

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

QUICKWAY TRANSPORTATION, INC. ^{1/}

Employer

and

Case 09-RC-260036

**GENERAL DRIVERS, WAREHOUSEMEN AND
HELPERS, LOCAL UNION NO. 89 AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS** ^{2/}

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

General Drivers, Warehousemen and Helpers, Local Union No. 89 affiliated with the International Brotherhood of Teamsters (Petitioner) seeks to represent a unit of all full-time dispatchers employed by Quickway Transportation, Inc. (Employer) at the Employer's 2857 S. English Station Road, Louisville, Kentucky facility, excluding all office clerical employees, temporary employees, casual employees, professional employees, guards and supervisors as defined by the National Labor Relations Act (Act). There are four employees in the petitioned-for unit. The parties have stipulated, and I find, that the agreed upon unit set forth above is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

A hearing was held by videoconference on May 22, 2020 ^{3/} before a hearing officer of the National Labor Relations Board (Board). The only issue presented in this matter, as discussed in more detail below, is whether the petitioned-for unit employees are supervisors under Section 2(11) of the Act. The Employer argues that the dispatchers are supervisors because they assign work to the drivers and responsibly direct them and resolve issues that come up with the drivers using their judgment and discretion. The Petitioner's position is that dispatchers do not have indicia of supervisory status, and therefore, are employees under the Act.

I have carefully considered the positions and arguments presented by the parties on this issue. For the reasons discussed below, I find that the Employer has failed to meet its burden of establishing that the dispatchers are supervisors under Section 2(11) of the Act.

^{1/} The Employer's name appears as amended at the hearing.

^{2/} The Petitioner's name appears as amended at the hearing.

^{3/} Hereinafter, all dates occurred in 2020 unless otherwise noted.

II. FACTS

a. Employers' Operations.

The Employer is engaged in the interstate transportation of goods and material. Its drivers are directly involved in the transportation of goods across state lines. Kroger supermarket, and its affiliates, is the Employer's primary client in Louisville out of KDC, a Kroger distribution center. The Employer generally receives two batches of loads daily from Kroger to deliver through a trucking company called Trans Service. A first batch of loads comes in around 9:00 a.m., and the second one comes in around 6:00 p.m. The Employer employs approximately 73 commercial driver license (CDL) drivers in its operation, with a fleet of 40 to 44 trucks.^{4/} When delivering the Kroger loads, the drivers use the Employer's tractors to pick up loads that are in Kroger-owned trailers. The drivers are based out of the Employer's Louisville terminal and two satellite operations in Franklin, Kentucky and Versailles, Kentucky.

The Employer also employs four dispatchers - two daytime dispatchers and two nighttime dispatchers. The daytime dispatchers work from 8:00 a.m. to 8:00 p.m., and the night dispatchers from 8:00 p.m. to 8:00 a.m. Only one dispatcher works per shift. Each works either the "first week" schedule of Sunday, Monday, Tuesday, and every other Wednesday, or the "second week" schedule of Thursday, Friday, Saturday, and every other Wednesday, for a 24-hour operation.

Chris Higgins is the Employer's terminal manager. He has sole responsibility over the employees and terminal operations and facilitates daily interactions with the company's customers. Higgins is available around-the-clock for any issues that arise regarding the operation. Kerry Evola is the operations manager and Lori Brown the office manager. Brown oversees payroll and billing and, according to the Employer, has the authority to discipline drivers.

b. Regulations applicable to driver's hours of service.

The Federal Motor Carrier Safety Administration (FMCSA) is an agency within the United States Department of Transportation that regulates the trucking industry in the United States. The Employer's drivers operate commercial motor vehicles (CMV) subject to the regulations of the FMCSA. The FMCSA has hours of service (HOS) rules in place applicable to CMV drivers that are designed to keep fatigued drivers off the public roadways.^{5/} These regulations put limits in place for when and how long drivers may drive, to ensure that they stay awake and alert while driving and to help reduce the possibility of driver fatigue.^{6/}

^{4/} On March 5, 2020, the Union filed a petition seeking to represent the Employer's drivers in Case 09-RC-257491. An election was ordered, and ballots are scheduled to be counted on June 22, 2020.

^{5/} 49 C.F.R. § 395; <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=&mc=true&r=PART&n=pt49.5.395>.

