

**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.

**BRIEF OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, CLC AS *AMICUS CURIAE***

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INTRODUCTION

The issue in this case is whether System Operators at Atlantic City Electric Company (“ACE”) possess the authority to assign employees to places and responsibly direct employees using independent judgment. The Acting Regional Director correctly determined that the System Operators do not have such authority, and concluded that System Operators are not statutory supervisors under the National Labor Relations Act (“the Act”). The parties have filed briefs addressing both issues on review.

The International Brotherhood of Electrical Workers, AFL-CIO, CLC (“IBEW”) writes separately because of its strong interest in ensuring that the National Labor Relations Board upholds the current standard under which the Board and courts consistently have concluded that System Operators are not statutory supervisors. The IBEW will first demonstrate that System Operators’ role in performing call-outs does not require independent judgment because the process is almost completely automated. Second, the IBEW will show that System Operators do not exercise supervisory independent judgment in outage prioritization because System Operators – across all utilities – rely only on company policies and commonsense. Finally, the IBEW will address ACE’s request that the Board overturn existing law in order to transform its System Operators into statutory supervisors. In short, the IBEW urges the Board to apply the well-settled standard it established in *Oakwood Healthcare*¹ and deny ACE’s Request for Review.

INTEREST OF THE IBEW

The IBEW represents approximately 750,000 active members who work in a wide variety of industries, including the utility industry. In total, IBEW local unions represent approximately 250,000 utility workers in various bargaining units across the United States and Canada. IBEW

¹ *Oakwood Healthcare*, 348 NLRB 686 (2006).

local unions represent more than thirty bargaining units that include System Operators who maintain the flow of electricity to customers in more than twenty-three states. The collective bargaining relationships between IBEW local unions and electric utility companies span more than thirty-five years. The issue of System Operators' status as employees covered by the Act is therefore critical to the IBEW and its local unions.

IBEW local unions representing System Operators include, for example, IBEW Local Union 300, which has represented System Operators at Green Mountain Power, the largest electric utility provider in Vermont, for over thirty years. Similarly, IBEW Local Union 1238 has represented System Operators employed by the City of Dover for over twenty-seven years. These are stable, productive collective bargaining relationships that may be compromised if the Board changes course regarding the supervisory status of System Operators. Should the Board find System Operators to be supervisors under the Act, that finding could disrupt dozens of historically successful collective bargaining relationships.

This outcome is not only contrary to Board precedent regarding supervisory status, it has the potential to damage industrial peace in an industry that is critical to our nation's infrastructure and security. The System Operator position is key to ensuring the reliability and security of the electrical grid, and the right to collectively bargain under the Act has secured stable labor relations in this delicate field for decades. There is no debate over whether System Operators' work responsibilities are complex, critical to our nation's infrastructure, or inherently consequential – the job is a serious one. The import of their labor, however, should not deprive them of their rights under the Act.

ARGUMENT

I. Automation and Routine Eliminate the Need for System Operators to Exercise Independent Judgment in Call-Outs or Prioritization.

System Operator (or sometimes Dispatcher) is a standard term for a wide range of roles within utility company control rooms. Electric utility companies across the United States employ System Operators to monitor and maintain the flow of electricity in their service area. System Operators address issues that arise in both emergency and normal situations, performing tasks including writing switching procedures, coordinating switching directions, changing voltages, changing generation output, and directing device repair. System Operators perform this work around the clock to supply electricity to customers without interruption.

Although the organizational structure, duties, and nomenclature for System Operator positions often vary utility to utility, two roles are virtually universal – “call-out” and outage prioritization. Call-out is the process System Operators use to facilitate the dispatch of field crews to areas of the electrical grid that are in need of repair. Outage prioritization is the act of categorizing power outages and optimizing resources to resume service according to a pre-determined order. As discussed below, automation and routine eliminate the need for independent judgment in the performance of these tasks.

A. System Operators do not Exercise Independent Judgment in Performing Call-Outs.

When an outage or other emergency occurs, System Operators contact work crews in the field to repair damaged components of the grid. Historically, customer service representatives notified System Operators of outages and emergencies reported over the telephone.² System

² Bill Perry, *From Lineman to Minuteman and Back*, Electricity Today, Apr. 2014, at 62 https://online.electricity-today.com/doc/electricity-today/et_april_2014_digital/2014042201/#62/ (last visited Feb 1, 2019).

