On December 27, 2021, International Brotherhood of Electrical Workers, Local 160 (“Petitioner”) filed a representation petition under Section 9(c) of the National Labor Relations Act (“Act”) seeking to represent certain employees employed by Northern States Power Company, a Minnesota corporation, d/b/a Xcel Energy (“Employer”) out of its transmission control center located in Minneapolis, Minnesota. Specifically, Petitioner seeks a unit of all full-time and regular part-time Balance Authority Operators (“BAOs”), Senior BAOs, Transmission System Operators (“TSOs”), Senior TSOs, and Network Reliability Leads (“NRLs”). There are approximately 17 employees in the petitioned-for unit.

A videoconference hearing on the petition was held on January 19, 20, and 21, 2022, before a hearing officer of the National Labor Relations Board (“Board”). The parties stipulated that the sole issue for me to decide is whether the NRLs employed by the Employer at its transmission control center located at 414 Nicollet Mall, Minneapolis, Minnesota, are supervisors as defined by Section 2(11) of the Act.

At the outset of the hearing, the hearing officer set forth the burden for proving supervisory status, including the Board’s standard of specific detailed evidence, and then the parties were provided with an opportunity to present their positions, call, examine, and cross-examine witnesses, to introduce into the record evidence of the significant facts that support their contentions, and to orally argue their respective positions and submit post-hearing briefs.

The Employer asserts NRLs must be excluded from any appropriate unit because they are statutory supervisors while Petitioner maintains NRLs do not possess any of the primary indicia required for a supervisory finding. Specifically, the Employer contends NRLs have authority in the interest of the Employer to assign work to employees, to responsibly direct employees, and to effectively recommend hiring, promotion, and demotion, using independent judgment. Petitioner maintains NRLs do not use independent judgment inasmuch as there is only one BAO (or Senior

1 At the hearing, the parties stipulated that NRLs do not exercise the authority to discharge, suspend, or lay off or recall other employees.
BAO) and one TSO (or Senior TSO) on any given shift and any tasks assigned or direction given are specific to one or the other position. It further argues NRLs do not effectively recommend hiring, promotion, or demotion.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, including the parties’ post-hearing briefs, and relevant Board law, I find that the Employer failed to meet its burden of showing NRLs are statutory supervisors by specific detailed uncontroverted evidence. Accordingly, I shall order a mail-ballot election in the petitioned-for unit.

I. THE EMPLOYER’S OPERATIONS

Xcel Energy services millions of electric and natural gas customers in Minnesota, Michigan, Wisconsin, North Dakota, South Dakota, Colorado, Texas, and New Mexico, through four operating companies: (1) The Employer, Northern States Power Company (Minnesota); (2) Northern States Power Company (Wisconsin); (3) Public Service Company of Colorado; and (4) Southwestern Public Service Company. Electricity is distributed through high-voltage transmission grids made up of transmission lines that deliver electrons from the powerplants where electricity is generated to load centers, where the Employer or other utilities distribute it to customers.

As a utility company, the Employer must abide by numerous regulations and standards including, but not limited to, those set by the Federal Energy Regulatory Commission (“FERC”), the federal agency that regulates the transmission and wholesale sale of electricity and natural gas; North American Electric Reliability Corporation (“NERC”), a nonprofit organization that promotes and ensures the stability of the North American bulk power system; Midcontinent Independent System Operator (“MISO”), a nonprofit independent system operator and regional transmission organization responsible for coordinating, controlling, and monitoring transmission systems across 15 U.S. states and the province of Manitoba in Canada; and Midwest Reliability Organization (“MRO”), which handles auditing and compliance for reliability electricity distribution. Failure to comply with NERC standards may result in fines or jeopardize the Employer’s continued operation. The Employer also falls within MISO’s geographic footprint. As such, MISO has the authority to declare emergencies and to require the Employer to take certain actions to maintain reliability across the transmission grids operated by its multiple

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2 Although not questioned by the Employer, I also find the petitioned-for NRLs share a community of interest with the petitioned-for BAOs, Senior BAOs, TSOs, and Senior TSOs based on the facts that NRLs, BAOs, and TSOs, including Senior BAOs and Senior TSOs, work together in the control center, have near constant interaction, interchange with the other positions in which they are qualified, and share similar terms and conditions of employment.

3 The parties stipulated to the appropriateness of a mail-ballot election, “with a 3-week polling period from the date ballots are mailed out until the date they are to be received.”

4 The Employer and Northern States Power Company (Wisconsin) are a singular registered functional entity with NERC.
member utility companies. In order to aid in complying with regulations and standards, the
Employer has developed a myriad of policies, procedures, guides, and manuals.\(^5\)

Each of Xcel Energy’s operating companies, including the Employer, have a transmission
control center ("control center")\(^6\) responsible for monitoring and controlling the high-voltage
transmission grids by manipulating the paths electrons travel from generation to load center,
which is typically done by switching facilities in and out of service ("outages"). Control centers
are primarily responsible for wholesale power transfers and distribution, although some limited
end-use customers are connected directly to the high-voltage transmission grid.

A. THE MINNEAPOLIS TRANSMISSION CONTROL CENTER

The instant petition involves employees at the Employer’s control center in
Minneapolis, Minnesota, which covers all the transmission assets the Employer owns and
operates in three states—Minnesota, North Dakota, and South Dakota. Assistant Manager
Mark Tiemeier is responsible for the Minneapolis control center and reports to Senior Director
of NSP Transmission Control Center Todd Sarkinen, who oversees both the Minneapolis control
center and the Xcel Energy control center in Eau Claire, Wisconsin.\(^7\) Sarkinen’s superior is
Senior Director of System Operations Roger Hargreaves, who oversees all four of Xcel Energy’s
control centers.

The Minneapolis control center\(^8\) is located behind a secure door on the secure sixth floor
of the Employer’s headquarters building. The control center contains a large map board with
customizable monitors displaying data and information about the Employer’s transmission grid,
which consists of approximately 450 substations and 5500 miles of transmission lines. In front
of the monitors are rows of consoles and desks. The front row contains four consoles and desks
while the second row consists of backup consoles and desks, which can be staffed in emergency
situations. The control center also contains a kitchenette and restrooms. Adjacent to the control
center are the offices of Assistant Manager Tiemeier, Senior Manager Sarkinen, and Senior
Director Hargreaves, who all generally work regular business hours, Monday through Friday.
The record indicates Tiemeier currently works in the office approximately three days per week
and from home two days per week. It does not disclose how often Sarkinen or Hargreaves are in
the office.

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\(^5\) The record contains approximately 27 Transmission System Policies and Plans, Transmission Operations
Procedures, and Emergency Operating Procedures and Plans; three Training Guides; and one Transmission Alarm
Manual. Although referenced multiple times, the record does not contain any Operating Guides.