^{6/} <https://www.fmcsa.dot.gov/regulations/hours-of-service>.

According to the FMCSA rules, the duty period for CMV drivers starts with their first job-related activity that occurs after at least ten (10) consecutive hours off-duty. Once the on-duty periods start, federal rules apply. First, once the duty period starts, it runs for 14 consecutive hours after which the driver may not drive a CMV again until after having 10 or more consecutive hours off-duty. Nothing stops the running of the 14-hour clock. Second, during the 14-hour duty period, or driving window, the driver may only drive a maximum of 11 hours. Third, when a driver has reached a total of 60 on-duty hours in 7 days, he/she must take a period of at least 34 consecutive hours off duty. There is an alternative rule available for carriers that operate 7 days a week, which mandates such 34-hour break after the driver reaches 70 hours in 8 days. The Employer utilizes this rule. Rule four requires an off-duty break at some point during the duty period. The rule says that the driver may not drive a CMV if it has been 8 or more hours since the last off-duty period of at least 30 minutes.

The Employer in this case keeps track of the drivers' hours of service through a program call PeopleNet. The system tracks actual driving time, the 14-hour workday time, and the 70-hour work week time.

c. Dispatchers' Duties Within the Employer's Operation

The dispatchers are responsible for covering and dispatching all the loads from the Employer's clients in a timely manner.

When a driver is hired, the dispatchers receive a document from Terminal Manager Higgins containing the drivers shift start times, off days, smoking or non-smoking preference and average commute. The start time preference is assigned at the time of hire, and the dispatchers have no participation in that assignment. The "start time" is a block of time that the driver can usually expect to start working. The dispatchers work from a daily drivers' schedule, which is a password protected spreadsheet that the dispatcher's access through their computers. It is a read only document that the dispatchers cannot alter. It contains each driver's ideal start window, workdays, days off, phone number, smoking preference and, sometimes, truck preference, if any. The spreadsheet contains all the driver information that the dispatchers need during their shift.

Donald Hendricks has been working for the Employer for the last 5 years. He is a dispatcher. When he was hired for the position he was interviewed by the Employer's terminal and operations managers at the time. Currently, he reports to Terminal Manger Higgins as his direct supervisor. He is a nighttime dispatcher, working from 8:00 p.m. to 8:00 a.m. During his shift there is an undisputed manager/supervisor on site, Lori Brown. As he explained it, dispatchers work hand in hand with Trans Service to haul Kroger products to Kroger grocery stores and to the Kroger distribution center in Louisville.

i. Load planning, dispatch and report obligations of dispatchers.

According to Terminal Manager Higgins, the dispatcher's primary responsibility is to use the drivers at an optimal level. Thus, when a dispatcher begins shift, he/she reviews the drivers' spreadsheet to verify the number of drivers available and their start time, commute time, etc., and consults PeopleNet for the drivers' hours of service. Kroger/Trans Service provides dispatchers with the number of loads and the time they want the loads to depart from the distribution center in order to arrive on-time at the stores. With all that information at hand, dispatchers match the drivers with the loads that correlate with the drivers start time. In doing so, they factor in the driver's commute time and the estimated time that it will take to transport the load. Additionally, it is imperative that they keep track of the driver's hours of service, as they must assign loads that the drivers are able to complete within the FMCSA hours-of-service (HOS) rules. Drivers must return to the Employer's facilities every day, unless there is a weather-related event, an hours-of-service issue or some sort of breakdown. Management's directive is that dispatchers cannot put drivers in hotels for the 34-hour reset, thus the assignment of loads must fit the driver's available hours of service.

Another factor that dispatchers take into consideration when load planning, is the type of driver involved, whether he/she is one that likes to help in the unloading or not, because that will affect the time the load takes to completion. They will also consider drivers' preferences for specific tractors or whether they are smoking or not smoking, but preferences cannot always be met since the Employer's fleet is a small one of about 40 trucks. An additional consideration could also be if a driver is not very good at maneuvering a specific loading dock.

The Employer explained that it has one of the best driver turnover rates at 40 percent. Terminal Manager Higgins testified that dispatchers play a big role in the retention of the drivers because they develop good relationships with the drivers, and they help ease any tensions or frustration drivers may experience by handling issues that come up. He asserted that, in furtherance of the Employer's efforts to retain drivers, dispatchers should look to set drivers with the type of loads they like. If there are no loads in the drivers start window, the dispatchers should do their best to accommodate them in a window where there are loads.

