* the employer submitted examples that clearly showed the putative supervisor being held accountable only for his own mistakes. *Entergy Mississippi*, *Inc.,* 357 NLRB at 2155 Although PECO is not required to show actual evidence of Foremen having been held accountable, here Foremen in fact have been held accountable for others, as evidenced by the performance reviews, the verbal counseling Doherty received, and the written reprimand Nolan received. *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012) ("performance evaluations … when corroborated by live testimony or other evidence, are obviously relevant to the issue of responsible direction.").[14]

---

[13] It is the possession of authority to carry out the supervisory function that is required, not its actual exercise. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003); see, also, *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004) (existence of the power, rather than its actual exercise, determines whether the individual is a supervisor); see, also, *NLRB v. Prime Energy*, 224 F.2d at 210 ("Once the existence of supervisory authority is established, the degree of frequency of its exercise is of little consequence.").

[14] The Regional Director's citation to *NLRB v. NSTAR Electric Co.*, 798 F.3d 1 (1st Cir. 2015) is also inapposite. Unlike *NSTAR*, PECO did not waive key arguments regarding independent judgment and that the Foremen prioritize schedules in emergent cases based upon the status of a case and can route field employees from one spot to another. The Court suggested that such judgment would be independent and not circumscribed by detailed instructions. 798 F.3d at 13.

D. *Compelling Reasons Support the Board Reconsidering the Restrictive Approach in Supervisory Cases.*

Even if the Board concludes that the Regional Director's analysis and conclusions are consistent with *Kentucky River* and *Oakwood Healthcare*, this case is a good example of the head-scratching results that can be produced when a Regional Director applies his interpretation of the Board's supervisory status cases to a given employer. There are compelling reasons why the Board should reconsider its analytical framework in analyzing supervisory status cases, particularly in the utility, power generation and other highly complex and dangerous operations that provide an essential service to the public.

First, the Regional Director expressly acknowledged PECO's "vast and varied utility operation, including emergent incidents resulting in widespread outages and other threats to public safety" and acknowledged the Company's obligation to provide safe and reliable electric and gas service to over 2 million customers. (D&DE at 2, 18). He summarily concluded, however, that the Foremen nevertheless were not supervisors primarily because in his view, they do not exercise independent judgment in assigning and responsibly directing work. That conclusion then begs the question: *if the Foremen are not the supervisors in the field, then who are*?[15]

Here, the Regional Director's decision contains no explanation or analysis as to who is supervising the Company's complex field operations if the Foremen are not. Indeed there was no testimony refuting the characterization by the Foremen that the Building Supervisors are rarely in the field, that many of them lack field experience and spend the vast majority of their day focused on managerial and administrative issues. Notably the Regional Director did not find

[15] In the system dispatcher cases, the Regional Director and Board at least noted that the system dispatchers in their view were not assigning the work, but rather that was the responsibility of the supervisors in the field. *See, e.g., Mississippi Power & Light Co.*, 328 NLRB 965, 972 (1999) ("nearly all their assignments are made by the field supervisor" rather than the putative supervisor).

otherwise. In short, the Regional Director's decision inappropriately suggests that PECO's highly complex and extensive gas and electric transmission and distribution systems are effectively constructed and maintained on autopilot.

Former Chairman Miscimarra's suggested approach would help avoid absurd results such as the one in this case, where a Regional Director mechanically applies his view of independent judgement in the assignment and direction of work, without regard to the nature of the work and who in fact is supervising it. Therefore the Board should take into account the nature and realities of the employer's operations, the work performed by undisputed statutory supervisors, and whether it is plausible to conclude that all supervisory authority is vested in the persons other than the putative supervisors at issue in this case. *Buchanan Marine, LP*, 363 NLRB No. 58, Slip op. at *5 (December 2, 2015) (Miscimarra dissenting) (identifying three common-sense factors the Board must consider in conducting a realistic appraisal of the statutory indicia set forth in Section 2(11), so as to "avoid conclusions regarding supervisory status that fail the test of common sense"—in other words, "[i]f one accepts the Board's finding that the disputed employees are not supervisors, does that produce a ludicrous or illogical result . . .");. *See also LakeWood Health* Center, 365 NLRB No. 10, Slip op. at *4-5 (December 28, 2016) (Miscimarra dissenting).

It is well-established that the Board already considers the ratio of supervisors to rank-and-file employees and, where that ratio is *unrealistic*, will undertake a practical evaluation. *See, e.g., D&T Limousine Service, Inc.*, 328 NLRB 769, 778 (1999) (holding individual was a supervisor where, if she were not, the employees at the facility would have no on-site supervision); *Essbar Equipment Company*, 315 NLRB 461, 466 (1994) (holding individual was a supervisor where he received slightly higher wages than field employees and, "[b]ut for him,

there would have been no one at the site with any authority"). Here the Regional Director missed the significance of the issue because he put the ratio of supervisors to employees in the "secondary indicia" box and then compounded his error by misreading the PUC's acceptance of PECO's span of control that the Foremen *function* as the supervisors in the field. (D&DE at 22) Following the framework proposed by former Chairman Miscamerra would prevent this categorical diminishment of factors simply because they are deemed "secondary" and result in more realistic supervisory determinations that reasonably reflect the employer's operations.

Second, notwithstanding extensive litigation involving multiple utilities and power companies, the Board still has not developed an analytical framework that defines the contours of "supervisor" in these industries in a way that is consistent with Section 2(11) as interpreted by the Courts of Appeals and the Supreme Court. Indeed, the frequent ping-ponging of the *Entergy* cases between the Board and the Fifth Circuit suggest the Board's approach needs significant review and revision given that Courts of Appeals regularly reject Board decisions regarding utility or power supervisors. *See, e.g., Entergy Gulf States Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001) (reversing Board in *Entergy Gulf States, Inc.*, 330 NLRB 196 (2000); *see also, Entergy Mississippi Inc. v. NLRB*, 810 F.3d 287, 297-98 (5th Cir. 2015) (vacating and remanding in part *Entergy Mississippi, Inc.*, 361 NLRB 892 (2014)).

Third, the Supreme Court admonished the Board in *Kentucky River* that the "independent judgment" element applies to all 12 of the listed supervisory functions in Section 2(11) and that the Board may not apply it more strictly or differently to one of the twelve functions versus the others. *Kentucky River*, 532 U.S. at 707. The Board's cases since *Oakwood,* however, suggest that the exercise of "independent judgment" is virtually assumed where the putative supervisor has the authority to hire, discipline, or discharge, but where the function is "assign" or

"responsibly direct," the requirement of "independent judgment" is applied, as this case shows, in an unrealistic manner. Following the framework suggested by Former Chairman Miscimarra would help eliminate that bias by applying the aforementioned holistic, common sense-driven approach.

VI. CONCLUSION

For all these reasons, PECO respectfully requests that the Board grant the Request for Review and reverse the Regional Director's Decision and Direction of Election because the Foremen and related positions are supervisors under the Act.

Respectfully submitted,

/s/ Karl A. Fritton

Karl A. Fritton
Reed Smith, LLP
Three Logan Square
1717 Arch Street
Philadelphia, PA 19103
215.241.7956
kfritton@reedsmith.com

Adam J. Weiner, Esq.
Reed Smith , LLP
10 South Wacker Drive
40th Floor
Chicago, IL 60606

Anne C. Bancroft, Esq
Mary Cate Gordon, Esq
Exelon Business Services Company
2301 Market Street
Philadelphia, PA 19103

Attorneys for Employer PECO Energy Company

November 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Employer's Request for Review of Regional Director's Decision and Direction of Election electronically filed has been served via email, this date, on the following:

Dennis P. Walsh, Regional Director, Dennis.Walsh@nlrb.gov;

Charles T. Joyce, Counsel for IBEW Local 614, ctjoyce@spearwilderman.com; and

Larry Anastasi Business Manager IBEW Local 614, thecleaner06@gmail.com.

/s/ *Karl A. Fritton*
Karl A. Fritton, Esq.

Dated: November 19, 2018

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

PECO ENERGY COMPANY

Employer

and **Case 04-RC-223713**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 614

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The statutory supervisory status of utility workers is an oft-litigated question and is the subject of this case where the Board is called upon to ensure that the protections of the National Labor Relations Act extend only to those who are employees. Mindful of the directive to interpret broadly the Act's definition of employee and after careful consideration of the nature of the work performed by the petitioned-for utility workers, I find that, on balance, PECO Energy Company (the Employer) has failed to carry its burden to show that Foremen and Master Technicians constitute statutory supervisors excluded from the Act. Because the Employer has agreed that these employees share a community of interest with the employees in the existing bargaining unit and constitute an appropriate voting group for purposes of a self-determination election, I shall order a self-determination election in the petitioned-for unit.

