

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**Austin, Texas**

**MTM TRANSIT D/B/A RIDE RIGHT**

**Employer**

**and**

**Case 16-RC-260987**

**AMALGAMATED TRANSIT UNION, LOCAL 1091**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The Petitioner seeks to represent a classification of road supervisors at the Employer's 817 W. Howard Lane facility in Austin, Texas. The Petitioner would like to include these employees within the existing unit of transportation and maintenance employees through an *Armour-Globe* self-determination election. There are currently three road supervisors at this facility.

The Employer objects to this proposal for three reasons. According to the Employer, road supervisors are statutory supervisors, as defined in Section 2(11) of the Act. The Employer also contends that road supervisors are confidential employees, and that road supervisors do not share a community of interest with the existing unit of transportation and maintenance employees.

I find that the Employer has not met the burden required to exclude these employees for any of these objections. Therefore, I am directing a mail ballot election for the road supervisors to determine whether they wish to be included in the existing unit of transportation and maintenance employees.

**I. OVERVIEW OF OPERATIONS AND BARGAINING HISTORY**

MTM Transit d/b/a Ride Right provides paratransit services for Capitol Metro (or CapMetro), Austin's public transit authority, as a contractor. The Employer has two facilities in Austin, the South Base at 509 Thompson Lane, and the North Base at 817 W. Howard Lane—where the employees covered by this petition work. About 150 employees work at the North Base.

The Union has represented North Base employees since 2015. As described in Article 1 of the Collective Bargaining Agreement, the existing bargaining unit includes, "all full-time and part-time drivers, driver/trainers, dispatchers and vehicle maintenance workers employed by the Company, excluding all other employees and supervisors in Austin, Texas."

## II. POSITIONS OF THE PARTIES

The Employer argues that road supervisors are excluded from coverage by the Act as statutory 2(11) supervisors and that they do not share a community of interest with the existing unit. The Petitioner makes exactly the opposite claim—that road supervisors are eligible to vote, and may be included in the existing unit.

At the hearing, both parties expressed a preference for a mail ballot election.

## III. LEGAL STANDARDS

### A. Supervisors

Supervisory status under Section 2(11) must be established by the party asserting that status, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001). Showing that an individual has the authority to use independent judgment and take or effectively recommend any one of the twelve actions mentioned in Section 2(11)<sup>1</sup> establishes supervisory status.

However, the language of this section must be construed narrowly, since an employee found to be a supervisor is denied the rights protected under the Act. See *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997). A lack of evidence is construed against the party asserting supervisory status, *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003), and conclusory statements without conclusive supporting evidence will not establish supervisory status. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Supervisory status is determined by looking at an individual's duties, and not their job title. *Dole Fresh Vegetables*, 339 NLRB 785 (2003). Nor can the mere issuance of a directive advising employees that they have supervisory authority establish supervisory status if this authority has never been exercised. *Security Guard Service*, 154 NLRB 8 (1965).

A statutory supervisor must exercise independent judgment, rather than judgment of a merely routine or clerical nature. To exercise independent judgment, “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-93 (2006).

A judgment is not independent if “it is dictated or controlled by detailed instructions” or if there is “only one obvious and self-evident choice.” *Id.* at 693. Nor is a judgment independent if it is made based on well-known employee skills or solely with respect to whether the employee is capable of doing the job. See *GS4 Government Solutions*, 363 NLRB No. 113, slip op. at 3 (2016); *KGW-TV*, 329 NLRB 378, 381-382 (1999). See also *The Arc of South Norfolk*, 368 NLRB No. 68, slip op. at 4 (2019). Nor will independent judgment be found if only supported by vague or hypothetical testimony that individuals “play to employee strengths” when selecting one employee

---

<sup>1</sup> Hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust grievances of other employees

over another to perform a particular task, *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153 (2015), or if work assignments are made only to equalize workload, see *Shaw, Inc.*, 350 NLRB 354, 354-357 (2007).

Instead, an employee only exercises independent judgment when they “act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Entergy Mississippi, Inc.*, 367 NLRB No. 109, slip op. at 3 (2019), quoting *Oakwood Healthcare*, 348 NLRB at 692-693.

### ***B. Confidential Employees***

Confidential employees are excluded from membership in bargaining units. The Board uses two tests to determine confidential status.

