

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

ATLANTIC CITY ELECTRIC COMPANY,

Employer,

and

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

Petitioner.

Case No. 04-RC-221319

**ATLANTIC CITY ELECTRIC COMPANY'S
BRIEF IN RESPONSE TO THE IBEW'S *AMICUS* BRIEF**

On February 12, 2019, the International Brotherhood of Electrical Workers (“IBEW” or “International Union”), represented by the same firm as appeared on behalf of the Petitioner, IBEW Local 210 (“Local 210” or “Union”), submitted an *amicus* brief urging the Board to deny ACE’s Request for Review of the Acting Regional Director (“Regional Director”)’s Decision and Direction of Election (“Decision”). Pursuant to the Order of the Board dated February 27, 2019, ACE submits this brief in response to the IBEW’s *amicus* brief.

I. ARGUMENT

In its *amicus* brief, the IBEW strays far outside of the record in its effort to argue that ACE’s System Operators are not supervisors within the meaning of the Act. The IBEW’s discussion of technological advancements in the industry generally (without citing to the record in this case) only serves to highlight the System Operators’ critical decision-making authority. These technological advancements support and facilitate the System Operators’ decision-making by filtering and channeling relevant information directly to the System Operators so that they can make decisions about the assignment of work and the direction of employees in the field. In this

way, the IBEW's discussion of this technology does not diminish, but rather bolsters, the conclusion that the System Operators are supervisors within the meaning of the Act.

This conclusion is fully supported by the actual record evidence and the Regional Director's own factual findings in this case, which clearly establish the supervisory authority of the System Operators. As ACE showed previously, and the IBEW fails to address, the Regional Director ignored both substantial record evidence and his own factual findings in wrongly dismissing the System Operators' supervisory status. The IBEW's arguments fail to account for or even address this dispositive record evidence, or the Regional Director's factual findings, which are both supportive of supervisory status.

Additionally, the IBEW makes arguments that are contrary to Supreme Court precedent on the proper meaning of independent judgment. If the law is properly applied to the largely undisputed facts of this case, the correct conclusion is inescapable: the System Operators are supervisors within the meaning of the Act.

A. The IBEW's Amicus Brief Grasps for Information That Is Not in the Record While Ignoring Undisputed Record Evidence and the Regional Director's Factual Findings.

1. Advances in Technology Have Enhanced – Not Eliminated – the Decision-Making Authority of System Operators.

In its *amicus* brief, the IBEW argues that certain technological advancements in the industry generally (the IBEW does not cite to the record evidence in this case) diminish System Operators' authority and independent judgement because the technology filters and prioritizes the information used by System Operators. (IBEW Amicus Brief, 4-5). The IBEW asserts that integrated information systems "all but automate call-out procedures." (IBEW Amicus Brief, 6). This argument should not be considered as a basis to uphold the Regional Director's decision

because it is not based on the record in this case. But even if it is considered, the IBEW's argument further confirms the supervisory status of ACE's System Operators.

Note that the IBEW states in its brief that integrated information systems “*all but* automate call-out procedures.” (IBEW Amicus Brief, 6) (emphasis added). “All but” is a critical qualifier because it is tacit, if not explicit, acknowledgment of the critical, human decision-making authority and judgment that System Operators continue to exercise even with this new technology. This technology does not replace System Operators but rather *facilitates* their decision-making processes by filtering and channeling all available, relevant information directly to them.

Courts have long reached this same conclusion, rejecting arguments that technology usurps independent judgment, as made by the IBEW here. *See, e.g., Monongahela Power Co. v. NLRB*, 657 F.2d 608, 614-15 (4th Cir. 1981) (finding that control room foremen's use of technologically complex equipment, when monitoring and distributing electrical power, did not detract from the necessity to use human expertise and judgment: “It is [the CRF's] expertise and judgment on which other employees, including his superiors, rely . . . Given the responsibility placed on him, he must be a skilled employee. However, we do not find from the record before us that he is merely an automaton who does “little than supervise the use of sophisticated machines.” (citation omitted). He is a supervisor with responsibility for himself and others . . .”); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 361-62 (1st Cir. 1980) (in finding that that shift operating supervisors were supervisors, rejecting the argument that they did “little more than supervise the use of sophisticated machines,” because they necessarily exercised significant independent judgment when directing system take-outs and start-ups “that clearly require carefully coordinated, precise skilled action by several operators” to ensure the smooth operation

of complex, delicate machinery) (citation omitted); *Ariz. Pub. Serv. Co. v. NLRB*, 453 F.2d 228, 231-33 (9th Cir. 1971) (rejecting the argument that putative supervisors’ operation is routine—requiring only that the employees supervise machines and relay orders to field supervisors, who then supervise the actual execution of the directive—in finding that they were supervisors).