After matching the loads, the dispatchers communicate with the drivers by phone, informing them of their load assignment. Higgins explained that for drivers out of the Franklin terminal, the loads assigned should be southbound, and for drivers operating from the Versailles terminal, the loads should be eastbound to the Lexington market and the cities in the vicinity because that is what makes more sense economically for the company.

During the day, changes to the load planning are made depending on how things run. If there is a breakdown, an accident, a driver calling in sick or the client wants to make a change with a load or refuses a load, all these circumstances have an impact on the plan. These situations will inevitably require the dispatcher to make changes to the planning and advise the drivers of such changes. These changes in loads are a daily occurrence. Changes or situations that occur during the shift are reported by the dispatchers in a "hand off report" at the end of their shift. This report is an email to all members of operations, managers and dispatchers, with all significant details

about the shift including incidents during the shifts, status of loads, tractors or trailer issues and dealings with drivers.

In weather related situations, dispatchers are expected to make the changes necessary to juggle the loads and get them to their destination. On January 30, 2019, during what was probably a snow event, dispatcher Hendricks had several drivers call off. The situation required him to adjust the dispatch to the drivers that were still available while remaining HOS compliant. Similarly, on March 2, there was a tornado in the area, which also required Hendricks to make changes to the load assignments. He reported these dispatch changes to management during these weather-related events.

When there is a breakdown of a truck or trailer, dispatchers initially identify whether the broken equipment belongs to Kroger, i.e. a trailer, or to the Employer, i.e. a tractor, and which parts are not working. This initial assessment will determine if the dispatcher will contact the Kroger shop for roadside assistance or the Employer's shop. When a breakdown occurs at night, the dispatcher must find roadside assistance from a third-party. The dispatcher reports these incidents to management by email.

According to Terminal Manager Higgins, if issues arise between a driver and a client, the dispatcher will serve as a mediator and try to deescalate the situation. In support of this claim, the Employer submitted a March 28 email chain initiated by Kroger's dispatch chain manager. The document shows that the Kroger manager sent an email to the Employer's operations group email address requesting someone to contact a store that was reporting that a driver had refused to come into the store during the unloading process. Dispatcher Chris Brimmer reported in the same email chain that he contacted the store and was informed that the driver did not help unload and just watched the unloading. He further reported that he called the driver, and the driver indicated the same thing, that he did not participate in the unloading. The record did not establish the outcome of this incident and if dispatcher Brimmer had any further involvement in the incident beyond reporting his conversations with the driver and the store.

If loads are going to be late, dispatchers keep track of the loads through a system with Kroger called CAMS and then inform the driver when the load is ready for pick up. They will also follow up with the client alerting them that the driver is waiting for the load. If a driver cannot complete a load, it is the dispatcher who notifies Kroger or other clients. For instance, on December 6, 2019, dispatcher Brimmer emailed Kroger to apprise that a load had to be rescheduled because the driver was unable to get the trailer out from where it was parked, and there was no one at the time available to lift the trailers. If the dispatcher realizes that a load is going to be late, it is their responsibility to document the occurrence in their report and contact the client to inform them of the situation.

When accidents occur, dispatchers are required to contact Terminal Manager Higgins and send an email to a group of employer officials to notify them that there has been an accident. Even if they do not have all the details, they must notify of the occurrence. Accidents are rather common, happening 2 to 3 times a week.

ii. Dispatcher's reports on drivers.

Dispatchers also report certain driver actions to management. For instance, on December 31, 2019, Hendricks reported that a driver had called off his second load because he did not feel safe driving while it was raining. Also, in December 2019, Hendricks reported that he did not dispatch a driver because the driver was not on PeopleNet and had not taken a drug test. Around the same time, Hendricks complained in an email about a driver who had refused to take a detour and deliver a load after a road closure. He added that in his opinion the driver was of no value to the company because it was not the first time that he had refused to work under a load assignment. Terminal Manager Higgins testified that he coached the driver after the incident, but there was no evidence that the driver received a disciplinary action based on any recommendation by Hendricks.