In the first “labor nexus” test, a confidential employee is one who 1) shares a confidential relationship with managers who formulate, determine, *and* effectuate management policies in the field of labor relations, and 2) assist and act in a confidential capacity to these managers. *Waste Management de Puerto Rico*, 339 NLRB 262, 262 fn. 2 (2003).

In the second test, confidential employees are those who have regular access to confidential information concerning anticipated changes that may result from collective bargaining negotiations. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987).

### ***C. Appropriate Inclusion of Unrepresented Groups Within an Existing Bargaining Unit***

Petitioner seeks a self-determination election to allow previously unrepresented groups of employees to be included in the existing transportation and maintenance unit—generally known as an *Armour-Globe* election.<sup>2</sup> A self-determination election is the proper way for an incumbent union to add unrepresented employees to its existing unit if the employees the union wishes to be included share a community of interest with unit employees and “constitute an identifiable, distinct segment so as to constitute an appropriate voting group.” *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990) (citing *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972)).

Whether a voting group is an “identifiable, distinct segment” is not the same question as whether the voting group constitutes an appropriate unit. *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011) (citing *Warner-Lambert*, 298 NLRB at 995). The “identifiable and distinct” analysis asks merely whether the voting group sought unduly fragments the workforce, or constitutes an arbitrary segment of unrepresented employees. *Capital Cities Broadcasting Corp.*, 194 NLRB at 1063; see also *Dillon Companies, Inc. v. NLRB*, 809 Fed. Appx. 1, 2 (D.C. Cir. 2020) (unpublished opinion).

The traditional community of interest analysis determines whether this identifiable and distinct segment can be added to the existing unit. This analysis takes place in three steps. *The Boeing Co.*, 368 NLRB No. 67, slip op. at 3 (2019).

---

<sup>2</sup> See *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942)

First, the proposed unit must share an internal community of interest. There is not a community of interest if the interests shared in the petitioned-for group are too disparate to form a community of interest within the proposed unit. *Id.* This analysis uses the factors discussed in *PCC Structural*s, 365 NLRB No. 160, slip op. at 13 (2017), examining whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. The Board also considers the bargaining history of the parties. *Buffalo Broadcasting Co.*, 242 NLRB 1105, 1106 fn. 2 (1979).

Second, the interests of the excluded and included employees are compared. This step considers whether excluded employees “have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *Boeing*, 368 NLRB No. 67, slip op. at 4, quoting *PCC Structural*s, 365 NLRB No. 67, slip op. at 11. If those distinct interests do not outweigh the similarities, then the unit is inappropriate. *Boeing*, 368 NLRB No. 67, slip op. at 4.

Finally, any guidelines the Board has established for specific industries (like public utilities or retail stores) should be considered. *Id.*

#### **IV. ANALYSIS OF RECORD EVIDENCE**

Three employees work as road supervisors at North Base. The Employer contends that they are statutory 2(11) supervisors, confidential employees, and do not share a community of interest with the existing unit. I find that the Employer has not met its burden of proof concerning any of these three arguments.<sup>3</sup> Therefore, road supervisors will be allowed to vote.

##### ***A. Road Supervisors Are Not Statutory Supervisors***

At hearing, the Employer contended that road supervisors should be excluded as statutory supervisors because they could discipline drivers, as well as conduct investigations of drivers that could lead to discipline, evaluate employee performance, and remove drivers from service. The Employer also pointed to several secondary indicia of supervisory status, and distinguished this case from a previous one, *Veolia Transportation Services*, 363 NLRB 98 (2016) in which the Board found that road supervisors were not statutory supervisors.

I find that road supervisors do not have the authority to use independent judgment and issue or effectively recommend discipline. The Employer did not show by the preponderance of the evidence that the coachings road supervisors give to drivers are, or lay a foundation for, disciplinary actions. Furthermore, the evidence does not show that any investigations a road supervisor might conduct, even if using independent judgment, would result in an effective recommendation of discipline.

---

<sup>3</sup> The Employer bears the burden of proving this claim made in their position statement and at the opening of the hearing. However, the Employer produced no evidence or argumentation to support it during hearing. Therefore, as no evidence was produced to support this claim, I find that road supervisors are not confidential employees.

Verbal or written coachings, counselings, and conferences can be disciplinary actions if they are a significant part of a disciplinary process, laying the foundation for future disciplinary actions. *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 565 (2010); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), *enfd. in rel. part 206 Fed.Appx. 405* (6th Cir. 2006), *cert. denied 549 U.S. 1338* (2007); *Trover Clinic*, 280 NLRB 6, 16 (1986)).