As the Regional Director found in this case, ACE’s System Operators must assimilate a wide range of information in order to perform the “difficult task” of making decisions that affect “individual and societal safety and security while constantly balancing needs and risks.” (Decision, 14). The record evidence demonstrates that System Operators, in making these decisions, must weigh a multitude of factors, such as safety (*e.g.*, downed wires), the type of customers impacted (*e.g.*, critical care facilities or hospitals), and staffing and efficiency considerations, as well as the broader impact to the electrical grid itself. (Tr. 19-20; 28-29; 118; 167-70). The Fifth Circuit in *Entergy Mississippi* faulted the Board for ignoring this very type of evidence which, if properly considered, shows that System Operators (or dispatchers in that case) assign field employees to locations using independent judgment. *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 297 (5th Cir. 2015) (“Evidence in the record shows that dispatchers’ judgment about how to allocate Entergy’s field workers is guided by a range of discretionary factors.”).

Although the IBEW attempts to portray the System Operators as automatons whose authority and judgment has been replaced by technology, the IBEW’s *amicus* brief reflects that technology enhances – *and does not eliminate and or even diminish* – the System Operators’ ability to make real-time decisions by quickly assigning field crews to the most critical outage areas:

- “[a]dvancements in information technology . . . *have streamlined System Operators’ call-out responsibilities.*” (IBEW Amicus Brief, 4) (emphasis added).

- the SCADA technology “allows System Operators to view dynamic data and alarms across the relevant section of the electric grid.” (IBEW Amicus Brief, 5).
- the ARCOS system “rapidly connects System Operators with the field crew responsible for the applicable outage area.” (IBEW Amicus Brief, 5).

What is notable is that the new technology funnels all of this information directly to the System Operators so that they can assign field employees quickly, and often unexpectedly, to areas sustaining critical outages and failures. In these and other ways, the IBEW’s *amicus* brief highlights and confirms what the record (ignored by the IBEW) shows: that System Operators are the central decision-makers, using independent judgment about where field crews need to be assigned and in what order of priority. As the Regional Director himself found, the System Operators “determine how resources are allocated, which can impact how long field employees are at a particular jobsite, and the number and types of crews dispatched.” (Decision, 10). Thus, there really is no dispute that the System Operators are responsible for work assignment decisions that are often critically important to the reliability and integrity of the power system and grid.

2. The Regional Director’s Factual Findings and Other Undisputed Record Evidence, Although Ignored by the IBEW in its *Amicus* Brief, Conclusively Establish That System Operators Are Supervisors.

The IBEW sidesteps the record evidence and the Regional Director’s factual findings because they are generally undisputed and supportive of the System Operators’ supervisory status. Resolution of the few evidentiary conflicts that do exist in the record is not essential for the Board to find that System Operators are supervisors within the meaning of the Act. Rather, the Board can reach that conclusion, and reverse the Regional Director’s Decision, based on *the Regional Director’s factual findings and other undisputed record evidence*. The Regional Director made several factual findings that are clear indicia of the supervisory status of System Operators:

- System Operators “are charged with the difficult task of directing the operation of the Employer’s distribution system and protecting its integrity, taking into account concerns for both individual and societal safety and security while constantly balancing needs and risks.” (Decision, 14).
- System Operators “determine how resources are allocated, which can impact how long field employees are at a particular jobsite, and the number and types of crews dispatched.” (Decision, 10).
- System Operators “operate substations and equipment in the field, monitor the system, and make priority decisions about where to place resources, which might entail dispatching field employees from a small outage to a large outage.” (Decision, 11).
- System Operators “can call a Field Supervisor directly and request that a crew be dispatched. . . . If there is a disagreement as to whether a field crew should be assigned, System Operators have the authority to direct Field Supervisors to assign crews. . . .” (Decision, 11).
- System Operators “may conclude that overtime work is necessary or that certain jobs should be cancelled.” (Decision, 15).
- System Operators have been disciplined for failing to hold workers over or failing to bring in a new crew after an existing crew “time[s] out.” (Decision, 12) (“For example, the Employer provided evidence of one instance in which a field crew ‘timed out’ and the System Operator did not bring in another crew. . . [resulting in] a ‘verbal censure[.]’”).
- System Operators conduct field audits to confirm that “switching and tagging” work is being handled accurately. (Decision, 12).
- System Operators follow guidelines but regularly deviate from those guidelines, “often a weekly occurrence.” (Decision, 10).