\(^6\) Xcel Energy’s four transmission control centers are located in Golden, Colorado; Amarillo, Texas; Eau Claire,
Wisconsin; and Minneapolis, Minnesota.

\(^7\) According to Tiemeier, Sarkinen’s direct reports are the Minneapolis control center Assistant Manager (himsel),
the Eau Claire control center Assistant Manager, and the Employer’s energy accountant and three outage
coordination engineers.

\(^8\) Testimony regarding the Minneapolis control center primarily came from four witnesses: (1) Senior Director Roger
Hargreaves; (2) Assistant Manager Mark Tiemeier; (3) a current 10-year NRL, who previously held positions with
the Employer as a BAO for approximately 1 year and TSO for approximately 4 years; and (4) a current 1-year NRL,
who previously held positions with the Employer as a BAO for approximately 2 years and as a TSO and Senior TSO
for approximately 6 years.
Inside the control center, system operators\(^9\) monitor and control the Employer’s transmission grid from the front row of consoles and desks. System operator is an umbrella term that refers to all the petitioned-for classifications—NRL, TSO, and BAO, including Senior TSO and Senior BAO.\(^{10}\) From left to right, the consoles and desks correspond to the BAO, NRL, and TSO. A fourth desk, known as transmission work request (“TWR”) is discussed below.

The Employer has organized its system operators into six crews, each generally consisting of one NRL, one TSO, and one BAO. Each crew works a 12-hour shift, from either 5:00 a.m. to 5:00 p.m. or 5:00 p.m. to 5:00 a.m. Only one crew is considered on duty at a time. The crews operate on a 6-week rotation, including two training weeks where they work five 8-hour weekday shifts. Since the onset of the COVID-19 pandemic, some training has been completed remotely. The record indicates system operators may pick up or cover open 12-hour shifts, resulting from scheduled and unscheduled absences or vacancies on other crews.

Assistant Manager Tiemeier testified that the BAO\(^{11}\) is responsible for the accuracy of data and information flowing into the control center pertaining to, among other things, how much electricity is generated, how much electricity is transferred from and to the Employer’s transmission grid and to neighboring grids, and the BAO calculates customer demand and load. The Employer currently employs four qualified BAOs, including one Senior BAO.

The primary responsibilities of the TSO involve switching facilities in and out of service and responding to equipment alarms. They work with field employees to ensure a safe environment for field crews to do their work (e.g., by switching a facility out of service while work is performed). They are also responsible for maintaining a consistent voltage across the Employer’s system to deliver electricity in an efficient manner. An NRL reporting on a TSO trainee indicated “80% of the TSO job is being the gatekeeper for safety, coordinating field work, communication with other control centers, and managing hardware problems on a real-time basis.” During the second training week in their 6-week rotation, TSOs typically cover the TWR desk, which consists of an 8-hour shift, Monday through Friday, dealing with upcoming outages and writing switching orders for the following day.

The Employer currently employs seven TSOs, including one or two Senior TSOs and one to three TSOs-in-training.\(^{12}\)

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\(^9\) Also referred to in the record simply as operators.

\(^{10}\) Tiemeier testified that the “Senior” designation requires a minimum 3 years’ experience in the underlying position. “Senior TSOs have some introductory training on some … special tools that help evaluate grid condition and also have additional responsibility to work on training of others, other TSOs in particular,” according to Tiemeier. The record indicates Senior BAOS have some unspecified additional responsibilities. As such, unless otherwise noted, the term BAO refers to both BAO and Senior BAO, and the term TSO refers to both TSO and Senior TSO.

\(^{11}\) Also referred to in the record as a balancing area operator, balancing operator, and balance operator; previously known as control area operator.

\(^{12}\) The employee list attached to the Employer’s statement of position lists only one Senior TSO and one TSO-in-training; however, Assistant Manager Tiemeier testified that there are currently two Senior TSOs and three TSOs in training.
The duties of the NRLs, whose supervisory status is in dispute, are discussed in detail below.

The record shows the typical career progression for a system operator is from BAO to TSO to NRL, although an individual may stay or delay in the BAO or TSO position to become a Senior BAO or Senior TSO, respectively. Before a system operator can perform the duties of a particular position, they must be qualified in that position. To qualify, an individual must complete the Employer’s formal on-the-job training program for that position, which consists of specific job performance measures (“JPMs”). A particular JPM can be completed in many ways, through observing or completing the requisite task, through discussing the task, walking through a simulation of the task, or completing coursework. As JPMs are completed, they are signed off on by a qualified operator, which Assistant Manager Tiemeier testified is generally an NRL or the training coordinator. Once all JPMs are completed and signed off for a position, the Employer’s training coordinator verifies completion, and then Tiemeier and the training coordinator conduct a final evaluation of the trainee’s performance, usually with the involvement of an NRL. The record does not detail the final evaluation or the NRL’s role in it. According to Tiemeier, “qualified … means they can work without instruction, work independently.” Tiemeier further testified that per NERC requirements … [system] operators have to have the authority to take independent action with no input from management.”

The Employer also requires system operators to acquire NERC Reliability certification within six months of becoming a BAO, TSO, or NRL, unless the individual already possesses the NERC certification for their job duties—Balancing for BAO or Transmission for TSO.13

As discussed below, there are approximately 176 policies and procedures (“work instructions”) that system operators must review annually.

The record indicates that a system operator may pick up or cover for any control center position—BAO, TSO, NRL—for which they are qualified. The Employer can also schedule them to work a different position for which they are qualified if there is a vacancy. For example, at the time of the hearing, two TSOs-in-training were currently working as BAOs to cover vacancies in that position.

B. NETWORK RELIABILITY LEADS (“NRLs”)

The NRL leads, supports, and develops the TSO and BAO on their crew to maintain overall reliability on the Employer’s transmission grid and ensure that no facility is loaded above its limit. The NRL also analyzes in a predictive manner for any conditions that may cause limit violations and attempts to eliminate or alleviate any risks. Due to the typical career progression, NRLs are also qualified as BAOs and TSOs, and they may perform some of their excess duties or cover their vacancies on other crews.

Senior Director Hargreaves, Assistant Manager Tiemeier, and both the 10-year NRL and the 1-year NRL testified that on-shift system operators—the NRL, TSO, and BAO—work

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13 Tiemeier testified that all but one system operator currently have NERC Reliability certification while one longstanding BAO has only a Balancing certification.
collaboratively as a team, but the NRL has the “final authority.” Qualified BAOs and qualified TSOs have independent authority to take actions, particularly in split-second emergency situations. Tiemeier further testified that a crew could develop other expectations where the BAO or TSO did not need to confer before taking actions.14 The 10-year NRL further testified that everything in the control center is “discussed and performed among the three operators”—NRL, TSO, and BAO. As an example, the 10-year NRL further testified that the TSO on his crew has the authority to respond to an emergency if the NRL is in the kitchenette making a meal, but if the NRL is in the control center there is a “mutual understanding” that should the TSO see something before the NRL then the TSO will notify the NRL and they will “discuss it” and “do [their] best to work and make mutual decisions together.”