If there is a progressive discipline system in place, and coachings are not demonstrably a significant part of it, then coachings are not disciplinary actions. *Altercare*, 355 NLRB at 565; *Promedica Health Systems*, 343 NLRB 1351; *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403-404 (1993). Thus, where a coaching “merely warns an employee of potential performance or behavior problems,” but does not affect any term or condition of employment, it is not a disciplinary action. See *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002); *Crittenton Hospital*, 328 NLRB 879 (1999) (authority to “point out and correct deficiencies in the job performance of other employees does not establish the authority to discipline.”).

Investigating and reporting substandard employee performance without recommending further discipline is not supervisory authority. *Springfield Healthcare, Ltd.*, 355 NLRB 937, 944 (2010); *Regal Health and Rehab Center, Inc.*, 354 NLRB 446, 473 (2009); see *Passavant Health Center*, 284 NLRB 887, 889 (1987) (collecting decisions). Thus, employee evaluations that do not recommend discipline or other personnel action are also not exercises of supervisory authority.

The Employer has not met its burden of showing by a preponderance of the evidence that road supervisors issue discipline when they counsel or evaluate employees. Where there is a progressive discipline system in place—as there is here—and coachings are not demonstrably a significant part of it, then coachings are not disciplinary actions. The record did not show that road supervisor coaching evaluation forms were demonstrably part of the disciplinary system, or routinely lead to specific steps under the progressive discipline system.

Instead, the record showed that road supervisor coachings were more akin to quality control inspections or reports on driver performance—and leadmen may inspect and report the work of others without being statutory supervisors. See *Brown & Root, Inc*, 314 NLRB 19, 21 *fn. 6* (1994). This same principle holds for those times that a road supervisor informed a manager that a particular employee was seen (either in person or on a recording) having problems that a road supervisor believed to violate company policy. Without showing by a preponderance of the evidence that these reports of misconduct or recommendations of corrective action were routinely followed and resulted in discipline, the Employer cannot show that road supervisors independently effectively recommend discipline.

Because the Employer did not demonstrate by the preponderance of the evidence that road supervisor coachings were effective recommendations of discipline, rather than mere warnings to employees of potential problems, I do not find that the record shows that road supervisors effectively recommended discipline when they coached employees.

While road supervisors helped draft employee discipline reports, the exhibits and hearing testimony showed that, in many cases, road supervisors wrote up employee discipline reports at the direction of management, and that road supervisors did not exercise independent judgment in

imposing a particular level of discipline. Instead, when a particular disciplinary action was chosen, this choice was dictated either by a manager or by Employer policy.

Many of the employee discipline notices entered into the record were drafted by road supervisors at the direction of managers, and not on their own initiative and judgment. Road supervisors did not exercise independent judgment when making these disciplinary decisions. Therefore, I find that the Employer has not met its burden of showing that road supervisors exercise independent judgment when making or effectively recommending employee discipline.

Nor has the Employer shown that road supervisors are statutory supervisors because they exercise some independent judgment when investigating incidents, including when deciding to remove a driver from service. Instead, the evidence shows that road supervisors do not exercise significant independent judgment in issuing or effectively recommending discipline. The record does not show that road supervisors exercise independent judgment in directing employees to submit to alcohol or drug testing, instead the record shows that the road supervisors merely follow Employer protocol or management directions.

I therefore find that road supervisors do not make final decisions or effectively recommend final decisions, that lead to discipline.

The Employer also raises several secondary indicia of supervisory status, including the job title, job description, and ratio of managers to unit employees.

The Employer argues that the title “road supervisor,” along with a job description giving road supervisors supervisory authority shows that road supervisors are statutory supervisors. This is not the case. An individual’s actual responsibilities, and not mere paper authority like job titles or descriptions, determines supervisory status. See *Lucky Cab Co.*, 360 NLRB 271, 272 (2014), citing *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000), enfg. in relevant part 327 NLRB 253 (1998). While road supervisors are called “supervisors,” and their job description says that they supervise direct reports by “conducting annual performance reviews, issuing disciplines, and providing daily oversight of assigned tasks,” this does not show that road supervisors are supervisors under the Act unless these things are actually done.

