

Nos. 20-1504, 20-1606

In the United States Court of Appeals
FOR THE THIRD CIRCUIT

ATLANTIC CITY ELECTRIC COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

REPLY BRIEF OF ATLANTIC CITY ELECTRIC COMPANY

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INTRODUCTION

The Regional Director’s own findings of fact defeat Board counsel’s and Intervenor IBEW’s overlapping arguments and establish that System Operators qualify as supervisors. Board counsel concede (at 13) that the Board majority adopted the Regional Director’s findings “in full.” Yet Board counsel and IBEW premise their arguments on factual mischaracterizations that conflict with those findings. The Court can and should hold the Board to the Regional Director’s findings.

Three findings deserve special mention: (1) System Operators “determine how resources are allocated, which can impact how long field employees are at a particular jobsite, and the number and type of crews dispatched,” (2) System Operators “make priority decisions about where to place resources, which might entail dispatching field employees from a small outage to a large outage,” and (3) “[i]f there is a disagreement as to whether a field crew should be assigned, System Operators have the authority to direct Field Supervisors to assign crews.” Appx27. These findings demonstrate that System Operators have the authority to determine where field crews work, and that suffices to make them supervisors under the National Labor Relations Act.

That conclusion follows from the Fifth Circuit’s and Board’s *Entergy* cases. Under those cases, deciding which electrical outages take priority qualifies as assignment authority requiring independent judgment. Although Board counsel and the IBEW try to distinguish *Entergy*, they cannot escape its essential conclusion that these types of prioritization decisions *necessarily* result in the assignment of field employees to places. *Entergy* holds that prioritization of outage work constitutes assignment, for purposes of determining supervisory status, even if those prioritization decisions are made without considering the skills of the individual, particular field employees who perform the repairs. As much as Board counsel and the IBEW try to obfuscate the record, the Regional Director’s findings establish that System Operators are supervisors, just like the dispatchers in *Entergy*. The Court should set the Board’s contrary rulings aside.

ARGUMENT

I. The Board’s skewed approach to the evidence precludes enforcement.

The Company’s opening brief identified two ways the Board applied a heightened standard of proof. First, the Regional Director and Board majority strayed from the preponderance-of-the-evidence standard by

rejecting evidence as supposedly “conflicting” and insufficiently “clear.” Company Br. 23-27. Second, and relatedly, both decisionmakers insisted on “specific occasion[s]” of the exercise of supervisory authority. *Id.* at 28-31.

Board counsel and the IBEW contend that the Company failed to preserve the first of these challenges. NLRB Br. 23-25; IBEW Br. 15-16. And Board counsel defend (at 25-28) the standards applied by the Board majority and Regional Director. These arguments lack merit, and the decisions below can be set aside on this basis alone.

A. The Company preserved all its challenges.

Board counsel appear to admit (at 23) that the Company has consistently contested the Board’s requirement of specific examples of the exercise of supervisory authority. Their forfeiture argument is limited to the Company’s challenge to the Board’s disregard of evidence that is supposedly in conflict or insufficiently clear. Even with that limitation, the argument fails.

The only legal principle cited by the majority was its claim that “the burden to establish supervisory status is not met where the record evidence ‘is in conflict or otherwise inconclusive.’” Appx5 n.3 (quoting

Phelps Cmty. Med. Ctr., 295 N.L.R.B. 486, 490 (1989)). The Regional Director cited the same principle, although it figured less prominently in his analysis. Appx21.

The Company challenged the Regional Director's discussion on this point in its request for Board review and brief before the Board. AR623-24; AR703-04; *see also* AR593; AR669. The Company explained that this discussion "reveal[ed] the Board's increasing reliance on doctrines and evidentiary principles . . . that are irreconcilable with the Act, which preclude a finding of supervisor status even when the record contains dispositive evidence of Section 2(11) authority." AR623; AR703. The Company argued that "[t]his unduly restrictive approach was applied by the Regional Director," and quoted the Regional Director's statement that "[w]here the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority the Board will find that supervisory status has not been established." *Id.* (citation omitted). The Company argued that such principles had no statutory basis and that "the Board should abandon those principles and overrule those decisions that have articulated and applied them." AR623-24; AR704. In addition, the Company invoked "the views expressed by former Chairman Miscimarra in

Buchanan Marine and other cases.” AR622; AR702-03. He frequently criticized the Board’s reliance on non-neutral evidentiary principles to reject supervisory status. *See Buchanan Marine, L.P.*, 363 N.L.R.B. No. 58, slip op. at 9 (Dec. 2, 2015) (Miscimarra, M., dissenting) (collecting cases); Company Br. 30-31.

