

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 Decision and Order
from the National Labor Relations Board**

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In our opening brief, International Brotherhood of Electrical Workers Local Unions 605 and 985 (“Unions”) explained that Respondent National Labor Relations Board (“NLRB” or “the Board”) arbitrarily ignored the Court’s remand instructions and failed to engage in reasoned decisionmaking in *Entergy Mississippi Inc.*, 367 NLRB No. 109 (Mar. 21, 2019) (“*Entergy III*”).¹

Specifically, the Unions demonstrated that the Board (1) failed to consider whether Dispatchers’ interactions with field employees constitute the exercise of “assignment” authority under Section 2(11), 29 U.S.C. § 152(11), of the National Labor Relations Act (“the Act”); (2) erred by failing to consider record evidence and to explain its reasoning regarding whether Dispatchers exercise independent judgment; and (3) improperly ignored the Unions’ argument and record evidence regarding skills assessment.

In response, the Board and Entergy retroactively offer explanations and analyses not found in *Entergy III*. With respect to whether Dispatchers’ actions constitute the exercise of “assignment” authority, the Board presents, for the first time, a multi-page assignment authority analysis to support a conclusion it failed to explain in the underlying decision. Aside from being incorrect, the Board’s new,

¹ “U. Br.” cites are to the Unions’ opening brief to the Court. “B. Br.” cites are to the Board’s opening brief, and “I. Br.” cites are to the Intervenor’s brief.

post-decision explanations for its decision do not transform what remains an arbitrary and poorly reasoned decision into one the Court should uphold.

The Board next argues that the Court's remand instructed the Board to reconsider whether Dispatchers exercise independent judgment, and to base that decision solely on record evidence supporting that conclusion. In reality, however, the Court's decision in *Entergy Mississippi, Inc. v. NLRB* merely highlighted unaddressed record evidence that arguably supports a finding of independent judgment. 810 F.3d 287, 298 (5th Cir. 2015) ("*Entergy II*"). It did not direct the Board to ignore other record evidence. On remand, the Board should have considered the entire record, not just the few examples of pertinent record evidence highlighted by the Court, and it should have explained how that evidence led it to conclude that Dispatchers exercise independent judgment. The Board in *Entergy III*, however, looked *only* at portions of the record supporting a finding of independent judgment, ignoring evidence to the contrary, and it failed to explain its reasoning. The Board's post-decision explanation and analysis of contrary evidence does not alter the lack of reasoned decisionmaking in its underlying decision.

Lastly, the Board concedes that skills assessment is a relevant factor when considering independent judgment, but it claims that the Court's remand permitted it to ignore the Unions' argument and supporting portions of the record. (B. Br. at

26-28) Contrary to the Board’s argument, the Court’s decision in *Entergy II* did not analyze skill assessment, let alone deem evidence on the issue irrelevant on remand.

ARGUMENT

I. The Board and the Intervenor Misstate the Applicable Standard of Review.

The Board and Intervenor Entergy Mississippi, LLC (“Intervenor” or “Entergy”) offer an overly narrow depiction of the Court’s standard of review, repeating only boilerplate statements that the Court will uphold a Board decision supported by substantial evidence. The Court’s review, however, goes beyond a narrow substantial evidence analysis. The Court not only considers whether a decision is supported by substantial evidence, but also whether the Board “articulated a ‘reasonable explanation for how it reached its decision.’” *Associated Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215, 219 (5th Cir. 2016) (quoting *Tex. Office of Pub. Util. Counsel v. FFC*, 183 F.3d 393, 410 (5th Cir. 1999)); *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (explaining that NLRB “adjudication is subject to the requirement of reasoned decisionmaking . . .”); *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1119 (D.C. Cir. 2018) (explaining the court should remand where the Board acted arbitrarily or where the Board’s order “reflects a . . . lack of reasoned decisionmaking”); *Penrod v. NLRB*, 203 F.3d 41, 46 (D.C. Cir. 2000) (citing *Macmillan Publishing Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir. 1999) (The

Regional Director’s “rationale was the antithesis of reasoned decisionmaking, and as such was arbitrary and capricious.”) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). Moreover, “in assessing whether the evidence in the record is substantial [the Court] must consider the facts that militate or detract from the NLRB’s decision as well as those that support it.” *Alcoa, Inc. v. NLRB*, 849 F.3d 250, 255 (5th Cir. 2017) (citations omitted).

