

No. 19-60616

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, CLC, LOCAL UNIONS 605 AND 985**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

This case presents a narrow question involving the application of a settled legal standard to the facts of a particular case, and is informed in part by this Court's findings in a previous decision remanding. The National Labor Relations Board does not believe that oral argument is necessary.

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**BRIEF FOR THE
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of International Brotherhood of Electrical Workers Local 605 and 985 (“Local 605”) for review of a National Labor Relations Board order dismissing an unfair-labor-practice complaint against Entergy Mississippi, Inc. 367 NLRB No. 109 (2019). The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding pursuant to Section 10(f), 29 U.S.C. § 160(f). The petition is timely, as the Act provides no time limits for such filings.

Because the Board’s Order is based partly on findings made in a prior bargaining-unit-clarification proceeding, the record in that case is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d). Courts review the Board’s actions in such a representation proceeding solely for the purpose of “enforcing, modifying, or setting aside ... the [unfair-labor-practice] order of the Board.” *Id.* The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the court’s ruling in the unfair-labor-practice case. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUE

The Board dismissed a complaint alleging that Entergy unlawfully refused to bargain with Local 605 regarding Entergy’s transmission and distribution dispatchers. Whether that dismissal was reasonable turns on the following question:

Does substantial evidence support the Board’s finding that Entergy’s dispatchers are statutory supervisors?

STATEMENT OF THE CASE

This case returns to the Court following remand to the Board on “the narrow question of whether [Entergy’s] dispatchers exercise independent judgment in assigning field employees to places,” and thus are statutory supervisors excluded

from the coverage of the Act. *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 298 (5th Cir. 2015). On remand, the Board concluded that the dispatchers indeed assign field employees to places using independent judgment. Accordingly, it dismissed a complaint alleging that Entergy’s refusal to bargain with Local 605 regarding the dispatchers violated the Act.

I. STATEMENT OF FACTS

A. Entergy Transmits and Distributes Electricity

Entergy is an electrical-utility company that supplies electricity to over 400,000 customers throughout Mississippi. Its service area is divided into 14 geographic networks across the state, with operations headquartered in Jackson. *Entergy Miss.*, 810 F.3d at 290; (ROA.4872-73; ROA.38, 101.)¹

Entergy has both transmission and distribution operations. Transmission obtains power from generation facilities and delivers it to substations, where distribution converts it to lower-voltage levels for delivery to residential and commercial customers. Entergy’s system includes 16,600 circuit miles of distribution line and 2,800 miles of transmission line, as well as over 200 substations. (ROA.4872; ROA.47-48, 212, 229-30, 473.)

¹ ROA citations preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence in the record. “Br.” cites are to Local 605’s opening brief to the Court.

Entergy employs transmission and distribution dispatchers in its central office and various types of field employees in the networks. Local 605 has represented Entergy employees since the 1930s, and the parties have entered into a series of collective-bargaining agreements during that period. The bargaining unit historically has included dispatchers. (ROA.4872-73; ROA.23-26, 44, 948.)

B. Dispatchers Monitor and Restore Power

Dispatchers monitor the power flow throughout the system and oversee the switching process for both planned and unplanned maintenance. *Entergy Miss.*, 810 F.3d at 290; (ROA.4872; ROA.85-86, 219-20.) Switching is the process of isolating and de-energizing segments of line for repairs or other maintenance and restoring power flow once the maintenance is complete. (ROA.4872; ROA.86-87, 2659.) Dispatchers write switching orders, which are step-by-step directions for the particular maintenance job. They relay the switching orders to field employees, who perform the repairs using those orders. (ROA.4873; ROA.89-91.)

From their base in Jackson, dispatchers have responsibility for all networks statewide. Dispatching operates 24/7, with dispatchers working 12-hour shifts (7am-7pm or 7pm-7am). (ROA.4872; ROA.72, 250.)

C. Dispatchers Send Field Employees to Trouble Spots

Entergy refers to unplanned maintenance needs such as power outages or downed wires as “trouble.” It responds to approximately 20,000-25,000 cases of

trouble per year. (ROA.43, 756-57, 828-29.) Dispatchers learn of a trouble case from customer reports or an internal computerized monitoring system. Each report is logged in the system, which aggregates all reports to predict the source of an outage. (ROA.4873; ROA.74-75.)

