

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

ATLANTIC CITY ELECTRIC COMPANY
Employer,

and

Case No. 04-RC-221319

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS
LOCAL 210,**
Petitioner.

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL UNION 210'S BRIEF IN OPPOSITION TO REQUEST FOR REVIEW**

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STATEMENT OF THE CASE

In 2017, International Brotherhood of Electrical Workers Local Union 210, (“Local 210”) which represents an existing unit of approximately 375 operation, production and maintenance employees at Atlantic City Electric Company (“ACE” or “the employer”), petitioned for an *Armour-Globe* self-determination election to ascertain whether approximately 16 System Operators and Senior System Operators (“SOs”) employed by ACE wished to be included in the existing unit. The employer contended that the SOs were Section 2(11) supervisors. After a one-day hearing, the Regional Director issued a Decision and Direction of Election finding that the SOs were not supervisors. *Atlantic City Electric*, Case No. 04-RC-193066, DDE (Mar. 17, 2017) (“DDE 1”).

In 2018, Local 210 again petitioned for an *Armour-Globe* self-determination election to ascertain whether the SOs wished to be included in the existing unit. The parties stipulated that the facts relevant to whether the SOs are Section 2(11) supervisors had not changed since the 2017 hearing and agreed to rely upon the findings from that hearing in the instant case. The employer continued to contend that the SOs are supervisors. On June 15, 2018, the Acting Regional Director again found that the SOs are not supervisors. An election was held and a majority of the SOs voted in favor of union representation. *Atlantic City Electric*, Case No. 04-RC-221319, DDE (June. 15, 2018) (“DDE 2”). The employer sought a Request for Review and has refused to bargain with Local 210 since that time. On December 13, 2018, the Board granted the employer’s Request for Review solely on:

whether System Operators possess the authority to assign employees to places and responsibly direct employees using independent judgment.

Atlantic City Elec., Case No. 04-RC-221319, Order Granting Request for Review, p.1

(Dec. 13, 2018).

The record is bereft of evidence to support the employer's claim that the SOs are Section 2(11) supervisors. Therefore, the Board should uphold the Regional Director's decision.

FACTS

I. Atlantic City Electric's Operations

Atlantic City Electric Company is a public utility company that operates, maintains and controls transmission and distribution systems to provide electricity to approximately 547,000 residential, commercial, and industrial customers in southern New Jersey from its Atlantic Regional Office in Mays Landing, New Jersey. Local 210 has represented the employer's operation, production, and maintenance employees since 1952, and its Dispatchers and Senior Dispatchers since 2002. (DDE 1, p.2)

II. System Operators' Work Responsibilities

The System Operators and Senior System Operators work out of the employer's control room with Dispatchers and Shift Supervisors. Shift Supervisors determine the numbers of Dispatchers and SOs assigned to a particular shift, which vary by season but are otherwise consistent. Ordinarily, there are four or five SOs and three Dispatchers assigned to each shift. There are about 300 front line men (also referred to as field employees), consisting of troublemen, meter readers, and crews, working daily. (DDE 1, p.9)

SOs remotely control the transmission system to permit construction, maintenance, or power restoration as quickly as possible using a computer system called an "energy management system." From the control room, they open and close circuit breakers to control transformers, reactors, and capacitors, and switch devices in and out on a daily basis. They are responsible for

isolating portions of the system so that repair or maintenance work can be done safely and efficiently. (DDE 1, p.9; Tr. 18) Some of this work is planned, but in emergency situations, SOs must act quickly to protect the security of the system, balancing the provision of power to customers against the risk of collapse of the system. Frequently, this involves “switching” to address shortages in supply or increases in demand. They prioritize resources not only during adverse weather conditions when restoration work is performed but also on normal “blue sky” days. (DDE 1, p.9; Tr. 19)

SOs follow guidelines and procedures written by the Director of Systems Operations for addressing outages and other issues that routinely arise in performing the above duties. The guidelines, found in about 150 different documents, set forth operational procedures for a wide range of activities. They establish a list of priorities that SOs should follow, and while SOs usually adhere to the guidelines’ framework when assigning priorities, they may deviate from the guidelines if necessary. Less senior SOs are expected to notify their Shift Manager if they deviate from the guidelines, although they are not required to do so. (DDE 1, p.10; Tr. 28-29, 119, 121, 125, 126-127, 138, 145-146, 171)

In making such decisions, SOs consider the time of day, type of customer, loading, and resources available. Safety and security issues, such as downed wires or outages at critical care facilities, are given top priority. They also work to restore power to the largest number of customers utilizing the fewest resources. (DDE 1, p.10)

SOs make operating system decisions that protect the integrity of the electric system, like taking out a circuit, dropping customers, or reconnecting customers to other circuits to avoid overloads. They write switching instructions for field employees so they can isolate, de-energize, tag, and ground stations so field crews can safely work on them. (DDE 1, p.10) In

writing the switching instructions, they use manuals that determine the steps to be taken. (Tr. 226)

SOs work side by side with Dispatchers in the control room, and they perform similar work. The key difference between them is the scope of their work. (DDE 1, p.10; Tr. 136-137) Dispatchers are responsible for individual service work, trouble work, and meter work involving small groups of customers or individual customers, and they dispatch resources to those areas. Typically, customers call in to report service issues, and the employer's computer system triangulates the calls and automatically dispatches troublemen to the likely source. The Dispatcher then monitors and prioritizes the trouble orders and work. (Tr. 230-231) SOs, on the other hand, have broader responsibility for geographic areas. The SOs operate substations and equipment in the field, monitor the system, and make priority decisions about where to place resources. (DDE 1, pp.10-11)

A. SOs Do Not Assign Work

SOs do not assign field employees to particular jobs. Rather, they determine the need for the work, and then they or the Dispatcher request the Field Supervisor to dispatch a crew to perform the work. Field Supervisors assign the field employees to particular jobs. (DDE 1, p.11; Tr. 246-248)

About every three to four weeks, SOs cancel previously scheduled work due to weather, customer usage issues, or a reliability issue on the system. Field employees may cancel their own jobs due to a lack of personnel or equipment, but they will usually inform the SOs that they have done so. (DDE 1, p.11)