In a January 9 email, Hendricks reported that a driver "did not want to do a Mason, he did not want to wait for a second load from KDC and did not want to do a Winchester" so the driver was "dismissed to go home." It is not clear from the document what Hendricks meant by "dismissed," but the Employer does not claim that Hendricks disciplined or discharged the driver. On February 19, dispatcher Shawn Bryson reported in an email that a driver was on the road sick struggling to finish his route. Thus, the driver was returning with his load to be reassigned to another driver. On February 24, Hendricks reported in an email that driver Randy Carroll complained that he was put on a truck with a smoker and had opted to wait for another truck instead. Hendricks reported on that same day that Carroll had later called asking if his load could be covered because he preferred not to take the load. According to the document, Hendricks told Carroll that he would cover his load. In a February 25 email, dispatcher Jenkins reported a no-call no-show from driver Simmons, a call from driver Pence informing that he had an upset stomach and requesting a short load, and that driver Babb had called to request a late load or "sitting" (synonymous with not working) and did not drive that day.

On March 28, dispatcher Brandy Cook took driver Joe Smith off the schedule after she checked that he had not certified his logs. Terminal Manager Higgins explained that she had been instructed to check that drivers had their logs certified, which they were not doing.

On April 7, Jenkins complained by email about the bad attitude of a driver to Terminal Manager Higgins, Operations Manager Evola, and Office Manager Brown. In his email, he explained that, after he sent the driver his load information for that day, the driver used foul language with the dispatcher in text messages and complained about having to drive to Nashville and informed the dispatcher that he was not going to drive. Jenkins covered his load with another driver. There was no evidence in the record disclosing whether the driver was disciplined for refusing to work or his attitude towards the dispatcher. On April 13, Jenkins reported in an email that driver Jimmy Jones called in to inform that he was not coming in to work because of a flooded basement and would call later to update on his status for the following day. In an email from April 15, Jenkins reported that one of the drivers was not feeling well, probably with something serious, so he told the driver that he could go to the doctor and his load would be covered by someone else.

Hendricks explained that dispatchers do not have the authority to force drivers to work, so he simply reports the situations to management and then either finds another driver to cover or sends the load back to Trans Service to find another company to do the load.

There was no evidence disclosing whether any of the drivers mentioned in the reports were disciplined for the situations reported above.

iii. Additional Duties of Dispatchers.

Dispatchers are also responsible for entering into a Kroger computer at their work area all the information that the drivers record on the bills of lading, including arrival and departure times at stores, and detention times beyond an hour. They help in preparing a utilization report that the terminal manager testified is used to obtain increased loads from clients and, therefore, to utilize the drivers more efficiently. The report includes the drivers that did not receive loads and those that could have done more than one load. Dispatchers also help in coordinating maintenance and repairs of the tractors with the drivers.

Dispatchers are authorized by management to issue “com checks” to drivers. The Employer uses a company, Comdata, to issue checks for drivers and vendors for situations that occur on the road. For example, when there is a breakdown, the “com check” is used to pay the road assistance vendor. Another situation could be when a driver’s fuel card is not working, the dispatcher issues the com check. Information about Comdata checks issued during a shift is included in the “hand off” report at the end of the dispatcher’s shift. For example, on November 22, 2019, dispatcher Chris Brimmer notified that the fuel card of driver Jeff Guillowry was not working, therefore, he wrote a check for \$170 so that the driver could fuel the truck. Dispatcher Hendricks testified that management has instructed them that they can issue checks for business purposes up to a \$1000 maximum, and that drivers have to submit the receipt of the transaction to payroll. He remembered an occasion where there was a tow that was priced at \$1400. Office manager Brown was in the office, and she instructed him to issue two \$700 checks for the tow.

Dispatchers oftentimes contact Kroger to secure drivers’ access to Kroger’s affiliate facilities when they are missing the proper paperwork to enter the facilities.

iv. Additional pay to drivers for out of the ordinary duties.

Terminal Manager Higgins explained that, on occasion, drivers receive additional pay to perform tasks that are out the ordinary, like if they move a trailer or a driver has to “rescue” another driver who has run out of hours. In those instances, the driver must fill out a form, an extra pay sheet, that the dispatcher submits to management for them to determine how the driver is going to be compensated. The Employer did not proffer any evidence showing whether the dispatcher plays any role in determining whether the driver gets approved for out of the ordinary pay or in the amount of money the driver receives.