When dispatchers learn of a trouble case, they send field employees to the scene to perform switching. *Entergy Miss.*, 810 F.3d at 291; (ROA.4873; ROA.54.) In doing so, dispatchers take those employees away from their regular duties, which consist of construction, installation, and maintenance work assigned by the networks' operations coordinators. (ROA.4873; ROA.42-47, 204, 310-11, 485, 3014-15.) If trouble arises during field employees' regular working hours, the dispatcher first calls the employee whom the relevant network has designated to handle trouble cases within its area. (ROA.4878; ROA.1228-29, 1245-46, 2255-65.) Dispatchers might not send the designated field employee if, for example, he or she is currently far away from the trouble. They also can send field employees from one network to another network to handle trouble. (ROA.884-87, 1344, 1465, 3022-23.) Outside of the field employees' regular hours, dispatchers consult a call-out list prepared by the network to identify which off-duty employees to recall and send to the trouble spot. Most call-out lists are ordered by seniority. (ROA.4873; ROA.1246-48, 1259.)

If multiple trouble cases arise at the same time, dispatchers decide which one to handle first. Among the factors they consider are the number of customers affected, the type of customers affected, weather, available resources, and the degree of danger posed by each case of trouble. *Entergy Miss.*, 810 F.3d at 297; (ROA.5039-40; ROA.583-91, 793, 938, 1131, 1298, 1408-09, 1830.) Entergy has no written rules or guidelines for prioritizing trouble cases. *Entergy Miss.*, 810 F.3d at 297; (ROA.5039-40; ROA.2824-25.) Entergy refers to certain high-volume customers as “major accounts,” such as large industrial facilities or hospitals. Major accounts tend to get top priority in trouble situations but do not automatically do so. (ROA.5039; ROA.76-77, 2828-30.) There is no rule or standard operating procedure governing how to prioritize multiple trouble cases that each affect a major account. *Entergy Miss.*, 810 F.3d at 297; (ROA.5039; ROA.793-94, 2824.)

Dispatchers decide how many field employees to send out to perform trouble work. *Entergy Miss.*, 810 F.3d at 291, 297; (ROA.5039; ROA.336, 585-86, 1131, 2719, 2960.) Entergy does not maintain a policy or guidelines on what number of employees to dispatch. The decision is based on factors such as the type of trouble, weather, and who is affected. (ROA.5039; ROA.336, 791-92, 1141, 2719, 2790-91, 2823.) If the first field employee sent to a particular trouble spot requests the assistance of additional employees, the dispatcher must make every effort to

provide the requested help. The dispatcher can decide whether to send help right away or at a later time. If the latter, the dispatcher may redirect the first employee to another trouble spot until the requested help becomes available. (ROA.5039; ROA.888, 1172-73, 1674, 2837-38.)

When they learn of new trouble, dispatchers can divert field employees who are already dispatched to other trouble cases, even if it means leaving the original job undone for the time being. Alternatively, the dispatchers can call out additional employees to handle the new case. They also can postpone a response until further resources become available. *Entergy Miss.*, 810 F.3d at 297; (ROA.5039-40; ROA.151, 586-87, 791-92, 1131, 1136, 1496, 2794-95, 2964, 3034-35.) There is no guidance from Entergy for such decisions. (ROA.5039; ROA.2825.)

Once field employees have completed a particular trouble case, the dispatcher can either release the employees back to their scheduled duties or direct them to other trouble spots. (ROA.5040; ROA.484-85, 2793-94, 3028-29.)

Dispatchers also can ask field employees working on trouble cases to stay past their shift and incur overtime. A dispatcher might do so to have the employees finish a job or because the dispatcher suspects that additional trouble may arise—for example, because a storm is approaching. (ROA.4873, 5040; ROA.311, 458-59, 591-92, 787-88, 3015, 3018.) Field employees are not required to work

overtime if asked by a dispatcher, but they typically do. (ROA.4873; ROA.1411-12.)

II. PROCEDURAL HISTORY

In August 2003, Entergy filed a unit-clarification petition asking the Board to determine whether Entergy's dispatchers should be excluded from the bargaining unit as supervisory employees. *See* 29 C.F.R. § 102.60(b). The Board's Regional Director for Region 15 found that the dispatchers were not statutory supervisors, and the Board affirmed. 357 NLRB 2150 (2011).