This discussion is more than sufficient to preserve the Company’s arguments. “The crucial question in a section [10](e) analysis is whether the Board received adequate notice of the basis for the objection.” *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 437 (3d Cir. 2016) (citations and quotation marks omitted). That standard comes from *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001): because Section 10(e) seeks to “ensure[] that the Board has an opportunity to entertain questions that parties will later ask appellate courts to review,” courts should “consider whether a party has given the Board adequate notice of the basis for its objection and that it ‘intends to press the specific issue it now raises’ on appeal.” *Id.* at 987 (citations omitted).

The Company objected to the Board’s reliance on “doctrines and evidentiary principles regarding Section 2(11) authority that are irreconcilable with the Act,” including refusal to accept “evidence [that it] is in

conflict or otherwise inconclusive.” AR623-24; AR703 (citation omitted). The Board majority nevertheless made that principle the centerpiece of its ruling. Appx5 n.3.

In response to the majority’s ruling, of course, the Company developed its argument that these evidentiary principles conflict with the Act using relevant judicial precedent. But the Company provided ample warning that it would develop this objection if the Board majority chose to premise its ruling on an evidentiary principle whose statutory basis the Company contested. *See, e.g., FedEx*, 832 F.3d at 438 (finding an issue adequately preserved before the Board even though the petitioner had only included a two-sentence footnote stating that a prior Board ruling was incorrectly decided “largely for the reasons cited” in a dissenting opinion); *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1478-79 (7th Cir. 1992) (concluding that objecting to administrative law judge’s exclusion of affidavit sufficed to preserve issue for appeal without need for seeking reconsideration even though the Board’s grounds for exclusion were very different from the judge’s); *Local 900, Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB*, 727 F.2d 1184, 1193-94 (D.C. Cir. 1984) (agreeing to consider a “distinct” retroactivity objection

because petitioner had “made it clear to the Board that it would object to the remedies the Board adopted” and the Board “should have realized that the union would urge the [retroactivity] objection on appeal”).

Board counsel and the IBEW cite no contrary decisions forbidding petitioners from developing an already-raised argument in response to the Board’s reasoning.¹ The case law instead holds that once a petitioner presents an objection to the Board, Section 10(e) allows it to develop and refine that argument on appeal in light of the Board’s reasoning and applicable law and need not seek Board reconsideration to do so. *See Augusta Bakery*, 957 F.3d at 1478-79.

B. The Board’s evidentiary requirements are untenable.

On the merits, Board counsel and the IBEW fail to justify the Board’s strict standard of proof, which departs from the preponderance standard. They cannot defend the Board’s (1) dismissiveness toward

¹ The cases cited by Board counsel are not remotely similar. In *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255 (1943) (per curiam), a boilerplate objection to “each and every recommendation” of the trial examiner provided insufficient notice of the employer’s objection to the Board’s authority to award a specific remedy. In *Pace University v. NLRB*, 514 F.3d 19, 22-25 (D.C. Cir. 2008), the appeal turned on whether the Board had abused *its* discretion in prohibiting the employer from raising a new objection in an unfair labor practice proceeding. IBEW’s string-cited cases (at 16) are likewise inapposite.

supposedly conflicting or unclear evidence (which was neither conflicting nor unclear) or (2) insistence on examples of the exercise of supervisory authority.

1. Board counsel and the IBEW do not dispute that the preponderance standard governs and requires evidence “sufficient to permit the conclusion that the proposed finding is more probable than not.” NLRB Br. 22 (citation omitted); IBEW Br. 14. Nor do they deny that Supreme Court precedent prohibits the Board from applying the standard in a way that differs from the preponderance standard that has been formally announced. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998). They instead insist that the majority did not depart from the preponderance standard. NLRB Br. 25-26; IBEW Br. 16-18.

This claim is demonstrably incorrect. On its face, the Board majority’s evidentiary discussion turned on whether the majority found “clear evidence” of supervisory status that did not conflict with other evidence. And a comparison of the majority’s discussion to the record and Regional Director’s own findings shows that the majority used its “clear evidence” standard as a smokescreen to avoid reaching the conclusion that the law and facts required.