Unrepresented employees who share a community of interest with an existing bargaining unit and are an appropriate voting group may vote whether to join the bargaining unit or remain unrepresented, so long as they are not otherwise excluded from the Act's coverage by statutory definition or Board policy. The Petitioner represents an existing unit of approximately 1200 production and maintenance employees, and now seeks a self-determination election, commonly referred to as an *Armour-Globe*[1] election, to ascertain whether approximately 150 Foremen and Master Technicians, Instrument Specialists, Power System Specialists, Support Service Planners/Schedulers, and Corrosion Control Specialists[2] wish to be included in that existing unit. While the Employer does not challenge the petition on community-of-interest grounds, it argues that inclusion of Foremen and Master Technicians in the unit is improper because they are supervisors within the meaning of Section 2(11) of the Act. The Employer maintains that Foremen and Master Technicians have the authority to assign and responsibly direct the work of employees using independent judgment, and to effectively recommend discipline, hiring, and

[1] The procedure is so named because it originated in *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937), and was refined in *Armour & Co.*, 40 NLRB 1333 (1942).

[2] Hereafter, any reference to Foremen or Master Technicians shall include reference to the Instrument Specialist, Power Systems Specialist Gas, Corrosion Control Specialist, and Support Service Planner/Scheduler.

promotion, and that they possess secondary indicia of supervisory authority. The primary indicia the Employer relies on are assignment and direction. As detailed below, to the extent that they participate in assignment of employees to jobs, there is insufficient evidence that they exercise sufficient independent judgment to be supervisors within the meaning of the Act. And to the limited extent that they direct the work of other employees, they are not "responsibly" directing that work within the meaning of the Act because there is insufficient evidence that they are held accountable for the work of the employees they supposedly supervise.

The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. A Hearing Officer of the Board held a hearing. The parties presented oral arguments, and the Employer filed a brief at the conclusion of the hearing.

I. OVERVIEW OF OPERATIONS

The Employer, headquartered in Philadelphia, Pennsylvania and employing 2500 employees, transmits, distributes, and sells electricity to 1.6 million customers in six Pennsylvania counties – Philadelphia, Delaware, Chester, Montgomery, Bucks, and York. The Employer also distributes and sells natural gas to 400,000 customers in southeastern Pennsylvania. Its service territory is approximately 2000 square miles. As a public utility company, the Employer is subject to extensive federal, state, and interstate regulation. PECO is a subsidiary of Exelon Corporation.

II. BARGAINING HISTORY

IBEW Local 614 (the Petitioner) has represented the Employer's production and maintenance employees since 2004. It currently represents about 1200 employees working in the following classifications and departments:

> All full-time and regular part-time production and maintenance employees employed by the Employer including Billing Consultants employed in the Meter Services Group, Contractor Liaisons, Design and Construction Consultants, High Bill Consultants, Meter Process Clerks, Meter Technicians, Metering Design and Construction Consultants, Revenue Protection Technicians, Senior Lab Technicians, Facilities PM Technicians, General Facilities Mechanics, General Utility, High Rise Mechanics, Electrical Technicians 1/C, Equipment Operators, Equipment Operator Helpers, Material Coordinators, Material Process Clerks, Tool Mechanics, Truck Drivers, Damage Prevention Inspectors, Energy Technicians, Engineering Assistants (other than Engineering Assistants employed at the Customer Information Desk), Engineering Technicians, Line Mechanics, Maintenance Assistants, Paving Inspectors, Power Quality Technicians, Senior Corrosion Control Mechanics, Senior Distribution Mechanics, Tech Maintenance, Tech Maintenance Underground Transmission, Work Process Clerks, Equipment Update Clerks, Facilities Drafters, Gas Design Technicians, Mapping Records Clerks, Senior Designers, Senior Facilities Drafters, and Plant Operations Mechanics.

The Foremen and Master Technicians were specifically excluded from the most recent collective-bargaining agreement, effective from April 1, 2015 to March 31, 2021.[3] The Foremen and Master Technicians have never been represented by any labor organization.

III. THE RELEVANT LEGAL STANDARDS

A. *Armour-Globe* Elections

An *Armour-Globe* self-determination election permits employees who share a community of interest with a unit of already represented employees to vote on whether to join the existing unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990); *Armour & Co.,* 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937). The Board has long recognized that a self-determination election is the proper mechanism by which an incumbent union adds unrepresented employees to its existing unit if the employees sought to be included share a community of interest with unit employees and "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).

B. Factors Relevant to Evaluating Supervisory Status Generally

The National Labor Relations Act specifically excludes supervisors from its coverage. It is well settled that the party asserting supervisory status bears the burden of establishing it by a preponderance of the evidence. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-12 (2001); *Shaw Inc.*, 350 NLRB 354, 355 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006); *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006). The Board has made clear that the evidentiary burden is significant and substantial, holding that purely conclusory evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center,* 348 NLRB 727, 729 (2006); *Avante at Wilson, Inc.,* 348 NLRB 1056, 1057 (2006); *Chevron Shipping Co.,* 317 NRLB 379, 381 n.6 (1995). The Board must not construe the statutory language too broadly because an individual found to be a supervisor is denied the Act's protections. *Avante at Wilson, supra* at 1057; *Oakwood Healthcare, supra* at 687. The party seeking exclusion must demonstrate specific details or circumstances clearly showing that the claimed supervisory authority exists and is not merely paper authority, and that the authority is more than sporadic. *Avante at Wilson, supra* at 1057-58; *Shaw, supra* at 357, fn. 21; *Oakwood Healthcare, supra* at 693; *Kanahwa Stone Co.*, 334 NLRB 235, 237 (2001). Further, where the evidence conflicts or is inconclusive regarding particular indicia of supervisory authority, the Board will find that a party has not established supervisory status on the basis of those indicia. *The Republican Co.,* 361 NLRB 93, 97 (2014); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003).

Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Under that test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 listed supervisory functions; (2) the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) the authority is held in the interest of the employer. *Kentucky River*, *supra* at

[3] Petitioner also represents a unit of the Employer's 200 call center employees employed under a separate collective-bargaining agreement.

712-13; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994). The 12 supervisory functions listed in the statute are the authority 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. 29 U.S.C. § 152(11).

The criteria for supervisory status enumerated in Section 2(11) are read in the disjunctive; possession of any one of the 12 indicia listed will confer supervisory status, as long as they are exercised using independent judgment. *Kentucky River*, *supra* at 713; *Shaw, supra* at 355. On a case-by-case basis, the Board differentiates between exercising independent judgment and giving routine instruction, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a routine, clerical, or perfunctory manner is insufficient to render an employee a statutory supervisor. *Oakwood Healthcare*, *supra* at 693; *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). Under Board precedent, effective recommendation involves an action without independent investigation by supervisors, not simply a recommendation that is ultimately adopted. *The Republican Co., supra* at 97; *Children's Farm Home*, 324 NLRB 61 (1997).

In *Oakwood Healthcare*, the Board clarified the definitions of "assign" and "responsibly to direct." The Board determined that the term "assign" refers to 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*, *supra* at 689. The authority to "assign" requires more than choosing the order in which an employee will perform discrete tasks within an overall significant assignment of duties. *Id.*

With respect to clarifying the definition of "responsible direction," the Board offered the following example: "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." *Id.* In other words, responsible direction, unlike the authority to assign, encompasses the delegation of discrete tasks rather than overall duties. *Oakwood Healthcare, supra* at 690-92. However, the authority to responsibly direct other employees requires that the delegation of discrete tasks carries with it accountability for the putative supervisor. The Board has explained that "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 692; *see also Community Education Centers,* 360 NLRB 85, 85-86 (2014).

A finding of supervisory status based on either authority to assign or responsibly direct must also involve an exercise of independent judgment. *Oakwood Healthcare*, *supra* at 692-93. In *Oakwood Healthcare*, the Board undertook a lengthy discussion of the "contours of 'independent judgment,'" and explained that it requires that an individual act or effectively recommend action free from the control of others and form an opinion or evaluation by discerning and comparing data, provided that the act is not of a routine or clerical nature. The

Board made clear that judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, a collective-bargaining agreement, or a higher authority's verbal instruction. *Oakwood Healthcare*, *supra* at 692-93; *PPG Aerospace Industries, Inc.*, 353 NLRB 223, 223 (2008). Further, the Board's interpretation of the term "independent judgment" applies regardless of the supervisory function implicated and without regard to whether the individual exercising the judgment is relying on professional or technical expertise. *Oakwood Healthcare, supra* at 692.