SOs regularly communicate with Field Supervisors regarding the need for both planned and emergency overtime. While the SO determines and advises the Field Supervisor of the need

for a crew, *it is the Field Supervisor who selects the employees* to whom overtime will be assigned. If an SO orders a field crew to a site but a Dispatcher cannot accommodate the request, an SO can call a Field Supervisor and *request* that a crew be dispatched. However, Field Supervisors can refuse such requests. If there is a disagreement as to whether a field crew should be assigned, SOs allegedly have the authority to direct Field Supervisors to assign crews, but the record is unclear as to whether this has ever occurred, and if so, how often or in what circumstances. The testimony was conclusory and no specific example was given. (Tr. 138; DDE 1, p.11)

Emergency work is performed by troublemen, who are assigned by district and are familiar with their assigned geographic areas. On normal “blue sky” days, troublemen retrieve their orders and go to work. This “planned work” is assigned by the Work Management Coordinator in the field. In storm conditions, SOs can reallocate field employees from planned work to trouble work, but it is the Field Supervisors who assign the employees to their overall assignments. (DDE 1, p.11; Tr. 141-143)

If field employees are unable to complete a job, they notify their Field Supervisor but may also call the SO to transfer their clearance to a different crew if they are leaving the job for the day. SOs cannot require field employees to stay to finish work. (DDE 1, p.12; Tr. 233-234)

B. SOs Do Not Responsibly Direct Employees

SOs perform field audits twice a year: they go to substations to inspect a permit or a clearance order—the switching and tagging instructions to “ensure that things are performed accurately on a permit.” (Tr. 185/19-186/13) There is no evidence that such audits result in discipline to field employees or Dispatchers, nor is there evidence that SOs are held accountable for errors made in the field. Rather, the record shows that the purpose of these infrequent field

audits is to familiarize the SOs with the equipment that is in the substations. (Tr. 185/19-186/13)

SOs are evaluated on their performance in terms of reliability, safety, and cost efficiency. The employer uses a Performance Accountability System which has an annual performance goal of fewer than 25 permit and tagging incidents/errors company-wide for field employees and zero errors for SOs. Dispatchers are held to the same standard as SOs and are evaluated using the same Performance Accountability Form. While SOs are not considered responsible for field employee errors, they are held accountable for their own conduct. For example, the employer provided evidence of one instance in which a field crew “timed out” and the SO did not bring in another crew, impacting a nuclear reactor which was undergoing a diesel emergency generator test. The SO received a “verbal censure” for his own failure. (DDE 1, p.12; Tr. 189-190)

SOs may have occasion to report violations of lock out tags to the Field Supervisor or Shift Manager, but any resulting discipline to field employees is determined by the Field Supervisor. SOs have no involvement in such decisions. SOs are obligated to report dangerous conditions caused by field employees, but that reporting obligation extends to all of the employer’s employees. There also is no evidence that SOs have the authority to authorize overtime. (DDE 1, pp. 12-13; Tr. 233-234)

ARGUMENT

I. Legal Standard

A. The Employer’s Burden

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-713 (2001); *Shaw Inc.*, 350 NLRB 354, 355 (2007); *Croft Metals*, 348 NLRB 717, 721 (2006). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Entergy Mississippi*,

Inc. v. NLRB, 810 F.3d 287, 295 (5th Cir. 2015); *Croft Metals*, 348 NLRB 717 (2006); *Oakwood Healthcare*, 348 NLRB 686 (2006).

Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the Act's twelve listed supervisory indicia; (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River*, 532 U.S. at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994). The Section 2(11) supervisory indicia 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 Board analyzes each case to differentiate between the exercise of independent judgment and giving routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. *Oakwood Healthcare*, 348 NLRB at 693; *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). The Board has made clear that the proponent's evidentiary burden is significant and substantial, holding that purely conclusory evidence is not sufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006); *Avante at Wilson*, 348 NLRB 1056, 1057 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 n.6 (1995).

The Board has an obligation not to construe the statutory language too broadly because

the individual found to be a supervisor is denied employee rights protected under the Act. *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970); *Avante at Wilson*, 348 NLRB at 1057; *Oakwood Healthcare*, 348 NLRB at 687. Where the evidence is in conflict or otherwise inconclusive, the Board will find that supervisory status has not been established. *The Republican Co.*, 361 NLRB 93, 97 (2014); *Dole Fresh Vegetables*, 339 NLRB 785, 792 (2003). To meet the burden of proof, a party must show specific details and/or circumstances making clear that the claimed supervisory authority actually exists and is not mere paper authority. *Avante at Wilson*, 348 NLRB at 1057-1058. The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Shaw, Inc.*, 350 NLRB at 357, n.21; *Oakwood Healthcare*, 348 NLRB at 693; *Kanawha Stone Co.*, 334 NLRB 235, 237 (2001).

It is not sufficient for the employer to show the exercise of a supervisory indicia alone. As the Supreme Court has clearly stated: “Every supervisory function listed by the Act is accompanied by the statutory requirement that its exercise ‘requir[e] the use of independent judgment’ before supervisory status will obtain” *Kentucky River*, 532 U.S. at 715. Likewise, it is not sufficient for the employer to show the exercise of independent judgment alone. Rather, independent judgment must be exercised in performing one of the twelve listed supervisory indicia. *Oakwood*, 348 NLRB at 692, 694. See also *NLRB v. NSTAR Electric Co.*, 798 F.3d 1, 22 (1st Cir. 2015) (“the exercise of independent judgment makes a worker into a supervisor only if the worker exercises such judgment in connection with a supervisory function”).

B. Development of the Board’s Standard for Supervisory Authority

1. Standard for Supervisory Authority in the Electrical Utility Industry

For decades before the decision in *Big Rivers Electric Corp.*, 266 NLRB 380 (1983), the Board regularly held that employees who monitored the transmission and distribution of electric power, designed switching orders, and directed field employees in carrying out the switching orders were not statutory supervisors. “The Board reasoned that these workers did not exercise independent judgment in directing field employees in carrying out ... switching orders or in the incidental assignment of employees during outages and other emergencies.” *Mississippi Power & Light Co.*, 328 NLRB 965, 968 (1999). In *Big Rivers*, the Board overruled those decisions, concluding that such employees responsibly directed other employees and that their assignment of employees to carry out switching directives involved the use of independent judgment. *Big Rivers*, 266 NLRB at 382.