Immediately after acknowledging that “some Employer witnesses testified that System Operators have the authority to prioritize jobs,” the majority turned to its interpretation of the testimony of only one union witness, Jim Luciani, as supposedly conflicting. Appx5 n.3. But Luciani’s testimony was actually consistent with the Company’s witnesses. Luciani testified that System Operators *can* prioritize one outage over other work. AR229-30, AR239-41. He also admitted that System Operators have “authority to cancel work” without “authorization or permission from anyone,” AR235-36, and “authority to change” a scheduled work plan when “a storm rolls in,” AR238. As the IBEW even concedes, Luciani explained “that in the event of multiple outages, if a troubleman is at one outage and does not have a higher priority, the [System Operator] has the authority to ask the troubleman to ‘go to the hospital next.’” IBEW Br. 25 (quoting AR241).² The testimony on these points was not

² In taking a different view of this exchange, Board counsel claim (at 35) that “Lucian[i] previously made clear that the field employee could simply say no” to a request to go to the hospital. There is no support for that claim. As the full testimony shows, Company Br. 42-43, Luciani said Dispatchers do *not* have authority to override System Operators’ priority decisions, and System Operators *do* have authority to tell field employees to go to a hospital unless the field employees do not have a “higher priority” like a human safety. AR240-41.

in conflict, and as detailed below, *see infra* Section II, these facts establish assignment authority under the holding of *Entergy*.

But even if elements of Luciani's testimony conflicted with that of other witnesses, the preponderance standard and reasoned-decisionmaking requirement do not let the Board end its analysis based solely on the identification of evidentiary conflict. At a minimum, the Board had to identify some reason for crediting the testimony of one witness over the testimony of others. *Cf., e.g., NLRB v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978) (explaining that when "the evidence before the Board is conflicting, and the Board's decision rests on credibility," courts are not "compelled to respect" a Board "credibility choice [that] is based on an inadequate reason, or no reason at all"). Here, the Board offered no reason—in either its decision or appellate brief—for finding (some of) Luciani's testimony more credible than that of the Company's witnesses. And the Board failed to address the key portions of Luciani's testimony that are entirely consistent with that of the Company's witnesses.

That failure is made worse by the Board's refusal to acknowledge the Regional Director's contrary findings in its decision and its appellate brief. The Regional Director made findings that System Operators

“determine how resources are allocated,” “make priority decisions about where to place resources,” and “have the authority to direct Field Supervisors to assign crews” in the case of any disagreement. Appx26-27. Given those findings, Board counsel cannot simply assert that the evidence was “conflicting” or “inconclusive.” The evidence was conclusive enough for the Regional Director to make these findings, which, by Board counsel’s own admission, the Board majority fully adopted. The Board majority and the Regional Director simply drew the wrong legal conclusion from these findings because they rejected the law articulated in the *Entergy* cases.

The substantial evidence standard of *judicial* review cannot justify these flawed evidentiary requirements. *See* NLRB Br. 26-27; IBEW Br. 17-18. By defining how *courts* should review the evidence, that standard gives the Board certain flexibility to make “a choice between two fairly conflicting views” of the evidence. NLRB Br. 27 (citation omitted). But the Board’s arguments here would inappropriately relieve the Board from making and explaining that choice.

Besides, even with the substantial evidence standard, the Board “is not free to prescribe what inferences from the evidence it will accept and

reject.” *Allentown Mack*, 522 U.S. at 378. It “must draw all those inferences that the evidence fairly demands.” *Id.*; see also, e.g., *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 437 (D.C. Cir. 2012) (explaining that a “lack of evenhandedness” in reviewing conflicting testimony violates the Board’s obligation under *Allentown Mack* (citation omitted)). Board counsel and the IBEW ignore these lessons from *Allentown Mack* and thus fail to defend the Board’s heightened standard of proof.

In this regard, the Board’s one-sidedness resembles its approach in another recently set-aside decision. In *STP Nuclear Operating Co. v. NLRB*, — F.3d —, 2020 WL 5543049, at *5 (5th Cir. Sept. 16, 2020), the Fifth Circuit—relying on its ruling in *Entergy II*—held that the Board’s denial of supervisory status “lacked substantial evidence” in the record as a whole. *Id.* The court stressed that a Board “decision that ignore[s] management testimony as well as all testimony from the [union side] that was damaging to [the union’s] case is not supported by substantial evidence.” *Id.* at *9. In *STP Nuclear*, as here, the Board had impermissibly “[t]urn[ed] a blind eye to” managerial testimony establishing that the purported supervisors had the claimed authority. *Id.*

This Court's precedent likewise stresses that the Board may not simply ignore relevant evidence that cuts against its conclusion. *E.g.*, *NLRB v. ImageFIRST Unif. Rental Serv., Inc.*, 910 F.3d 725, 736 (3d Cir. 2018) (denying enforcement on this ground); *MCPC, Inc. v. NLRB*, 813 F.3d 475, 492 (3d Cir. 2016) (same). Still less may the Board ignore evidence *and* factfinder findings that the Board has adopted as its own. *ImageFIRST*, 910 F.3d at 736. Yet here the Board did just that.