1. Assignment of Work and Responsibly to Direct

As noted above, there are approximately 176 policies and procedures that system operators review annually, approximately 27 of which are in the record. Assistant Manager Tiemeier described policies as providing the high-level expectations for employee actions while procedures provide guidance on how to respond to certain situations.15 Senior Director Hargraves testified that the Employer’s policies and procedures help it demonstrate that it meets NERC standards and function as a checklist to help operators be successful in dealing with “large and emergency operations and load shed and a variety of things, loss of communication.” The 1-year NRL testified that in his time as an NRL he has yet to encounter a situation that falls outside of the Employer’s policies and procedures. Other witnesses testified that not all policies and procedures provide step-by-step instructions for every incident or condition.

The 1-year NRL further testified that his BAO knows what to do on 95 percent of their tasks, specifically “most of their tasks are pretty mundane and BAO is on autopilot…. they [are] responsible enough to complete all their assigned tasks without further instruction except for system emergencies and abnormalities such as implementing temporary operating guides.” Tiemeier also testified that a BAO’s main role with data accuracy is a “very repetitive task,” and that an NRL’s involvement “is during more abnormal situations.” The 1-year NRL also testified that his TSO knows what to do on 90 percent of their tasks. According to the 10-year NRL, the designations on the NRL job description are fairly accurate in that 20 percent of the job responsibilities involve managing and overseeing the TSO and 20 percent of the job responsibilities involve managing and overseeing the BAO. The 10-year NRL described several instances of “peer checking,” where the TSO (or BAO) calls out the action they are about to perform and the NRL confirms the action. The record does not further detail how the 10-year NRL manages or oversees the on-shift TSO or BAO during normal conditions.

14 For example, the record contains an e-mail report of an NRL training an unqualified TSO. The NRL wrote specifically that the TSO-in-training “[did] not need to get permission from the NRL to switch on the 69KV system.”

15 The record indicates Operating Guides are similar to procedures. As noted above, there are no Operating Guides in the record.
a. **Employer work instructions, including policies and procedures, operating guides, training guides and job performance measures (“JPMs”)**

As noted above, the record contains approximately 27 work instructions, along with the training guides and JPMs for the BAO, TSO, and NRL positions. The record primarily contains testimony from Assistant Manager Tiemeier regarding the JPMs and several policies indicating the NRLs have “final authority” on what actions are taken. His testimony does not contain details regarding the factors an NRL considers when determining the action to take or who takes the action. As discussed above, the record indicates BAOs generally perform BAO-specific tasks and TSOs generally perform TSO-specific tasks. No witness specifically identified a task that would or could be performed by either a BAO or TSO and, in the case of such a task, the record does not indicate what factors an NRL considers in determining whether the BAO or TSO will perform it. The record contains approximately seven specific examples provided by NRLs regarding how they and their crews respond to certain incidents. These are discussed in detail in the Assign section of Application of Board Law, below. The on-shift NRL does not determine who works in what position except in limited circumstances discussed in the Scheduling section, below.

b. **Annual review of transmission control center documents**

As noted above, the Employer requires system operators to review all control center documentation on an annual basis to ensure they understand the key concepts and content of its policies and procedures. According to Tiemeier, NRLs are responsible for ensuring their crewmembers understand the key concepts and content. A Procedure Committee of system operators and managers breaks the approximate 176 work instructions into eight sessions of between approximately 15 to 30 documents, with input from management, training coordinators, and NRLs.

Pursuant to the Employer’s Control Center Document Review policy (NSP-PRO-A-023), the NRL is responsible for conducting the reviews, called tailgate sessions, for their crew. For each session, the crews receive a session book with the documents for review. The 10-year NRL testified that his crew prefers to do their review on night shift after they have completed other paperwork. He further testified that they look at any procedural changes or summary changes and then do a high-level overview of the procedure under review. If there are any concerns, the crew will do a deeper review, going line by line if necessary. Following review, the NRL may leave their own or their crewmembers’ comments, which could lead to changes in the policy. One example in the record was a comment that a certain responsibility, whether BAO or TSO, needed clarification. All operators then sign and date that they have completed the session. The record contains signature sheets for two sessions, and the dates for operators on the same crew frequently vary. The Employer highlighted a comment by an NRL and/or his crew that did not result in a change.

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16 Tiemeier has not held any system operator positions.
c. Scheduling

As indicated above, a TSO is assigned to work the TWR desk from 6:00 a.m. to 2:00 p.m., Monday through Friday, during their second training week each rotation. However, the Employer’s TWR Shift Policy (NSP-POL-P-010) allows the TSO working the TWR desk to adjust their schedule with the approval of the on-shift NRL. The 10-year NRL testified that the TSO on the TWR desk must notify the on-shift NRL of a schedule adjustment, which the NRL notes in the schedule book. He further testified that he has never denied a schedule adjustment to a TSO on the TWR desk. The 1-year NRL testified that he would not allow a TSO on TWR to adjust their schedule when it would lead to minimal overlap with the regular business hours based on workload. For example, he would disallow a 2-hour adjustment to 4:00 a.m. to 12:00 noon because the TSO would not be available for emergent work or to communicate and coordinate with the necessary people.

As part of the same policy, if the TSO on the TWR desk wants to use PTO, the policy states they must find their own replacement and, if one cannot be found, contact the Assistant Manager. Assistant Manager Tiemeier testified that, despite the policy, he has always referred the TSO on the TWR desk to the on-shift NRL to make the decision on whether to grant the time off. He further testified that he honors the decision of the NRL. The record contains the example of a TSO requesting off the Friday after Thanksgiving. Tiemeier and the 10-year NRL both testified that, because of low workload on that particular day, the on-shift NRL and TSO are able to review upcoming TWR work, and so the request is granted. The record does not indicate any factor other than workload considered by an NRL, nor does it indicate if an NRL (or the Assistant Manager) has ever denied the vacation request of a TSO on the TWR desk.17

Similarly, per Employer policy, the on-shift NRL is responsible for staffing unplanned absences or vacancies. Tiemeier testified that system operators find their own coverage for planned vacancies. When covering unplanned vacancies, the on-shift NRL contacts other operators to find volunteers to cover vacant shifts. The on-shift NRL will contact those operators that are qualified to cover the open shift and are otherwise available to work the shift in question. If no one is available, Assistant Manager Tiemeier will become involved to find a solution. The record does not establish that NRLs can require an employee to come to work rather than request an employee cover a vacant shift.