C. Analysis of Supervisory Authority in the Utility Industry

Board law concerning the supervisory status of individuals working in the utility industry has evolved over the years. For decades, the Board regularly held that employees who monitored the transmission and distribution of electric power, designed some or most of the switching sequences, and directed field employees in carrying out the switching orders were not statutory supervisors and could therefore invoke their right under the Act to unionize. In *Big Rivers Electric Corp.*, 266 NLRB 380 (1983), however, the Board reversed course and concluded that these individuals responsibly directed other employees and that their assignment of employees to carry out switching directives involved the use of independent judgment. *Id.* at 383 n.2.

In *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), the Board returned to its decades-long position and overruled *Big Rivers.* In overturning *Big Rivers*, the Board reasoned that the rationale in that case failed to give appropriate weight to the "quasi-professional, quasi-overseer" nature of electric utility dispatchers and overemphasized the inherent complexity of the dispatchers' duties and the potential adverse consequences to the health and safety of employees and the public resulting from possible dispatcher misjudgment. *Id.* at 969-70. In returning to prior precedent, the Board invoked the rationale of the charge-nurse supervisory cases and concluded that, while dispatchers exercise *critical* judgment based on professional experience, expertise, know-how, or formal training and education, they do not exercise *supervisory* judgment. *Id.*

As explained above, in *Oakwood Healthcare*, *supra* at 686, the Board clarified the definitions of "assign," "responsibly to direct," and "independent judgment" under Section 2(11) of the Act.[4] The Board first applied *Oakwood Healthcare* to the utility industry in *Entergy Mississippi, Inc.*, 357 NLRB 2150 (2011). In that case, the Board held that the employer's electrical dispatchers were not statutory supervisors because they neither assigned work nor responsibly directed employees. Rather, according to the Board, the dispatchers directed field employees in the step-by-step instructions of a switching order and were held accountable for their own failures and errors, but not for the actions of the field employees they directed. The Board therefore found, relying on *Oakwood Healthcare*, that the dispatchers' direction was not sufficiently responsible. *Entergy Mississippi*, *supra* at 2154-55 (relying on *Oakwood Healthcare*, *supra*). With respect to the authority to assign, the Board observed that outages dictated the location or place for field employees to perform work, and field employees already assigned to the affected area handled the outage. Under these circumstances, the Board determined that the

[4] See also *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Golden Crest Healthcare Center, supra.*

dispatchers did not assign work pursuant to the exercise of independent judgment. *Entergy Mississippi*, *supra* at 2156. The Board found further that although the dispatchers had the authority to assign overtime to field employees during outages, they could not *require* the employees to work the outage overtime assigned to them. *Id.*; *Golden Crest Healthcare*, *supra* at 729.

More recently, in *NLRB v. NSTAR Electric Co.*, 798 F.3d 1 (1st Cir. 2015), the First Circuit enforced a Board order denying an employer's request for review of a decision and direction of election involving a determination that the employer's transmission systems supervisors and senior transmission outage coordinators were not statutory supervisors. Applying *Oakwood Healthcare*, the court agreed that the individuals occasionally reassigned field employees to alternate locations during planned and unplanned outage work, but did so without exercising independent judgment inasmuch as detailed instructions and established call-out procedures controlled the reassignments. *Id.* at 13-14. The court also agreed that the individuals did not "assign" work under Section 2(11) despite dispatching field employees to work that could require overtime because the field supervisors retained full authority to assign and approve overtime. *Id.* at 15.

IV. FACTS

A. Overview of the Employer's Organization

The Employer's organization includes five main departments, each with a distinct role in the sale, distribution, and transmission of gas and electricity:

- Construction and Maintenance (C&M) – Electrical and Aerial: construction and maintenance of aerial and underground electric distribution facilities throughout the Employer's system;
- Construction and Maintenance (C&M)– Gas: construction, maintenance, and testing of the Employer's gas pipelines and facilities, includes the West Conshohocken gas plant, which manufactures and stores liquefied natural gas;
- Customer Response: first responders to service disruptions to the system and other emergent work;
- Transmission and Substations (T&S): installation, maintenance, and testing of the Employer's transmission lines and substations; and
- Field and Meter Services: installation, maintenance, and inspection of meters throughout the system, includes revenue protection efforts (preventing theft of service) and high bills (customer complaints that the charge is too high).

The table below contains the titles of the petitioned-for Foremen and Master Technicians and the corresponding department.

Construction & Maintenance (C&M) – Electrical	Foreman Aerial Foreman Underground
Construction and Maintenance (C&M) – Gas (including Gas System Control and Plant Operations)	Operations Foreman Distribution Instrument Specialist Gas Power Systems Specialist Gas Corrosion Control Specialist Support Services Planner/Scheduler
Customer Response	Foreman Customer Response Foreman Energy Technician
Transmission and Substation (T&S)	Foreman T&S Master Technician
Field and Meter Services	Foreman Customer Response

B. Assignment of Work

1. Staffing and Work Planning (Assignment of Work)

Foremen and Master Technicians work in different locations and with work groups that perform varied duties. The work groups, ranging from three other employees to 22 employees, have at least one Foreman; some work groups have more than one Foreman. Despite the differences, the petitioned-for Foremen and Master Technicians share certain overarching job similarities, including staffing and work planning. The particular staffing methods and work planning procedures are outlined below by department and foreman or master technician.

Construction and Maintenance - Electrical

Foreman Aerial/Underground

In C&M – Electrical, the work is predominantly planned weeks in advance by the workweek managers, including the number and types of classifications needed. Foremen participate in weekly management calls to review the status of the planned work and provide information that affects the schedule. For example, Foremen advise whether necessary equipment is available, a customer is prepared for work or needs an alternative shut-off schedule, or additional crew is needed to complete the job. On the basis of this information, jobs may be rescheduled and revised. On the Friday before the week, the planned work schedule is finalized.

Foremen then assist with determining which crew members will perform particular jobs based on a series of factors, including complexity of job, qualifications, training needs, and the

type of truck. A complex job may require more crew members or exclude certain crew members. For instance, apprentices cannot do switching work and they may be paired with more experienced employees for training purposes. A job may require hotstick qualification, which is a training involving insulated stick work on 34000 volt lines. Certain jobs may require a bucket truck, which not all employees have. Bucket work requires two employees. Foremen also schedule two senior employees to do tally boards, which are customer commitment jobs that are smaller, "quick hitter" jobs, because those employees like the work.

Foremen may need to reschedule a job because, for instance, a customer does not want to have its electrical power shut off or because a needed truck or piece of equipment is unavailable. Foremen may also reprioritize jobs because of an emergent assignment (referred to as Priority-10) or re-arrange employees among crews to accommodate absent employees or storms.

Construction and Maintenance - Gas

Foremen

In C&M – Gas, which is responsible for the leaks and main work, one of the Foremen establishes the daily schedule for maintenance jobs (valve, bridge, and regulatory station inspections and odorant testing) and emergent leak repairs. The planned work generally originates from the work management team and Distribution Operation Center (DOC).[5] Planned leak jobs include non-emergent issues discovered by employees in the course of other work or requests from a designer who is planning new business. Most of the planned work (valve, regulatory station, and bridge) is annual and routine; a maintenance schedule is kept in a software system and by Foremen. Odorant testing is both random (emergent) and fixed. As the name makes clear, emergent leak repairs are unplanned and they require immediate attention.

Foremen look over the work relayed from the work management team and DOC and assist with staffing the jobs. Foreman Gant testified that he assembles crews based primarily on qualifications and training concerns. For instance, regulatory station inspections must be done by specially qualified employees, referred to as R-qualified. Foremen will pair R-qualified employees with non-qualified employees to ensure training opportunities pursuant to company policy. Likewise, odorant testing must be performed by R-qualified employees. According to Foreman Gant, R-qualified employees, who are all equally qualified, are scheduled based on availability. The remaining crew members are scheduled for valve inspection work. Foremen schedule the most senior employee to the bridge inspection work. Foremen will designate one crew every day to be responsible for any emergent leak repairs.

[5] DOC refers to a group in a region that is responsible for dispatching in that area. It appears that employees use this term interchangeably with OCC, operations control center. Both OCC and DOC refer to designated authorities that act as dispatchers.