While the clarification petition was pending, Entergy refused to bargain with Local 605 over the dispatchers' terms and conditions of employment on the ground that they were supervisors. The Board's General Counsel issued an unfair-labor-practice complaint alleging that Entergy's refusal violated the Act. Based on its determination in the unit-clarification case that the dispatchers were not supervisors, the Board granted the General Counsel's motion for summary judgment. 361 NLRB 892 (2014).

Entergy filed a petition for review of the unfair-labor-practice decision with this Court. On review, the Court vacated the Board's decision in part and remanded. *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287 (5th Cir. 2015). The Court held that the Board "ignored significant evidence suggesting that dispatchers 'assign' field employees to 'places' using 'independent judgment,'" which would

make them supervisors under the Act. *Id.* at 298. Specifically, it pointed to evidence that “dispatchers arguably exercise independent judgment when deciding how to allocate Entergy’s field workers” during instances of multiple simultaneous trouble cases. *Id.* at 297. It remanded to the Board for further proceedings on whether that evidence established supervisory status.

III. THE BOARD’S CONCLUSIONS AND ORDER

In a Decision on Remand and Order issued March 21, 2019, the Board (Chairman Ring and Members Kaplan and Emanuel) accepted the Court’s decision as law of the case and “review[ed] the evidence identified by the court.” (ROA.5040.) The Board concluded that the dispatchers are supervisors and dismissed the unfair-labor-practice complaint. It also clarified the bargaining unit to exclude the dispatchers.

STANDARD OF REVIEW

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Alcoa, Inc. v. NLRB*, 849 F.3d 250, 255 (5th Cir. 2017). Substantial evidence “is such relevant evidence that a reasonable mind would accept to support a conclusion.” *Alcoa*, 849 F.3d at 255 (internal quotation omitted).

Supervisory status is a question of fact. *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 292 (5th Cir. 2015). Even beyond the deference accorded the Board on

factual matters generally, “courts normally extend particular deference to NLRB determinations that a position is supervisory.” *Id.* (internal quotation omitted); *see also Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 343 (5th Cir. 1980) (courts “accord special deference to the Board’s expertise in determining supervisory status”).

SUMMARY OF ARGUMENT

On remand from this Court, the Board evaluated the evidence the Court identified and concluded that Entergy’s dispatchers are supervisors under the Act because they exercise independent judgment in assigning employees to places. Substantial evidence in the record supports that finding, which is also in accord with the Court’s findings and observations in its previous decision. Accordingly, the Board reasonably dismissed the unfair-labor-practice complaint alleging that Entergy had unlawfully refused to bargain regarding the dispatchers.

Dispatchers assign employees to places by telling field employees where to go to perform trouble work. They send those employees from one work area to another, then either on to yet another location or back to the original one. As the Board explained, dispatchers’ decisions necessarily lead to field employees’ assignments to particular locations.

Dispatchers also exercise independent judgment in their assignment decisions. They make those determinations based on their own evaluation of a

number of discretionary factors without set rules or standard operating procedures. When multiple trouble cases arise at once, for example, dispatchers decide where to send field employees first. Although Entergy has some general prioritization practices, dispatchers can deviate from the typical order after evaluating the facts on the ground. They also can reassess earlier assignment decisions and redirect dispatched employees to other trouble locations based on changed circumstances. Dispatchers also decide how many total field employees to assign to trouble duty, which impacts which employees go where.

Local 605's various arguments against the Board's supervisory-status finding lack support in the record or are in tension with the Court's previous decision in this case. And none overcome the particular deference accorded the Board in supervisory-status determinations.

ARGUMENT

The Board Reasonably Dismissed the Complaint Because Entergy's Dispatchers Are Statutory Supervisors

In remanding this case, the Court identified evidence that “arguably shows that dispatchers assign field employees to places by exercising independent judgment” and thus are supervisors under the Act. *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 298 (5th Cir. 2015). On remand, the Board “review[ed] the evidence identified by the court” and concluded that “the evidence highlighted by the court establishes that the dispatchers ... are statutory supervisors.” (ROA.5038, 5040.) Because supervisors are excluded from the Act’s coverage, Entergy did not violate the Act in refusing to bargain over the dispatchers’ terms and conditions of employment and the Board reasonably dismissed the complaint.