Operators then referenced a paper mapping system and reached out to individual field repair crews over a company radio, according to spreadsheets and paper lists.³ At times, under that process, the coordination of work crews could take hours.

Advancements in information technology, however, have streamlined System Operators' call-out responsibilities. Utility companies now use myriad computer programs and advanced applications to manage call-outs. These systems include Outage Management System ("OMS"), Supervisory Control and Data Acquisition ("SCADA"), Energy Management System ("EMS"), Automated Reports and Consolidated Ordering System ("ARCOS"), and other similar systems. Utility companies invest in and value these tools because they improve reliability, decrease outage response times, and increase employee safety.⁴ System Operators use these various information systems every day to monitor the Bulk Electric System⁵ and execute call-outs.

Indeed, these information systems are crucial to System Operators' day-to-day work. OMS, for instance, is a generic term for various outage management systems that, among other things, can record and prioritize outages, provide up-to-the-moment data on the electric grid, and provide call-out information to field personnel.⁶ These systems are capable of recording customer-reported

³ *Id.*

⁴ *Id.*; UGI Utilities, Inc., Electric Reliability Outlook & Summer Readiness for 2018, Pennsylvania Public Utility Commission, http://www.puc.state.pa.us/Electric/pdf/Reliability/Summer_Reliability_2018-UGI.pdf (last visited Feb. 1, 2019) ("In 2017, UGI implemented the ARCOS call-out system to provide automated callout of employee resources. The automated system replaced UGI's manual callout process, thereby improving efficiency and overall crew response time.").

⁵ The Bulk Electric System is a complex network of electrical components made up of each power generator and transmission device connected to the North American grid that is 100 kilovolts or above.

⁶ *Appalachian Power Co.*, Case No. 11-RC-6654, DDE slip op. at 7 (Dec. 29, 2006) (System Operators use OMS, "an electronic outage reporting system through which certain lines can be

outages and outages detected by automatic meter reading (“AMR”) systems that identify outages without customer calls.

SCADA, in the context of electric utility service, is software that controls, monitors, and analyzes the electric grid in real-time. SCADA allows System Operators to view dynamic data and alarms across the relevant section of the electric grid. System Operators also use this software to control circuit breakers, transformers, reactors, and capacitors as needed.

ARCOS is an automated call-out program that rapidly connects System Operators with the field crew responsible for the applicable outage area. ARCOS identifies the crew that is closest geographically, determines the best crewmember to perform the work, and makes a computer-generated call. System Operators then receive a pop-up notification when a crew accepts the job.⁷

Nearly every major utility company uses these or similar computer programs.⁸ An Acting Regional Director detailed one example of the ARCOS call-out process in *Central Hudson*:

“ARCOS [...] determines the order of who gets called in and it calls the employees directly. The ARCOS priority callout order is programmed to follow the [employees’] collective-bargaining agreement. Given that guidelines exist to determine when these call-in are made, and an automated system determines who gets called and contacts the employees directly, the [System Operators’] role in this process does not require the exercise of independent judgment and is therefore insufficient to establish supervisory status.”⁹

closed or re-energized for the performance of maintenance work during an outage. [System Operators’ computers also provide] access to the call-out database used to dispatch [field crews.]”).

⁷ Perry, *supra* note 2, at 63.

⁸ *ARCOS Acquires Utility Services Division of Macrosoft*, ARCOS (2017), <https://www.arcos-inc.com/arcos-acquires-utility-services-division-macrosoft/> (last visited Feb. 1, 2019) (“ARCOS counts more than 130 utilities as customers including America’s top 25 largest electric and gas utilities that impact 87 percent of all U.S. electric consumers.”).

⁹ *Central Hudson Gas & Electric*, Case No. 03-RC-144384, DDE slip op. at 9-10 (Feb. 25, 2015), Req. for Rev. denied (NLRB, Mar. 25, 2015).

When integrated, information systems all but automate call-out procedures. The utility industry occasionally defines the integrated use of these systems as a “unified operator interface.”¹⁰ This is because from the time of the outage to the assignment of the field crew, integrated information systems allow System Operators to concentrate on managing generation load and preparing restoration plans, while automated processes determine who performs repairs in the field.