In reviewing a decision of the Board, the Court will not “sustain agency action on grounds other than those adopted by the agency in the administrative proceedings.” *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520 n.3 (5th Cir. 2007) (quoting *Macmillan Publ’g Co.*, 194 F.3d at 168). Thus, it is not the Court’s responsibility to conjure its own explanation for *why* the Board reached a certain conclusion. Where the Board fails to offer a reasonable explanation for its decision, the Court must remand to the Board for further proceedings. *Entergy II*, 810 F.3d at 297; *Amoco Prod. Co. v. NLRB*, 613 F.2d 107, 112 (5th Cir. 1980) (“[B]ecause this is a factual determination for the Board to make, we are commanded by precedent to avoid substituting our own judgment for that of the Board.”).

II. The Board Failed to Consider Whether Dispatchers Assign Field Employees to a Place and its Post-Decision Assignment Authority Analysis Cannot Save its Decision in *Entergy III*.

As stated in our opening brief, the Court should remand *Entergy III* to the Board for further proceedings because the Board failed to explain the factual basis

or legal reasoning supporting its finding that Dispatchers possess supervisory authority under the Act. The Board’s decision in *Entergy III* skipped a requisite prong of supervisory analysis when it failed to consider whether Dispatchers’ interactions with field employees meet the definition of statutory assignment as the term is used in Section 2(11) of the Act.

A. Whether Dispatchers “Assign” Field Employees was Within the Scope The Court’s Remand and is Appropriate for The Court’s Review.

Initially, Entergy argues (1) that the Court remanded only the issue of independent judgment, and (2) that the Unions’ assignment argument is barred by Section 10(e) of the Act. 29 U.S.C. § 160(e). Entergy alone offers these arguments. The Board does not dispute that assignment authority is at issue here nor does it contend that the Unions’ argument is barred by Section 10(e). The Court should dismiss Entergy’s arguments because the principal parties in this proceeding do not disagree on the issues currently before the Court.

i. The Court’s Remand was Not Limited to the Question of Independent Judgment.

The dispute in *Entergy II* concerned only the first two prongs of the Act’s three-prong test for supervisory status: (1) whether Dispatchers hold the authority to

assign; and (2) whether they exercise that authority with independent judgment.² The Board has never made a conclusive finding concerning the first prong of this test because of the procedural complexity of this case.

In *Entergy II*, the Court issued its remand because record evidence “arguably show[ed] that [D]ispatchers ‘assign’ field employees to places by exercising ‘independent judgment.’” 810 F.3d at 298. The Court did not affirm or reject the Board’s approach to the first prong in *Entergy I* because the Board had bypassed it completely. *Id.* at 296 (“The Board assumed that [D]ispatchers ‘assign’ field employees to a place.”); *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 13 (1st Cir. 2015) (observing that the Board in *Entergy I* *did not decide* whether Dispatchers’ “directions to go to particular locations to do discrete tasks constitute assignments within the meaning of the [Act].”) (emphasis added);³ *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2156 (2011) (“*Entergy I*”). The Board in *Entergy I* found that the employer failed to meet its burden regarding the “independent judgment” prong, and thus the Board had no reason to consider the “authority to assign” prong. *Entergy I*,

² The third prong of the test is whether the alleged supervisor’s authority is held in the interest of the employer. (U. Br. at 14)

³ The Court in *NSTAR* further observed, “[t]he Board had explained in [*Entergy I*] that electrical dispatchers did in a sense assign field employees to places, by telling field employees where to go “[d]uring trouble outages. ... [*Entergy I*] did not resolve, however, whether that was assignment or ad hoc direction.” 798 F.3d at 13 n.10.

357 NLRB at 2156. Accordingly, the Court did not review the first prong of supervisory-status analysis because the Board offered no finding for it to review.

As we explained in our opening brief, supervisory status can be disproved by showing that one prong of the Act’s test has not been met. Such was the case in *Entergy I. Id.* Supervisory status cannot be proved, however, unless all three prongs are satisfied.