The record contains one example of an NRL sending another operator home, specifically the on-shift BAO on Christmas Eve 2021. The NRL sent a text message to Assistant Manager Tiemeier, noting the BAO had a fever of 101°F but could still taste and smell, and the remaining operators were “wiping everything down.” The text message also noted the TSO position was covered and the on-shift TSO-in-training would cover the BAO desk, as he is qualified as BAO. Tiemeier testified that an operator who is sent home does not get paid if they do not have PTO. Although Tiemeier testified that NRLs have the authority to send other operators home for “any reason”, the record does not contain any further examples or situations where an NRL has sent someone home.

17 Tiemeier was “fairly confident” the TSO on the TWR desk requested off for the day after Thanksgiving 2021 and he referred them to the on-shift NRL, who granted the request “since the workload is not very high” on that day.
d. Accountability

The 1-year NRL testified that he is accountable, and could be disciplined, if he makes a mistake when reviewing another system operator’s actions. He gave the example of potential discipline for approving an incorrect procedure versus not being held accountable for a TSO’s incorrect execution of an approved order.

The Employer has the ability to award a higher pay differentiation (i.e., a permanent wage increase or raise) and one-time bonuses based on an employee’s accomplishments. Regarding raises, the record contains one example of the 10-year NRL receiving an extra $0.50 per hour pay differentiation. The underlying recommendation for the additional raise states the NRL did “a great job mentoring [and] developing his shift and is a top performer.” The recommendation contains no further information on why the increase was being sought.

A spot-on bonus is a one-time monetary award, specifically for hourly nonunion employees of the Employer, to recognize extraordinary performance such as deftly handling challenging events or participating in special projects or using special computer applications. The record contains two examples of spot-on bonuses. The first is a $500 bonus in 2018 that was given because an NRL was a “[c]hampion of an effort to develop alarm response manuals to fill gaps with existing alarms. Works well with substation engineering to develop manuals that are operator-focused. Excels at coaching his TSO and BAO and ensuring they continue to develop their abilities.” The second is a $1250 bonus because an NRL “[l]ed his shift through a challenging operating scenario during the polar vortex in January 2019. Created a spreadsheet for tracking breakers in alarm so others could stay informed of current status. Completed a post-mortem analysis of the event and proposed changes to alarm response manuals so event could be handled better in the future.” Hargreaves testified that $1250 bonus was given because of how the NRL led his team “and a big part of it was again also independent judgment and stuff that factored into it, too, both.” The record does not indicate how the NRL led his shift, assignments he made or directions he gave, or any factors the NRL considered while leading his team through the polar vortex. Hargreaves testified that he had extracted only the spot-on bonuses for NRLs of the Employer that he felt showed supervision, support, and development of their crew.

Assistant Manager Tiemeier and Senior Director Hargreaves testified that no NRL has received formal discipline in the past 10 years, including discipline for the performance of their crew. When asked if an NRL “failing to effectively complete their shift” could result in discipline, Tiemeier answered: “It could.” The record does not specify how an NRL could fail to complete a shift or if such failure could be the result of NRL-controlled actions of a BAO or TSO (or what those actions would be). Hargreaves also testified that it was speculative but that an NRL would “probably” be disciplined in the hypothetical situation where they allowed bad behavior, however, it “would be very, very dependent on the specific circumstances.” The record does not indicate any specific circumstances in which an NRL would be disciplined for the performance of the on-shift BAO or TSO.
2. **Discipline**

The 1-year NRL testified that he has not been told that he has the authority to discipline the on-shift TSO or BAO, and that he would take any disciplinary issues to Assistant Manager Tiemeier. He further testified that in his 8 years as a BAO, TSO, and Senior TSO, he was never disciplined by the NRL on his crew, only coached and counseled regarding operations.

Assistant Manager Tiemeier testified that he issued only one formal discipline—an oral reminder—to a TSO-in-training approximately 8 years ago for absenteeism. He further testified that he “worked with the NRLs in that case to gather all the information about [the TSO-in-training’s] attendance issues that persisted over time,” and then Tiemeier issued the oral reminder. The record contains no further details for this situation and does not reference a recommendation by an NRL for discipline of the TSO-in-training.

The record indicates a different TSO-in-training was offered the choice between a performance improvement plan (“PIP”) or returning to his previous BAO position. The TSO-in-training chose demotion to the BAO position. Tiemeier testified that a PIP was not discipline but could result in termination if not successfully completed. This example is discussed further in the Promote (or Demote) section, below.

3. **Hire**

Assistant Manager Tiemeier testified that he is the hiring lead and makes the hiring decision for system operators. He prefers to have an NRL on the interview panel for BAO vacancies because they are subject matter experts on what it takes to operate the Employer’s transmission grid. He does not have any system operators on the interview panels for TSOs or NRLs due to potential conflicts of interest, as TSO and NRL candidates typically already work in the control center. Tiemeier further testified that he “very highly” values and considers the NRL’s input and if the NRL presents a good recommendation on why a BAO candidate should or should not be hired, he “generally will be … following that recommendation,” unless he possesses knowledge of something the NRL may not or other extenuating circumstances. The record does not detail the knowledge Tiemeier may have or whether he follows the recommendations of anyone else on the panel, how he resolves conflicting recommendations, or how often he has followed recommendations by NRLs or other panel participants.

The record contains one example of a round of interviews used to fill two BAO vacancies in 2021, specifically five Interview Guides completed by an NRL in October and November 2021 for five different BAO candidates. The Interview Guides contain the NRL’s scores to structured interview questions, along with some comments. Neither the guides nor the comments make a specific recommendation for or against hiring. Tiemeier testified that the interview panel consisted of himself, an NRL, and the Employer’s energy accountant because any newly hired BAO will have to build a working relationship with her. The record does not contain the Interview Guides competed by Tiemeier or the energy accountant and does not indicate whether more than five candidates were interviewed and, if so, whether the same (or any) NRL participated. Tiemeier further testified that he hired the two BAO candidates the NRL scored the highest. The record does not disclose how Tiemeier or the energy accountant scored any of the five candidates or whether the interview panel had subsequent discussions regarding
the candidates; nor does the record detail any discussions the interview panel had regarding any of the candidates, or any actual recommendations made by the NRL or energy accountant. Further, the evidence does not indicate whether, or how often, NRLs have participated in BAO interview panels beyond the five Interview Guides in the record.

4. 

Promote (or Demote)

As indicated above, the typical career progression in the Minneapolis control center goes from BAO to TSO to NRL, although an individual may decide to stay or delay in the BAO or TSO position and become a Senior BAO or Senior TSO. Regarding promotion from TSO to Senior TSO, Assistant Manager Tiemeier testified that it is based on “input” and “recommendation[s]” from NRLs and that he confirms the candidate has met the minimum time requirement and then does an “independent evaluation,” including “evaluating other aspects, special tools, and then training ability” due to the close working relationship between an NRL and their TSO. He further testified that he relies “heavily on the NRL to provide feedback [on] whether they believe their TSO has met the expectations.” The record does not indicate any specific expectations for the Senior TSO position beyond the 3-year tenure requirement, how the NRL evaluates or assesses whether a TSO has met the expectations of a Senior TSO, or any instances of an NRL recommending a TSO (or BAO) be promoted to Senior TSO (or Senior BAO). The record contains no specific details on promotion from BAO to Senior BAO.