In 1999, in *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), the Board returned to its decades-long position when it reversed *Big Rivers*, finding that the Board there failed to give appropriate weight to the nature of electric utility dispatchers’ work and placed too great an emphasis on the inherent complexity of the dispatchers’ duties and on the potential adverse consequences to the well-being and safety of the public and employees that might result from the dispatchers’ misjudgments in performing their own work. *Mississippi Power*, 328 NLRB at 969–970. Applying the rationale of the charge nurse supervisory cases, the Board concluded that the exercise of critical judgment by dispatchers based on their experience, expertise, know-how, or formal training and education did not amount to the exercise of supervisory judgment unless exercised in carrying out a supervisory indicia. *Id.* at 973-974.

2. Board Revises Supervisor Standards in *Oakwood Healthcare* Following Guidance from the U.S. Supreme Court

In the meantime, the Board was struggling with its standards for determining supervisory assignment, supervisory responsible direction, and supervisory independent judgment. In two decisions, the U.S. Supreme Court observed that the Board had had difficulty throughout the years defining the actions of “assign” and “responsibly to direct,” and the concept of “independent judgment.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 714 (2001); *NLRB v. Healthcare & Retirement Corp.*, 511 U.S. 571, 579 (1994). In *Kentucky River*, the Court rejected the Board’s attempt to limit the scope of “independent judgment” by excluding from the definition only *one type* of judgment, which was technical/professional judgment, as applied to responsible direction. However, the Court also provided some guidance to the Board, and advised that instead of distorting the meaning of “independent judgment” to limit the scope of certain *types* of judgment related to specific supervisory acts, the Board could: (1) limit the scope of independent judgment by defining the *degree* (rather than the *type*) of judgment it considers supervisory independent judgment; and (2) refine the *definition* of one or more of the *supervisory functions themselves*, citing as an example the supervisory function of responsible direction. *Kentucky River*, 532 U.S. at 720-21.

In 2006, in the *Oakwood* trilogy, the Board followed the Supreme Court’s advice, and carefully considered and explained the supervisory functions of “assign,” “responsibly to direct,” and more precisely defined supervisory “independent judgment” by the *degree* of judgment exercised.

a. Assign

In *Oakwood Healthcare*, 348 NLRB 686 (2006), the Board clarified that, in the context of Section 2(11), “assign” refers to the acts of (1) designating an employee to a place (such as a

location, department or wing), or (2) appointing an employee to a time (such as a shift or overtime period), or (3) giving significant overall duties to an employee. *Id.* at 689-90. The Board distinguished the latter from “ad hoc instructions to perform discrete tasks,” which it found to be “direction” rather than assignment. *Id.* at 690. The Board explained that assigning an employee to a certain department, a certain shift, or overall tasks would qualify as “assign” within Section 2(11). Choosing, however, the order in which an employee is to perform discrete tasks within the overall assignment would not qualify as “assign” within Section 2(11). The Board stated:

The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as “assign” within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to “assign.” To illustrate our point in the health care setting, if a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, the charge nurse’s ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment.

Oakwood, 348 NLRB at 689. *See also NLRB v. NSTAR Electric Co.*, 798 F.3d 1, 16 (1st Cir. 2015) (“[i]n *Oakwood Healthcare*, the Board distinguished between giving a worker a broad category of responsibilities, which the Board treated as assignment, and directing a worker to do a specific task,” which the Board treated as “only a direction”).

The federal courts have upheld *Oakwood*’s revised definition of supervisory assignment consistently. *See, e.g., NLRB v. NSTAR Electric Co.*, 798 F.3d at 16 (where field employees do not receive their daily assignments, which tell them where they need to be and when to conduct specific operations, from their alleged supervisors (electric system dispatchers), the alleged supervisor does not engage in supervisory “assignment”); *Mars Home for Youth v. NLRB*, 666

F.3d 850, 854 n. 2 (3d Cir. 2011) (managers did not assign significant overall tasks to resident assistants (RAs) and were not in charge of their daily schedules, but gave them only ad hoc assignments, such as monitoring a single resident, or responding to crises); and *Lakeland Healthcare Associates, LLC v. NLRB*, 696 F.3d 1332, 1347 (11th Cir. 2012) (agreeing that licensed practical nurses (LPNs) were not supervisors of certified nursing assistants (CNAs), because the LPNs assigned only tasks, on an ad hoc basis, depending on particular needs as they arose, such as taking vital signs or administering a sedative to a particular patient).

b. Responsibly Direct

The Board clarified in *Oakwood* that a putative supervisor has the authority to responsibly direct if that individual is “accountable for the performance of the task by another, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Oakwood Healthcare*, 348 NRB at 692. Thus, employees may “direct” other employees, but the directing employee is only a statutory supervisor if he or she is “responsible” for the other employee’s performance (*and* the exercise of the authority requires the use of “independent judgment”). *Id.* at 691 n. 28.

To establish responsibility, the Board clarified in *Oakwood* that it must be shown that: (1) the employer delegated to the putative supervisor the authority to: (a) direct the work; and (b) take corrective action, if necessary; *and* (2) there is “a prospect of adverse consequences for the putative supervisor if he/she does not take these [corrective] steps.” *Id.* at 692. It is not enough to show that the putative supervisors are accountable for their *own* mistakes. *Id.* at 695. There is a distinction between being held accountable for one’s own error (non-supervisory accountability), versus being held accountable for the failure of one’s crew (supervisory accountability). See *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2154-2155 (2011), *enf’d in*

relevant part, 810 F.3d 287 (5th Cir. 2015) (“[e]very circuit court that has interpreted *Oakwood* has read it to require responsible direction for *other’s* actions” (emphasis added)).