A. Supervisors Are Not Covered by the Act

Employers have an obligation under the Act to “bargain collectively with the representatives of [their] employees.” 29 U.S.C. § 158(a)(5). That obligation does not extend to “any individual employed as a supervisor,” however, because such individuals are excluded from the Act’s definition of “employee.” 29 U.S.C. § 152(3). To qualify as a supervisor under the Act, an individual must:

hav[e] authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a

merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). That is, a statutory supervisor uses independent judgment in the exercise of a listed supervisory function. A supervisor need not be able to perform all of the functions set forth in the Act, but must “hold the authority to engage in any 1 of the 12.” *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001); *see also Poly-Am., Inc. v. NLRB*, 260 F.3d 465, 479 (5th Cir. 2001) (noting that “the existence of any one of the statutory powers [is] sufficient to confer supervisory status” (internal quotation omitted)).

The supervisory authority to assign includes “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006); *accord Entergy Miss.*, 810 F.3d at 296. Even if not responsible for making assignments in the first instance, individuals may exercise assignment authority if they can “reassess[] ... assignments during a shift,” *Oakwood Healthcare*, 348 NLRB at 697, or “ma[k]e adjustments to the work assignments made initially,” *Alois Box Co. v. NLRB*, 216 F.3d 69, 75 (D.C. Cir. 2000).

To exercise independent judgment, an individual must “act ... free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare*, 348 NLRB at 692-93; *accord Entergy Miss.*, 810

F.3d at 296. Because the judgment must be more than “routine or clerical,” it must involve some degree of discretion. *Entergy Miss.*, 810 F.3d at 296 (quoting *Oakwood Healthcare*, 348 NLRB at 693). By contrast, “a judgment is not independent if it is dictated or controlled by detailed instructions,” such as an employer policy or a collective-bargaining agreement. *Id.* However, “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Id.* For example, individuals can exercise independent judgment where an employer policy identifies factors to consider but leaves room for individual evaluation and “is not ... outcome determinative.” *Oakwood Healthcare*, 348 NLRB at 696-97. Likewise, the “authority to deviate from that policy based on ... assessment of the particular circumstances” can constitute independent judgment. *Id.* at 693-94. Independent judgment to assign can be shown where the putative supervisors “exercise discretion in deciding how to allocate the resources available,” either in initial assignments or when reassigning based on changed circumstances. *Id.* at 697.

Supervisory status is a fact-intensive determination that depends largely on the circumstances of a particular case. *See Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 343 (5th Cir. 1980) (“The facts of each case determine whether an individual is a supervisor.”); *Oakwood Healthcare*, 348 NLRB at 699 (Board will “assess each case on its individual merits”). Moreover, the Supreme Court has

instructed that “the statutory term ‘independent judgment’ is ambiguous with respect to the *degree* of discretion required for supervisory status” and thus that “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.” *Ky. River*, 532 U.S. at 713. The burden of proving supervisory status rests with the party asserting it, and requires more than conclusory evidence. *Id.* at 710-12.

B. Entergy’s Dispatchers Are Supervisors

Substantial evidence supports the Board’s finding that Entergy met its burden of showing that its dispatchers are supervisors under the Act because they assign field employees to places using independent judgment. That determination falls within the scope of the “particular deference” owed the Board on supervisory-status issues, *Entergy Miss.*, 810 F.3d at 292, and is in keeping with the Court’s findings and observations in its decision remanding. Local 605 has not shown any reason for the Court to displace the Board’s judgment.

1. Dispatchers Assign Field Employees to Places

Entergy’s dispatchers assign field employees—one of the statutory indicia of supervisory status—by “designating an employee to a place.” *Oakwood Healthcare*, 348 NLRB at 689. As the Board explained (ROA.5039-40), they send field employees to trouble spots to execute switching orders. Such instruction involves removing employees from their regular work locations and sending them

to other places to perform trouble work. (ROA.4873, 5040.) A dispatcher can send field employees to trouble cases both inside and outside of their geographic network; indeed, some field employees work on trouble outside of their networks “quite often.” (ROA.1465.)