The record contains one example of a voluntary demotion, one example of a promotion from BAO to unqualified TSO (TSO-in-training), and one example of TSO-in-training to qualified TSO.

Regarding the demotion, in 2014, a BAO was promoted to unqualified TSO and was completing his JPMs to qualify as TSO. In 2015, Assistant Manager Tiemeier became aware the TSO-in-training was struggling, so Tiemeier placed him on a particular NRL’s crew to “get kind of an assessment.” On April 19, 2015, the NRL emailed Tiemeier a 4-page review of the TSO-in-training, listing observations, example behaviors, his responses, and the results. The NRL noted he was not averse to the information being used “[i]f, in the future, the information is needed to make a decision as to the [TSO-in-training]’s qualifications.” While the email notes that the TSO is “not cutting it,” neither the email nor the document contains a recommendation. Tiemeier further testified that he had other discussions with NRLs and with the TSO who trained the TSO-in-training. A different NRL sent an email to Tiemeier on May 9, 2015, noting the TSO-in-training “needs more training,” is “missing basic stuff,” and “there is some level of concern about [his] training.” On August 14, 2015, the first NRL emailed a 6-page document to Tiemeier with more observations of the TSO-in-training’s performance. The document reports on the interactions between the NRL and TSO-in-training. It does not contain a recommendation. Following this email, Tiemeier sent the NRL a draft performance improvement plan (“PIP”), which the NRL returned with edits on August 22, 2015. On September 3, 2015, Tiemeier spoke with the TSO-in-training and offered him the choice between a PIP as TSO or a demotion to his previous BAO position. Tiemeier testified that multiple NRLs raised the idea of retaining the TSO-in-training as a BAO. The record does not detail the specifics of any conversations between Tiemeier and the NRLs. Tiemeier testified that if the NRLs had not presented information, his

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18 Referred to in the document as trainer responses.
“opinion could have been [that the TSO-in-training is] not going to cut it as TSO” and “[i]t would have gone down a different path.” The record does not indicate the outcome of the so-called different path.

The first example of promotion involves the aforementioned demoted BAO being repromoted to TSO-in-training. Tiemeier testified that an NRL worked “very, very closely” with the demoted BAO to develop his skills to be repromoted to TSO. According to Tiemeier, the NRLs were “comfortable” with the demoted BAO being given a second chance at TSO, he took their input “very highly” and did “some independent evaluation” to confirm the BAO’s readiness for promotion. The demoted BAO was repromoted to TSO-in-training around 2021.

Regarding promotion from unqualified TSO to qualified TSO, Tiemeier testified that there is no “pay change or anything else like that” when a person becomes a qualified TSO, but that “they can work without instruction, work independently.” At some point in 2021, the Employer placed a different TSO-in-training on an NRL’s crew because the Employer had received mixed feedback and so the NRL could work on training her. The record does not indicate how long she was on the NRL’s crew. On October 10, 2021, after working with the TSO-in-training over particular weekend shifts, the NRL emailed Tiemeier that “an argument could be made that [the TSO-in-training] was not a good operator” due to “inefficiencies” but the NRL disagreed with those arguments, noting the trainee had completed all required JPMs and worked the most recent weekend “as a qualified TSO and [he] believe[d] that [the trainee] deserves to be qualified immediately.” The record does not indicate when the trainee completed all the required JPMs. On October 15, 2021, Tiemeier emailed the operators in the Minnesota and Wisconsin transmission control centers announcing the trainee “completed [their] final qualification today and meets the qualifications to work independently at the TSO desk. According to Tiemeier, he and the training coordinator administer a final evaluation that usually includes an NRL. The record does not indicate or detail the final evaluation in general or the “final qualification” that the TSO-in-training completed on October 15.

5. **Other Supervisory Indicia**

The parties stipulated that NRLs do not possess the authority to suspend, lay off, recall, or discharge employees. Further, there is no record evidence, nor does the Employer assert, that NRLs have the authority to transfer employees, or reward employees, or to adjust their grievances, or effectively recommend such actions, using independent judgment.

6. **Secondary Supervisory Indicia**

The following facts may support a supervisory or nonsupervisory finding but, standing alone, cannot determine the NRLs’ supervisory status.

The Employer requires NRLs to complete training that includes sections or measures on leading and overseeing certain system operator activities. Crews are referred to by the name of their NRL.

As noted above, BAOs and TSOs must complete the Employer’s formal on-the-job training program, which consists of JPMs that are generally signed off on by NRLs. According to Tiemeier, BAOs-in-training and TSOs-in-training are being told by qualified operators that “the
NRL is the lead. The NRL has final say. NRL makes the challenging, critical decisions within the control center.” The 10-year NRL testified that he believes BAOs and TSOs understand NRLs have final authority. The on-shift NRL is the highest-ranking individual in the transmission control center outside of typical business hours. Outside of typical business hours, there are only three individuals in the control center—one NRL, one TSO, and one BAO.

The record indicates the following salary grades, including minimum and maximum hourly wages for the various system operator positions, and annual salaries for managers.

<table>
<thead>
<tr>
<th>Salary Grade</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>BAO T2</td>
<td>$35.30</td>
<td>$58.00</td>
</tr>
<tr>
<td>TSO T2</td>
<td>$35.30</td>
<td>$58.00</td>
</tr>
<tr>
<td>Senior BAO T3</td>
<td>$40.40</td>
<td>$66.50</td>
</tr>
<tr>
<td>Senior TSO T3</td>
<td>$40.40</td>
<td>$66.50</td>
</tr>
<tr>
<td>NRL T4</td>
<td>$46.50</td>
<td>$76.60</td>
</tr>
<tr>
<td>Assistant Manager S</td>
<td>$100,000</td>
<td>$163,000</td>
</tr>
<tr>
<td>Senior Manager T</td>
<td>$116,000</td>
<td>$189,000</td>
</tr>
</tbody>
</table>

Assistant Manager Tiemeier testified that all current NRLs have a higher hourly wage than the existing BAOs, TSOs, Senior BAO, and Senior TSOs. The record does not indicate the amount of overtime any of the positions typically work or whether NRLs are paid a lower hourly wage when covering for a different position.

The “Talent Connection” page of the Employer’s intranet lists all system operators together and shows them reporting to Tiemeier. The 1-year NRL testified that he goes to Tiemeier for unresolved issues with tools about system operators’ jobs, including SCADA, TSM, phone lists, and answers for his writing questions.