Perhaps the strongest secondary indicium of supervisory status is the ratio of managers to unit employees. While it is true that there are only a handful of managers to supervise a multitude of drivers, secondary indicia of supervisory status cannot show supervisory status on their own, but reinforce a finding of supervisory status due to the statutory criteria. Therefore, this strong secondary indicium cannot support a finding of supervisory status.

Because road supervisors do not perform any of the statutory tasks mentioned in Section 2(11) using independent judgment, and because secondary indicia can only support a finding of supervisory status if a 2(11) task is so performed, road supervisors are not statutory supervisors.

### ***B. Road Supervisors Share A Community of Interest With The Existing Bargaining Unit***

The Employer also argued that road supervisors, if statutory employees, could not be included in the existing unit. According to the Employer, road supervisors interests conflict with those of other unit employees, since road supervisors evaluate unit employees; perform different tasks, have different work sites, and report to different supervisors than unit members; and should be excluded based on bargaining history.

I find that road supervisors share a community of interest with the existing bargaining unit, and that they may be included as a part of it. The weight of factors in the Board's traditional community of interest determinations, as described in *PCC Structural*s, lead to this conclusion.

Road supervisors work closely with drivers, who are in the existing bargaining unit, showing a high degree of functional integration. The weight of evidence shows that they share common supervision, similar work situs, similar working conditions and uniforms, and similar compensation to other unit members. Finally, the testimony established that road supervisors sometimes perform the same job duties as drivers—driver positions road supervisors once held, and to which they return.

I do not find that the quality assurance or coaching functions performed by road supervisors justify excluding them from the same unit as drivers. Nor do I find the exclusion of road supervisors from the list of employee classifications represented in the existing unit significant. See *UMass Memorial Medical Center*, 349 NLRB 369, 370 (2007); *Centerpoint Energy Houston Electric, LLC*, 368 NLRB No. 109 (2019) (even if a collective bargaining agreement specifically excludes a category of employees from a bargaining unit, this does not necessarily mean that excluded classes of employees cannot later be accepted into the unit, unless there is an explicit contractual promise not to seek to represent these employees).

These factors suggest that road supervisors would be appropriately included in the same unit as drivers, with whom they share a community of interest. There is no evidence showing that employees who would not be included in this proposed unit would share meaningfully distinct interests in collective bargaining that would outweigh similarities with unit members. Finally, the Board's decisions have not set out industry-specific guidelines that would prohibit including road supervisors in the existing unit.

Therefore, because road supervisors are not statutory supervisors or confidential employees, and may be included in the existing unit, they should be allowed to vote on whether they wish to be included in the existing unit for the purpose of collective bargaining.

## **V. CONCLUSION**

The evidence does not show that road supervisors are statutory supervisors or confidential employees, or managers. Furthermore, the record shows that road supervisors share a community of interest with the existing unit. Road supervisors should therefore be allowed to vote in a self-determination election on whether they wish to be included in the existing unit for the purposes of collective bargaining.

Therefore, based on the entire record, and as discussed above, I find that:

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, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

4. 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.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**INCLUDED:** All road supervisors who are employed at the Employer's facility located at 817 W. Howard Lane in Austin, Texas.

**EXCLUDED:** All other employees, office clerical employees, guards, and supervisors as defined in the Act.

### **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 the **Amalgamated Transit Union, Local Union 1091** as part of the existing unit of transportation and maintenance employees represented by the Amalgamated Transit Union, Local Union 1091 at the Employer's 817 W. Howard Lane facility located in Austin, Texas.

#### **A. Election Details**

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 16 on Monday, August 3, 2020. Voters must return their mail ballots so that they will be received in the Region 16 office by 4:45 p.m. on Monday, August 24, 2020. The mail ballots will be counted on Thursday, August 27, 2020 at 2:30 p.m. at a location to be determined, either in person or by videoconference, after consultation with the parties, provided the count can be safely conducted on that date. .

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 16 office by no later than 4:45 p.m. on Monday, August 10, 2020, in order to arrange for another mail ballot kit to be sent to that voter.

## B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending July 4, 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.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

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 July 23, 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](http://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](http://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. 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.

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](http://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** at Fort Worth, Texas, this 21<sup>st</sup> day of July 2020.



---

Timothy L. Watson, Regional Director  
National Labor Relations Board, Region 16  
Fritz G. Lanham Federal Building  
819 Taylor Street, Room 8A24  
Fort Worth, Texas 76102-6107