Moreover, the dispatchers’ ability to assign field employees to places continues for as long as those employees are on trouble duty. After the work at one trouble spot is completed, dispatchers instruct the employees where to go next—either to other trouble cases or back to their original work locations. The Board further noted that, if multiple trouble cases arise at once, dispatchers can redirect employees to leave their current trouble sites and report to different ones. (ROA.5039-40.) If employees are en route to one trouble location, dispatchers can divert them to another. In all of those situations, dispatchers are literally telling field employees where to go to perform their work, a foundational term and condition of employment. As the Board put it, “dispatchers’ decisions ... necessarily result in the dispatchers sending particular field employees to particular places.” (ROA.5040.)

The dispatchers’ role fits comfortably within the definition of “assign” set forth in *Oakwood Healthcare*, adopted by this Court in *Entergy Mississippi*, and applied here (ROA.5040)—“designating an employee to a place (such as a location).” *Entergy Miss.*, 810 F.3d at 296 (quoting *Oakwood Healthcare*, 348

NLRB at 689). The emergency-room charge nurses in *Oakwood Healthcare* had the power to assign because they “assign employees to geographic areas within the emergency room.” 348 NLRB at 695. Here, dispatchers’ assignment authority is even broader, because it extends to sending field employees to locations beyond their regular work areas. Moreover, the fact that an assignment to any given trouble spot is temporary (Br. 19-20) is of no consequence. The charge nurses’ place assignments in *Oakwood Healthcare* likewise were not permanent, because employees subsequently rotated to different locations in the emergency room on their own. 348 NLRB at 695. Moreover, the dispatchers retain control over field employees after any given trouble assignment by designating their subsequent location. Finally, the Board’s determination that the dispatchers’ actions constitute assignment accords with the “ordinary meaning” of that word as it “is used in everyday speech,” which is how *Oakwood Healthcare* interpreted the statutory term. *Id.* at 690.

Local 605 is incorrect to contend (Br. 16-18) that the Board somehow did not analyze the issue of whether dispatchers assign employees. Local 605’s argument rests on one sentence in the Board’s decision stating that “dispatchers undisputedly assign employees to places” (ROA.5040). But that phrase was a rhetorical conclusion to the analysis, not the totality of the analysis itself. Indeed, it followed directly after the Board’s explanation that “dispatchers’ decisions

regarding outage prioritization and reassigning field employees necessarily result in the dispatchers sending particular field employees to particular places.”

(ROA.5040.) Local 605 takes issue with the word “undisputedly” (Br. 17), but many of the facts underlying the Board’s determination are indeed undisputed, regardless of whether Local 605 disputes the conclusion drawn from them.

Local 605’s other arguments are unsupported by the record. The dispatchers’ role is not, as Local 605 contends, limited to the ordering of tasks within a set or pre-assigned area. (Br. 19-21.) Local 605’s comparison (Br. 20) of dispatching to instructing houseware-department employees which items to stock first is therefore inapt. Unlike in that scenario, dispatchers take field employees away from one work area and send them elsewhere. To adopt Local 605’s analogy, a dispatcher’s trouble assignment is more akin to a change in department than an ordering of tasks within a department. Moreover, the cases Local 605 cites for the proposition that notifying employees of tasks does not constitute assignment (Br. 20-21) are inapposite because they dealt largely with an aspect of assignment not at issue in this case. They analyzed whether putative supervisors assign employees by “giving significant overall duties”—a separate analysis from whether they assign employees to a place. *See NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 12 (1st Cir. 2015) (explaining that assigning to places and assigning duties are “distinct types of activities” for supervisory-status analysis).

Local 605's assertion (Br. 21-23, 26) that dispatchers cannot require field employees to perform trouble work is likewise contrary to the record. As operations coordinator and former field employee William McCorkle explained, a field employee "ha[s] to respond to the dispatcher" when on duty. (ROA.3010-11, 3029.) If the employee refuses to do so, he "is going to get disciplined." (ROA.2669.) The dispatchers' manager likewise confirmed that a dispatched field employee is "required to stay at work and continue to work until released" by the dispatcher. (ROA.2634, 2794.) The dispatcher "has control over" and "owns" the employee during that period. (ROA.3015, 3023-24.) Field employees can decline a dispatcher's assignment only if the assignment is outside of their regular working hours. All of the testimony Local 605 cites (Br. 22-23) refers to that limited circumstance.² Moreover, a field employee could decline an after-hours request from any Entergy official, including the director of operations or even the CEO. (ROA.3027-28.)