These findings are sufficient to establish System Operators’ supervisory status under Section 2(11) of the Act, insofar as they establish System Operators’ authority to assign and responsibly direct work using independent judgment. The record is replete with undisputed evidence and admissions by Local 210’s witnesses that reinforce the conclusion that System Operators are supervisors.

First, undisputed testimony establishes that System Operators' decisions are *not* controlled by geographic proximity or rote application of pre-written instructions; nor are they constrained by existing policies or guidelines. Instead, the record reflects that System Operators must balance various priorities and relative impacts in deciding what portions of the system may be taken offline or should be prioritized for repair. (Tr. 19-20; 28-29; 118; 167-70). That System Operators may and regularly do deviate from general written guidelines on the basis of their own, independent decision-making—as frequently as once per week, depending on the particular situation encountered—is *not* a matter in dispute. A System Operator called by Local 210 as a witness admitted that he changes work plans and deviates from standard operating procedures. (Tr. 137-38; 238-39).¹

Second, the record demonstrates that System Operators prioritize work to be completed by field crews at different locations. System Operators can and do require additional crews to be dispatched to a particular location, and often move crews from different geographic parts of the service territory to get more resources to a particular location or reassign particular field employees to other locations based on circumstances “on the ground.” (Tr. 120; 123; 126; 247). System Operators may also work with field supervisors to decide which crew is best for

¹ Thus, even though Work Management Coordinators plan some of the work to be performed by field crews, this does not in any way undermine the authority of System Operators to assign and direct the work performed by field crews. There is no dispute that System Operators can and do deviate from the work that is planned by the Work Management Coordinators. Even on so-called “blue sky” days, unexpected developments can arise (*e.g.*, hot weather or an unexpected outage of another piece of equipment), and System Operators can and do make independent, real-time decisions in response to those changing conditions or unexpected developments. System Operators may cancel a planned outage for the day or make other decisions that are necessary to maintain the integrity of the electrical system. (Tr. 131; 175-76; 178; E. Ex. 8). Based on this undisputed evidence, the Regional Director found that “System Operators can reallocate field employees from planned work to trouble work,” through assignments effectuated by field supervisors. (Decision, 11). Other employees, including Work Management Coordinators, lack the “situational awareness” of a System Operator to make these critical, real-time work assignment decisions. System Operators alone have the knowledge, skill, and situational awareness to make these work assignment decisions, using independent judgment, in order to ensure the reliability and integrity of the power grid. (Tr. 247).

particular projects, based on the employees' qualifications and skills. (Tr. 137-38). As the Union's own witness admitted on cross-examination, System Operators can, for example, direct specific employees to go to a particular job or project. (Tr. 240-41) (acknowledging that System Operators have the authority to tell a particular employee that a specific job or project needs to be addressed next).

This undisputed evidence, along with the Regional Director's factual findings, belie the IBEW's assertion that prioritizing work is not a supervisory task. Here, as the Regional Director specifically found, the System Operators' prioritization decisions actually determine where, when, and for how long field employees work. The Regional Director found that System Operators "make priority decisions about where to place resources, which might entail dispatching field employees from a small outage to a large outage," and they "determine how resources are allocated, which can impact how long field employees are at a particular jobsite, and the number and types of crews dispatched." (Decision, 10-11). These critical decisions are not automated; they require independent judgment by the System Operators.

Third, it is undisputed that the bargaining unit dispatchers work under the direction of System Operators. This fact is reflected in job descriptions negotiated with Local 210 and attested to by the Union's Business Manager. (Tr. 105; E. Ex. 3).