Instrument Specialist, Power Systems Specialist Gas, Corrosion Control Specialist, and Planner/Scheduler[6]

The C&M – Gas department includes liquefied natural gas work done in the West Conshohocken gas plant. The Foremen assist in planning preventative maintenance work, calibration schedules, and repair of leaking valves. Foremen make crew determinations based on employee skill set, which employees have learned on the job and through job trainings. Based on their experience with the crew members, Foremen know which employees are skilled at particular work. For example, Instrument Specialist Robert Braxton testified that, on his team, one employee is particularly skilled at computer work, another at regulators and odorizers, and third at regulatory issues. Foremen share crews depending on availability.

Customer Response

Customer Response Foreman

In Customer Response, which primarily performs emergent work, the Customer Response Foreman (electric) obtains the schedule for the work group from OCC dispatchers at the start of each work day. The OCC schedule includes the emergent work scheduled for the day and preliminary assignments of specific employees to particular jobs. Employees receive their daily assignments by calling the OCC at the start of their shift. The Customer Response team also performs corrective and preventative maintenance work, as time permits. When the OCC advises that emergent work is relatively light, Foremen will schedule the OCC-designated preventative maintenance employee to do preventative and corrective maintenance work. It is the OCC and not the Foreman that designates the preventative maintenance employee. Foremen also support guarantee work, which is when a customer has paid to have manpower and work done at a date and time certain. Guarantee work is scheduled by the workweek managers, and Foremen follow a set process for scheduling employees to the guarantee work.

As not all members of the team are equally qualified, Foremen may change particular assignments based on qualifications, certain proficiencies among the crew, and well-known job skills. For instance, changing out gas gauges on switches and underground work are tasks that not all team members can complete. Foremen may also make scheduling changes when situations arise that require additional employees for a particular job. For instance, proper protocol requires a minimum number of employees for certain switching jobs or manhole work. In cases where the OCC's schedule lacks the necessary manpower under the proper protocols, the Foreman will ask the OCC to send additional employee(s) to the job. Foremen may also suspend a job under certain circumstances. Foreman Collazzo testified that he once shut down a job because the employees could not physically access a manhole. In such circumstances, when a job is shut down, employees contact OCC for alternate work assignments, and if there is no alternative assignment, they go home. Foremen also make changes to the schedule to equalize the workload, and when a job requires overtime based on protocols.

---

[6] The Employer stipulated that the testimony of Instrument Specialist Robert Braxton applies to the other three specialists: Power Systems Specialist Gas, Corrosion Control Specialist, and Support Service Planner/Scheduler.

Foremen and supervisors share responsibility for being the on-call supervisor. Each foreman or supervisor is on-call once every 12 weeks. The on-call supervisor is responsible for any emergency or high-profile jobs that arise after approximately 4:00 p.m. and before the start of the shift the next day at 7:00 a.m. The on-call supervisor staffs the whole system, not just one particular region. In making staffing determinations, the on-call supervisor will follow the call-out protocols for each of the individual regions.

Foreman Energy Technician

The energy technicians in Customer Response primarily perform emergent work. The OCC schedules the emergent work based on geography. Foremen schedule appointments for padmount inspections[7] and for customers who want to establish gas service or reactivate service. Foremen staff open shifts according to company procedures. Foremen schedule inactive gas jobs based on employee work schedules and well-known skill sets. They schedule padmount inspections based on circuit and geographic area. For padmount inspections, Foremen also pair less experienced employees with more experienced ones to assist with progressions.

Foremen also assist with staffing levels in several ways. They may, after receiving a call from an energy technician who has asked for help, contact the OCC and indicate that additional employees are needed. Foremen do not decide which employees to dispatch; they simply relay the stated staffing need to the OCC. Similarly, in surge events, where there is a risk of higher voltages energizing into houses, Foremen will tell the OCC if the extent of the damage requires more technicians. Technicians are then scheduled based on call-out lists. Foremen may also make staffing adjustments if the OCC schedule is over-staffed for a day as extra employees generally perform padmount work. Alternatively, if Foremen discover over the radio that additional help is needed on emergent work, padmount inspection employees will be moved to help with the emergent work. In these instances, Foremen select the preventative maintenance employee who is nearest to the jobsite needing assistance.

Customer Response Foreman (fault locate)

The Customer Response Foremen (fault locate) rotate weekly to one of seven different foreman roles on the fault locate team.[8] In the "set-up" rotation, Foremen prepare job packets for the jobs scheduled by OCC. In the "heavy fault locate" rotation, the Foreman goes with the crew to locate the fault and repair it. In the underground residential development (URD) rotation, Foremen visit jobsites to ensure that the crews have everything they need. In the utility rotation, Foremen perform catch up work, including cleaning the truck, getting materials or tools, administrative work, and they assist the Philadelphia city crews.

When performing set-up rotation, Foremen schedule the work based on company protocol. Priority 10 work (which must be addressed as soon as possible) is completed first and

---

[7] This involves inspecting a transformer that is fed from underground wires.

[8] The seven roles are: day work set-up (7:00 a.m. - 3:00 p.m.), backshift set-up (3:00 p.m. - 11:00 p.m.), heavy fault locate, backshift heavy fault locate, day work heavy fault locate, underground residential development, and utility.

then any other job that, according to the Employer's system, is considered a priority due to an approaching or passed target date for completion. Once the higher priority work is scheduled, Foremen next schedule the oldest work, but also may consider the geographical proximity of jobs. Foremen may assign a job out of order if it is in close proximity to another scheduled job. Foremen also base staffing decisions on the nature of the work (e.g., URD development job will naturally go to the URD team), travel considerations, and shift rotations.

Transmission and Substation

T&S Foreman

For the Transmission and Substation department, DOC generates work requests and routes them to Foremen through a software program called Asset Suite. Foremen assist with staffing for planned corrective and preventative maintenance work and Priority 10 and 20 work (work that must be completed within one or two weeks). Foremen review the work requests and make staffing decisions based on location, skill sets, equipment, and nature of the job. For example, Foremen try to minimize drive time, ensure that the proper equipment is available and employees have the required skill set. For instance, hot fill work requires certain skills and not all employees have hot fill equipment or test equipment. Foremen schedule employees for "repeat" jobs if that employee has had success with a particular job and that type is on the schedule again. Foremen also pair newer employees with more experienced ones to help with training. Once the schedule is set, Foremen prepare work orders, including information that, based on job experience, will be useful, and clearance requests for the employees.[9]

Foremen may adjust work schedules if multiple Priority 10 jobs arise, but otherwise staffing changes are few. Under company policy, Priority 10 jobs take precedence, so other jobs may be canceled to handle competing Priority 10 work. Foreman Louis Collazzo testified that "once the day has started [and his] crews already got their work, [he] just can't pull them without talking to the OCC." Foremen may also adjust staffing when one job has progressed to the point of no longer requiring a second employee. Foremen can make staffing adjustments by asking the workweek manager whether employees are available due to canceled jobs. Foremen negotiate with DOC or system managers (designated authorities that are part of OCC) to reprioritize work, but cannot overrule personnel assignments made by DOC or system managers.

Master Technician

Master Technicians maintain, replace, and repair system control and data acquisition (SCADA) equipment. Work management develops the weekly schedule, which includes job descriptions and possibly material requests. Work management then provides the weekly schedule to Master Technicians on Thursdays, who review it, identify jobs for their teams, and then determine staffing. Jobs are typically staffed by two employees and possibly an apprentice and depend on classification (A, B, or C technician), widely known skills and abilities, training

[9] Clearance requests are used to create clearance orders, which include the step-by-step detailed instructions for the work. Foremen do not prepare clearance orders.

opportunities ensuring broad exposure to work needed to progress, and occasionally personality traits.

Master Technicians make changes to the schedule based on emergent work needs of another T&S group (Fix It Now) that are directed from the designated authority. They also make changes when jobs must be canceled because materials do not support the job. When work is canceled, Master Technicians schedule employees for other prioritized work. Additionally, Master Technicians may swap one classification for another if an employee is having difficulty. For instance, a technician B is changed out for a technician A.

Field and Meter Services

In the Field and Meter Services Department, Foremen plan theft investigations, service terminations for theft, meter work and maintenance, and storm work. The work originates from several sources. The Employer monitors meters using DataRaker, a system that uses algorithms to detect gas or electric theft, which accounts for the largest number of meter "flags." The Employer also has a customer hotline for suspected meter issues and receives reports from employees while out on jobs. Additionally, Foremen plan and schedule job requests from the Employer's external affairs department, which usually come from government agencies.