² The only potential exception Local 605 identifies (Br. 23) is one witness's equivocal "guess" that a field employee "may" be able to decline a dispatcher's assignment when faced with a "major critical emergency at home." (ROA.2794.) Even if true, there is no indication that this policy is any different than for field employees' non-trouble work.

2. Dispatchers Exercise Independent Judgment in Assigning Field Employees to Places

Substantial evidence and this Court's findings likewise support the Board's conclusion that dispatchers exercise independent judgment when assigning field employees to places. As the Board detailed (ROA.5040), dispatchers have discretion in a variety of decisions that affect such assignments when responding to multiple instances of trouble, including where to send employees first, how many to assign to trouble work, and whether to reassign employees from one trouble location to another. Local 605's contrary arguments find no support in the record or precedent.

a. Dispatchers Have Discretion in Prioritization Decisions

As the Board and Court highlighted, dispatchers prioritize responses in multiple-trouble situations. They decide where first to send field employees without any set rules, guidelines, or standard operating procedure dictated by Entergy. Instead, they prioritize trouble cases based on their own evaluation of the facts on the ground. As the Court found, "[e]vidence in the record shows that dispatchers' judgment about how to allocate Entergy's field workers is guided by a range of discretionary factors." *Entergy Miss.*, 810 F.3d at 297. Specifically, those decisions involve "discerning and comparing data" such as the type of trouble, the number and identity of customers affected, weather, and safety concerns. *Oakwood Healthcare*, 348 NLRB at 692-93. And dispatchers use their own

“expertise and experience” when making those determinations (ROA.2826)—no one else at Entergy weighs in on the decision. *Cf. Mercedes Benz of Orland Park*, 333 NLRB 1017, 1048 (2001) (finding dispatcher was not a supervisor where “there is no evidence that [he] exercises any true independent judgment, such as by prioritizing or assigning priorities to work”).

In prioritization decisions, dispatchers thus act “free of the control of others” and their conclusions are not “dictated or controlled by detailed instructions.” *Oakwood Healthcare*, 348 NLRB at 693. To the extent there is a general practice of prioritizing certain types of trouble (Br. 25-26), it is not binding. As the Board observed, “[a]lthough dispatchers have a list of priority customers . . . , dispatchers are authorized to make a judgment call” that deviates from that order based on their evaluation of the circumstances. (ROA.5039.) The number of customers affected is one factor, but not the only factor, in a dispatcher’s decision regarding which trouble to address first, for example. Similarly, although a major-account customer “probably” would get priority, it would not “automatically” have such status. (ROA.2828-30.) Dispatchers can instruct field employees to address smaller trouble en route to a bigger case. (ROA.796, 938.) Or they might decide not to address trouble at a major-account factory if the factory is closed at the time. (ROA.2829-30.) Because a major-account designation thus does not ensure priority service, Entergy’s general policy of addressing those cases first is not

“outcome determinative,” *Oakwood Healthcare*, 348 NLRB at 696. Instead, it “allows for discretionary choices.” *Id.* at 693; *see also NSTAR*, 798 F.3d at 14 n.13 (noting that “[i]t is not immediately clear to us how judgment ... regarding prioritization of trouble spots could be circumscribed by detailed instructions”).³

Further, as the Court found, Entergy does not provide its dispatchers with any guidance for handling a situation where trouble hits multiple high-priority customers simultaneously. *Entergy Miss.*, 810 F.3d at 297. A dispatcher would have to decide, for example, whether first to send employees to an outage affecting several hundred customers or one affecting a nursing home (ROA.793-94) or which hospital to service first if several face outages (ROA.2824-25). The judgment call of whether to prioritize a high-volume outage or an unsafe situation such as a live downed wire likewise rests with the dispatcher. (ROA.938.)⁴

Local 605 notes that prioritizing trouble cases is not an enumerated supervisory function under the Act (Br. 24), but the Board did not say otherwise.

³ The electrical dispatchers in *NSTAR* were not supervisors, but, unlike here, the record in that case contained no evidence regarding the dispatchers’ prioritization decisions in multiple-trouble situations. 798 F.3d at 14 n.13.

⁴ In addition to lacking support in the record, Local 605’s argument that prioritization decisions are dictated by set policy or management (Br. 25-26) is contradicted by the Court’s findings that “there are no standard operating procedures within Entergy for ... which kind of account’s to be turned on first” and “dispatchers’ judgment about how to allocate Entergy’s field workers is guided by a range of discretionary factors.” 810 F.3d at 297.