2. Board counsel and the IBEW compound their problems by refusing to address a wealth of Third Circuit precedent rejecting the proposition that employers must provide specific examples of the exercise of supervisory authority. Four Third Circuit decisions across six decades hold that supervisory status depends on the *possession* of supervisory authority regardless of whether or how often that authority is exercised. *See NLRB v. Beaver Meadow Creamery*, 215 F.2d 247, 251 (3d Cir. 1954); *W. Penn Power Co. v. NLRB*, 337 F.2d 993, 996 (3d Cir. 1964); *NLRB v. Prime Energy Ltd. P'ship*, 224 F.3d 208, 210 (3d Cir. 2000); *NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113, 132 (3d Cir. 2017); *Company Br. 29*, 38-39. Board counsel and the IBEW never grapple with these holdings and similar decisions from other courts. *See, e.g.*, *STP Nuclear*, 2020

WL 5543049, at *4 (“[T]he possession of authority to engage in any of these [supervisory] functions—even if this authority has not yet been exercised—is what determines whether an individual is a supervisor.”).

Board counsel instead highlight (at 27-28) a non-precedential Third Circuit ruling and a D.C. Circuit decision. *See NLRB v. Sub Acute Rehab. Ctr. at Kearny, LLC*, 675 F. App’x 173, 178 (3d Cir. 2017); *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962-64 (D.C. Cir. 1999). But neither establishes that employers must offer specific examples of the exercise of supervisory authority. In fact, *Beverly Enterprises* recognizes that “the failure to exercise supervisory authority may indicate only that circumstances have not warranted such exercise” and that “a supervisor’s lack of occasion to exercise authority may itself indicate that that authority is very strong indeed.” 165 F.3d at 963.

Unlike this case, *Sub Acute* and *Beverly Enterprises* involved generalized testimony about purported supervisory authority that was discredited by specific examples involving the purported supervisors. In *Sub Acute*, one witness testified that “Licensed Practical Nurses” made assignments based on judgments about lower-level employees’ skill levels, but the same witness exclusively offered examples in which her

assignments were not based on such judgments. 675 F. App'x at 178. In *Beverly Enterprises*, there were seven specific examples of the purported supervisors *declining* to impose discipline on their own, belying claims that they had disciplinary authority. 165 F.3d at 963-64.

Here, in contrast, there are no concrete examples casting doubt on System Operators' supervisory authority. Yet the Board ignored the undisputed evidence based on a supposed lack of "clear evidence of a specific occasion" on which that authority was exercised. Appx5 n.3. That approach contradicts the law of this circuit and must be rejected.

II. Board counsel and the IBEW cannot explain how the System Operators have less authority than the *Entergy* dispatchers.

The Company's opening brief explained (at 34-35, 45-46) that System Operators' authority to assign field crews to places is materially indistinguishable from the authority held by dispatchers in *Entergy II* and *III*. The Board itself concluded in *Entergy III* that because "decisions regarding outage prioritization and reassigning field employees necessarily result in the dispatchers sending particular field employees to particular places in multiple outage situations," those dispatchers "undisputedly assign employees to places. 367 N.L.R.B. No. 109, slip op. at 3. The Board rejected as "meritless" the very argument that Board counsel and the

IBEW make here—that, to be supervisors, the dispatchers must “assess the skills of individual field employees and match them to specific repair jobs.” *Id.* Since the filing of the Company’s opening brief, the Fifth Circuit denied the union’s petition for review of *Entergy III*, heightening the need for treating these like cases alike. *See Int’l Bhd. of Elec. Workers, AFL-CIO v. NLRB (Entergy IV)*, 973 F.3d 451 (5th Cir. 2020).

Board counsel cannot defend the Board’s different conclusion here based on supposed differences in the record. The record establishes that System Operators possess the same authority as the dispatchers in the *Entergy*.

A. Board counsel and the IBEW barely elaborate on the majority’s conclusory assertion that the record here differs from the *Entergy* record. NLRB Br. 36; IBEW Br. 39-40. According to Board counsel’s account, “the facts in *Entergy* supported the findings that dispatchers [1] assigned employees to locations, [2] then reassigned them elsewhere, or [3] called out additional employees when necessary, [while] the record here establishes that system operators possess no such authority.” NLRB Br. 36. The Regional Director’s own findings, which Board counsel concedes (at 13) were adopted “in full,” demonstrate that Board counsel

are wrong to distinguish *Entergy* on these grounds: those findings show that System Operators have each of these three types of authority.