In creating the schedule, Foremen first identify 10-15 total job requests from external affairs or older jobs and schedule employees for those jobs. Foremen staff jobs based predominantly on geography and whether the work requires a bucket truck, which, by regulation, necessitates a two-person crew. Employees do two-week rotations for bucket-truck and single technician jobs. Foremen also consider familiarity with the area and preferences on working alone or in pairs in making scheduling decisions. They also consider crime rates in the area for deciding whether a job is a two-person job. Once Foremen have made the preliminary job and staff designations, the work group planner fills out the rest of the schedule for the 11-person team with other theft and meter work based on geography. Each employee can typically handle up to 20 jobs per day.

Foremen make scheduling changes if priority work comes in during the day. Foremen will also make changes when bucket-truck work, which requires two people, arises and only one employee has been scheduled. Other schedule changes occur when an employee finishes early, as Foremen either have that employee call the planner for additional work or equalize the workload themselves.

2. Walk-downs

In addition to planning work and schedules, Foremen and Master Technicians, to varying degrees, make jobsite visits before commencing work, known as "walk downs," to better understand the physical location and layout. During a walk-down, Foremen and Master Technicians consider job set-up, equipment needs, crew size, safety, and underground (gas) issues, and work with customers to determine the best time to shut off services. Foremen and Master Technicians sometimes take other crew members or Foremen with them. Not all jobs are walked down; some Foremen do more frequent walk-downs than others. For instance, Foreman

McHugh testified that he does very few walk-downs. Planners, designers, and technicians (bargaining unit employees) also complete walk-downs.

Foremen and Master Technicians use information gleaned from walk-downs to develop or adjust work plans. Given the highly regulated nature of the utility industry, company policy and procedure, industry standards and regulations, safety protocols, state and federal laws, and other proscriptions heavily circumscribe the Employer's work plans. For example, Foreman Coleman testified that he adjusted pole placement based on a walk-down. During the visit, he observed that the speed limit and federal law required the pole to be placed at a particular distance from the curb and ramps. Foremen also testified that walk-downs may show that plans that include building poles may need adjustments due to minimum clearances required and because city buildings are often close to one another. Foremen testified that a physical visit to the site may also show that digging is necessary, which will affect the work plans because state law requires a Pennsylvania One Call for any digging work and minimum three business days' advance notice of excavation. With respect to equipment adjustments, Foreman Collazzo testified that, during the walk-down, he evaluated the availability of space for a generator that was to be brought to the jobsite and then was able to request a generator of a particular size. Master Technician John Doherty similarly testified that a walk-down may reveal that a particular piece of equipment, like a monitor, is defective or broken, and he can then make adjustments to the equipment needed for the job.[10] Walk-downs also allow Foremen and Master Technicians to exercise common sense in work planning. For example, where a walk-down shows public inconvenience because of road blocks or a similar obstacle, Foremen and Master Technicians will expedite the work to minimize disruptions to the public. Foremen and Master Technicians likewise testified that walk-downs, combined with the knowledge and experience gained through their employment, provide information that helps them plan the work.

3. Overtime

As a general matter, Foremen and Master Technicians testified about two different kinds of overtime: (1) emergent (also variously referred to as emergency and outage) and (2) non-emergent overtime, including scheduled and continuing. With regard to emergent overtime, the Employer has a company-wide procedure outlined in "Job Aid 70 PECO All-Call Progression," also referred to as call-out procedures. Those call-out procedures govern personnel response to load off (addressing imbalances between supply and demand of electricity), public safety, odor response, weather events, and outages. The personnel response naturally intensifies as the severity or impact of the event increases. Foremen and Master Technicians have no discretion to deviate from the prescribed call-out procedures.

Foremen and Master Technicians testified, without contradiction, that they follow the call-out procedures when there is emergent work and that the nature of the work (emergencies) establishes the need to finish it. For instance, Foreman Mercado testified *precisely* to the Level 2 procedure when he offered an example of how he assigned overtime. In his outage example, he told employees who were currently working that they needed to stay; employees who had constraints notified him and he instructed employees to stay until relief arrived, and they complied. This example comports exactly with the instructions of Job Aid 70. Foremen Gant,

[10] According to Master Technician Doherty, he performed this particular walk-down when he was acting supervisor.

McHugh, Collazzo, and Clarke similarly testified, again without contradiction, that they follow the Employer's call-out procedures for emergent overtime.

With respect to non-emergent overtime, Foremen and Master Technicians testified that they follow overtime lists and procedures that have been negotiated between the parties. Foremen Gant, Doherty, McHugh, Clarke, Thomas, Quigley, Schmitt, and Houlihan all testified that their work groups maintain and follow overtime procedures, including continuity of work (allowing existing shift members to complete jobs) and lists of eligible employees. Foremen and Master Technicians acknowledged that in non-emergent situations, they do not force employees to work overtime. For example, Foreman Mercado testified that in non-outage situations, he has never ordered a crew to stay and if employees do not want to stay, there is "no consequence," and the work is put off until the next day. Foreman Clarke similarly testified that in a surge (non-emergent) event, he uses an overtime list and moves to the next person if an employee declines the overtime.[11] Further, Foremen and Master Technicians testified that experience and knowledge of the work acquired through their years on the job assists them in determining whether overtime is necessary to complete an ongoing non-emergent job.[12] In some work groups, overtime is always available because there is a backlog of work.

C. Responsible Direction

1. Jobsite Visits

Foremen and Master Technicians testified that, to varying degrees, they visit jobsites while the employees are working, to ensure adherence to safety procedures, availability of all needed materials and equipment, and completion of the work. They also use jobsite visits to discuss operating procedures and to ensure that work performance comports with all procedures and policies. As discussed above, the work performed by the Employer's employees is heavily regulated and widely prescribed by procedures, standards, and policies. Given these factors, when Foremen and Master Technicians speak to employees about how to perform certain tasks, they are relying on established protocols and years of experience. For example, Foreman Clarke testified, when asked about various examples of instruction he had offered at the jobsite, that "[t]he procedure is set. . . . Everything we do has a procedure to follow." He offered further that "[i]f it's a procedure, yes, you must follow it and it tells you exactly what you should do." Foreman Clarke gave an example of an on-the-jobsite direction to an employee to follow a specific procedure for gas odorants. Foreman Thomas also gave an example of a direction at the jobsite based on company policy of doing certain cuts remotely rather than while in the manhole. Foremen Quigley and Smith both testified that they do not direct employees on what tasks to do or how to do them because there are procedures in place for all of the jobs which employees follow.

---

[11] Foremen Quigley and Smith both testified that they contact their supervisor if there is an overtime situation, and the supervisor approves it. Foreman Braxton testified that he can force an employee to work overtime, but only gave a single example of such direction.

[12] Foremen Quigley and Schmitt testified that their supervisor or shift manager decides whether overtime is necessary.

In addition to reliance on set, detailed protocols when communicating with employees, Foremen and Master Technicians also testified that they rely heavily on their experience and knowledge gained through their employment as apprentices and then progressing to line mechanics or technicians. Foreman Gant, for example, testified that while instructing employees at the jobsite, he "rel[ies] on years of experience as a foreman and as a senior distribution mechanic." Foreman Thomas likewise testified that he instructed crews where to cut a cable based on his experience on the job and his ability to read prints and cable cards properly.

Other Foremen and Master Technicians testified to few instances of directing employees how to do a job. Foreman Collazzo does so only if there is a hazard. Foreman Steger presented an example where the "employee did all the work. . . . [He] basically just assisted him and talked to the customer was the main thing." Foreman Steger agreed that he only helps employees with "discrete tasks on the overall job." Foreman Clarke similarly agreed that his example involving taps on a flicker was simply a discrete task.

2. Accountability

Many of the Foremen and Master Technicians also testified that they are not held accountable for the work of the crews. Foremen Steger, Clarke, Quigley, Houlihan, and Smith denied accountability for the work of the employees. Performance evaluations of Foremen and Master Technicians do not establish otherwise. The performance evaluations contain a broad range of goals and core competency assessments, including "Lead," "Coaching," and "Manage." However, these goals and competencies appear simply to be addressing the ability of the Foremen and Master Technicians to be an example, to foster a positive working environment, to coach employees and develop their skills, and similar assessments. The evaluations do not provide any clear guidance on whether Foremen and Master Technicians are accountable for other employees.

The record disclosed two incidents where the Employer chastised foremen for their own failures in overseeing their crew's work. One incident involves the Employer issuing a foreman a written reprimand for: (1) failing to stop certain members of his crew from intentionally trespassing onto customer property to handle customer property; and (2) failing to stop a crew member from riding on the bed of a pickup truck unsecured. However, the foreman in question was disciplined due to his own role in the events surrounding the discipline. The second incident involves the Employer merely giving a master technician an oral coaching for scheduling an employee for a job without the requisite experience to adequately perform the job. Again, the Employer faulted the judgment of the master technician.