Driver Curt Sikes testified that he filled out extra pay forms after he was told by a dispatcher to pick up a truck that had been left at a dealer and when he dropped another driver off to pick up a truck. The Employer did not submit copies of these forms submitted by drivers during the hearing.

v. *The dispatcher's involvement in drivers' drug and alcohol testing.*

The FMCSA establishes procedures for conducting workplace drug and alcohol testing under 49 CFR § 382.^{7/} There are different types of testing, some of which were discussed during the hearing: post-accident testing, reasonable suspicion testing and random testing.^{8/}

Drug and alcohol tests may be required after crashes according to the following chart:^{9/}

Type of Accident Involved	Citation Issued to the CMV Driver	Test Must Be Performed by Employer
Human Fatality	Yes	Yes
Human Fatality	No	Yes
Bodily Injury with Immediate Medical Treatment Away from the Scene	Yes	Yes
Bodily Injury with Immediate Medical Treatment Away from the Scene	No	No
Disabling Damage to Any Motor Vehicle Requiring Tow Away	Yes	Yes
Disabling Damage to Any Motor Vehicle Requiring Tow Away	No	No

^{7/} <https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/overview-drug-and-alcohol-rules>; <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=&mc=true&r=PART&n=pt49.5.382>.

^{8/} Other required tests are pre-employment testing, return to duty testing and follow up testing.

^{9/} 49 CFR §382.303.

Drivers must be randomly tested throughout the year; the minimum annual percentage rate for random alcohol testing shall be 10 percent of the average number of drivers positions an employer employs. ^{10/} Additionally, drivers who appear to be under the influence of drugs or alcohol can be immediately tested for reasonable suspicion. ^{11/} Employers are called to train their supervisors to detect the symptoms of driver impairment. ^{12/} The Employer's determination that reasonable suspicion exists "must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver." ^{13/} The observations for alcohol and/or controlled substances reasonable suspicion "shall be made by a supervisor or company official who is trained" in accordance with the regulations. ^{14/}

When an accident that requires testing under FMCSA occurs, the dispatcher is responsible for coordinating the testing of the driver within the first 8 hours of the accident. All dispatchers have taken the drug and alcohol training to identify individuals under the influence. It is an online training course that takes about 4 hours. The Employer issued diplomas for each of the dispatchers identifying them as managers on the diploma.

Terminal Manager Higgins explained that there has been only one instance in which a dispatcher has sent a driver to reasonable suspicion training. The dispatcher involved was Hendricks. According to Higgins, Hendricks, called him after setting up a drug screen, and handed him the paperwork. Higgins took the driver to the testing facility.

Hendricks testified that, on Christmas Eve 2019, a driver reported to work and smelled of alcohol, his speech was slurred, his eyes were glassy, and he was unsteady in his stance and gait. He believed the driver was under the influence of alcohol and he called Terminal Manager Higgins and advised him of the situation. Hendricks explained that in Louisville there is only one 24-hour drug and alcohol testing facility, and that he went into the site and ordered the test for the driver. He says that Higgins also ordered a test. It is unclear from the record why both ordered the test and if Hendricks ordered the test before or after alerting Higgins of the situation with the driver. Higgins reported to the terminal and took the driver to the clinic for the required testing. In addition to the online training that Hendricks received from the Employer, he was previously a police officer for 8 years. This knowledge helped him make the assessment over the driver's condition.

^{10/} 49 CFR §382.305.

^{11/} 49 CFR §382.307.

^{12/} 49 CFR §382.603.

^{13/} 49 CFR §382.307(a).

^{14/} 49 CFR §382.307(c).

vi. Testimony of Driver Curt Sikes.

Driver Curt Sikes explained that, at the start of his workday, he receives a text message from the dispatcher containing his load information, which will be the destination, trip number and time of departure. Throughout the day, the dispatcher keeps tracks of his hours to make sure he remains legal, in other words, compliant with the HOS regulations.

Sikes maintains constant communication with the dispatchers and notifies them if, for example, a load is not ready and the expected time that it will be ready. This information is used by the dispatchers to determine whether the driver should move another load or remain waiting. Another instance is when a load is going to be unloaded by hand, the driver will let dispatch know that the load will take longer than expected. This information is necessary for the dispatcher to make the appropriate movements of loads. When he experiences a breakdown of his truck, he contacts the dispatcher, who decides if the client needs to be contacted for the repair or the Employer takes care of it. The dispatcher also helps him make corrections to his logs in PeopleNet for any discrepancies or if their system freezes. Sikes is knowledgeable of the routes that he takes to deliver his loads (drivers have a route book), but there have been occasions when a dispatcher has suggested a detour because of road closure or accident.