Fourth, it is undisputed that System Operators are eligible for management-level bonuses, and that those bonuses are based, in part, on how well the field employees under the System Operator's direction perform. (Tr. 156-57; 160-61).²

² While the Decision acknowledges these bonuses, (Decision, 13), it fails to evaluate or otherwise address them when examining the impact of the System Operators' compensation on its assessment of their supervisory status, (Decision, 17), which is a material error noted in ACE's Brief on Review. *See, e.g., Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962) (considering higher rate of pay as evidence of supervisory status, when compared with the pay of the production employees).

Fifth, it is undisputed that System Operators work without a higher-level supervisor more often than not; they are in the control room 24 hours a day, 7 days a week, while higher-level supervision is present only 50-55 hours a week. (Tr. 213). The frequency with which individuals work without higher supervision is an “additional factor relied on by the courts when concluding that [they] are statutory supervisors.” *Mississippi Power & Light Co.*, 328 NLRB 965, 978 (1999) (Members Hurtgen and Brame, dissenting) (footnote omitted). *See also D&T Limousine Serv., Inc.*, 328 NLRB 769, 778 (1999) (holding individual was a supervisor where, if she were not, the employees at the facility would have no on-site supervision); *Essbar Equip. Co.*, 315 NLRB 461, 466 (1994) (holding individual was a supervisor where he received slightly higher wages than field employees and, “[b]ut for him, there would have been no one at the site without any authority”).

All of this undisputed evidence cannot be ignored, as the IBEW attempts to do in its *amicus* brief. The record, and the Regional Director’s own factual findings, point clearly and strongly to the conclusion that System Operators are supervisors within the meaning of the Act.

B. The IBEW’s Amicus Brief Further Errs By Making Arguments That Are Contrary to the Law and the Evidence in This Case.

While acknowledging that System Operators’ prioritization decisions “impact” the assignment of field employees, the IBEW contends that “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.” (IBEW Amicus Brief, 9). The IBEW’s attempt to minimize the independent judgment of the System Operators mimics the Regional Director’s effort to downplay it as mere “professional judgment”. (Decision, 14).

The Regional Director and the IBEW’s effort to diminish the independent judgment exercised by System Operators must be rejected because it is contrary to the Supreme Court’s

decision in *Kentucky River. NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001). As the Supreme Court made abundantly clear, it does not matter what “kind” of judgment is used. *Id.* at 715 (“What supervisory judgment worth exercising, one must wonder, does not rest on ‘professional or technical skill or experience’?”). The Act does not distinguish between “professional” or “technical” judgment and other types of independent judgment. *Id.* at 707 (“This interpretation, by distinguishing different kinds of judgment, introduces a categorical exclusion into statutory text that does not suggest its existence.”). *See also Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006) (noting existence of “independent judgment” does not turn on whether judgment uses professional or technical expertise).

The IBEW’s argument is a repackaging of the discredited rationale of the Board’s decision in *Mississippi Power & Light Co.*, 328 NLRB at 970, which courts have held cannot survive the Supreme Court’s decision in *Kentucky River*. *See Public Service Co. of Colo. v. NLRB*, 271 F.3d 1213 (10th Cir. 2001); *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 205, 208, 210 (5th Cir. 2001).

C. No Change in the Law Is Required to Hold That the System Operators Are Accountable for the Work of Subordinate Employees.

The IBEW incorrectly suggests that ACE is arguing that a change in Board law is necessary in order to hold that System Operators are accountable for the work of subordinate employees, for purposes of the responsible direction analysis. (*See IBEW Amicus Brief*, 12-16). No change in the law is needed in order to reach this conclusion.³ Rather, as noted in ACE’s

³ Nor would adopting the “common-sense” principles articulated by former Chairman Miscimarra require a change in law or precedent, as the IBEW argues. (*IBEW Amicus Brief*, 16-19). As former Member and Chairman Miscimarra explained consistently, by inviting consideration of common-sense factors in assessing whether putative supervisors possess any of the supervisory indicia outlined in Section 2(11), the common-sense approach “do[es] not comprise “a new test for supervisory status,” but a guide to how the Board should apply the indicia of supervisory status that Congress listed in Section 2(11).” *See Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 14 (Dec. 2, 2015) (Member Miscimarra, dissenting).

Brief on Review, existing law *supports* a finding that System Operators are accountable for their subordinates' work.