In short, the Court’s remand was not limited to the question of “independent judgment” because it could not be. If the scope of the Court’s remand were limited to the exercise of independent judgment, the Board could only have made a finding on that issue – the second prong of the test. Such a remand would leave the first prong – the question of “assignment” authority – unaddressed by the Board and circumvented in this proceeding. The effect of this would be far from *de minimis*. The Dispatchers in this case would be labeled supervisors and deprived of the Act’s protections simply because they exercise independent judgment in their jobs. That decision could not be reasonably based in the law or consistent with the Act. *NSTAR Elec. 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.”).

ii. Section 10(e) of the Act Does Not Bar Review of Whether Dispatchers “Assign” Field Employees.

Under Section 10(e) of the Act, a court of appeals “lacks jurisdiction to review objections that were not urged before the Board.” *Woelke v. Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982). The purpose of Section 10(e) is to give the Board notice and an opportunity to confront objections to its rulings before it defends them in court. *Indep. Elec. Contractors of Hous., Inc. v. NLRB*, 720 F.3d 543, 551 (5th Cir. 2013). Thus, the Court “does not lack ‘jurisdiction’ to consider the merits of an NLRB order if the Board itself chooses not to raise a Section 10(e) exhaustion defense.” *Id.*

First, as noted above, the Court should discard Entergy’s argument because the Board did not invoke the affirmative Section 10(e) defense. *Id.* (dismissing Section 10(e) argument when only raised by intervenor). Second, the Board clearly had an opportunity to confront the question of assignment authority because the Board’s brief argues that it did so. (B. Br. at 17) Third, the Unions raised this argument before the Board on multiple occasions. ROA.3913-3916 (Unions’ 2006 Post-Hearing Brief); ROA.4173-4182 (Unions’ 2007 Brief in Opposition to Entergy’s Request for Review); ROA.5095-5106 (Unions’ 2007 Brief in Response to the Board’s Grant of Review). Indeed, the Unions’ briefs on each of these occasions included separate arguments for the “assignment authority” prong and the “independent judgment” prong of Section 2(11) analysis.

B. The Assignment Analysis in the Board’s Brief Does Not Resolve the Flaws in *Entergy III*.

The Board in *Entergy III* failed to perform the first analytical step under *Kentucky River, i.e.*, the Board failed to explain its conclusion that the Dispatchers “assign” field employees to a “place.” See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712-13 (2001). Instead, the Board merely stated that dispatchers “undisputedly” assign employees to places. As the Unions have explained, however, this question has been in dispute throughout these proceedings.⁴ (U. Br. at 16)

The Board’s brief attempts to excuse the Board’s failure by characterizing the term “undisputedly” as the “rhetorical conclusion” to a one-sentence “analysis” preceding the word “undisputedly.” (B. Br. at 17-18) There are two primary problems with the Board’s arguments. First, “undisputed” means “not questioned or disputed.” Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/undisputed> (last visited Dec. 26, 2019). At no point, however, has the Board shown that the question of the Dispatchers’ assignment authority is not in dispute. Second, the “analysis” the Board points to is seriously

⁴ At oral argument in *Entergy II*, the bench acknowledged that nothing in the record suggests that the Unions, or the Board, conceded that Dispatchers’ communications to field employees constitute Section 2(11) assignment. See Oral Argument for Case No. 14-60796, available at <http://www.ca5.uscourts.gov/oral-argument-information/oralargument-recordings> (minute mark 38:30 – 38:55) (Circuit Judge stating “I haven’t seen the record to say they conceded [assignment to a place].”).

flawed. The Board directs the Court to one sentence of its decision, which states “dispatchers’ decisions regarding outage prioritization and reassigning field employees necessarily result in the dispatchers sending particular field employees to particular places.” *Entergy III*, 367 NLRB slip. op. at 3; (B. Br. at 17-18).⁵

If, as the Board’s brief contends, this sentence constitutes the Board’s full explanation for its determination that Dispatchers have the authority to “assign” work to field employees, then the Board has missed the point. The Unions’ do not dispute that Dispatchers contact field employees to tell them the location of an outage. What the Unions dispute now, and have disputed throughout this proceeding, is whether this action constitutes an assignment under Section 2(11). Rather than addressing that question, the Board erroneously concluded that the issue was not in dispute.