D. Other Responsibilities of the Foremen and Master Technicians

Foremen conduct safety and driver audits for employees. Audit results are anonymous and do not provide the basis for any adverse consequence to employees. They have no effect on wages. Audits are used to reinforce safety protocols and audit incidents may be raised among foremen, supervisors and managers as learning opportunities.

The annual vacation schedule is created at the beginning of the year based on seniority and factors outlined in the collective-bargaining agreement. With respect to day-to-day vacation time, some Foremen and Master Technicians appear to approve vacation requests provided that

minimum staffing levels are maintained; Foremen and Master Technicians do not establish those staffing thresholds. Master Technician Doherty acknowledged that a supervisor could overrule his approval. Foremen Quigley, Schmitt, and Houlihan all testified that they do not have the ability to approve leave requests. Foreman Mercado testified that he can request employees to come in early to work, but he cannot require them. Foreman Mercado further testified that he can permit employees to leave work early if employees work through their lunch break.

Foremen and Master Technicians will occasionally serve as the Employer's single point of contact (SPOC) during a high profile situation where the Employer wants one person to "run that site." The SPOC is the liaison for the Employer with regard to customers, media, and Employer representatives.

E. Other Supervisory Indicia

There is insufficient evidence that Foremen and Master Technicians have the authority to hire or effectively recommend the hire of other employees. In his last twenty years as a Master Technician, Doherty twice reviewed a pile of resumes and pared down the number of applicants based on whether the resume revealed obvious technical abilities. He also scored applicants on certain aptitudes as either a plus or a minus. Several other Foreman offered similar testimony. Instrument Specialist Braxton testified that he developed aptitude tests for applicants, told his supervisor how they performed, and sat in on meetings with management to determine whether to hire applicants. However, there is no evidence that Braxton's recommendations are followed. Moreover, neither Foremen nor Master Technicians participate in interviews, rank candidates, effectively recommend hiring, or make hiring decisions. Further, their participation in the hiring process is voluntary and not required as part of their regular duties. Indeed, Foreman Quigley no longer participates in the process because he believes that human resources made poor hiring decisions.

There is similarly insufficient evidence that Foremen and Master Technicians have the authority to discipline or effectively recommend such discipline. Although there were some examples of Foremen and Master Technicians coaching employees,[13] the record is devoid of a single example of an effective discipline recommendation from a foreman or master technician. Foremen and Master Technicians are occasionally part of a "fact-finding" process, which is an interview conducted by the supervisor to review an infraction. Foremen and Master Technicians act only as witnesses if they have relevant information to provide or, more often, as note-takers. After the fact finding, there is a "consensus call," where human resources and "local leadership" review the information and decide the appropriate discipline, if any. Foremen and Master Technicians are on the call to present the fact-finding information and answer questions.

[13] There was an isolated example of a foreman having been involved with sending an employee for fitness for duty testing. The evidence, however, is that the foreman did not act alone and that a supervisor and human resources were also involved. Foreman Coleman likewise testified that he "got a supervisor" when he suspected an employee was not fit for duty. Foreman Quigley corroborated the need to involve a supervisor.

According to Master Technician Doherty, they do not have any input into the disciplinary decision.[14] (Tr. 824.)

There is similarly insufficient evidence that Foremen and Master Technicians have the authority to promote or effectively recommend promotion. The record establishes that the Employer's employees progress through the negotiated wage scale by satisfying time-in-classification requirements. Once an employee has met the timing requirement, the employee progresses to the next step and higher pay by operation of the collective-bargaining agreement. Foremen and Master Technicians have absolutely no authority to otherwise override the terms of the parties' agreement. The Employer did not offer any evidence of non-progression promotions.

The parties' agreement definitively forecloses any assertion that evaluations play a role in promotions. In any event, Foremen and Master Technicians do not have any formal role in evaluating employees. Foremen and Master Technicians inconsistently testified as to whether they have any role in evaluating employees. Some might give feedback to supervisors; maintain evaluative information in their heads and pass it up the chain; or send information to a supervisor. They were, however, unanimously agreed on one critical point: their feedback and comments do not affect wages.

There is similarly insufficient evidence that Foremen and Master Technicians have the authority to reward or effectively recommend such rewards. Foremen and Master Technicians testified that they may give employees $25 Wawa convenience store or gas cards for doing a great job. The frequency of these gift cards was inconsistent among the Foremen and Master Technicians as one gave gift cards to employees as often as five to 10 times per month and others gave them only once or twice per year. With respect to meals purchased for employees, Foremen and Master Technicians are simply complying with the collective-bargaining agreement, which entitles employees to a meal allowance under certain circumstances, including working two hours overtime and working five hours of call-out time.

There is also no evidence that Foremen or Master Technicians have the authority to transfer, lay off, or recall employees or to adjust their grievances, or to effectively recommend such action. The Employer did not offer any testimony or documentary evidence that Foremen or Master Technicians have any of these authorities.

F. Secondary Indicia of Supervisory Status

Foremen and Master Technicians are paid an hourly wage that is 10.5% higher than the journey-level hourly rate. They are eligible for benefits that are not available to the bargaining unit, including: the Employer's annual incentive plan bonus, seven weeks of bonding leave, two weeks of caregiver leave, and a take-home vehicle.[15] Foremen and Master Technicians receive

---

[14] It is not clear that all foremen participate in consensus calls. Indeed, Foreman Thomas testified that foreman involvement "went away a couple of years ago," and Foreman Clarke also testified that participation in consensus calls ended two years ago.

[15] There is no evidence in the record as to details or qualifications for an incentive bonus other than that it is based on individual performance.

certain trainings, attend certain meetings with supervisors and other managers, and are subject to the same severance policy as supervisors and managers.

The testimony overall established that Foremen and Master Technicians have no meaningful role relating to time sheets; rather, Foremen and Master Technicians simply forward the sheets to supervisors and managers. Foreman Schmitt testified that he does not even have access to the online time sheet system so he could not approve any time sheets. Foreman Houlihan recounted an event when he had a time sheet returned to him because there was a concern as to his authority to approve it; in that instance, he had approved the time sheet while upgraded to supervisor. Foreman Steger offered an isolated instance of time sheet approval during an inclement weather event where he had knowledge of hours worked during the storm. He clarified, however, that supervisors "normally" approve time sheets.

V. ANALYSIS

A. Supervisory Status of Foremen and Master Technicians

As the party asserting supervisory status, the Employer has the burden to produce sufficient evidence to show that Foremen and Master Technicians exercise at least one of the supervisory indicia set forth in Section 2(11) of the Act, and that they do so through the exercise of independent judgment. The Employer primarily contends that Foremen and Master Technicians assign work to employees with independent judgment and responsibly direct them, but the record evidence supports neither contention.

Foremen and Master Technicians have the difficult task of staffing and, to varying degrees, performing the Employer's vast and varied utility operation, including emergent incidents resulting in widespread outages and other threats to public safety. They must be familiar with and follow a range of protocols, procedures, and regulations and be constantly mindful of safety precautions. While their job is certainly demanding, they make staffing decisions primarily based on factors which indicate limited and routine judgment, such as experience, training and geographic or regulatory factors. Similarly, they perform and oversee the difficult and critical work of the crews based upon heavily prescribed procedures and their experience, expertise, training, or education, and they are not held accountable for the work of their crews. Under established Board precedent, Foremen and Master Technicians therefore do not exercise sufficient supervisory authority to exclude them from the Act's protection. *Oakwood Healthcare, supra, Mississippi Power, supra, Providence Hospital, supra.*

1. Assignment of Work

As described above in *Oakwood Healthcare, supra* at 689, the Board stated that the term "assign" refers to "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." Accordingly, designating an employee to a particular shift or assigning certain significant tasks would qualify as assignment. While Foremen and Master Technicians assist in assigning employees to significant tasks, the record

evidence falls short of establishing that they exercise independent judgment in making these assignments as these decisions require merely routine judgments. See *WSI Savannah River Site,* 363 NLRB No. 113, slip op. at 3 (2016).