He explained that drivers are not generally tasked with unloading trailers, but 80 percent of the time he helps with the unloading. Additionally, if a specific client needs help unloading, the dispatcher will inform him in advance. There are instances where some facilities charge for the unloading of the trailer. In that case, he would call the dispatcher to take care of the situation.

vii. Dispatchers' authority to discipline, hire, lay off, recall, promote, discharge, reward, and adjust grievances.

Terminal Manager Higgins testified that dispatchers do not have authority to discipline, hire, discharge, reward or adjust grievances. Regarding complaints and grievances, he explained that dispatchers could report the information they have available, but it is up to him to investigate and come up with a resolution. Similarly, he testified, they do not have authority to approve leave, although they are expected to attempt to accommodate last minute requests from drivers to modify their load assignments (discussed below). The Employer has never laid off personnel, so there is no evidence of layoffs or recalls.

No evidence was submitted during the hearing regarding job evaluations, wage increases, and approval of overtime, if any.

viii. Approval of time off requests of drivers.

Driver retention is very important in the company. Dispatchers, according to Higgins, play their role by making sure that they provide the load information to drivers in a timely manner and by "catering to some of their specific needs." Some of those needs could be trying to accommodate a family event or celebration. Higgins explained that, for instance, if a driver

forgets to request time off for a birthday celebration, the dispatcher could work with the driver and figure out if he can help in any way at the time of the assignment of loads. Notwithstanding, the proper protocol to request time off is to submit a day off request form to Higgins or Operations Manager Evola.

In Brimmer's hand off report of November 22, 2019, he reported that driver Ethan Black wanted to switch his off day from Tuesday to Sunday. In a January 7 hand off report to the operations group email, Hendricks reported that a driver needed a personal day off; he simply reported: "Foust needs a personal day on 1/8 for dental work." It is not clear from the email whether he was asking for permission or reporting that he had approved the requested leave. Driver Sikes testified that the Employer requires them to request vacation time off at least a month in advance, but they also have two personal days off a year. He explained that he generally works those out with the dispatcher, if it is a last-minute thing, to get loads covered by another driver. The Employer did not submit any document to demonstrate that these personal days off are approved by the dispatchers, although Sikes testified that he fills out a form to that effect.

According to dispatcher Hendricks, dispatchers do not have authority to approve time off to drivers. When they call in sick, he merely records it in an email to the manager. For instance, in his hand off report of February 4, he advised Terminal Manager Higgins that a driver was asking for a Saturday off for a funeral, and that he told the driver to call a manager. Higgins asked him whether they had instructed him to fill out a time off request.

III. ANALYSIS

a. Legal Framework

The Act expressly excludes supervisors from its protection. Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly 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 judgement.

Possession of any of those attributes is enough to convey supervisory status, provided that the authority is exercised with independent judgement. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000). Supervisory status may be shown if the alleged supervisor has the authority either to perform a supervisory function or to effectively recommend the same. If such authority is used sporadically, the putative supervisor will not be deemed a statutory supervisor. *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 17 (2018). The supervisor has to at least act or effectively recommend such action "without control of others and form an

opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare*, 348 NLRB 686, 692-693 (2006). Judgment is not independent when the putative supervisor follows detailed instructions (e.g., policies, rules, collective-bargaining agreement requirements). *Id.* at 693. Nor does independent judgment encompass those actions that are a “routine or clerical nature,” sporadic or perfunctory. *Id.* at 693, citing *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). If a choice is obvious, the judgment is not independent. *Oakwood Healthcare*, 348 NLRB at 693. The party asserting supervisory status has the burden of proving supervisory authority and must establish it by a preponderance of the evidence. Lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). Purely conclusory evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991). Similarly, supervisory status is not demonstrated when evidence is in conflict or inconclusive. *Entergy Mississippi, Inc.* 367 NLRB No. 109, slip op. at 2-3 (2019).

b. The dispatchers do not have authority to assign.