⁵ Determining that putative supervisors possess the authority to “assign” requires more than a mere conclusory sentence because it can deprive workers of the Act’s protections. The Board’s efforts to clarify the meaning of “assign” demonstrate that the question is not as simple as whether one employee tells another employee to do something. For example, in 2003, the Board issued a notice and invitation to file briefs addressing assignment authority in light of the Supreme Court’s decision in *Kentucky River*. The Board sought comments relating to the meaning of “assign,” as that term is used in Section 2(11) of the Act. The Board then issued a series of decisions interpreting assignment authority, including assignment to a place. A single conclusory sentence proclaiming that Dispatchers send field employees to places is insufficient to explain the Board’s application of an ambiguous term. The Board must provide a reasoned analysis explaining why that determination is consistent with the Act. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Golden Crest Healthcare Ctr.*, 348 NLRB 727 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006).

In an apparent attempt to make up for the Board’s lack of analysis, the Board’s brief offers an analysis and explanation for why Dispatchers’ interactions with field employees supposedly fit within the definition of “assign” set forth in *Oakwood Healthcare*, as adopted by the Court in *Entergy II*. 810 F.3d at 295. That the Board’s attorneys conducted an analysis of this question in their brief to the Court, however, does not serve as a substitute for the reasoned explanation and analysis required, but missing, in the Board’s decision in *Entergy III. Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d at 520 n.3 (refusing to consider new arguments offered by the Board because the Court “may not affirm an agency decision on reasons other than those it provided.”).

C. The Assignment Analysis in the Board’s Brief Offers New Arguments Not Found in *Entergy III* and is Contradicted by the Record.

The Board’s decision does not explain *why* the act of “sending particular field employees to particular places” amounts to “assigning” them under Section 2(11). To be sure, the *why* is critical in this case, because the act of telling an employee where to perform work does not inherently amount to the authority to assign.

For example, the Board holds, and circuit courts have affirmed, that telling employees where to work does not qualify as Section 2(11) assignment where the putative supervisor cannot *require* those employees to do so. *UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251, 255 (D.C. Cir. 2019); *Mars Home for Youth v. NLRB*,

666 F.3d 850, 855 (3d. Cir. 2011) (no assignment authority where putative supervisors could not require assistants to drive residents to medical appointments); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 729 (2006) (“It is well established, however, that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken.”) (emphasis in original).

The Board’s decision in *Entergy III* did not even acknowledge that the authority to require work is a component of Section 2(11) assignment analysis, let alone explain why it ignored the principle it relied on *Golden Crest Healthcare*. 348 NLRB at 729. This deficiency is especially glaring here because the record demonstrates that Dispatchers cannot require field employees to report to a particular location. (U. Br. at 22-23) Thus, Entergy’s Dispatchers do not possess the authority to “assign” as the term is used in Section 2(11) of the Act.

Apparently recognizing this flaw, the Board’s brief, for the first time in this proceeding, states that Dispatchers can require field employees to perform trouble work at a particular location. (B. Br. at 19) The Board’s brief does not cite to a Board finding on this issue because it cannot – the Board has never found that Dispatchers can require work of field employees. In fact, it has repeatedly found that Dispatchers cannot require field employees to *stay* at work. *Entergy II*, 810 F.3d at

298 (“The [Board in *Entergy I*] reasonably discredited the testimony of three Entergy employees, who haltingly testified that [D]ispatchers have the authority to require field workers to stay on-duty.”).

Even if the record did demonstrate that Dispatchers can require work, the Board – not its attorneys – must provide that analysis and explanation. The Board cannot rely on its staff’s post hoc analysis to repair the arbitrary nature of its decision in *Entergy III*. The Board itself must make a finding based on relevant record evidence and explain its reasoning. The record evidence, however, contradicts the Board’s new assertion. Instead, the record demonstrates that (1) field employees can refuse assignments, and (2) even if they could not, Dispatchers cannot discipline field employees who refuse to perform work. ROA.3020; (U. Br. at 22-23).

In fact, each Decision and Order in these proceedings recognized that Dispatchers cannot require field employees to perform work. ROA.3423 (2004 Decision and Order) (“the evidence reflects that the field employees inform, not ask, the dispatchers when they must leave work and the dispatchers have no authority to require them to remain at work.”); ROA.4042 (2007 Supplemental Decision and Order) (“Once the dispatchers call the appropriate field employee, the field employee can decline to respond to the trouble. The dispatchers have no authority to order the field employee to respond to the call.”).