The Board considered dispatchers' prioritization of trouble cases as evidence of independent judgment in the exercise of the supervisory function of assigning employees to places, not as a supervisory function itself. (ROA.5040 n.7.) The connection between prioritization and assignment is clear under the facts of this case—by deciding which trouble cases to address first, dispatchers decide where to send field employees first. As the Board explained, the former “necessarily result[s]” in the latter. (ROA.5040.) In addition, the Board did not, as Local 605 claims (Br. 24), base its independent-judgment conclusion exclusively on dispatchers' prioritization role—as detailed below, it looked also to dispatchers' discretionary ability to decide “how many employees should be sent” and whether to “reassign field employees” from one trouble case to another. (ROA.5040.)

b. Dispatchers Have Discretion in Allocation Decisions

Additional evidence of independent judgment lies in dispatchers' decisions regarding how many field employees to assign to trouble work in multiple-trouble situations. (ROA.5039-40.) When new cases arise, they decide whether to dispatch additional field employees to handle those cases or to make do with those they already have assigned to trouble work. They also can decide *not* to assign anyone to a particular trouble spot immediately, but instead to postpone any response until more or different employees are available. Such decisions impact which field employees go where. As with prioritizing trouble cases, dispatchers

have no set guidelines to follow for such matters. In making those decisions, dispatchers thus “exercise discretion in deciding how to allocate the resources available.” *Oakwood Healthcare*, 348 NLRB at 697; *see also Planned Bldg. Servs., Inc.*, 318 NLRB 1049, 1060 (1995) (supervisor exercised “his judgment as to ... the number of [employees] available” in making assignments). Although field employees can request that a dispatcher send additional help to a given trouble spot (Br. 26), dispatchers decide whether to send that help right away or later. And the dispatcher holds the responsibility for deciding the total number of field employees dispatched to perform trouble work at a given time, which impacts the availability of the requested help.

Dispatchers also have discretion to reevaluate their placement decisions and switch course based on changed circumstances. (ROA.5039-40.) After sending an employee to one trouble location, the dispatcher can reassign him to another before he completes the initial case. The decision whether to reallocate resources could reflect a determination regarding the relative priority of the two cases, but may also be based on other factors. For example, a dispatcher could redirect a field employee from a single lights-out case to a substation breaker lockout because the latter affects more customers. But the dispatcher also could decide not to order that change if the employee is far away from the substation and it would be more efficient for her to first complete the current assignment. (ROA.586-87.) Such

ability to “reassess[] ... assignments,” *Oakwood Healthcare*, 348 NLRB at 697, and “ma[k]e adjustments to the work assignments made initially,” *Alois Box*, 216 F.3d at 75, reflects the use of independent judgment. *See also Planned Bldg. Servs.*, 318 NLRB at 1060 (finding supervisory status for individual who “transfers [employees] from one assignment” to another based on “his judgment as to their urgency”).

The decision whether to route employees to additional trouble cases (and which ones) or back to their regular work after they complete an initial trouble assignment likewise belongs to the dispatcher, based on her evaluation of the outstanding trouble cases. Here, too, dispatchers act “free of the control of others.” *Oakwood Healthcare*, 348 NLRB at 693.

c. Local 605’s Arguments Are in Tension with the Remand

Local 605 resists the independent-judgment conclusion the Board drew from the Board’s and Court’s factual findings. But Local 605’s arguments are unavailing in light of the current posture of the case and the nature of the analysis.

Local 605 contends (Br. 27-28) that the Board needed to consider again the evidence underlying the vacated finding in its 2011 decision that dispatchers did not exercise independent judgment in assigning employees to places. But the Board had no reason to do so. Supervisory status is a binary proposition—it either exists or not. The Board “will not engage in balancing the supervisory aspects of

the job with the nonsupervisory in order to determine [such] status.” *Gen. Films, Inc.*, 307 NLRB 465, 471 (1992) (internal quotation omitted). Accordingly, independent judgment as to one aspect of a supervisory function is sufficient to establish supervisory status, regardless of whether such judgment exists as to other aspects of that function. Even if the evidence the Board discussed in its 2011 decision did not show independent judgment in assigning, therefore, the Board had no need to discuss that evidence again once it found that other evidence *did* show independent judgment. Local 605’s argument is thus misplaced given the nature of the supervisory-status analysis. In any event, the evidence it mentions (such as dispatchers’ use of computer programs to identify trouble locations) does not undercut or conflict with the evidence that the Court suggested, and the Board on remand found, established independent judgment.⁵