In *Croft Metals*, for example, lead persons were deemed supervisors where they were issued written warnings *for the failures of their crews* to meet production goals, or because of other shortcomings of their crews. *Croft Metals*, 348 NLRB at 722. However, where the employer failed to establish that it holds the alleged supervisors responsible for subordinates’ actions, or where it is *unclear* that the employer does so, supervisory “responsibility” is not established. *Entergy Mississippi, Inc.*, 357 NLRB at 2154-2155. *See also Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op at 4 (2016) (no responsible direction where the employer presented no evidence that any alleged supervisor has ever been held accountable *for another employee’s* mistake); *Community Education Centers, Inc.*, 360 NLRB 85, 85 (2014) (where disciplinary notices to alleged supervisors concern the supervisor’s own performance, no “responsibility” or accountability found); *G4S Government Solutions, Inc.*, 363 NLRB No. 113, slip op. at 1 (2016) (no responsible direction *where it was not clear* whether the alleged supervisor was disciplined due to inadequate performance by his subordinates, or due to his own deficient performance).

c. Using Independent Judgment

In response to the Supreme Court’s admonitions in *Kentucky River*, the Board focused, as the Court advised, on the *degree of discretion* required to render a judgment supervisory, when applied to *any* supervisory function. *Oakwood*, 348 NLRB at 692. The Board concluded that supervisory independent judgment requires, at a minimum, that an individual must: (1) act free of the control of others; *and* (2) form an opinion or evaluation by discerning and comparing data. *Id.* at 692-93. Moreover, under the plain terms of the statute, to be supervisory, independent

judgment must (3) be exercised in connection with one of the twelve supervisory functions. *Id.* at 692, 694; *NLRB v. Kentucky River*, 532 U.S. at 712-13.

i. Free From the Control of Others

The Board explained that judgment that is dependent upon the control of others is not “independent,” whether that control comes from detailed instructions in the form of company policies or rules, verbal instructions from a higher authority, or the provisions of a collective bargaining agreement. *Oakwood*, 348 NLRB at 693. However, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for *discretionary* choices. *Id.*

ii. Discerning and Comparing Data

The authority to assign or direct a task, to be independent, must involve a judgment that involves a degree of discretion that rises above the routine or clerical. *Id.* Deciding which employee gets certain assignments based on employees’ *skills* does give rise to sufficient independent judgment. *Hausner Hard-Chrome of Kentucky, Inc.*, 326 NLRB 426, 427 (1998). For example, if a registered nurse weighs the condition of a patient against the skills or training of available personnel when making an assignment, the nurse’s assignment involves the use of independent judgment. *Oakwood*, 348 NLRB at 693.

If, however, there is only one obvious and self-evident choice, or if the assignment of significant overall duties or the direction to perform a task is based solely on equalizing workloads, or the geographic location of the work, the requirements for independent judgment are not met, and the assignment is not supervisory. *Id.* at 693, 697-93. For example, in *NLRB v. Atlantic Paratransit of N.Y.C.*, 300 Fed. Appx. 54, 56 (2d. Cir. 2008), the Second Circuit agreed with the Board and found no independent judgment used in assigning drivers to routes because:

(1) the large majority of the routes were pre-assigned; and (2) when the dispatchers had to reassign drivers they did so based on mechanical factors, such as geographic location and company policies, and *not on the skill of the drivers*.

iii. To Be Supervisory, Independent Judgment Must Be Exercised in Connection with One of the Twelve Supervisory Functions

Merely exercising complex judgment and making discretionary choices do not make one a supervisor. To be supervisory, independent judgment must be used *in connection with one of the twelve supervisory functions*. *Oakwood*, 348 NLRB at 692, 694. Thus, a putative supervisor may make many complicated and independent decisions in the performance of his or her own duties, but he or she is not a “supervisor” until he or she assigns or responsibly directs an employee based on that judgment. *Oakwood* at 694. *See also NLRB v. NSTAR Electric Co.*, 798 F.3d 1, 23 (1st Cir. 2015) (“the exercise of independent judgment makes a worker into a supervisor only if the worker exercises such judgment in connection with a supervisory function”).

3. The *Oakwood Healthcare* Standard Applies to the Electrical Utility Industry

Oakwood's clarified standard has been applied in the electrical utility industry with court approval. The Board first applied *Oakwood Healthcare* to the utility industry when it revisited the supervisory status of electrical dispatchers in *Entergy Mississippi*, 357 NLRB 2150 (2011). There, the Board held that a group of 25 dispatchers were not statutory supervisors because they did not assign work or responsibly direct employees. The Board reasoned that although the dispatchers had the authority to direct field employees in the step-by-step instructions of a switching order, and were held accountable for their own failures and errors, they were not held accountable for the actions of the field employees they directed. As the Fifth Circuit noted in

upholding the Board’s decision that the dispatchers did not responsibly direct other employees: “*Oakwood* made clear that the putative supervisor must be potentially liable not only for his own failures, but also for the failures of his subordinates.” *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 294-296 (5th Cir. 2015). *See also Oakwood Healthcare*, 348 NLRB at 692. The Fifth Circuit therefore upheld the Board’s decision that the dispatchers did not responsibly direct employees because “the evidence showed ‘that the dispatchers are accountable for their own work, i.e., their own failures and errors, and not those of the field employees.’” *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d at 295, quoting the Board’s decision, 357 NLRB at 2154-2155.

Further, the Board found that the dispatchers did not have supervisory authority to assign field employees under the *Oakwood Healthcare* standard because the assignment of those employees to trouble locations did not entail the exercise of independent judgment. As to the requirement that they direct the employees to a location or “place,” the Board assumed without deciding that dispatchers’ directing field employees to a location or reassigning them during outages was assignment rather than direction. 357 NLRB at 2156. The Board then found that the location of the outage dictated where the employee would be assigned, and the field employees assigned to that particular area were assigned to the outage work, so the dispatchers did not exercise independent judgment in assigning employees. *Id.*¹

More recently, in *NLRB v. NSTAR Electric Company*, 798 F.3d 1 (1st Cir. 2015), the Court of Appeals found there was substantial evidence to support the conclusion that thirteen transmission systems supervisors and three senior transmission outage coordinators were not