For example, in an integrated system, after an outage is recorded by OMS, SCADA allows a System Operator to locate the trouble and attempt to manipulate the corresponding switches through that system. If this is unsuccessful, the System Operator can activate ARCOS, automatically sending field crews to the scene of the outage. As one utility company employee put it, System Operators can now use the “outage management system and SCADA system to isolate trouble while ARCOS gets crews out in the field.”¹¹

Even where integrated call-out systems are not used, System Operators rarely do more than contact the next field crew member on a pre-determined call-out list, or relay the repair job to a field crew supervisor. In those situations, System Operators do not assess the skills of individual workers; they merely activate the company’s established process.

Thus, System Operators, across most if not all utilities, do not assess or evaluate specific field crew members. In fact, System Operators rarely, if ever, decide which field crew or

¹⁰ Advanced Control Systems, <https://www.acspower.com/outage-management-system/> (last visited Feb. 1, 2019); Open Access Technology International, Inc., <https://www.oati.com/solutions/smart-energy/data-acquisition-asset-control> (last visited Feb. 1, 2019).

¹¹ ARCOS Case Study, *available at* <http://www.arcos-inc.com/wp-content/uploads/2017/10/Electric-Southern-Company-Callout.pdf> (last visited Jan. 29, 2019).

individual crewmember should repair a damaged component. Instead, as explained above, field crews are often assigned by (1) automated operating systems like ARCOS that pre-determine assignments;¹² (2) field supervisors;¹³ or (3) reference to the collective bargaining agreement or a company-managed list, all of which eliminate any exercise of independent judgment.¹⁴

The system for assigning field work is no different at ACE. There, the assignment of field work is completely out of System Operators' hands.¹⁵ In the event of an outage, ACE System Operators inform field supervisors of new repair work.¹⁶ Field supervisors then assign field crews to the particular job.¹⁷ Because it is field supervisors who actually send crews out, ACE System

¹² *Avista Corp.*, Case No. 19-RC-15234, DDE slip op. at 9 (Sept. 4, 2009) (When using ARCOS, the System Operator “selects the number of employees needed by classification (i.e., 2 journeymen linemen) and then ARCOS automatically begins dialing employees in that classification.”); *DTE Energy Company*, Case No. 07-RC-188032, DDE, slip op. at 14 (Jan. 27, 2017) (System Operators “do not directly inform field employees as to where they are to go, but rather request field employees through their supervisors or ARCOS.”); *Central Hudson Gas & Electric*, Case No. 03-RC-144384, DDE slip op. at 9-10 (Feb. 25, 2015), Req. for Rev. denied (NLRB, Mar. 25, 2015); *Delmarva Power & Light Co.*, Case No. 19-UC-586, DDE at slip op. at 4 (Sept. 29, 1999).

¹³ *Nevada Power Co.*, Case No. 28-RC-6186, DDE slip op. at 8 (Jun. 30, 2003) (When requesting repairs, System Operators were required to “call the first line supervisor based on a list kept at the desk,” and “most of the communications they have with field employees are through either first line field supervisors, team leaders, or on-call troubleshooters.”).

¹⁴ *Mississippi Power & Light Co.*, 328 NLRB 965, 972 (1999) (“During the regular hours of a field crew’s work, the field employees’ supervisor decides which employees to call. During off hours, there is a designated on-call crew. The call out is usually performed by the on-call supervisor. [If there is no on-call supervisor,] the dispatcher [performs call-outs] based on a predetermined list.”); *Central Hudson Gas & Electric*, Case No. 03-RC-144384, DDE slip op. at 4, n. 3 (Feb. 25, 2015), Req. for Rev. denied (NLRB, Mar. 25, 2015) (Callout order was based on the existing collective bargaining agreements).

¹⁵ *Atlantic City Electric*, Case No. 04-RC-193066, DDE slip op. at 11 (Mar. 17, 2017).

¹⁶ *Id.*

¹⁷ *Id.*

Operators lack any opportunity to assess the skills or qualifications of the individuals performing repairs.