Finally, Local 605’s emphasis on the point that dispatchers do not assess the skills of individual field employees before assigning them to trouble cases (Br. 31-32) is in tension with both the law of the case and precedent. As the Board noted (ROA.5040-41), the Court was aware that Entergy’s dispatchers use on-call lists rather than individual skills assessment in selecting who to assign, but nonetheless suggested that the record could support a finding of independent judgment. *See*

⁵ For example, although the computer program identifies the geographic coordinates of the various trouble locations, the dispatcher decides the order in which to send field employees to those locations and how many to send.

810 F.3d at 297. The Court recognized that on-call lists determine *who* dispatchers assign, but did not find such evidence determinative of the supervisory-status issue because the lists “don’t tell the dispatcher *when* or *how many* people to dispatch.” *Id.* (emphasis added). The Court would not have remanded to the Board for further analysis of the issue if the lack of skills assessment had been dispositive.

In any event, Local 605 points to no Board or court decision holding that skills assessment is necessary for a finding of independent judgment. Indeed, the fact-intensive supervisory-status analysis eschews that kind of per se requirement.⁶ The cases Local 605 cites (Br. 29 n.2, 31) identify skills assessment as a factor, but not the only factor; they relied on other issues besides lack of skills assessment in finding no independent judgment.⁷ Moreover, courts and the Board sometimes

⁶ In a concurring footnote in *Oakwood Healthcare*, Member Kirsanow would have found independent judgment based solely on evidence of skills assessment. 348 NLRB at 698 n.56. He described his finding as based on a “narrower range of evidence” than the majority, *id.*, making clear that the majority did not consider skills assessment determinative of the independent-judgment question.

⁷ See, e.g., *Thyme Holdings, LLC v. NLRB*, 2018 WL 3040701, at *3 (D.C. Cir. 2018) (no discretion in location decisions or authority to call in extra employees); *NLRB v. Sub Acute Rehab. Ctr. at Kearney, LLC*, 675 F. App’x 173, 178 (3d Cir. 2017) (other officials made time and place assignments); *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1264-65 (11th Cir. 1999) (assignments based on pre-existing schedule of tasks); *NLRB v. Atl. Paratrans of NYC, Inc.*, 300 F. App’x 54, 55-56 (2d Cir. 2008) (other officials pre-assigned most work locations). *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986)—the only in-circuit case Local 605 cites—contains no discussion of skills assessment.

have rejected supervisory-status arguments even where the purported supervisors did conduct such assessments. *See, e.g., Cranesville Block Co. v. NLRB*, 741 F. App'x 815, 816 (D.C. Cir. 2018) (finding evidence that individual “assign[s] the work based solely on mechanics’ known skill or experience ... insufficient to demonstrate supervisory authority”); *Shaw, Inc.*, 350 NLRB 354, 356 n.9 (2007) (“Assigning employees according to their known skills is not evidence of independent judgment.”). Skills assessment simply does not bear the dispositive weight that Local 605 suggests—it is neither necessary nor sufficient to demonstrate independent judgment.

The Board followed this Court’s instructions on remand to consider whether evidence the Court identified established supervisory status for dispatchers. Substantial evidence and the particular deference accorded the Board in such matters supports the Board’s finding that it did. Because Entergy had no statutory obligation to bargain regarding the dispatchers, its refusal to do so did not violate the Act. The Board reasonably dismissed the complaint.

CONCLUSION

The Board respectfully requests that the Court deny Local 605's petition for review.

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National Labor Relations Board
December 2019

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

INTERNATIONAL BROTHERHOOD OF	:
ELECTRICAL WORKERS, AFL-CIO, CLC,	:
LOCAL UNIONS 605 AND 985	:
	:
Petitioner	:
	: Case No. 19-60616
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 15-CA-017213
	:
Respondent	:

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street SE
Washington, DC 20570

Dated at Washington, DC
this 12th day of December 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,185 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 12th day of December 2019