First, the Regional Director’s findings show that System Operators “assign[] employees to locations.” System Operators “determine how resources are allocated, which can impact how long field employees are at a particular jobsite, and the number and type of crews dispatched.” Appx26. As a granular example of System Operators’ authority to assign employees to locations, the Regional Director found that System Operators can “dispatch a crew to [a] site to operate [a] switch.” *Id.*

Second, System Operators’ authority to make priority decisions includes authority to “reassign[]” field employees from one location to another. The Regional Director found that this authority “might entail dispatching field employees from a small outage to a large outage.” Appx27. And the Regional Director further found that “[i]n storm conditions, System Operators can reallocate field employees from planned work to trouble work.” *Id.* Even Board counsel admit this (at 30).

Third, System Operators have authority to “call[] out additional employees when necessary.” According to the Regional Director’s findings:

If a System Operator orders a field crew to a site but a Dispatcher cannot accommodate the request, a System Operator can call a Field Supervisor directly and request that a crew be dispatched. However, Field Supervisors can refuse such requests. If there is a disagreement as to whether a field crew should be assigned, *System Operators have the authority to direct Field Supervisors to assign crews*

Appx27 (emphasis added). To be sure, the Regional Director complained about a lack of examples of System Operators exercising their authority to overrule Field Supervisors. *Id.* But as discussed above, the law requires only that the authority exist, regardless of how often it is exercised. *See supra* Section I.B.2.

B. Ignoring these findings, Board counsel try to distinguish *Entergy* by implying that Field Supervisors need not implement System Operators' assignment decisions. They claim, for example, that the evidence is "unclear" as to what happens if a Field Supervisor disagrees with a System Operator's assignment decision. NLRB Br. 15-16, 31. The IBEW similarly asserts (at 7) that System Operators only "allegedly" have authority to direct Field Supervisors to assign crews.

These contentions simply contradict the Regional Director's finding that "System Operators have the authority to direct Field Supervisors to

assign crews.” Appx27. Board counsel and the IBEW cannot justify the Board’s decision by manufacturing factual uncertainty that the Regional Director found not to exist.³

At times, Board counsel seem to want to distance themselves from their concession that the majority adopted the Regional Director’s findings. For example, they highlight the Board majority’s statement that “Luciani’s testimony disputed the assertion that System Operators have the authority to command Dispatchers, Field Supervisors, and Work Coordinators to dispatch employees to a specific location or call them back,” Appx5 n.3—again ignoring the Regional Director’s finding that in the event of a disagreement, System Operators “*have the authority to direct Field Supervisors to assign crews.*” Appx27 (emphasis added).

The Board cannot cherry-pick the record evidence to advance a conclusion contrary to the record as a whole and the Regional Director’s own

³ Board counsel misleadingly suggest that the Regional Director found the evidence “conflicting as to whether the system operators ‘have the authority’ to require that field crews follow [System Operators’] input.” NLRB Br. 31. But the Regional Director merely stated that Field Supervisors have the authority to match up specific employees to the tasks that the System Operators have designated as a priority. Appx31. As discussed below, *infra* Section II.C, this does not undermine System Operators’ assignment power.

finding. True, Luciani expressed his opinion, “I don’t think that I can direct the supervisor to [call in crews].” AR234 (Luciani). But Luciani ultimately admitted that System Operators *do* have “authority to change” a scheduled work plan when “a storm rolls in,” AR238, and to tell field employees where to go during an outage, AR240-41. Luciani did not contend that Field Supervisors had ever disagreed with his or any other System Operators’ decision to send a crew to a high-priority site.

Luciani’s supervisor, shift manager Jay Davis, extensively testified that if a Field Supervisor refuses to bring in a crew, System Operators can order him to do so. AR245-48. He said he knew of “situations where that’s happened,” although “[i]t’s uncommon” because Field Supervisors “shouldn’t be refusing system operation’s request to get work done.” AR248-49; *see also* AR135, AR138 (Sullivan) (testifying that System Operators can direct Field Supervisors to assign crews). Contrary to Board counsel’s assertions (at 31) and the IBEW’s (at 7, 18), Davis’s testimony was not “conclusory.” The Regional Director *credited* it. And reasonably so, because it was consistent with Luciani’s own admissions about System Operators’ authority.

At a minimum, even if one indulges the fiction that System Operators cannot overrule Field Supervisors without Davis’s intervention, the evidence at least shows that System Operators can effectively recommend assignments—which is sufficient to prove supervisory status. *See* Company Br. 39. Davis himself testified that he stands behind System Operators’ decisions, that he treats those decisions as taking precedence over Field Supervisors’ views, and that System Operators have the “ultimate authority” to make such decisions, in emergency situations especially. AR248. Board counsel and the IBEW have no response to this evidence of effective recommendation. The IBEW ignores effective recommendation entirely, and Board counsel merely repeat (at 32) their erroneous demand for more specific examples. *See supra* Section I.B.2.