¹ *Entergy Mississippi* currently is pending before the Board on remand solely on the issue of whether the dispatchers assign employees to “places” through the exercise of “independent judgment.” 810 F.3d at 299. The court was concerned because the Board had not addressed some of the record evidence related to directing employees to locations. *Id.* at 297-98.

statutory supervisors. The Acting Regional Director, as had the Board in *Entergy*, had assumed without deciding that dispatching field employees to reassigned locations and to “trouble” locations constituted assignment and found the transmission system supervisors were not supervisors under the Act because the dispatching did not involve the use of independent judgment. *Id.* at 12-13 and n.10. Applying *Oakwood Healthcare*, the court agreed that although these classifications of employees occasionally reassigned field employees to alternate locations during planned outage work and to trouble locations during unplanned outages, such assignments did not require independent judgment as they were controlled by detailed instructions and established call-out procedures. *Id.* at 13-14. Additionally, the court agreed that the transmission systems supervisors and senior transmission outage coordinators did not assign work within the meaning of Section 2(11) based on their dispatching of field employees to work that might require overtime because although they might authorize overtime work for field employees after discussion with the employees’ supervisors, the field supervisors possessed the full authority to assign and approve overtime for the field employees. *Id.* at 15.

II. System Operators are Not Supervisors Under the Act

The only issues on review are whether the SOs assign employees to places within the meaning of *Oakwood Healthcare* and whether they responsibly direct employees—and in either case—using the required independent judgment.

A. System Operators Do Not Assign Employees to Places Using Independent Judgment

1. System Operators Do Not “Assign” Employees to Places

The employer did not meet its burden to show that SOs assign employees to a place. As the above cited cases make clear, “assign” in Section 2(11) refers to an overall assignment to a place and not a direction to perform a discrete task. *See e.g., NLRB v. NSTAR Electric Co.*, 798

F.3d at 16 (where field employees do not receive their daily assignments, which tell them where they need to be and when to conduct specific operations, from their alleged supervisors (electric system dispatchers), the alleged supervisor does not engage in supervisory “assignment”).

Although in its Request for Review, the employer claims that SOs assign work, the record does not support that claim. The record shows that SOs use a computer system “to open and control circuit breakers, to control transformers, reactors, capacitors, switching devices in and out [of service] on a daily basis.” (Tr. 18/4-6) “They are reconfiguring the electric system remotely through the control room to either allow construction, allow maintenance, or to restore customers as quickly as possible.” (Tr. 19/16-19). In other words, they are performing physical work remotely through the computer program. SOs also prioritize the work—that is, based on their overview of the current state of the system, they decide what work should be performed next to keep the most customers in service in the most efficient manner.

The SOs do not assign workers to a place, e.g. location, department or wing. The Work Coordinator, a grade above the SOs, schedules the planned work to be performed. (Tr. 222/8-10) The Work Coordinator “coordinates all the outages.” (Tr. 225/13-226/2) The Work Coordinator tells the SOs what work is going to be done the next day. (Tr. 225/24-226/2) SSO Jim Luciani testified without contradiction that a Substation Supervisor schedules the work for the field employees, and the SOs do not know what employees are going where until they are going there. (Tr. 227/19-228/1) During a storm, “the storm room also takes control and directs [field employees] to go places.” (Tr. 229/24-230/5) The employer presented no testimony that SOs play any role in assigning troublemen, meter readers, or crews to their overall work locations. There was testimony from the employer that the SOs “call a Supervisor and say we need two

more crews out here, get them on the system, do the on call system to get them out.” (Tr. 128/19-129/1) The employer, however, presented no evidence that SOs have any involvement in selecting the workers called in.

The employer presented only two examples of alleged SO involvement in directing field employees to places. First, there was testimony that in the event of multiple outages, if a troubleman is at one outage and does not have a higher priority, the SO has the authority to ask the troubleman to “go to the hospital next” (Tr. 240/20-241/5)—not an overall assignment but a direction to perform a discrete task. Second, there was testimony that although SOs reconfigure the electric system remotely through the control room to either allow construction, allow maintenance, or to restore customers as quickly as possible (Tr. 19/16-19), SOs sometimes cannot perform the work remotely and need to “allocate resources” to go out and “close a switch” (Tr. 123/4-9)—another example of a direction to perform a discrete task and not an overall assignment. These examples are analogous to the example in *Oakwood* of ordering an LPN to immediately give a sedative to a particular patient—a direction to perform a discrete act—which does not qualify as “assign” under Section 2(11). *Oakwood*, 348 NLRB at 689. See also *NLRB v. NSTAR Electric Co.*, 798 F.3d 1, 16 (1st Cir. 2015). Thus, the employer failed to show SOs assign employees to places. In addition, as shown below, the employer also failed to show that the SOs exercise independent judgment in performing the tasks on which the employer relies in claiming SOs assign work.

2. There is No Evidence System Operators Use Independent Judgment in Purportedly Assigning Employees to Places

Even assuming that SOs assign employees to places—which, as shown above, they do not—the record utterly fails to show that SOs exercise the requisite independent judgment to select particular employees to perform work.

For an assignment to involve the requisite *independent judgment*, it must be free from the control of others, and the alleged supervisor must choose the assignee by weighing his or her qualifications against needed work. *Oakwood*, 348 NLRB at 694. If, however, the assignment is based on routine factors, such as the geographic location of the worker and the work, or the need to equalize workloads, or if there is only one obvious and self-evident choice, the requirements for independent judgment are not met, and the assignment is not supervisory. *Oakwood*, at 693, 697-98.

The record is completely devoid of any testimony that SOs use independent judgment to select employees to perform specific work assignments. The employer presented no evidence that SOs weigh the needs of the work against the qualifications of the employee to whom the work is assigned and make the assignment using independent judgment, as required. *Oakwood Healthcare*, 348 NLRB at 693-694, 697-98. *See also Lakeland Healthcare Associates v. NLRB*, 696 F.3d 1332, 1348 (11th Cir. 2012); *NLRB v. NSTAR Electric Co.*, 798 F.3d 1, 13-15 (1st Cir. 2015).