This assignment scheme is analogous to the one in *NLRB v. NSTAR Elec. Co.*, where the U.S. Court of Appeals for the First Circuit enforced a Board decision finding a lack of independent judgment because delegated assignments were made pursuant to call-out procedures and geographic posts.¹⁸ In that case, the Board found, and the First Circuit agreed, that the System Operators in question did not exercise independent judgment because they had no discretion in determining who performed repair work.¹⁹ System Operators at ACE similarly lack this discretion because they do not choose which individual is sent to a job.

A party claiming that System Operators are supervisors must show that the purported supervisors weigh the qualifications of the workers against the assigned work when assigning an employee to a place, time, or when giving significant overall duties.²⁰ Here, the technological advancements in utility operations mean that System Operators simply are not called upon to exercise such independent judgment. Stated differently, whether through computerized call-out systems, pre-determined call lists, or field supervisors, electric utility companies have streamlined the call-out process, taking System Operator decision-making out of the equation.

B. System Operators do not Exercise Independent Judgment When Prioritizing Outages Because the Sequence is Routine and Commonsense.

Although prioritizing work is not one of the twelve supervisory indicia enumerated in the

¹⁸ 798 F.3d 1, 13-14 (1st Cir. 2015). *See also Croft Metals*, 348 NLRB 717, 721 (2006); *Sears, Roebuck & Co.*, 292 NLRB 753, 754 (1989) (holding that assignment based on geographic proximity does not involve the exercise of independent authority).

¹⁹ 798 F.3d at 13-14.

²⁰ *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

Act, utilities often rely on System Operators' role in the prioritization process to claim that the System Operators are supervisors. Such evidence, however, cannot support a claim that System Operators are supervisors.²¹ To the extent such prioritization does impact other employees, that fact does not establish the supervisory status of System Operators because the prioritization does not rise to the level of independent judgment—it is merely routine and commonsense.²²

In order to establish independent judgment, the assignment cannot be routine or clerical in nature.²³ The Board has repeatedly held that prioritization of outages does not constitute independent judgment because it is based on straightforward considerations and company policies.²⁴ For instance, in *Mississippi Power & Light*, the Board found that the putative supervisors did not exercise independent judgment because outage prioritization took place “pursuant to the Employer’s critical customers list.”²⁵ This holding is consistent with the Board’s

²¹ 29 U.S.C. § 152(11); *Oakwood Healthcare*, 348 NLRB at 694; *NSTAR Electric Co.*, 798 F.3d at 22 (“the exercise of independent judgment makes a worker into a supervisor only if the worker exercises such judgment in connection with a supervisory function.”).

²² *Mississippi Power & Light Co.*, 328 NLRB at 973; Fallon Forbush, *Best Practices for Critical Customers*, American Public Power Association, available at <https://www.publicpower.org/periodical/article/best-practices-critical-customers> (“Oftentimes, the only distinction between customers is their size of service.”).

²³ *Oakwood Healthcare*, 348 NLRB at 693.

²⁴ *Mississippi Power & Light Co.*, 328 NLRB at 973; *Appalachian Power Co.*, Case No. 11-RC-6654, DDE slip op. at 18 (Dec. 29, 2006) (finding that commonsense, not independent judgment, dictate[d] [which] ... outage should be dispatched first.”); *Avista Corp.*, Case No. 19-RC-15234, DDE slip op. at 9 (Sept. 4, 2009) (finding that prioritization “based on commonsense considerations [was] not unique to supervisors.”); *Delmarva Power & Light Co.*, Case No. 19-UC-586, Supp. DDE slip op. at 3 (Sept. 29, 1999) (“There is no evidence that electric system operators determine priorities without reference to the Employer’s established policy.”).

²⁵ *Mississippi Power & Light Co.*, 328 NLRB at 973.

more recent examination of independent judgment in *Oakwood*.²⁶

The utility industry's approach to outage restoration is intrinsic. System Operators' marching orders are so well-established that the process is essentially reflexive. In the event of simultaneous power outages, System Operators follow a routine process to determine the order in which outages are repaired. Virtually every utility company in the country follows the same basic sequence for outage prioritization: (1) dangerous situations; (2) critical customers and critical infrastructure/key resources (including public safety buildings, hospitals, nursing homes, emergency shelters, and schools); (3) commercial areas that provide basic necessities such as gas and groceries; and (4) repairs that energize the largest number of individuals.²⁷

Many utilities also designate high-priority customers, communicated to System Operators through management-created databases. These are sometimes called "critical customer lists," "priority customer lists," or "special care" lists.²⁸ These databases serve as an inventory of customers whom System Operators must prioritize in the event of an outage. This arrangement is commonplace and routine.²⁹ To the extent there is any gray area between outage restoration

²⁶ *Oakwood Healthcare*, 348 NLRB at 693 (“[J]udgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”).