C. The other strategy Board counsel and the IBEW pursue to distinguish *Entergy* is to stress that System Operators do not pick which specific employees will go to outage locations that System Operators determine to be priorities. NLRB Br. 29-31; IBEW Br. 27-28. But the System Operators’ authority to assign work is no less supervisory merely because the details of the System Operators’ assignment decisions are implemented by other supervisors (the Field Supervisors).

On the contrary, the Ninth Circuit has held on similar facts that “[t]he effective exercise of authority is nonetheless supervisory though it is passed on through another supervisory employee.” *Ariz. Pub. Serv. Co. v. NLRB*, 453 F.2d 228, 233 (9th Cir. 1971). Board counsel and the IBEW suggest that this case is no longer good law because it found the “System Supervisors” to have responsible-direction authority, and the Board has since modified its responsible-direction test. But Board counsel identify no case from any era that calls into question *Arizona Public Service’s* holding on this point—*i.e.*, whether it makes any difference that System Operators’ decisions are implemented by Field Supervisors.⁴

In fact, in upholding the Board’s *Entergy III* decision, the Fifth Circuit rejected a similar argument. *Entergy IV*, 973 F.3d at 463-64. The court found it reasonable for the Board to have held in *Entergy III* “that dispatchers’ prioritization of outages required the use of independent judgment, and that this discretionary function *necessarily* results in the

⁴ Board counsel err in suggesting (at 37) that System Operators, unlike the *Arizona Public Service* supervisors, lack frequent direct contact with field employees. Luciani testified that System Operators regularly have direct contact with field employees, including when “they need to transfer their clearance because they are leaving and somebody else has to take over.” AR222, AR232.

assignment of field employees to places.” *Id.* The court rejected the union’s argument that this type of supervisory authority exists only where the supervisors consider particular field employees’ skills or qualifications. *Id.* at 464. This discussion refutes the IBEW’s mistaken claim (at 27-28) that assignments must assess employees’ qualifications to involve independent judgment.

D. As in *Entergy*, System Operators prioritize where field employees are sent to work, and there is no serious dispute that those priority decisions require the exercise of independent judgment. The Company’s opening brief explained (at 54), and Board counsel do not disagree, that although the Regional Director concluded System Operators use “professional judgment,” Supreme Court precedent precludes treating “professional judgment” as something less than “independent judgment.” *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 715 (2001).

Board counsel misleadingly suggest (at 7) that dispatching field crews is a fully automated process. That is also the main theme of Amicus IBEW International, which improperly relies on outside-the-record evidence to make its argument. The actual record of this case establishes otherwise: System Operators have to weigh competing considerations—

including safety, the type of customers affected, staffing and efficiency considerations, as well as the broader impact to the electrical grid itself—in deciding whether to prioritize one outage over another. Company Br. 55-56. From this evidence, the Regional Director found that System Operators use a range of information to perform the “difficult task” of making decisions that affect “individual and societal safety and security while constantly balancing needs and risks.” Appx30. The same sort of evidence led the Fifth Circuit to remand *Entergy II* to the Board. See *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 297 (5th Cir. 2015).

The independent judgment System Operators display in making priority decisions explains why *NLRB v. NSTAR Electric Co.*, 798 F.3d 1 (1st Cir. 2015), does not support the Board. Contrary to the IBEW’s portrayal (at 33-34), there was no dispute in *NSTAR* about whether decisions by “Transmission System Supervisors” to send field employees to particular locations “constitute assignments within the meaning of the statute.” 798 F.3d at 13. The dispute turned on independent judgment. *Id.* And as the Company’s opening brief explained (at 56), the First Circuit found NSTAR’s best argument for independent judgment forfeited.

Board counsel argue (at 46) that the First Circuit found insufficient evidence that the *NSTAR* Transmission System Supervisors actually made prioritization decisions during multiple outages, claiming that the record here is the same. But again, Board counsel ignore the Regional Director's findings here: "System Operators . . . make priority decisions about where to place resources," including when multiple outages occur simultaneously. Appx27. Board counsel (and the IBEW) likewise ignore the Company's extensive discussion of the evidence and findings showing that these decisions require independent judgment and that System Operators regularly deviate from written guidelines, which the Regional Director's findings described as "often a weekly occurrence." Appx26; Company Br. 50-56. Board counsel simply rehash their claim that System Operators' outage priority decisions do not "involve any of the Section 2(11) powers" and their vague demands for more "specific evidence." NLRB Br. 42-44, 47.