The Board has recognized that, in the utility industry, the location of an outage or other service issue fully dictates the location of work assignments. *Entergy Mississippi, supra.* Assignment of work based on geographic proximity is commonsense efficiency, and assignments on this basis are routine and insufficient to establish supervisory status. *Id.; St. Vincent Hospital,* 344 NLRB 586, 595 (2005), citing *Carlisle Engineered Products, Inc.*, 330 NLRB 1359 (2000). In *NSTAR Electric, supra*, the Board determined that a putative supervisor does not exercise independent judgment where detailed instructions and procedures control assignments. Further, the Board will find independent judgment lacking "[i]f there is only one obvious and self-evident choice." *Oakwood Healthcare, supra* at 693.

Foremen and Master Technicians do not designate the location of the work; service issues and outages do. As discussed in far more detail above, Foremen and Master Technicians use a number of considerations to staff jobs, none of which, however, is more than a routine or prescribed choice. Like the non-supervisors in *Entergy Mississippi*, the Foremen and Master Technicians in this case exercise commonsense efficiency and often let geography dictate assignments. When proximity to the job is not the deciding factor, Foremen and Master Technicians rely on certain non-discretionary considerations, such as safety protocols and company procedures that require a particular skill (e.g., hotsticking) or a particular number of employees (e.g., work requiring a bucket truck), where there is only "one obvious choice." For example, Master Technician Doherty testified that his team is made up of "A, B, and C" technicians. When he staffs a job, he knows which category of technician has the skill set that is needed for that job, and he will assign a technician from that category. Although he sometimes has to choose between technicians within a particular category, he does so based on well-known factors such as the years of experience each one has applying their particular skills. Foremen and Master Technicians also follow company policies and the parties' agreement that require the advancement of training opportunities in making assignments of apprentices and trainees.

Foremen and Master Technicians do not schedule shifts or determine working hours of employees. Although Foremen and Master Technicians may conclude that overtime work is necessary, they simply follow the collective-bargaining agreement or the Employer's call-out procedure in determining which employees work overtime. Their overtime decisions, therefore, are not the result of independent judgment, but rather, that of compliance with an established, written set of detailed procedures or adhering to an overtime list. As the Board stated in *Entergy Mississippi, supra,* the authority to allocate overtime to employees during outages, without more, does not equate to the assignment of work as it is not a requirement that particular employees work the overtime assigned to them. Likewise, the routine ability to allow employees to leave work early when they work through lunch does not establish an assignment of work within the meaning of Section 2(11) of the Act. See *Washington Nursing Home,* 321 NLRB 366, fn. 4 (1996).

While it is clear that Foremen and Master Technicians serve a pivotal role in the Employer's operation, they do not assign significant tasks through the exercise of independent

judgment. In making decisions while "walking down" a job, for example, they predominantly rely on common sense, their on-the-job knowledge, and established protocols and policies. Their decisions regarding the type of crew, equipment used, length of a particular job, or instructions used therefore do not amount to assignment of work using independent judgment.

Accordingly, I find that there is insufficient evidence to establish that Foremen and Master Technicians assign work using independent judgment within the meaning of Section 2(11) of the Act.

2. Responsible Direction

"Direction" encompasses both monitoring employee performance to make certain that tasks are performed correctly and making discrete assignments of specific jobs. *Golden Crest Healthcare Center, supra* at 730. The Board defines "discrete assignments" as deciding what job will be performed next or who shall do it, provided that such direction is both responsible and carried out with independent judgment. *Oakwood Healthcare, supra* at 694. The evidence must establish that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. Here, then, the Employer must show that Foremen and Master Technicians exercise independent judgment in deciding whether employees' performance meets appropriate standards; that they can take corrective action in response to deficient performance; and that they are held accountable for employees' performance and can suffer adverse consequences if those employees perform poorly. *Community Education Centers, supra* at 85; *WSI Savannah River Site,* 363 NLRB No. 113, slip op. at 2 (2016). The Employer has failed to make that showing.

There is no record evidence to establish that Foremen and Master Technicians use jobsite visits or audits to evaluate whether an employee's performance meets the Employer's standards, or that they have the authority to take any corrective action for performance deficiencies. To be clear, Foremen and Master Technicians are certainly concerned with safety, and during these visits and audits they do not ignore, and will correct, safety and equipment concerns. However, such concern is distinct from a general requirement that putative supervisors must have the authority to evaluate performance standards. Nor do Foremen and Master Technicians direct *how* the work is performed. Rather, company protocols, state regulations, federal law, and a host of other prescriptions direct how the work will be performed; Foremen and Master Technicians simply remind or advise employees of these procedures when necessary. There is similarly insufficient evidence that the Foremen and Master Technicians are held accountable for employee performance or that they suffer adverse consequences if employees perform poorly. The Foremen's performance evaluations do not establish otherwise. Those documents are inconclusive and include only vague references that do not demonstrate accountability for the work of others. The Employer cites two isolated incidents in an attempt to show accountability for the performance of others, but these examples are hardly dispositive. In fact, as the record makes clear, the Foreman's written reprimand in the first incident stemmed from his own failings, not solely from the deficiencies of others. In short, the Foreman and employee were jointly involved in the incident, which resulted in separate discipline for both.

Accordingly, I find that the Employer has failed to establish that Foremen and Master Technicians responsibly direct the job performance of any employees. *Oakwood Healthcare, supra* at 695; *Golden Crest Healthcare Center, supra* at 731-32.

3. Other Indicia of Supervisory Status

The Employer further argues that other supervisory indicia support its contention that Foremen and Master Technicians are statutory supervisors. Specifically, the Employer asserts that Foremen and Master Technicians have the authority to hire, discipline, and promote, or to effectively recommend such action. As outlined above, the record evidence simply does not establish that Foremen or Master Technicians have any meaningful role in the hiring process. To the contrary, on an infrequent basis, some Foremen and Master Technicians have reviewed resumes, scanned for key words that suggest certain minimal proficiencies, and then passed those resumes on to human resources. Later in the process, they confirm whether a particular applicant has completed an assessment successfully. They do not interview, rank, or effectively recommend anyone for hiring. This minimal, largely clerical function in the hiring process is further not an obligatory job duty. Merely having input into management decisions which are actually made by others does not confer supervisory status. *SDI Operating Partners,* 321 NLRB 111 (1996). Under these circumstances, I reject the Employer's contention that Foremen and Master Technicians hire or effectively recommend such action.

There is likewise no record evidence that Foremen and Master Technicians have the authority to discipline employees, or to effectively recommend discipline. Their participation in fact-finding and a subsequent consensus call falls well short of the required showing.[16] In fact-finding sessions, Foremen and Master Technicians participate as witnesses, recounting any knowledge of an incident being investigated, or as note-takers. Neither capacity rises to the level of statutory supervisory authority to discipline or effectively recommend discipline. Similarly, on consensus calls, they have little to no input and are there to answer questions. The Employer failed to establish that mere coaching constitutes discipline. See *Veolia Transportation Services, Inc.,* 363 NLRB No. 98 (2016). The record lacks a single example where a Foreman or Master Technician either meted out discipline or effectively recommended discipline. Accordingly, I reject the Employer's contention that Foremen and Master Technicians discipline or effectively recommend discipline.

The Employer argues that through their role in evaluating employees, Foremen and Master Technicians exercise the authority to promote or effectively recommend promotion. As a preliminary matter, I note that the Employer has not shown that Foremen and Master Technicians have any meaningful role in evaluating employees. Testimony was inconsistent, and the single piece of documentary evidence established nothing more than the fact that Foreman Houlihan was listed on an employee's evaluation as his foreman. Foreman Houlihan did not draft the evaluation or sign it as the employee's supervisor. Assuming, however, that Foremen and Master Technicians do, in fact, evaluate employees, the parties' collective-bargaining agreement wholly eliminates any relevance of this finding since the agreement expressly sets forth the terms under which employees receive step and wage increases, and

[16] It is not clear that Foremen continue to participate on consensus calls. For purposes of addressing this argument, however, I assume they still have occasion to be on consensus calls.

evaluations are *not* a factor. Employees progress based on time in a particular classification. Therefore, whether Foremen or Master Technicians evaluate employees, a finding the record does not support, is entirely beside the point. It is settled that completion of employee appraisals or evaluations does not establish supervisory status absent evidence that the appraisals directly determine personnel actions affecting the employees. *Williamette Industries,* 336 NLRB 743 (2001)("when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor") citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999); *Nymed, Inc.*, 320 NLRB 806, 813 (1996). I therefore reject the Employer's contention that Foremen and Master Technicians promote or effectively recommend promotions.

There is also insufficient evidence that Foremen and Master Technicians have the authority to reward or effectively recommend rewards. I find the sporadic and limited grant of $25 gift cards is insufficient to establish supervisory authority. See *Veolia Transportation,* 363 NLRB No. 188, slip op. at 5 (2016).