²⁷ American Public Power Association, *Restoration Best Practices Guidebook*, at 26 (2018), https://www.publicpower.org/system/files/documents/Restoration_Best_Practices_Guidebook_2_018.pdf (last visited Feb. 1, 2019); Atlantic City Electric Company, <https://www.atlanticcityelectric.com/Outages/StormCenter/Pages/StormRestorationProcess.aspx> (last visited Feb. 11, 2019).

²⁸ *Mississippi Power & Light Co.*, 328 NLRB at 973.

²⁹ Edison Electric Institute, *Understanding the Electric Power Industry's Response and Restoration Process*, Oct. 2016, available at https://www.eei.org/issuesandpolicy/electricreliability/mutualassistance/Documents/MA_101FINAL.pdf (accessed on Jan. 31, 2019), p. 2 (“Every electric company has a detailed plan for restoring electricity after a storm.”).

priority-levels, System Operators use everyday knowledge to decide which outage to address next. “Gray area” prioritization is so informal, in fact, that the process is often omitted from utility company operating procedures – prioritization orders are simply engrained in System Operators from their first day on the job.³⁰

At certain companies, shift supervisors guide which outage to address first. Similarly, social media and public perception permeate control rooms. Many utility companies monitor social media websites to address concerns and communicate with customers about outages.³¹ Outages dominating the conversation on television and social media platforms are relayed to System Operators with heightened priority. System Operators are then told to prioritize those specific outages.³²

When System Operators determine the sequence in which field crews address outages, they do not do so according to *their own* determination of which segments of the utility’s client base are more important. From their first day on the job, to their last, System Operators are instructed, to respect and execute the pre-determined outage restoration sequence – beginning with outages that pose a danger, and ending with restoring power to individual households.

In *Entergy Mississippi*, the U.S. Court of Appeals for the Fifth Circuit vacated and remanded the Board’s decision that dispatchers do not exercise independent judgment in assigning

³⁰ *Entergy Miss., Inc.*, 810 F.3d 287, 297-298 (5th Cir. 2015).

³¹ Andrew Blackman, *Utilities Tap Power of Social Media*, The Wall Street Journal, Sept. 22, 2013, available at <https://www.wsj.com/articles/utilities-tap-power-of-social-media-1379884639> (accessed on Jan. 18, 2019) (“Some electricity companies, for example, say it helps them pinpoint and fix outages quickly. When landlines and home computers are down, Twitter can give customers a simple, quick way to alert their utility and help the company respond more swiftly.”).

³² *Id.*

field crews to trouble spots.³³ The court did so because it felt the Board did not adequately consider the fact that System Operators prioritize the repair of some outages over others.³⁴ As explained here, however, System Operators do not exercise independent judgment during outage prioritization, and even if they did, deciding the order in which an employee performs work is not an exercise in “assignment” authority.³⁵

II. The Board Should Not Use this Matter to Overturn Existing and Well-Settled Board Law.

As a last resort, ACE asks the Board to overturn existing Board law to the extent it precludes the Board from finding that the System Operators are supervisors. The IBEW will address two of ACE’s more far-reaching arguments.³⁶ First, ACE asks the Board to revise its well-settled definition of accountability for the purpose of determining what constitutes “responsible direction” under the Act.³⁷ Second, ACE asks the Board to ignore both the Act and *Oakwood* to adopt former Chairman Miscimarra’s faulty “commonsense” approach to determining supervisory status.³⁸

The Board should reject ACE’s request that it upend settled Board law governing

³³ *Entergy Miss., Inc. v. NLRB*, 810 F.3d at 297-298.

³⁴ *Id.*

³⁵ *NLRB v. NSTAR Electric Co.*, 798 F.3d at 16 (“[i]n *Oakwood Healthcare*, the Board distinguished between giving a worker a broad range of responsibilities, [...] and directing a worker to do a specific task,” which the Board treated only as direction).