Indeed, Dispatchers' interactions with field employees are less "assignments" than they are requests or notifications of outages. *Entergy I*, 357 NLRB at 2151 ("In an emergency or after-hours call-out situation, the dispatchers on the DOC side must call out field employees by seniority or rotation. The field employee whom the dispatcher contacts can refuse to take the assignment."); ROA.1132-1133 (Dispatchers' outage communications are not "direct order[s]". Dispatchers must find "additional help" if a field employee declines work); ROA.1134 ("It's not unusual for a [field employee] to say, I've got another commitment, that I really need to get off, and if you could get someone else to work, I would appreciate it, things of that sort."); ROA.1180; ROA.1424 (Dispatcher Tony DeLaughter testified that Dispatchers "advise" field employees that "the lights are out" at specific addresses and "ask[s] them to go look at it."); ROA.3216 (Email communication inquiring why a Dispatcher did not continue down the call-out list after a field employee refused to report to an outage).

In its post-hoc explanation, the Board, for the first time, argues that Dispatchers can "send field employees to trouble cases both inside and outside of their geographic network." (B. Br. at 16) This argument is simply unsupported by the record evidence. Dispatchers contact field employees according to pre-assigned network designations. If a field employee is not available in any given network, Dispatchers contact management to seek assistance. ROA.150 ("[Dispatchers] call

out the first individual either by seniority or by assigned first call location which is a predetermined listing.”); ROA.1023 (“oftentimes there is a [field employee] assigned to that particular territory); ROA.782-783 (If no field employees are available in a given network, Dispatchers contact the Manager of Resources who then locates a crew); ROA.785 (Network Manager instructed Dispatcher to call two field employees to perform repairs outside of their assigned network).

Regardless, the Court should disregard this argument because the Board has never found that Dispatchers have authority to require field employees to perform work within, or outside, their pre-assigned networks. The Board cannot retroactively offer reasons for its decision that it failed to articulate during its administrative review. *Strand Theatre of Shreveport Corp.*, 493 F.3d at 520 n.3 (“[The Court] will not ... affirm an agency decision on reasons other than those it provided.”).

D. Intervenor’s Argument Regarding *Golden Crest Healthcare* is Inaccurate.

Entergy argues that the “authority to require work” principle set forth in *Golden Crest Healthcare* applies only to “assignment” to a “time,” or “overall duty.” (I. Br. at 49) In doing so, Entergy cites to no Board or circuit case supporting this novel concept. *Golden Crest Healthcare Center* states that a supervisor must have the ability to require that a certain *action be taken*. 348 NLRB at 729. Indeed, the Board has not made this argument here nor has it ever stated that this principle applies only to certain types of assignment, and, the Board and the Courts have

applied this principle broadly. *E.g.*, *UPS Ground Freight, Inc.*, 921 F.3d at 255; *Mars Home for Youth*, 666 F.3d at 855 (putative supervisors could not require employees to drive patients to places); *Loyalhanna Health Care Assocs.*, 352 NLRB 863, 870 (2008) (nurse managers could not require LPNs to report to a new location).

The Intervenor attempts to distinguish *UPS Ground Freight* by noting that it involved “assignment of work” and does not mention “assignment to a place.” (I. Br. at 49); *UPS Ground Freight, Inc.*, 921 F.3d at 255. The facts of that case undercut the Intervenor’s argument. In *UPS Ground Freight*, the employer sought to establish the supervisory status of a UPS dispatcher. The dispatcher was responsible for “assigning drivers to routes” and “reassigning routes when there were ‘call outs.’” *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip. op. at 2 (July 27, 2017). By making these assignments, the dispatcher determined the locations to which drivers made deliveries. *Id.*

The Board held, and the D.C. Circuit affirmed, that the employer failed to meet its burden to establish supervisory status because, although the dispatcher “was responsible for ensuring that all scheduled routes were covered, he did not have the authority to *require* a driver to accept a particular route. Rather, if a driver sought to reject a route and another route was unavailable, [the dispatcher] was required to refer the driver to management.” *Id.* at 2.

In that case, the dispatcher “assigned” drivers to routes and determined where they made deliveries. That is, the dispatcher “assigned” employees to the location where work was performed. *Id.* The Board and the D.C. Circuit relied on *Golden Crest Healthcare* in finding that the dispatcher did not engage in supervisory assignment under Section 2(11) of the Act because the dispatchers did not possess the *authority* to assign. *UPS Ground Freight, Inc.*, 921 F.3d at 255. The decision’s analysis does not distinguish between assignment to a place, time, or significant duties. The “ability to require work” analysis applies not only to assignment to a time, but to all three assignment types.