SOs cannot directly call employees in to work. The employer's witness admitted that SO's cannot bring employees in directly. "They get a Supervisor. The Field Supervisor will do that." (Tr. 152/13-17)

There was testimony that in the event of multiple outages, if a troubleman is at one outage and does not have a higher priority, the SO has the authority to ask the troubleman to "go to the hospital next" (Tr. 240/20-241/5). There was no testimony to support a finding that in doing so, the SO is not merely following instructions in making a routine decision—obviously an outage involving a hospital would be a high priority—or that SOs have any choice about who to send. The record shows troublemen are assigned by geographic district. "They know their

district like they know their backyard of their house. If they get a call and it says 1026 Marlboro is out of service, they pretty much know what pole to go to....” (Tr. 107/5-8) So the only conclusion the record supports is that troublemen are assigned according to geographic location.

As noted above, there was testimony that SOs sometimes cannot perform the work remotely and need to “allocate resources” to go out and “close a switch”:

They might close a switch. Maybe they can do it, themselves. If it's in a substation, generally, they can do it from their terminals. If it's out on a line, sometimes they may have to decide to use resources, allocate resources to go out and operate that switch, because we are not fully automated at Atlantic City Electric, nor are we anyplace for that matter. So there are some times when you have to allocate resources to go and do field switching.

(Tr. 123/1-9) What was missing from the employer’s evidence was any testimony as to who decides what employee or employees are sent to perform the work and how that decision is made.

Thus, in addition to failing to show that the SOs assign employees to work, the employer also failed to show that the SOs exercise any independent judgment in deciding who should be sent to perform discrete tasks.

B. System Operators Do Not Responsibly Direct Employees Using Independent Judgment

The only additional testimony involving any duties that could even arguably entail directing other employees—when switching instructions are read and checked off—was devoid of any evidence that such direction involves the exercise of independent judgment. The SOs generally write the switching instructions from a Substation Manual. The switching instructions are included with the work assignments given to the field employees by the Work Management Coordinators. Then, when the employee is at a location out in the field, he or she calls an SO and reads the steps to the SO as the steps are performed and the SO checks the steps off on a

copy of the instructions. (Tr. 226/3-15) This alleged “direction” of the field workers does not involve the exercise of any independent judgment by the SOs. And there was absolutely no testimony about what percentage of an SO’s time is devoted to either writing switching instructions or remotely listening to field employees read the instruction steps. (Tr. 222/8-17)

Moreover, the employer failed to show that any direction by SOs is responsible direction. The record supports the opposite conclusion. Although the employer claims that SOs are held accountable for the work of field employees, the record fails utterly to support that claim. The employer presented only two examples of alleged accountability, and neither supports the employer’s claim. The employer claims that the Regional Director found that an SO was disciplined for failing to assign a new crew to complete a nuclear reactor test. (Req. for Rev. p.3)

The Regional Director’s decision fails to support the claim. The Regional Director stated:

The Employer’s evidence of a single example of ... purported adverse consequences, in which a System Operator failed to communicate with the field crew with respect to the nuclear reactor test, in fact illustrates that System Operators are evaluated strictly on their own performance and thus undermines the Employer’s argument.

(DDE 1 at 16) And the testimony of the employer’s witness supports the Regional Director’s conclusion that the example undermines the employer’s argument:

Q Can you think of any examples where a system operator has had feedback as a result of work done by a first responder?

A We’ve had a situation up at our feeder substation that a crew was performing some work and they were getting close to timing out. The system operator did not follow up with getting another crew to complete that work and it had an effect on a neighboring utility. Actually, it had an effect on a nuclear reactor where they were doing a diesel emergency generator test and we needed to get that piece of equipment back in service because the nuclear reactor had plans to do that test and they could not have been out of service at the same time. And so that employee was given a verbal censure on following up on that sort of -- on making sure that work should have been completed.

Q When you say the employee received a censure, it was the system operator?

A It was a system operator.

(Tr. 189/16-190/7) It is clear from the testimony that the field employees were not found to have done anything wrong, and it was only the SO's performance that was at issue—clearly not an example of accountability for the performance of other employees.

The employer also claims that the Regional Director “ignored evidence of a situation in which the field crew erred by failing to contact the System Operator before proceeding with ‘switching’ work, which resulted in verbal coaching of the System Operator.” (Req. for Rev. p.5) The problem with the employer's claim is that the record fails utterly to support it.

The example involved a flash and explosion that occurred when field workers were performing “switching” work and did not realize the full load had not transferred from one transformer to another. The extensive incident report shows that no worker was found at fault in the incident. Rather, the report states: “The root cause of the incident was determined to be the failed operation of the #2 Transformer 69kv CS ‘C. The S&C Mark II and III type of Circuit Switchers have had numerous documented operational issues throughout the ACE system including the #2 Transformer 69kv CS ‘C at Terrace.” (Employer Ex. 10, p.2) The report further states: “Though not a contributory factor to the failure, the decision to resume switching after troubleshooting should have been communicated and decided collectively with the system operator.” (Employer Ex. 10, p.3) “The ACE ROC does not include an individual step for taking readings in their switching instructions as a standard practice when paralleling transformers. The practice to include this step is not common to DPL or Pepco and is not standard practice to neighboring utilities.” (*Id.*)

The report then recommends, inter alia, “System Operators will include in all future switching instructions a unique step to take readings to verify load has been placed on the

distribution transformer when paralleling to another transformer bank.” (*Id.*) So the alleged “coaching” was not disciplinary in nature but rather a direction to the SOs to include a unique step not common in the industry in future switching instructions. The report does not support a finding that the SO was held responsible for the failure of the workers performing the switching operation to perform a step that was not in the switching instructions.

The employer’s evidence thus shows only “that the [System Operators] are held accountable for their own work, i.e., their own failures and errors, and not those of the field employees.” *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d at 295, quoting the Board’s decision, 357 NLRB at 2154-2155. Thus, the employer also failed to show SOs responsibly direct other employees.

C. Prioritizing Work is Not a Supervisory Indicia

The employer relies heavily on the fact that the SOs prioritize work and can direct what work is performed next based on the SOs’ view of the electrical grid, a view that Field Supervisors do not have. (Req. for Rev. pp.15-17) Prioritizing work is not one of the twelve supervisory indicia and therefore does not support the employer’s claim that the SOs are supervisors.