³⁶ The IBEW concurs with, and will not repeat, IBEW Local 210’s argument that there is no basis for returning to the standard in *Big Rivers Corporation*.

³⁷ ACE Brief on Review at 34-35, 40.

³⁸ ACE Brief on Review at 40-43.

supervisory status. The Board issued its decision in *Oakwood*, which underlies its later decisions concluding that System Operators are not supervisors, only after the Board issued a notice and invitation to the Employer, the Petitioner, and interested *amici curiae* to file briefs addressing the supervisory standard in light of the Supreme Court's decision *NLRB v. Kentucky River*.³⁹ Relying on this public input, the *Oakwood* Board carefully balanced the competing interests and the Supreme Court's guidance in *Kentucky River*⁴⁰ to develop a standard for evaluating supervisory status that has now been universally accepted by the courts. If the Board accepts ACE's invitation to modify the *Oakwood* standard for assessing supervisory status, the Board should do so only after inviting full briefing from the public. In any event, the Board should reject ACE's arguments as contrary to precedent and the Act.

A. Responsible Direction Must Include Accountability, Including the Potential for Adverse Consequences.

ACE contends that the *Entergy Mississippi* majority's conclusions concerning System Operators' exercise of responsible direction were based on an overly narrow reading of *Oakwood*, and that the Regional Director in this matter erred by also applying "an overly-narrow construction of accountability." In short, ACE contends that, for the purpose of measuring a purported supervisor's accountability for the work of subordinates, the Board should look only to whether a purported supervisor may receive praise or adverse consequences in connection with the alleged supervisor's overall management of subordinates. ACE contends that the Board need not consider whether the purported supervisor is actually subject to adverse consequences for the specific errors of subordinates. Such an analysis is, however, contrary to *Oakwood*.

³⁹ *Oakwood Healthcare*, 348 NLRB 686, 686 (2006).

⁴⁰ *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

In clarifying the phrase “responsibly to direct,” the *Oakwood* Board focused principally on the term “responsibly,” and explained that Congress never intended this supervisory function to include “minor supervisory functions performed by lead employees, straw bosses, and set-up men.”⁴¹ Thus, one may “direct” another employee, but the directing employee is only a statutory supervisor if he or she is “responsible” for the directed employee’s performance and the exercise of the authority requires the use of “independent judgment.”⁴²

In defining the term “responsibly,” the *Oakwood* Board noted that it agreed with several courts of appeals that, for direction to be “responsible,” the person directing and performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one performing the oversight if the tasks performed by the subordinates are not performed properly.⁴³ The Board then defined more precisely what supervisory “accountability” comprises. To establish such accountability, the party asserting supervisory status must show that (1) the employer “delegated to the putative supervisor the authority to direct the work, and the authority to 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

⁴¹ *Oakwood Healthcare*, 348 NLRB at 690.

⁴² *Id.* at 691 n. 28.

⁴³ *Id.* at 691-692. See, e.g., *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 267 (2d Cir. 2000) (“In determining whether ‘direction’ in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs.”); *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 209 (5th Cir. 2001) (“To direct other workers responsibly, a supervisor must be ‘answerable for the discharge of a duty or obligation’ or accountable for the work product of the employees he directs.”); *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994) (finding no responsible direction where the alleged supervisors directed employees, but were not “responsible” for what the employees actually did, and were not “accountable” for the errors or misconduct of the employees they allegedly supervised).

[corrective] steps.”⁴⁴

The courts consistently have agreed with the Board that the putative supervisor must face at least the prospect of actual adverse consequences for the errors of the supervised employees, rather than for his/her own mistakes.⁴⁵ Thus, where an employer testified that an alleged supervisor was given an “oral reprimand” for a lower level employee’s bad performance, the court found no supervisory “responsibility” because there was no proof that the alleged supervisor actually suffered an adverse consequences.⁴⁶ *Mars Home for Youth* provides another example.⁴⁷ There, assistant managers were not “responsible” for the failure of resident assistants to follow the assistant managers’ directions because the record showed that the assistant managers were not disciplined for the resident assistants’ failures, but for their own failings as assistant managers.⁴⁸ Accordingly, where a lower level employee performs inadequately, and the purported supervisor is not held accountable, the evidence “highly supports a finding that the purported supervisor is in

⁴⁴ *Id.* at 692.