In short, supervisory status is not established where, as here, the evidence demonstrates that Dispatchers cannot require field employees to perform work at a certain location. ROA.4042 (“Once the dispatchers call the appropriate field employee, the field employee can decline to respond to the trouble. The dispatchers have no authority to order the field employee to respond to the call.”); ROA.1132-1133 (Dispatchers’ outage communications are not “direct order[s]”. Dispatchers must find “additional help” if a field employee declines work). This case should therefore be remanded because the Board failed to analyze and determine whether the Dispatchers’ task of notifying employees where to perform work is, in fact, supervisory authority.

III. The Board Failed to Articulate a Reasoned Explanation for its Conclusion that Dispatchers Do Not Exercise Supervisory Independent Judgment and Arbitrarily Ignored All Contrary Record Evidence.

In our opening brief, the Unions explained that even if, as the Board concluded, the Dispatchers do exercise independent judgment in prioritizing outages, they do not do so in connection with a Section 2(11) function. Stated differently, the Board has never connected the Dispatchers' exercise of independent judgment to the assignment of field employees to a place. Moreover, the Board has failed to confront record evidence demonstrating that, even if the Dispatchers exercise independent judgment in the prioritization of outages, the Dispatchers' direction of field personnel to a particular outage is (1) governed by Dispatchers' training and the company's verbal instructions, (2) governed by the judgment of field employees themselves, who decide how many field personnel are necessary to address problems in the field, and (3) subject to the availability and cooperation of field personnel to move to the location of a problem.

A. The Board Failed to Connect Independent Judgment to a Supervisory Function.

Even if it is assumed for the sake of argument that the Dispatchers exercise assignment authority under Section 2(11) of the Act, they do not exercise independent judgment in doing so. The Board contends that it based its independent judgment findings on three alleged Dispatcher responsibilities: (1) prioritization; (2)

deciding how many employees should be sent to an outage; and (3) deciding whether to reassign employees. (B. Br. at 23) Even assuming Dispatchers exercise independent judgment in these acts, the Board has not established that these acts are connected to a supervisory function.

The Board contends that these three tasks show that Dispatchers assign field employees to places using independent judgment. (B. Br. at 23) As set forth above, however, the Board has never explained how sending field employees to places constitutes a Section 2(11) function. Thus, even if the Board had established that Dispatchers exercise independent judgment in these three tasks, the Board has not explained why the underlying act – telling field employees where outages are – amounts to Section 2(11) assignment. *NSTAR Elec. 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”).

Regardless, the Board’s analysis of the Dispatchers’ duties fails to connect independent judgment to a Section 2(11) assignment. The Board seems to have concluded that Dispatchers take the following steps when responding to multiple outages.

1. Dispatchers decide the order in which outages should be repaired.
2. Dispatchers decide the number of field employees needed to address each outage.

3. Dispatchers decide that field employees must be shifted from one outage to another.
4. Dispatchers consult the pre-determined call-out list to identify the appropriate field employee(s) to make the repairs.
5. Dispatchers contact the pre-determined field employee(s) and request that they make the repairs.

Even assuming the Board correctly found that Dispatchers exercise independent judgment in making the decisions in steps one through three, it failed to analyze or explain its reasoning in finding that the exercise of independent judgment in steps one through three is directly connected to the assignment of field employees to a place in step five. Even accepting that the Board actually analyzed assignment authority, and that step five is assignment under Section 2(11) of the Act, asking the next field employee on a pre-determined call-out list to perform a task does not require independent judgment in performing that assignment. *Mississippi Power & Light Co.*, 328 NLRB 965, 970 (1999) (acknowledging that communicating information to other employees based on complex decisions does not necessarily mean that an alleged supervisor uses supervisory judgment in assigning others); *Oakwood*, 348 NLRB at 693 (observing that an “assignment” does not require independent judgment if there is only one employee to choose from, “even if [the assignment] . . . involves forming an opinion or evaluation by discerning and comparing data”).

B. The Board Mischaracterized the Unions’ Argument Regarding a Full Review of Record Evidence and *Entergy III*’s Related Deficiencies.