Because these arguments fail as already discussed, the Court should conclude that System Operators are supervisors for the same basic reasons as the dispatchers in the *Entergy* cases. The Board's failure to offer more than "*ipse dixit*" dismissal of the *Entergy* cases justifies

setting the decision aside on its own. *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004).⁵

* * *

The most glaring grounds for vacatur here are the Board majority’s departure from binding Supreme Court and Third Circuit authority on the appropriate evidentiary principles, and failure to adhere to its own conclusion in *Entergy* that prioritizing outage work “necessarily” results in the assignment of field employees to particular places. But as discussed next, the Board also erred in its rejection of the other indicia of supervisory authority, and Board counsel and the IBEW fail to explain those errors away.

⁵ In a footnote, Board counsel suggest that the Court should decline to follow the *Entergy* cases because of a “threshold question” about whether “temporary assignments of field employees to trouble locations constitute[s] assignment within the meaning of Section 2(11).” NLRB Br. 36 n.5 (citation omitted). Intervenor IBEW and Amicus IBEW International make similar arguments. But the Board’s rulings undisputedly did not rest on this line of reasoning. And under black-letter administrative law, courts “must judge the propriety of [agency] action solely by the grounds invoked by the agency.” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also, e.g., New Vista*, 870 F.3d at 133 n.12. So the Court may not take up these arguments that prioritizing outages cannot qualify as assignment to places because these assignments are merely “temporary.”

III. The Board failed to address evidence that System Operators assign employees to times.

Many of the facts demonstrating System Operators' authority to assign employees to locations using independent judgment also demonstrate authority to assign employees to times using independent judgment. Company Br. 46-49. The IBEW ignores these arguments. And Board counsel return to their earlier points, including their constant, incorrect refrain that the Company needed to produce more examples of the exercise of authority. NLRB Br. 39-42. But Board counsel also make a separate argument regarding overtime that warrants a response.

Both sides apparently agree that being able to require overtime constitutes assignment authority. *See Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689 (2006). Board counsel maintain (at 41) that even though System Operators are able to "conclude that overtime work is necessary," they do not possess this form of authority because they purportedly cannot require specific employees to perform necessary overtime. But as Board counsel admit, Michael Sullivan, Pepco Holdings' Vice President of Electric and Gas Operations, testified to the contrary: System Operators *can* require specific crews to perform overtime, at least in emergency situations. AR159. Neither the Board nor the Regional

Director addressed this testimony. Nor did they explain that they were “discount[ing] that testimony as conflicting with Luciani’s.” NLRB Br. 41. Here too, the Board simply disregarded evidence that conflicted with its conclusion, which is not reasoned decisionmaking and is unsupported by substantial evidence on the record as a whole. *See supra* pp. 12-13.

In any event, Luciani’s testimony does not conflict with Sullivan’s. Sullivan testified specifically about requiring overtime in emergency situations, while Luciani explained, more generally, that his practice would not be to hold the same crew over if they had clocked out. AR233-34 (Luciani). Luciani did not say that he disagreed with Sullivan or that he could not require specific employees to stay on an assignment in an emergency situation. Again, it is improper to dismiss managerial testimony out of hand simply because there was other evidence suggesting “that some supervisors do not exercise their authority.” *STP Nuclear*, 2020 WL 5543049, at *9 n.14.

IV. System Operators responsibly direct other employees using independent judgment.

Board counsel and the IBEW do not dispute that System Operators direct field employees; their arguments rest on a strained interpretation

of accountability. And Board counsel's arguments as to why System Operators do not direct *Dispatchers* repeat the factual mischaracterizations debunked above. *See supra* p. 9 & n.2; AR240 (Luciani) (testifying Dispatchers do not have authority to override System Operators' priority decisions). Rather than repeating these points, this section addresses the arguments that implicate responsible direction, which is a sufficient, independent basis for finding supervisory status.

A. Board counsel misconstrue accountability.

The Company's opening brief explained (at 63-64) that the Board's constricted notion of accountability conflicts with *Oakwood Healthcare*, which defines accountability as requiring the putative supervisor to take corrective action when supervised employees err. 348 N.L.R.B. at 692. In response, Board counsel *agree* with this description of *Oakwood Healthcare*, NLRB Br. 48, 53, but they try to twist the Company's argument away from the crucial point: the line between holding supervisors accountable for their own mistakes versus their subordinates' mistakes is not where the Regional Director drew it.⁶

⁶ Board counsel's heavy reliance on *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011), is misplaced. The Court there found a

The record here clearly shows at least a “prospect of adverse consequences” if System Operators fail to take corrective action toward (1) field employees and (2) Dispatchers. As Board counsel concede (at 49), the “verbal censure” one System Operator received came because he failed to fix a problem that the field crew created “without notifying” that System Operator. Specifically, the System Operator was censured for not “making sure that work should have been completed” by the field crew. AR190 (Davis). While it is true that the System Operator could have solved the issue by calling in a new crew, it was the field employees’ failure to complete the work on schedule that put him in that position where corrective measures were necessary. The field crew’s action was the reason for the System Operator’s censure.