⁴⁵ *See, e.g., Lakeland Health Care Assocs. v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012) (a prospect of adverse consequences is sufficient, but there must be more than merely a paper showing that such a prospect exists); *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012) (the alleged supervisor may simply be at risk for adverse consequences, but that risk must be for the bad performance of others, not his own performance in overseeing others).

⁴⁶ *Rochelle Waste Disposal*, 673 F.3d at 596. *See also Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 314-15 (6th Cir. 2012) (where there was testimony that a bad evaluation for monitoring alleged subordinates performance could affect promotions of alleged supervisors and lead to their discipline, court found responsibility had not been established because there was no evidence it had ever happened, the nurses’ job descriptions did not convey that nurses may suffer adverse consequences for aids’ performance, and there was an admission that evaluations did not affect nurses’ pay).

⁴⁷ *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011).

⁴⁸ *Id.*

fact not actually at risk of suffering adverse consequences for the performance of others.”⁴⁹ On the other hand, where a job description stated that an alleged supervisor’s primary purpose was to supervise the day-to-day activities of the supposed supervisees, and there was uncontradicted testimony that the alleged supervisors would be written up if they failed to ensure the subordinates complied with company standards, the court did find supervisory accountability.⁵⁰

These cases and others⁵¹ demonstrate that the Board and Regional Directors have not, in fact, applied an overly-narrow construction of accountability. Instead, the Board and Regional Directors, with support from the courts, have faithfully applied *Oakwood’s* thoughtful test for determining whether a purported supervisor is engaged in *responsible* direction of subordinates. There is no basis for overturning this well-established test simply so ACE and other utilities can convert System Operators into statutory supervisors.

B. The “Commonsense” Approach is Contrary to the Act.

ACE asks the Board to adopt former Chairman Miscimarra’s proposal to define supervisory status based on the “practical realities of the workplace,” rather than on the definition enacted by Congress. As the Board has stated a number of times, the test proposed by former

⁴⁹ *Rochelle Waste Disposal*, 673 F. 3d at 596. *See also NLRB v. Atlantic Paratrans of N.Y.C., Inc.*, 300 Fed. Appx. 54, 57 (2d Cir. 2008) (conclusory testimony that adverse consequences were likely for driver dispatchers insufficient to establish supervisory “responsibility” where the employer could not point to any instance in which dispatchers were warned that they could face adverse consequences if the drivers did not perform properly, or that any dispatcher was actually disciplined for any driver misconduct).

⁵⁰ *Lakeland Healthcare*, 696 F. 3d at 1332.

⁵¹ *E.g., Matson Terminals, Inc. v. NLRB*, 728 Fed. Appx. 8 (D.C. Cir. 2018); *NLRB v. Sub Acute Rehab. Ctr. at Kearny, LLC*, 675 Fed. Appx. 173 (3d Cir. 2017); *Brusco Tug & Barge, Inc. v. NLRB*, 696 Fed. Appx. 519 (D.C. Cir. 2017); *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287 (5th Cir. 2015); *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1 (1st Cir. 2015).

Chairman Miscimarra is “not grounded in the text of the Act and does not appropriately consider the indicia of supervisory status enumerated in Sec. 2(11).”⁵²

Specifically, the proposed test would consider (1) the nature of the employer’s operations; (2) the work performed by undisputed statutory employees; and (3) whether it is plausible to conclude that all supervisory authority is vested in persons other than the putative supervisors.⁵³ Regarding the third prong of this test, former Chairman Miscimarra seems to concentrate on a rather simple question, namely “is it reasonable to believe that *nobody* or *so few people* possess supervisory authority in this workplace?”⁵⁴

Applying his proposed test in *Buchanan Marine*, former Chairman Miscimarra stated:

My colleagues conclude that the captain is not a supervisor, even though the captain is the only person present with authority to address, in real time, all questions that arise regarding each of the above issues. I believe the facts, though simplified above, make it self-evident that these operations require a finding that *someone*—namely, the captain—possesses the authority to exercise at least some of the functions specified in Section 2(11) and is a statutory supervisor.⁵⁵

This analysis is misguided for three reasons: (1) it suggests that, in every workplace, a statutory supervisor is present at all times; (2) it conflates colloquial supervisory authority with supervisory authority under the Act; and (3) it fails to recognize that it is the employer’s burden to prove supervisory authority, not the Board’s.