II. SUPERVISORY STATUS

A. BOARD LAW

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) 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 to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The above 12 statutory criteria (or “primary indicia”) for supervisory status are read in the disjunctive, making possession of any one of the indicia sufficient to establish an individual as a supervisor. Thus, the Act sets forth a three-part test for determining supervisory status. Individuals are “statutory supervisors if: (1) they hold the authority to engage in any one of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their ‘authority is held in

The Board’s seminal decision in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), sets forth the analysis to be applied in assessing supervisory status,19 including in the utility industry. See *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2152–2154 (2011) (*Entergy I*), affd. in relevant part 810 F.3d 287, 294 (5th Cir. 2015).

The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Oakwood*, 348 NLRB at 693; see also *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994). The authority to effectively recommend an action means that the recommended action is taken without independent investigation by acknowledged supervisors, not simply that the recommendation is ultimately followed. See *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1748–1749 (2011) (quoting *Children’s Farm Home*, 324 NLRB 61 (1997)); see also *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 5 (2016) (*Veolia I*); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998).

“[T]o 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. …[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company rules or policies, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Oakwood*, 248 NLRB at 692–693. Testimony that decisions are collaborative also is insufficient to show independent judgment free from the control of others. *CNN America, Inc.*, 361 NLRB 439, 460 (2014) (citing *KGW-TV*, 329 NLRB 378, 381–382 (1999)); see also *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7–8 (2016) (*Veolia II*). Professional or technical judgments involving the use of independent judgment are supervisory only if they involve one of the 12 primary indicia. *Entergy I*, 357 NLRB at 2154 (quoting *Oakwood*, above at 692).

The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights protected by the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Oakwood*, 348 NLRB at 687.

Nonstatutory indicia (or “secondary indicia”) can be used as background evidence to support a finding of supervisory status but are not dispositive without evidence demonstrating the existence of one of the primary or statutory indications of supervisory status. See *DirecTV*, 357 NLRB at 1750 (citing *Ken-Crest Services*, 335 NLRB 777, 779 (2001)); see also *PowerBack Rehabilitation*, 365 NLRB No. 119, slip op. at 2 (2017) (citing *Modesto Radiology Imaging, Inc.*, 365 NLRB No. 187, slip op. at 5 (2016) (*Veolia II*). The exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Oakwood*, 348 NLRB at 693; see also *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994). The authority to effectively recommend an action means that the recommended action is taken without independent investigation by acknowledged supervisors, not simply that the recommendation is ultimately followed. See *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1748–1749 (2011) (quoting *Children’s Farm Home*, 324 NLRB 61 (1997)); see also *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 5 (2016) (*Veolia I*); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998).

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19 In particular, the Board adopted specific definitions for “assign,” “responsibly to direct,” and “independent judgment.” On the same day, it also issued decisions in two companion cases, applying its newly refined supervisory analysis—*Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). As such, Board decisions involving these terms that predate *Oakwood* may be of limited precedential value.
Compare *K.G. Knitting Mills, Inc.*, 320 NLRB 374 (1995) (finding no primary indicia where individual opened facility in the morning, “watch[ed] everything” before the manager arrived, and processed trucks arriving at plant). Secondary indicia of supervisory status typically include, but are not limited to: the individual’s designation as a supervisor; attendance at supervisory meetings; participation in supervisory training programs; responsibility for a shift or phase of the employer’s operation; authority to grant time off to other employees; responsibility for inspecting the work of others; responsibility for reporting rule infractions; providing training or mentoring to employees; receipt of privileges exclusive to members of management; and compensation at a rate higher than the employees supervised. The ratio of putative supervisors to employees is also a secondary indicator of supervisory status.

**Burden of Proof and Weight of the Evidence**

The burden of establishing supervisory status rests on the party asserting that such status exists. *NLRB v. Kentucky River*, 532 U.S. at 711; *Shaw, Inc.*, 350 NLRB at 355; *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Croft Metals*, above at 721; *Oakwood*, 348 NLRB at 687.

The fact that not all putative supervisors have actually exercised supervisory authority does not defeat a supervisory finding. See generally, *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 fn. 8 (2001). However, the Act “requires … evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.” *G4S Regulated Security Solutions*, 362 NLRB 1073 (2015) (quoting *Oil Chemical & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (DC Cir. 1971), cert. denied 404 U.S. 1039 (1972)). See also *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest*, 348 NLRB at 731. “Purely conclusory evidence does not satisfy that burden. Lack of evidence is construed against the party asserting supervisory status.” *Veolia II*, 363 NLRB No. 188, slip op. at 7 (citing *Lynwood Manor*, above at 490; *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003)). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper absent independent evidence of the possession of the described authority. *Golden Crest*, above at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)). See also *CHI LakeWood Health*, 365 NLRB No. 10, slip op. at 1 fn. 1 (2016) (cases cited therein).

In terms of meeting the evidentiary burden to establish supervisory authority, the Board’s post-*Oakwood* decisions emphasize the evidence must be detailed and specific, particularly with respect to the factors weighed or balanced in exercising putative supervisory authority, in order to establish independent judgment. *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016); *Pacific Coast M.S. Industries*, 355 NLRB 1422 (2010); *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1425 & 1436 (2007); *Lynwood Manor*, 350 NLRB at 490; *Austal USA, L.L.C.*, 349 NLRB 561, 561 fn. 6 (2007); *Avante at Wilson*, 348 NLRB at 1057; *Golden Crest*, 348 NLRB at 731; *Croft Metals, Inc.*, 348 NLRB at 722.

Where 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, at least on the basis of those indicia. *Veolia II*, 363 NLRB No. 188, slip op. at 7 (citing *Phelps...*

Finally, the sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See Shaw, Inc., 350 NLRB at 357 fn. 21; Oakwood, 348 NLRB at 693. See also Kanawha Stone Co., Inc., 334 NLRB 235, 237 (2001); Commercial Fleet Wash, Inc., 190 NLRB 326 (1971).

Less weight has been given to evidence and testimony without an established foundation in the record. Similarly, the weight of record evidence is attenuated by the passage of time or where it concerns facts or circumstance predating organizational and procedural changes at the Employer. Conversely, I accord more weight to witness testimony where the record establishes direct knowledge of the facts.20 Affirmative responses to leading questions are devalued because they suffer the weakness of being the testimony of the questioner rather than the witness. See generally, H. C. Thomson, Inc., 230 NLRB 808, 809 fn. 2 (1977). Such testimony typically does not constitute the specific detailed evidence necessary to establish putative supervisors possess primary indicia consistent with the concern expressed that it is the actual duties and actual accountability of the worker that count when determining supervisory status. G4S, 362 NLRB at 1072–1073.

**B. APPLICATION OF BOARD LAW TO THIS CASE**

Of the 12 primary indicia for supervisory status, the Employer does not contend, and the record contains no evidence, that NRLs transfer, suspend, lay off, recall, discharge,21 or reward employees, or adjust their grievances, or effectively recommend such action, by virtue of their independent judgment. The Employer asserts the NRLs use independent judgment to assign and responsibly direct work, along with effectively recommending hiring, promotion (and demotion) using independent judgment. Petitioner asserts the evidence fails to establish independent judgment in assignment of work, responsible direction of work, or the authority to reward, discipline, suspend, hire, or transfer employees, or effectively recommend such actions.