4. Secondary Indicia of Supervisory Status

Finally, the Employer argues that the ratio of supervisors to employees, higher pay, and shared characteristics with supervisors and managers support a finding that they are statutory supervisors. Significantly, absent evidence that an individual possesses any one of the primary indicia enumerated in Section 2(11) of the Act, such secondary indicia alone are insufficient to establish supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Billows Elec. Supply of Northfield, Inc.*, 311 NLRB 878, 878 n.2 (1993); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993).

I reject the Employer's contention that the supervisor to employee ratio would be too high if foremen are not considered supervisors. The ratio of employees to supervisors alone is insufficient to establish supervisory status. *North Jersey Newspapers Co.,* 322 NLRB 394, 395 (1996). In any event, the Employer itself has defended its wide span of control among supervisors in response to an August 2017 audit conducted by the Pennsylvania Public Utility Commission (PUC). When questioned about its supervisory span of control during the audit, the Employer explained:

> [W]ide spans of control are typically the result of a supervisor overseeing a larger group containing Foremen or Master Technicians. These Foremen each oversee a subset group of employees for their respective supervisor with group composition changing day-to-day depending on work/needs. Foremen *are not considered supervisory employees*; however, they address day-to-day performance issues, direct other employees on the job sites and help perform work tasks. Meanwhile, supervisors are more administrative in nature and provide work oversight, planning, budgeting, etc. (emphasis added).

The Employer's own stated justification to a state regulatory body as to why a high ratio of employees to supervisors was acceptable undercuts its claim here that a finding of non-supervisory status will have a negative effect on its dealings with that same regulatory body. Likewise, with respect to higher salary, this factor is insufficient to support a finding of supervisory status. *Wilshire at Lakewood*, 343 NLRB 141 (2004).

B. Appropriate Voting Group

The Employer has stipulated that, in the event that I found the Foremen and Master Technicians to be non-statutory supervisors, the petitioned-for Foremen and Master Technicians share a community of interest with the employees in the existing bargaining unit and that "an *Armour-Globe* election would be appropriate." Accordingly, I shall order an *Armour-Globe* election to determine whether the Foremen and Master Technicians wish to be included in the existing bargaining unit.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter 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 Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization that claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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

   All full-time and regular part-time Foremen, Master Technicians, Instrument Specialist Gas, Power Systems Specialist Gas, Support Services Planner/Scheduler, Corrosion Control Specialist employed by the Employer, excluding all other employees, guards, and supervisors as defined in the Act.

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 Electrical Workers, Local 614** as part of the existing unit of employees in the following classifications:

All full-time and regular part-time production and maintenance employees employed by the Employer including Billing Consultants employed in the Meter Services Group, Contractor Liaisons, Design and Construction Consultants, High Bill Consultants, Meter Process Clerks, Meter Technicians, Metering Design and Construction Consultants, Revenue Protection Technicians, Senior Lab Technicians, Facilities PM Technicians, General Facilities Mechanics, General Utility, High Rise Mechanics, Electrical Technicians 1/C, Equipment Operators, Equipment Operator Helpers, Material Coordinators, Material Process Clerks, Tool Mechanics, Truck Drivers, Damage Prevention Inspectors, Energy Technicians, Engineering Assistants (other than Engineering Assistants employed at the Customer Information Desk), Engineering Technicians, Line Mechanics, Maintenance Assistants, Paving Inspectors, Power Quality Technicians, Senior Corrosion Control Mechanics, Senior Distribution Mechanics, Tech Maintenance, Tech Maintenance Underground Transmission, Work Process Clerks, Equipment Update Clerks, Facilities Drafters, Gas Design Technicians, Mapping Records Clerks, Senior Designers, Senior Facilities Drafters, and Plant Operations Mechanics,

EXCLUDING Customer Consultants, Customer Service Center Clerks, Engineering Assistants assigned to work at the Customer Information Desk (CIDEAs), Executive Administrative Assistants to the President, Administrative Assistants, Executive Administrative Assistants, Executive Assistants to the President PECO, Junior Analysts External Relations, Rate' Coordinators, Regulatory Assistants, Regulatory Clerks, Accounts Receivable Representatives, Billing Coaches, Billing Consultants (other than Billing Consultants employed in the Meter Services Group), Billing Specialists, Credit Specialists, Customer Consultant Coaches, Junior Analysts, Junior Analysts Payment Processing, Revenue Control Representatives, Revenue Recovery Representatives, Facilities Clerks, Customer Choice Consultants, Finance Assistants, Senior Administrative Coordinators, Analysts IT, Claims Coordinators, Real Estate and Facilities Clerks, Communications Assistants, Executive Chauffeurs, office clerical employees, guards, and supervisors as defined by the Act.

A. Election Details

The election will be held on **October 25, 2018** from 6:30 a.m. to 8:30 a.m. and 2:30 p.m. to 4:30 p.m. in the following locations:

- Cafeteria of the Employer's Oregon Maintenance Shop located at 2610 S. Delaware Ave, Philadelphia, PA 19148
- Electric Ready Room in the Employer's West Chester Service Building located at 896 S. Bolmar St., West Chester, PA
- Conference Room 7 and 8 of the Employer's Warminster Service Building located at 400 Park Avenue, Warminster, PA
- MD&S Conference Room in the Employer's Plymouth Service Building located at 680 Ridge Pike, Plymouth Meeting, PA
- Conference Room A and B of the Employer's Baldwin Service Building located at 1510 Chester Pike, Eddystone, PA.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **October 12, 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.

Also, eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

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 **October 17, 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 of Election

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. 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.

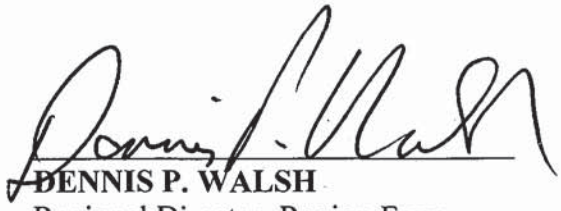
RIGHT TO REQUEST REVIEW

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 15, 2018



DENNIS P. WALSH
Regional Director, Region Four
National Labor Relations Board

Form NLRB-707
(4-2015)

United States of America
National Labor Relations Board
NOTICE OF ELECTION

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN $5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. DO NOT SIGN YOUR BALLOT. Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. DO NOT SIGN YOUR BALLOT. Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-707
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

VOTING UNIT 04-RC-223713

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All full-time and regular part-time Foremen, Master Technicians, Instrument Specialist Gas, Power Systems Specialist Gas, Support Services Planner/Scheduler, Corrosion Control Specialist employed by the Employer who were employed during the payroll period ending October 12, 2018.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All other employees, guards, and supervisors as defined in the Act.

If a majority of valid ballots are cast for International Brotherhood of Electrical Workers, AFL-CIO, Local 614, they will be taken to have indicated the employees' desire to be included in the existing non-professional unit currently represented by the incumbent union. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

DATE, TIME AND PLACE OF ELECTION

Thursday, October 25, 2018	6:30 AM to 8:30 AM and 2:30 PM to 4:30 PM	Multiple Locations (See Below)

EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

ALL BALLOTS WILL BE MINGLED AND COUNTED IMMEDIATELY AFTER THE CONCLUSION OF THE LAST VOTING SESSION.

- **Cafeteria of the Employer's Oregon Maintenance Shop located at 2610 S. Delaware Ave, Philadelphia, PA**
- **Electric Ready Room in the Employer's West Chester Service Building located at 896 S. Bolmar St., West Chester, PA**
- **Conference Room 7 and 8 of the Employer's Warminster Service Building located at 400 Park Avenue, Warminster, PA**
- **MD&S Conference Room in the Employer's Plymouth Service Building located at 680 Ridge Pike, Plymouth Meeting, PA**
- **Conference Room A and B of the Employer's Baldwin Service Building located at 1510 Chester Pike, Eddystone, PA.**

The count will be held at the Cafeteria of the Employer's Oregon Maintenance Shop located at 2610 S. Delaware Ave, Philadelphia, Pennsylvania.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-707
(4-2015)

United States of America
National Labor Relations Board
NOTICE OF ELECTION

UNITED STATES OF AMERICA
National Labor Relations Board
04-RC-223713

OFFICIAL SECRET BALLOT

For certain employees of
PECO ENERGY COMPANY

Do you wish to be represented for purposes of collective bargaining by

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 614?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box.

If you spoil this ballot, return it to the Board Agent for a new one.

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

Sample

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-707
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (215)597-7601 or visit the NLRB website www.nlrb.gov for assistance.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.