The employer’s witnesses made clear that although the SOs may be deciding, based on their overview of the system, what work should be performed when, they are not assigning the employees who perform the work. “The [System] Operator’s role is prioritizing ... what work gets done and when it gets done.” (Tr. 135/9-12) Shift Manager Jay Davis testified that the SO has the authority to tell the Field Supervisor “I need you [Field Supervisor] to find other resources.” Thus, the SO is not assigning the workers—the Field Supervisor is assigning the workers. And if the Field Supervisor refuses, the employer’s witness admitted that the SO

cannot then call in the workers but rather can elevate the request to the Manager of the district and then to the Shift Manager. “Then we work that out.” (Tr. 246/21-248/9)

The employer’s witness also testified that SOs have the discretion to cancel planned work, if for example, a storm is coming through, but his testimony suggests that the SOs are not making the decision on their own. “They inform the shift leader, shift supervisor that it looks like we should cancel this job.” (Tr. 132/2-13 (emphasis added)). And SOs admittedly cancel work only infrequently—“About once every three weeks, four weeks.” (Tr. 215/16-20) Even if SOs do make such decisions on their own, they are not assigning work to employees or reassigning work to employees. They are simply prioritizing work. Prioritizing work is not a 2(11) supervisory indicia.

The employer also did not show that SOs exercise independent judgment in prioritizing work. The record establishes that the SOs must follow extensive company guidelines or procedures when prioritizing the work. There are approximately 150 such guidelines they must follow. (Tr. 28/22-29/7, 121/5-8, 125/3-22, 138/13-24, 145/25-146/4, 171, 226-227) The guidelines are written by management above the level of SOs. (Tr. 138/17-24) Senior System Operator Luciani testified without contradiction “we have operational procedures for pretty much everything that we do.” (Tr. 226/18-19) And even when SOs must make decisions quickly, such as when there are multiple outages due to a storm, the SOs still must follow the procedures in making decisions based on their familiarity with the procedures. (Tr. 238/19-239/7, 242/7-11)

Employer witness Shift Manager Jay Davis testified that “once a week” SOs deviate from procedures. Davis did not testify to the exercise of any independent judgment on these occasions—Davis testified, “we go off script once a week as to some of our procedures”

(emphasis supplied). He did not testify about any specific occasions when SOs have gone “off script” from procedures on their own. (Tr. 211/18-213/1) Nor did he testify that when SOs go “off script” it involves any of the twelve 2(11) supervisory indicia.

And even if SOs do exercise independent judgment in prioritizing work—something the record does not support—that cannot support a supervisory finding. As the employer has admitted, independent judgment “is not supervisory judgment unless it is exercised in relation to one of the 12 indicia of supervisory authority.” (Atlantic City Electric Company’s Request for Review of the Acting Regional Director’s Decision and Direction of Election (“Req. for Rev.”) p.21) *Oakwood*, 348 NLRB at 692, 694. *See also NLRB v. NSTAR Electric Co.*, 798 F.3d 1, 22 (1st Cir. 2015) (“the exercise of independent judgment makes a worker into a supervisor only if the worker exercises such judgment in connection with a supervisory function”).

In this case, the employer’s assertions about SOs’ duties show the duties are not related to performing one of the twelve indicia of supervisory status. For example, the employer asserts:

In deciding what portions of the system can be taken offline or should be prioritized for repairs, the System Operators must balance multiple factors—including but not limited to—safety, customer demand, whether critical care facilities or other priority customers are impacted (*e.g.*, hospitals), how many field employees are available to be dispatched, the amount of time needed for the repairs, and the integrity of the electric system. (Tr. 28-29; 118; 169-70). They are also responsible for monitoring the stability of the entire system and to take independent actions to prevent against overload and blackouts. (Tr. 19-20).

(Req. for Rev. p.8) This might describe an exercise of independent judgment, but it does not describe the exercise of independent judgment while assigning or responsibly directing other employees.

The employer further asserts:

Neither field supervisors, nor the dispatchers or field crew, have authority to override what the System Operators indicate they need in terms of priority or staffing resources. (Tr. 138; 244-45; 247-49). These other positions lack the

“situational awareness” of a System Operator, who alone has the best knowledge and skill to make the right judgments to ensure the reliability of the power grid. (Tr. 247).

(Req. for Rev. p.10) Again, this might describe an exercise of independent judgment, but it does not describe the exercise of independent judgment while assigning or responsibly directing other employees.

D. The Employer’s Other Factual Claims Lack Merit

The Board has only granted review as to the issues of assigning employees to places and responsibility directing employees using independent judgment, so the employer’s additional claims addressed below should no longer be at issue in this case. We nevertheless address them to set the record straight.

1. Overtime

In asserting that the record shows that SOs decide whether overtime will be performed, the employer misstates the record. (Req. for Rev. p.2) The testimony to which the employer points is that in cases of expected overtime—that is “scheduled or planned overtime that’s done by the work management organization”—SOs can hold crews over to finish the work. (Tr. 159/4-10) Clearly, the actual testimony was that the work management organization schedules the overtime—it is part of the planned work. SSO Luciani testified that if a crew was working on a job and reached the end of their shift, he would not instruct them to stay over into overtime to finish the job. If SOs wanted the piece of equipment back in service, the SOs would make a call to their Supervisor to say, “hey, we really need this piece of equipment back. Can you guys do a callout and get some guys in.” (Tr. 233/18-234/8) Luciani attested that he can make the request but does not think he has the authority to direct the Supervisor to comply with the request—“that’s above my level.” (Tr. 233/18-234/8) As the D.C. Circuit has noted, “particular

caution is warranted before concluding that a worker is a supervisor despite the fact that the purported supervisory authority has not been exercised.” *Beverly Enterprises-Massachusetts, Inc. v. NLRB*, 165 F. 3d 960 (D.C. Cir. 1999). This is especially true here, where the SOs have not been told they have the requisite authority. Employees who have not been told that they have authority probably do not have it.