Existing law does *not* require proof that the supervisor actually suffered discipline or other adverse consequences for the errors of the employees working under the supervisor's direction. Instead, as the IBEW recognizes, the law requires *only* "the *prospect* of adverse consequences for the errors of the supervised employees." (IBEW Amicus Brief, 15) (emphasis added). See *Oakwood Healthcare*, 348 NLRB at 692. See also *Lakeland Health Care Assocs. v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012); *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012).

The record evidence in this case meets this standard. It is undisputed that System Operators' performance and compensation are both impacted by the performance of the field crews that the System Operators direct. (Tr. 127; 186-87; 218-19; E. Ex. 9) (discussing performance reviews); (Tr. 156-57; 160-61) (discussing bonuses, which include a metric for regional/field performance). For example, as part of the performance accountability system, the Company evaluates whether System Operators have fewer than 25 "permit and tag errors" by the field crews in the System Operator's region. (Tr. 186-87; E. Ex. 9, at 2 of 9). The form makes clear that such field crew errors are separate and apart from accountability for the System Operator's own errors, for which they have a threshold of *zero* incidents. (*Id.*).

Furthermore, the *Oakwood* standard does not focus narrowly on evidence that the supervisor is held accountable for the errors of the employees that he or she directs. As Member Hayes explained in his dissent in *Entergy Mississippi*:

[A] supervisor's "responsible direction" under *Oakwood Healthcare* is not based simply on being accountable for the errors and mistakes of the employees directed. Rather, accountability focuses on the supervisor's own conduct and

judgment in exercising oversight and direction of employees in order to accomplish the work.

Entergy Mississippi, 357 NLRB 2150, 2158 (2011) (Member Hayes, dissenting) (footnote omitted). In other words, the standard focuses on whether the individual is held accountable for the responsibility of leading and directing the work of others.

In any event, the record in this case *does* contain evidence of System Operators being held accountable for the work of the field crews working under the System Operator's direction. The evidence shows that a System Operator received a verbal coaching when a field crew failed to contact the System Operator before proceeding with certain switching work. (Tr. 192; 204 E. Ex. 10). This is evidence of accountability because the verbal coaching was an adverse consequence for the failures of the field employees. Both the incident report and the testimony at the hearing demonstrate that the censure of the System Operator was driven in significant measure by *the decision of field personnel* to resume switching after troubleshooting *without* first discussing and making that decision with the System Operator. (Tr. 192:8-16) (E. Ex. 10) (incident report stating that "the decision to resume switching after troubleshooting should have been communicated and decided collectively with the system operator").⁴

This is exactly the type of evidence that courts have held is sufficient to prove that an individual is engaged in responsible direction using independent judgment:

⁴ On cross-examination, counsel for Local 210 acknowledged that the System Operator was held responsible for the field employee's actions. Counsel only sought to clarify whether the System Operator was formally disciplined, or had any hand in disciplining the field employee for his actions:

Q You would agree with me that *the system operator who is held responsible* did not in turn discipline any of the people in the field from these actions, correct?

A I certainly would agree with you there.

Tr. 204:22-25 (emphasis added).

When finding that individuals who monitor power transmission are statutory supervisors, courts of appeals have emphasized that these individuals direct complicated switching functions—particularly in emergency situations—and that this constitutes “responsible direction,” requiring the use of “independent judgment,” within the meaning of Section 2(11).

Mississippi Power & Light Co., 328 NLRB at 977 (citing *S. Ind. Gas & Elec. Co. v. NLRB*, 657 F.2d 878, 884 (7th Cir. 1981); *Maine Yankee Atomic Power Co.*, 624 F.2d at 362).

Thus, the record in this case amply supports the conclusion that System Operators responsibly direct the work of other employees using independent judgment. No change in the law is needed to reach that conclusion.

II. CONCLUSION

For the foregoing reasons, none of the arguments raised by the IBEW in its *amicus* brief alters the conclusion that System Operators both assign and responsibly direct work using independent judgment and are therefore supervisors under the Act. As a result, the Board should reverse the Acting Regional Director’s Decision and Direction of Election.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew L. Gniewek, counsel for Atlantic City Electric Company, hereby certify that a copy of the foregoing Brief in Response to the IBEW's *Amicus* Brief was electronically filed on the NLRB's e-filing system and served via electronic mail and U.S. mail, upon the following:

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