To assign, per *Oakwood Healthcare*, 348 NLRB at 689, requires that the individual in question designate an employee to a place (e.g., location, department) or time (shift or overtime), or give significant overall tasks to an employee. Also see, *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2153 (2011). “Responsibility for making work assignments in a routine fashion does not make one a supervisor, nor does the assumption of some supervisory authority for a temporary period create supervisory status.” *Coral Harbor*, 366 NLRB No. 75, slip op. at 17-19 (2018).

The dispatchers assign work in a routine fashion and do not use independent judgement in doing so. In this case, the record shows that the dispatchers receive an email each day from the Employer’s primary customer, Kroger, providing them with loads and dispatch schedule. The schedule details the time that the loads are expected to be ready for pick up, and the time that Kroger wants the load to depart the distribution center to arrive on-time at the stores. With that information, and the information contained on the drivers’ spreadsheet, the dispatchers assign loads to drivers. In doing so, dispatchers rely primarily on driver’s preference, hours of service, and starting times, although sometimes they might consider driver skills. For example, if a driver is not great at maneuvering a particular dock. The evidence showed that if dispatchers assigned a driver to a load the driver deemed undesirable, and the driver rejected it, the dispatcher would switch the load to another driver or return the load to Kroger. Dispatchers also reassigned routes when there were “call outs” due to such things as illness and weather conditions, but there was no evidence that dispatchers approved any leave. They merely referred the drivers to management officials or to fill out a leave form and reported the calls out and requests for leave in the shift “hand off” report.

The record showed that dispatchers do not have authority to require a driver to accept a load. For instance, a driver rejected a load assignment to Nashville, after insulting the dispatcher. Another driver did not want loads to Mason or Winchester and did not wait for a second load in KDC. Yet another one refused to take a second load because of safety concerns while driving in the rain. The Employer did not submit evidence that drivers are disciplined

when they refused load assignments from the dispatcher. The record showed that under these circumstances, the dispatcher's responsibility is to ensure that all scheduled loads are covered; thus, they would find another driver who was available to take the load.

The above evidence demonstrates that dispatchers do not exercise meaningful discretion in their assignment of routes. They merely match loads with available drivers after reviewing the drivers' schedules in a spreadsheet. There was no substantial evidence that dispatchers relied on drivers' skills to assign routes in any significant way, and the limited circumstances under which it may have happened did not entail the exercise of independent judgment. Assigning a load based on a driver's skill to maneuver a dock is self-evident. See e.g. *UPS Ground Freight*, 365 NLRB No. 113 (2017).

Additionally, the record does not establish that the dispatchers take any actions in response to drivers' conduct beyond ensuring that their inability to cover a load, for whatever reason, is resolved by finding another driver. For example, the record shows that dispatchers merely report incidents, changes in load assignments and difficulties during their shift in the "hand off" report, without any recommendation. In instances when a driver has been involved in an accident, dispatchers are required to immediately contact the terminal manager. They act within specific rules and policies established by the Employer. Merely reporting incidents or referring problems to a supervisor does not establish supervisory authority. See, *Lucky Cab Co.*, 360 NLRB 2271, 272 (2014); *Coral Harbor*, 366 NLRB No. 75 slip op. at 20 (2018).

This case differs from *Entergy Mississippi, Inc.*, 367 NLRB No. 109 (2019), cited by the Employer. In that case dispatchers worked for an electric utility company. They performed switching operations to alter the flow of electricity. In situations of emergency, they had to address unexpected outages and decide where to send the repair crews first. They would consider a range of discretionary factors in making those decisions, without the use of written guidelines, such as whether locations had the most customers and if it was a hospital, or a factory. They also considered logistical factors such as whether a field employee could quickly repair a trouble spot, and whether the outage would cause damage to the customer's facility. The dispatchers herein do not use such judgement to assign loads to drive. The Employer's clients send the loads and destinations and the dispatchers match a driver scheduled for the shift to a load considering the amount of hours they are allowed to drive pursuant to specific limits established by law, and whether they prefer a particular truck, and if they are smoking or non-smoking.

The "hand off" email reports submitted by the Employer to support its allegations that dispatchers are 2(11) supervisors are insufficient to establish that the dispatchers possess supervisory status. The emails do not establish that these employees use independent judgement or discretion in assigning drivers to loads. Additionally, these emails fail to show that dispatchers make any recommendations with respect to disputes between drivers and clients or drivers and dispatchers. To the contrary, they establish that the dispatchers serve a reporting function to enable management to take necessary actions with respect to the drivers. Insofar as the record establishes that, on a single occasion, dispatcher Hendricks may have initiated a drug test after observing that a driver appeared to be under the influence, I accord great weight to the

fact that he immediately involved Higgins in finding that such isolated incident is insufficient to confer supervisory status.

c. The dispatchers do not possess any other indicia of supervisory authority.