Board counsel also mischaracterize the second specific example discussed in the Company’s opening brief (at 62). The testimony reveals “that the system operator should have given some further instruction to

lack of accountability because numerous examples showed the putative supervisors were *not* accountable for subordinates’ mistakes. *Id.* The Court did not cast doubt on the principle, which Board counsel accept, that imposing adverse consequences on a supervisor for failing to take corrective action qualifies as accountability.

the field resource,” AR190-91 (Davis)—exactly the sort of corrective action that *Oakwood Healthcare* contemplates.

Board counsel dispute the severity of the adverse consequences that these episodes, or field crew switching mistakes more generally, pose for System Operators. But the Regional Director and Board did not make these arguments, Appx5 n.3; Appx28, so *Chenery* precludes considering them. Besides, Board counsel acknowledge that warnings suffice as a prospect of adverse consequences. NLRB Br. 53 (citing *Croft Metals, Inc.*, 348 N.L.R.B. 717, 719 (2006)). In addition, the evidence is uncontradicted that System Operators’ evaluations and compensation count the number of errors made by field employees and require that number to be less than 25. Company Br. 63. This case is nothing like *Mars Home*, where the employer failed to adequately explain evaluations’ vague references to “interpersonal relationships.” 666 F.3d at 854.

For similar reasons, Board counsel fail (at 57) to undermine the evidence that System Operators’ oversight of Dispatchers affects their compensation. Board counsel cite no contrary evidence and merely ignore the testimony about how System Operators’ bonus structure considers their “average speed of restoration.” AR161 (Sullivan). The evidence

shows that restoring power after an outage turns, at least in part, on System Operators' guidance to the Dispatchers about which particular outages take priority. AR239-40 (Luciani).

B. System Operators' direction of field employees and Dispatchers requires independent judgment.

The Company's opening brief (at 66-67) relied on, and cross-referenced, the same evidence that shows System Operators' independent judgment in making priority decisions as support for the separate claim that System Operators exercise independent judgment in responsibly directing field employees and Dispatchers. Board counsel nonetheless assert (at 57) that the Company failed to identify the evidence of System Operators' independent judgment in this responsible direction. In doing so, Board counsel mistakenly assume the only question here is whether switching instructions, standing alone, require independent judgment. NLRB Br. 54-56; *see also* IBEW Br. 29-30.

But the Board ignores the reason why System Operators write switching instructions—to give direction to other employees so they can safely perform work that does not already have a predetermined plan or sequence. AR126-27. That is the essence of independent judgment.

Furthermore, switching instructions were hardly the Company's only example of responsible direction. A critical part of System Operators' direction to field employees and Dispatchers is prioritizing the restoration of power at high-priority sites. That was the problem that led to the System Operator's verbal censure in the example recounted above involving a nuclear facility's inability to perform its diesel emergency generator test. AR189-90 (Davis). As the *Entergy* cases and evidence in this case attest, such priority decisions require independent judgment and are not predetermined by Company guidelines.

CONCLUSION

The Court should grant the petition for review, set aside the Board's Decision and Order, the Board's Decision on Review, and the Regional Director's Decision and Direction of Election and certification of election results, and deny the Board's cross-application for enforcement.

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COMBINED CERTIFICATES OF COMPLIANCE

In accordance with Local Appellate Rules 28.3(d) and 46.1(e), I certify that all attorneys whose names appear on this brief are members in good standing of the bar of this Court or have filed an application for admission.

In accordance with Local Appellate Rule 31.1(c), I certify that the texts of the electronic brief and paper copies are identical and that McAfee Endpoint Security 10.7 was run on the file and did not detect a virus.

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,481 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1), according to the word count of Microsoft Word 2016. 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 Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: October 20, 2020

s/ Michael E. Kenneally
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CERTIFICATE OF SERVICE

I hereby certify that counsel for all parties are registered as Filing Users of the Court's CM/ECF system and that a copy of this brief will be served electronically on this date by operation of the Court's CM/ECF system.

Dated: October 20, 2020

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