First, former Chairman Miscimarra’s query posits that, regardless of the presence or

⁵² *Veolia Transportation*, 363 N.L.R.B. No. 188, slip op. at 5, n. 13 (2016).

⁵³ *Buchanan Marine, L.P.*, 363 N.L.R.B. No. 58, slip op. at 2 (2015).

⁵⁴ *G4S Government Solutions, Inc.*, 363 N.L.R.B. No. 113, slip op. at 7 (2016) (Former Chairman Miscimarra opining that it is “implausible to suggest that all authority to responsibly direct 330 lower-level protective force personnel is exercised exclusively by 10 statutory supervisors.”).

⁵⁵ *Buchanan Marine, L.P.*, 363 N.L.R.B. No. 58, slip op. at 4 (2015) (emphasis added).

absence of supervisory indicia listed in Sec. 2(11), every workplace includes at least one supervisor under the NLRA at all times. That idea, however, is nowhere to be found in the text of the Act. Next, it assumes that because someone is the highest authority, or the most senior in a department, they are necessarily a statutory supervisor. As the Board explained in *Lakewood Healthcare Center*, “‘highest authority’ is a secondary indicium of supervisory status which does not confer 2(11) status where [...] the putative supervisors are not shown to possess any of the primary indicia of supervisory status.”⁵⁶

Second, in addressing former Chairman Miscimarra’s test, the Board has recognized that statutory employees can “monitor the performance of other employees,” “report their findings to the Employer,”⁵⁷ or even “issue orders to other employees,”⁵⁸ all without being excluded from the protections of the Act. Indeed, it is possible for an employee to be “in charge” in the conversational sense and still be a statutory employee – the two are not mutually exclusive. The Board is charged with applying the statutory definition of supervisor to the extent set forth under Section 2(11), and no further. As the Court of Appeals for the Third Circuit stated, it would be inappropriate “to usurp Congress’s authority to promulgate the law.”⁵⁹

Last, the Board recognizes the party asserting supervisory status bears the burden of proving the putative supervisor possesses the authority to engage in one or more of the indicia set

⁵⁶ *Lakewood Health Center d/b/a CHI LakeWood Health*, 365 N.L.R.B. No. 10, slip op. at 1, n. 1 (2016).

⁵⁷ *Veolia Transportation*, 363 N.L.R.B. No. 188, slip op. at 5, n. 13 (2016).

⁵⁸ *Id.*

⁵⁹ *NLRB v. Attle-boro Associates, Ltd.*, 176 F.3d 154, 163 n. 3 (3d Cir. 1999) (“The notion of a proper ratio is not contained in section 2(11) and the Supreme Court has not endorsed it as an analytical method for determining supervisory status.”).

forth in Section 2(11).⁶⁰ It is neither the Board’s responsibility, nor its prerogative, to assess the reasonableness of an employer’s business practices in a quest to identify a statutory supervisor when the party asserting supervisory status has failed to meet its burden. Instead, the Board must only “rely upon the statute—specifically, the 12 enumerated types of 2(11) authority—and not other considerations [former Chairman Miscimarra] propounds”⁶¹

CONCLUSION

Since the Board’s decision in *Mississippi Power & Light* in 1999, Regional Directors, the Board, and the courts have routinely rejected employers’ attempts to categorize System Operators as statutory supervisors. Those decisions are not only supported by precedent, they are also consistent with the modern realities of System Operators’ duties. System Operators perform difficult and complicated jobs, but they do not assign employees to places or responsibly direct employees using independent judgment. Accordingly, the Board should deny ACE’s Request for Review and uphold the Acting Regional Director’s decision.

Respectfully submitted,

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⁶⁰ *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710-713 (2001).

⁶¹ *NLRB v. Prime Energy LP*, 224 F.3d 206, 209 (3d Cir. 2000) (“We do not consider the ratio of supervisors to employees when determining the supervisory status of a position, and we give equal weight to each of the twelve categories within the statutory definition.”); *G4S Government Solutions, Inc.*, 363 N.L.R.B. No. 113 (2016).