The Employer admitted that the dispatchers do not have the authority to discipline, hire, promote, or discharge, and I so find. I further find that the dispatchers do not possess the authority to layoff, recall, reward or adjust grievances. The Employer does not claim as much and there is no evidence of such authority in the record. Nor is there evidence that the dispatchers effectively recommend any of the foregoing actions. Regarding the Employer's reliance on the fact that it expects dispatchers to attempt to accommodate last minute requests of drivers to switch load assignments for special occasions, I note that the Employer otherwise admits that dispatchers do not have authority to approve vacations requests. Moreover, the record evidence shows that their purported approval of the last-minute requests is, at best, routine and done in connection with their duty to cover loads for delivery.

Finally, there is no record evidence establishing that the dispatchers responsibly direct the drivers. The responsibility to direct requires that the person directing and performing the oversight of the employee is held accountable for such direction. *Oakwood Healthcare*, 348 NLRB at 690-691. The Employer presented no evidence that the dispatchers are subject to adverse actions – or rewards – based on the drivers' performance or conduct.

In sum, the Employer has failed to meet its burden to adduce sufficient evidence establishing that dispatchers possess the authorities enumerated in Section 2(11) of the Act. Accordingly, I find that the dispatchers are not supervisors within the meaning of the Act and may appropriately be included in a unit of employees for collective bargaining.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction in this case.^{15/}

^{15/} The parties stipulated in Board Exhibit 2, and I find, that the Employer is a Kentucky corporation that is engaged in the interstate transportation of goods and material. During the most recent 12-month period, the Employer derived gross revenues in excess of \$50,000 from the transportation of goods and materials directly to points outside the Commonwealth of Kentucky.

3. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer.
4. No collective-bargaining agreement covers the employees in the petitioned-for unit, and no other bar exists to conducting an election.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time dispatchers employed by the Employer at its facility located at 2827 S. English Station Road, Louisville, Kentucky 40299; but excluding all office clerical employees, temporary employees, casual employees, professional employees, guards, supervisors as defined in the Act and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

A. Election Details

The election will be conducted by United States mail. The Petitioner and the Employer both requested a mail election. Given the extraordinary circumstances caused by the spread of COVID-19 that still face the Commonwealth of Kentucky and the entirety of the United States, I find it appropriate to exercise my discretion to direct a mail ballot.

The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit. At **4:30 p.m., on Thursday, June 25, 2020**, ballots will be mailed to voters by the National Labor Relations Board, Region 9. ^{16/} Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and do not receive a ballot in the mail by **Tuesday, July 7, 2020**, should communicate immediately with the National Labor

^{16/} Petitioner waived 8 days of its right to have the voting list for 10 days before the voting period starts.

Relations Board by either calling the Region 9 Office at (513) 684-3686 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

The ballots should be returned to the Regional Office by **Friday, July 17, 2020**. All ballots will be comingled and counted at the Region 9 office, John Weld Peck Federal Building, National Labor Relations Board, 550 Main Street, Room 3-111, Cincinnati, Ohio at **Noon on Monday, July 20, 2020**. In order to be valid and counted, the returned ballots must be received in the Region 9 office prior to the counting of the ballots. Due to the above-mentioned extraordinary circumstances of the COVID-19 pandemic, I further direct that the ballot count will take place remotely through a video platform, such as iPhone, FaceTime or Skype, to be determined by the Regional Director. Additionally, given our future uncertainty caused by the COVID-19 pandemic, and the often in-flux federal, state, and local government regulation of businesses, offices, and the movement of people, I further direct that the aforementioned ballot count date may be postponed should it become necessary to do so.

The parties have agreed, and I conclude, it is appropriate that the Notice of Election and ballots will be in English.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **Saturday, June 13, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Monday, June 22, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election.^{17/} For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

^{17/} The election will be deemed to have begun on the date the ballots are mailed out by the Regional Office.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: June 18, 2020



Matthew T. Denholm, Regional Director
National Labor Relations Board, Region 09
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Cincinnati, OH 45202-3271