2. System Operators’ Supervision

The employer claims that SOs work without supervision nights and weekends (Req. for Rev. pp.8,34)—which is not a primary supervisory indicia. Under the plain terms of Section 2(11) of the Act, the employer must show that the putative supervisor exercises at least one of the twelve listed indicia to establish supervisory status. “It is well established that where, as here, putative supervisors are not shown to possess any of the primary indicia of supervisory status enumerated in Sec. 2(11), secondary indicia are insufficient to establish supervisory status.” *Golden Crest Healthcare Center*, 348 NLRB 727, 730 n.10 (2006). *See also Ken-Crest Services*, 335 NLRB 777 (2001); *General Security Services Corp.*, 326 NLRB 312 (1998), *enf’d*, 187 F.3d 641 (8th Cir. 1999). For that reason, the Board should not even reach the employer’s claim related to a secondary indicium.

At any rate, the claim is inaccurate. Although the SOs’ supervisor, Shift Manager Jay Davis, is on-site about 50-55 hours a week (Tr. 213/2-12), the employer fails to acknowledge Shift Manager Jay Davis’ testimony that he remains “on-call all the time.” (*Id.*) Emphasizing his availability to the SOs at all times, Davis attested: “They call me in Spain.” (*Id.*) Thus, at no time are the SOs without supervision.

3. System Operators Do Not Recommend Discipline

The employer's claim that SOs effectively recommend discipline provides another example of the employer's misrepresentation of the record here, which should result in a thorough review of the hearing transcript and exhibits by the Board. The employer claims: "At a bare minimum, the record conclusively establishes that System Operators can effectively recommend discipline for field crew and dispatchers to their supervisors (Tr. at 153-54) (noting that field crew and dispatchers will be disciplined for failing to follow System Operator instructions, which the System Operator would accomplish by reporting the issue to the individual's manager)." (Req. for Rev. p.28 n.18) In so claiming, the employer misrepresents the record. The employer's witness clearly testified that although the SOs are expected to report problems or a failure to follow instructions by Dispatchers or employees in the field (Tr. 153/8-155/6), "[t]hey do not" have "any input into what happens after [they report the problem]" (Tr. 155/2-6). Rather: "It's the field—it's the line supervision's in the field responsibility to administer any discipline." (Tr. 155/2-6)

E. The Employer's Suggestion that the Board Return to the Rationale in *Big Rivers Corporation* Lacks Merit and Would Not Support a Finding that the System Operators are Supervisors under the Act

Contrary to the employer's assertion, there are no convincing reasons for the Board to return to the rationale in *Big Rivers Electric Corporation*, 266 NLRB 380 (1983). Nor is there any reason to apply a different supervisory standard in the electrical utility industry.

Big Rivers predates the Board's 2006 "thorough and well-reasoned opinion" in *Oakwood*. *Entergy Mississippi v. NLRB*, 810 F.3d 287, 293 (5th Cir. 2015). The standard set forth in *Big Rivers* therefore does not apply the Board's definitions of "assign," "responsibly direct," and "independent judgment," adopted in *Oakwood Healthcare* in response to the U.S. Supreme Court

cases that were issued after the *Big Rivers* decision. Moreover, the Board analyzes the facts of each case in determining whether purported supervisors are Section 2(11) supervisors, and even under the Board's decision in *Big Rivers*, the SOs here are not statutory supervisors. In *Big Rivers*, unlike at ACE, "there [was] no manual providing specific instruction or guidelines for system supervisors to follow in carrying out their responsibilities...." *Big Rivers*, 266 NLRB at 381. In *Big Rivers*, unlike here, there was no evidence that a Shift Manager or other upper supervision was on-call 24/7 and always available to the system supervisors. *Big Rivers*, 266 NLRB at 382, 383 ("If the emergency occurs after regular working hours or on weekends, the system supervisor may be unable to contact the transmission superintendent" In *Big Rivers*, unlike at ACE, there were "no manual[s] to guide [the system supervisors] in designing the switching orders...." *Big Rivers*, 266 NLRB at 382-383. Not surprisingly, even before *Big Rivers* was overruled, the Board in 1992, rejected an attempt by Delmarva Power via a UC petition to remove the SOs from the bargaining unit as Section 2(11) supervisors (Tr. 81/9-18).² The SOs had been in that bargaining unit since the late 1940s, according to the employer's witness. (Tr. 84/21-24) (In 2011, the SOs were taken out of the bargaining unit only upon agreement between IBEW Local 1238 and Delmarva Power and not on a finding of supervisory status (Tr. 60/17-61/3)).

As noted above, after struggling for years with the meaning of "assign," "responsibly direct," and "independent judgment," the Board in 2006 issued its trilogy of cases, known as the *Oakwood* trilogy. Applying the U.S. Supreme Court's guidance in *Kentucky River*, the Board clarified the statutory terms "assign," "responsibly direct" and "using independent judgment." And the Board's *Oakwood* trilogy standards have been approved by the Courts of Appeals,

² Pepco Holdings includes ACE, Delmarva Power and Pepco (Tr. 12).

including in application to the electrical utility industry. *See NLRB v. NSTAR Electric Co.*, 798 F.3d 1 (1st Cir. 2015) (“So far as we are aware, every circuit that has considered the question has deferred to the portions of the Board’s construction of the supervisor definition in *Oakwood Healthcare* and on which *Entergy Mississippi* relied....”). The employer has offered no convincing reasons warranting departure from the well-established *Oakwood* trilogy standards.

Nor is there any reason to apply a different supervisory standard in the electrical utility industry. If anything, the utility industry has become more automated with the advent and increasing sophistication of computer programming. Computer programs automatically triangulate incoming outage calls, to pinpoint the area of, and then the likely equipment, causing an outage. (Tr. 230/11-25). With the use of increasingly sophisticated computer programming, there is less and less need for the exercise of independent judgment by Operations workers.

CONCLUSION

For the foregoing reasons, the employer’s Request for Review should be denied and the Acting Regional Director’s decision finding the System Operators are employees under the Act upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 28, 2019, I filed the foregoing International Brotherhood of Electrical Workers, Local 210 Brief in Opposition to Request for Review electronically with the National Labor Relations Board, and served a copy via e-mail on the following:

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