The Court’s remand did not instruct the Board to *only* review evidence suggesting that Dispatchers exercise independent judgment in (1) prioritizing outages, (2) selecting the number of employees to send to an outage, and (3) reassigning employees. The Court’s remand also required the Board to consider record evidence suggesting that the Dispatchers do *not* exercise independent judgment in performing those tasks. *See Entergy II*, 810 F.3d at 298 (“Decisions by the Board that ignore a relevant portion of the record cannot survive substantial evidence review.”). Because the Board myopically focused on the evidence highlighted by the Court without confronting contrary evidence, the Court should vacate *Entergy III* because it “ignore[s] a relevant portion of the record.” *Id.*

To be sure, the Board was not required to review and discuss all evidence in the record. But where, as here, the Board has changed its position on supervisory status, it must explain the basis for that change in a reasoned manner. As the Unions explained in their opening brief and above, the Board has failed to do so. The purpose of our discussion of conflicting record evidence is to show that the record is replete with evidence undercutting the Board’s conclusions regarding independent judgment. Because of this conflicting evidence, it was paramount that the Board

clearly explain its reasoning, which the Board failed to do. The Board misconstrues the Unions' argument on this point.

The Board incorrectly suggests that the Unions believe the Board must balance the supervisory aspects of Dispatchers' jobs against the non-supervisory aspects. (B. Br. at 26) That depiction is simply wrong. The Unions do not dispute that *Gen. Films Inc.*, 307 NLRB 465 (1992), cited by the Board,⁶ stands for the proposition that in considering supervisory status, the Board need not weigh a putative supervisor's Section 2(11) authority against aspects of their job lacking such authority (*e.g.*, balancing the fact that a putative supervisor can hire against the fact that she cannot fire). *Id.* at 471. But that case does not stand for the proposition that the Board need only consider record evidence that supports its conclusion and is free to ignore record evidence to the contrary.

The Court should vacate the Board's decision and remand for further proceedings not because the Board did not consider Dispatchers' non-supervisory job functions, but because the Board failed to consider and confront record evidence demonstrating that they do not exercise independent judgment when prioritizing outages⁷ or determining how many field employees to request.

⁶ B. Br. at 25-26.

⁷ For example, the Board failed to confront the testimony of Distribution Dispatcher Tony DeLaughter who explained that Dispatchers "start with [the]

The Board’s brief states, “even if the evidence the Board discussed in its 2011 decision did not show independent judgment in assigning field employees . . . the Board had no need to discuss that evidence again once it found that other evidence *did* show independent judgment.” (B. Br. at 26) (emphasis in original). The Board effectively argues it was only required to review evidence supporting a finding of independent judgment. (B. Br. at 25-26) The Board’s interpretation of the Court’s remand cannot be correct, however, because any Board decision based on such a one-sided review of the record would necessarily fail under the Court’s standard of review. *Carey Salt Co. v. NLRB*, 736 F.3d 405, 410 (5th Cir. 2013) (“a decision by the Board that ‘ignores a portion of the record’ cannot survive review under the ‘substantial evidence’ standard.”) (citing *Lord & Taylor v. NLRB*, 703 F.2d 163, 169 (5th Cir. 1983) (reversing finding of employer’s anti-union animus where Board ignored all management testimony and unfavorable testimony by discharged employee).

Here, the Board did not even mention substantial record evidence that cuts against a finding of independent judgment. (U. Br. at 25-26); ROA.1195-1196 (Dispatchers address outages according to size unless “overruled by management”); ROA.1674 (the parties’ collective bargaining agreement requires that Dispatchers

greatest number of customers” and “gradually work . . . down to single calls.” ROA.1195-1196; *see also* ROA.1407-1409; ROA.1412; ROA.1427.

provide support field employees request); ROA.1022-1030 (Field employees tell Dispatchers how many workmen are necessary for the job). To satisfy the Court's standard of review, the Board must confront this record evidence and articulate a reasonable explanation for how it determined that one portion of the record outweighed the other. *Alcoa, Inc.*, 849 F.3d at 255; *Associated Builders & Contractors of Tex., Inc.*, 826 F.3d at 219.

IV. The Board Erroneously Contends that the Court Considered and Set-Aside Record Evidence and Board Precedent Regarding Skills Assessment.