As explained in the sections below, the examples of purported supervisory authority in the record focus on NRLs’ final authority in decision making. However, the evidence contains minimal details of the NRLs’ discretion, including the factors considered and how they are weighed. It also lacks specificity on how NRLs’ decisions or actions directly affect employees. Witness testimony generally lacks specific examples and, where tangible examples are given, they lack the specific evidence to show independent judgment or to otherwise substantiate supervisory authority through primary indicia, or the effective recommendation of such.

The record also fails to establish that NRLs are held responsible for the actions of BAOs

20 For example, Assistant Manager Tiemeier currently works approximately 24 hours (three 8-hour days) per week in the office and did not work in the office for 6 months at the start of the COVID-19 pandemic while the petitioned-for employees work in the office 168 hours (24 hours a day, 7 days a week). Further, the record does not indicate the amount of time Tiemeier spends in the control center versus his office.

21 As noted above, the parties stipulated that NRLs do not possess the authority to suspend, lay off, recall, or discharge employees.
or TSOs. Accordingly, I find the Employer has not satisfied its burden to prove NRLs are statutory supervisors.

1. Assign and Responsibly to Direct

In *Oakwood*, the Board explained, by way of example, how assignment and responsible direction may arise from a single incident. Specifically:

[I]n the case of assignment and direction, even if the charge nurse makes the professional judgment that a particular patient requires a certain degree of monitoring, the charge nurse is not a supervisor unless and until he or she assigns an employee to that patient or responsibly directs that employee in carrying out the monitoring at issue.

348 NLRB at 694. In their post-hearing briefs, the Employer and Petitioner have delineated aspects of NRL duties, as falling under either assign or responsibly to direct while, at the same time, addressing their so-called “final authority” as both assignment of work to BAOs and TSOs and the responsible direction of BAOs’ and TSOs’ work. I note that the record evidence frequently fails to include details necessary to distinguish between an NRL’s assignment of significant overall duties and tasks to a BAO or TSO and an NRL’s direction of a BAO or TSO to perform discrete tasks. Therefore, where warranted, I have analyzed certain NRL instructions under both primary indicia.

At the outset, I note the record is generally in conflict and otherwise inconclusive regarding work performed by qualified BAOs and qualified TSOs and regarding NRLs’ assignment or direction of that work. The record evidence, including Assistant Manager Tiemeier’s testimony, reveals qualified BAOs and TSOs “can work without instruction, work independently” and have the authority to do so; however, it also indicates that crews collaborate on their actions to be taken and responses to alarms and other emergencies. While all witnesses testified generally that NRLs may have some type “final authority,” the evidence does not detail a single situation where an NRL independently countermanded a BAO’s or TSO’s authority or prior decision. The record fails to disclose factors an NRL (or crew) considers when determining which course of action to take, the tasks to perform, or, importantly, whether the BAO or TSO is to perform them.

a. Assign

The Employer acknowledges that it maintains detailed policies, procedures, and operating guides for many activities in order to minimize risk to, and maximize the reliability of, its transmission grid by providing instructions for consistent responses to alarms and other emergency or abnormal situations. However, it asserts the work instructions are often general guidelines or contain multiple options from which an NRL must determine, using independent judgment, the specific actions to take and who should take them. Petitioner maintains NRLs apply and follow established procedures and any decision making among options involves routine, clerical, or obvious choices. Specifically, Petitioner contends that, as there are only one BAO and one TSO on a crew, the evidence fails to show the NRL does more than use professional judgment in determining a course of action and then give TSO-specific tasks to the TSO and BAO-specific tasks to the BAO.
The Board defines “assign” as referring “to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” Oakwood, 348 NLRB at 689. Elaborating on this definition, the Board stated that “assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night), or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ … However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of” assignment authority. Ibid.

Assignments that are based on well-known employee skills do not involve independent judgment. CNN America, 361 NLRB at 460 (citing KGW-TV, 329 at 381–382, enfld. in relevant part 865 F.3d 740 (DC Cir. 2017)); see also S.D.I. Operating Partners, L.P., 321 NLRB 111 (1996). Similarly, basing an assignment on whether the employee is capable of performing the job does not involve independent judgment. See WSI Savannah River Site, 363 NLRB No. 113, slip op. at 3 (2016) (citing Volair Contractors, Inc., 341 NLRB 673, 675 fn. 10 (2004)); Cook Inlet Tug & Barge, Inc., 362 NLRB 1153, 1154 (2015) (citing Croft Metals, 348 NLRB at 722). Nor is independent judgment established by the assignment of recurrent and predictable tasks. Shaw, Inc., 350 NLRB at 356; Croft Metals, above at 721 fn. 14 (citing Franklin Home Health Agency, 337 NLRB 826, 831 (2002); Bowne of Houston, 280 NLRB 1222, 1223 (1986)). As noted above, assignment of work in a merely routine, clerical, or perfunctory manner, where there is only one self-evident choice, or solely on the basis of equalizing workloads does not require independent judgment. Oakwood, 348 NLRB at 693.

Thus, for NRLs to be found statutory supervisors, the Employer must show through specific detailed evidence that they assign system operators to a place, time, or significant overall duties and how such assignments are made, including the nonroutine or nonobvious factors they consider.

Regarding assignment to a place or time, the BAO works at the BAO console to the left of the NRL, and the TSO works at the TSO console to the right of the NRL. A crew—NRL, BAO, TSO—is assigned to a preset 6-week rotating schedule. For planned absences, system operators either find their own coverage or other qualified operators “assign themselves” to the vacant shift, according to Assistant Manager Tiemeier. Per Employer policy, the on-shift NRL is responsible for filling system operator vacancies due to unplanned absences; however, on cross examination, Tiemeier acknowledged that the NRL “will call around to find someone to fill that shift.” He further testified that if no one was available, he would work with the NRL “to figure out how … to solve that situation.” The 10-year NRL also acknowledged that he looks at who is “available to work on shift that won’t conflict with another shift coming on and who is qualified.” Thus, the record fails to establish NRLs have the authority to force an employee into work rather than request an employee cover a vacant shift. In order to establish supervisory authority to assign, the evidence must show the putative supervisor can require a certain action to be taken, including overtime work. Entergy I, 357 NLRB at 2156–2157; Golden Crest, 348 NLRB at 729.