The Unions' opening brief argued that the Court should vacate the Board's decision in *Entergy III* because the Board failed to consider record evidence demonstrating that Dispatchers do not assess the skills of field employees or explain why it summarily dismissed skills assessment as a relevant consideration. In its brief, the Board asserts that the Unions' argue that skills assessment is necessary for a finding of independent judgment. (B. Br. at 27) Contrary to the Board's contention, the Unions do not contend that skills assessment is necessary for a finding of independent judgment. Rather, the Unions contend that by ignoring the Unions' argument concerning skills assessment, the Board arbitrarily ignored evidence regarding skills assessment which, even if not dispositive, is relevant to independent judgment analysis. In opposition, the Board's brief offers yet another post-decision explanation that cites no Board or court decision holding that the

Board is entitled to ignore evidence, or a party's arguments altogether, simply because it believes – without any support – that the remanding court already has an opinion on the matter.

As the Unions demonstrated in their opening brief, the Court's decision made no reference whatsoever to skills assessment, nor did it decide that skills assessment evidence is irrelevant. (U. Br. at 30) Thus, the Board erred by failing to consider this evidence based solely on the unmerited assumption that the Court would find supervisory status absent individual skills assessment.

A. The Board's Interpretation of Skills Assessment Precedent is Inaccurate.

The Board attempts to downplay the importance of skills assessment in the cases cited in the Unions' opening brief. (U. Br. at 29 n.2); (B. Br. at 27 n.7) For example, the Board incorrectly suggests that the putative supervisors in *Thyme Holdings, LLC v. NLRB* had “no discretion in location decisions.” That is false. *See Thyme Holdings, LLC v. NLRB*, No. 17-1191, 2018 BL 183048 at *4 (D.C. Cir. May 22, 2018) (D.C. Circuit acknowledging that putative supervisors “assigned discrete tasks to assistants, such as sending an assistant to work in a certain location.”). Similarly, the Board attempts to downplay the skills assessment component of *NLRB v. Atlantic Paratrans of N.Y.C., Inc.*, by noting that “other officials pre-assigned most work locations.” 300 Fed. Appx. 54, 56 (2d Cir. 2008). In that case, however, the Board found, and the Second Circuit affirmed, that the dispatchers did not

exercise independent judgment specifically because they did not assess the skills of the employer's drivers.⁸

The Board also argues that the cases cited by the Unions did not focus on skills assessment. (B. Br. at 27 n.7) That is also false. For example, the Board argues that *NLRB v. Sub Acute Rehab. Ctr. at Kearny, LLC* does not support the relevance of skills assessment because “other officials made time and place assignment[s].” 675 Fed. Appx. 173, 178 (3d Cir. 2017); (B. Br. at 27 n. 7). What the Board failed to explain, however, is that those cases highlighted the pre-determined assignments to emphasize that the putative supervisors did not assess the skills of employees, and thus did not exercise independent judgment. *Sub Acute Rehab. Ctr. at Kearny, LLC*, 675 Fed. Appx. at 178 (“These routine adjustments do not evidence any analysis of...skill sets, and therefore do not demonstrate independent judgment.”).⁹ Those

⁸ *Id.* (“[W]hile a significant minority of trips must be reassigned based on unforeseen factors . . . the factors that the dispatcher considers to determine who will receive the additional trips are largely mechanical and geographical and do not rest on considerations of the skill of the drivers. Therefore, the Board reached a conclusion supported by substantial evidence when it determined that the dispatchers did not exercise independent judgment.”).

⁹ *See e.g., Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1265 (11th Cir. 1999) (finding no assignment authority because putative supervisors relied on pre-determined schedules in making assignments rather than on the skills and experiences of the putative subordinates) (citing *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1279 (5th Cir. 1986) (assignment editors were not supervisors because they made assignments based on decisions already made by manager).

cases are particularly relevant here because Dispatchers *undisputedly* do not choose which field employee addresses any given outage, and thus do not consider field employees skill sets. *Entergy III*, 367 NLRB slip. op. at 3 n.8 (“[Field employees] are selected pursuant to the parties’ on-call lists.”); (U. Br. at 31-32).

CONCLUSION

For these reasons, and the reasons set forth in the Unions’ opening brief, the Court should vacate the Board’s decision and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 6, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,307 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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