The record contains one example of a TSO-in-training moving to the BAO console after the on-shift BAO went home sick; however, the record shows this was the self-evident choice
based on who was available that could perform the work, as the TSO-in-training was a qualified BAO but not a qualified TSO. As noted above, assignments based on obvious choices or whether an employee is capable of performing the job do not involve independent judgment. *Oakwood*, 348 NLRB at 693. See, for example, *Brusco Tug & Barge, Inc.*, 362 NLRB 257 (2015), incorporating by reference 359 NLRB 486, 491 (2013) (assigning overtime to sole engineer not supervisory); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153, 1154 fn. 8 (2015) (assigning tasks to sole deckhand not supervisory); *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 3 (2016) (assigning duties to sole associate producer not supervisory). Nor do assignments based on employee availability. *Springfield Terrace LTD*, 355 NLRB 937, 943 (2010).

Similarly, the evidence regarding the on-shift NRL's authority to approve or disapprove requests to adjust the TWR desk schedule falls short of establishing independent judgment. The record contains no examples of an NRL disapproving a schedule adjustment and the hypothetical disapproval testified to by the 1-year NRL shows only that he would consider the obvious factor of whether the work could be completed—if it could not he would not approve the adjustment.

Accordingly, I find that the evidence is insufficient to show NRLs possess or exercise the authority to assign employees to a place or time, including by scheduling, within the meaning of Section 2(11) of the Act.

Regarding assignment of significant overall duties, the Employer belabors the “final authority” of NRLs to purportedly prioritize actions and determine how to respond to alarms and other conditions within the general guidelines of the myriad work instructions the parties introduced as evidence.22 However, the record fails to disclose any incident or time when an NRL decides whether the BAO or TSO should perform the work; rather, the record indicates that BAOs and TSOs have well-defined roles in the control center and perform position-specific tasks. Even assuming such decisions are made, the evidence is insufficient to show independent judgment, as the record lacks any factors an NRL considers in assigning the BAO instead of the TSO to perform a particular task or vice-versa.

The record contains only seven tangible examples from NRLs of actual work performed on their crews, none of which indicate that the tasks performed by BAOs or TSOs were not obvious choices and none of which detail any factors considered by the NRL when instructing the BAO or TSO or when determining who should perform the work. Rather, the evidence and examples indicate NRL decisions that deviate from work instructions, or for which there are no step-by-step instructions, are often based not only on the input of their BAO and TSO but the consensus of all crewmembers and, in fact, the record fails to show a single actual instance of disagreement between an NRL and the on-shift BAO or TSO. I quote and discuss the record examples below.

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22 I acknowledge that some of the work instructions in the record do not contain step-by-step instructions; however, many of them refer to operating guides and other documents not in the record that may contain such directions. I note the record contains approximately 27 of approximately 176 policies and procedures that system operators must annually review.
Q. … Do you have a basis that you can provide with examples of how the members of your crew understand that you have the final authority and final say on decision making on [y]our crew?

A. Using procedures such as the disturbance outage procedures, when we have, say, a line goes out, I can direct -- in the past I have directed my balancing operator to review information to build a timeline of an outage. I directed my transmission operator to look at a line outage to see what switches we can put back in service to restore customer load. And also which crews or field personnel need to be notified to respond to and some cases other companies to respond to the outage.

Q. And are those decisions that you make -- that you have the final say on?

A. I have the final say. I do use the input of my balancing operator and my transmission operator, but in the end, the NRL has the final say.

…

A. … if I may use the example of January 2019 polar vortex, which was already mentioned and discussed, the alarm procedures we had in place, number alarms we had come in clearly exceeded -- because my crew was next crew on after [another NRL]’s crew. And it involved making decisions that were beyond the scope of the procedures in the alarm responses on how to respond to these breaker outages and line outages and cold weather conditions. There are times when the procedures can be very specific and we follow them step for step. There are times when the procedures leave gaps that the NRL has the final authority on, but also uses the knowledge and experience of the balancing operator and transmission operator to decide how to respond to the situations. That does include calling out field personnel when necessary to respond to events 24 hours a day, seven days a week, holidays, it doesn’t matter.  

Tr. 425-427. The above examples fail to indicate any factors the NRL considered when directing the BAO and TSO other than their own input or how each was not the self-evident choice given the tasks to be assigned. Thus, the record is insufficient to establish independent judgment.

Q. And if you hear somebody say this is what I’m intending to do and for whatever reason, in terms of evaluating the current system configuration, current status, whether there are any alarms, if you think that’s not the right path to go down, would you then tell the TSO wait, no, don’t do that right now?

A. I have actually done that. I can’t remember if it was last week or week before I told a transmission operator to stop and all it was was I wanted him to look at the flows on the lines so that when he did open up a line he would see how the megawatts and megaflow

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23 I note the 10-year NRL’s account does not indicate whether field personnel were contacted or what, if any, instructions they were given (or by whom) for the 2019 polar vortex. Importantly, the record does not contain any information on what factors, if any, the NRL considers if instructing the TSO (or BAO) to contact field personnel, or whether it is a BAO- or TSO-specific task.
would change. It was not a safety issue. It was [a] training issue that gave me a chance to have input.

Tr. 435. The above example does not show an NRL stopping a TSO from performing a function, as the TSO continued to perform the task at hand. Rather, as acknowledged by the NRL, “[i]t was [a] training issue” that demonstrates how an NRL coaches a TSO and develops their understanding of work. Thus, the record fails to show an NRL assigning (or directing) work.

A. In the most [recent] disturbance, I’ll use that as example, there will be numerous alarms coming in simultaneously. We [the NRL and the TSO] both look for critical alarms to determine what event took place and we agree on the event that took place then we start looking at other alarms that came in simultaneously to get more information to help us determine what did happen or what caused that event. So we’re working together and trying to come up with the answers to the question.

Tr. 513. The above example shows collaboration not independent final authority. Even assuming the NRL has final authority, nothing in the example suggests anyone other than the TSO could perform the tasks and, thus, fails to establish independent judgment.

Q. … So those small percentage of tasks that the BAO and TSOs don’t automatically know is their responsibility, what type of tasks might those be?

A. Especially emergency response, responding to disturbances is one, rarely entered into emergency states. I had the misfortune -- I could say fortune to be training as NRL during a recent energy emergency alert this past summer. We actually entered into a higher level of emergency than we had experienced in years. And it was dusting off -- getting farther into the procedure than most of us had been in a long time and assigning, delegating roles as prescribed by the procedure BAO you need to change the status from yellow now to original. That’s one example of something the BAO rarely does that I had to instruct based on the procedure.

Tr. 545-546. The above example fails to show any deviation from written work instructions. Instead, it indicates the NRL used the work instructions “prescribed by the procedure” and the BAO and TSO had position-specific tasks; thus, it fails to establish independent judgment.

A. …I’ll offer the example -- historical example -- a substation catches on fire then control center personnel have to decide how to react to that and how to contain the situation which may simply be switching equipment or it may involve shedding load.

Tr. 432. The 10-year NRL testified that “training and experience” would guide how, where, and how much load to shed if it was not directed by MISO. He further testified that he was probably the only person to shed more than 40,000 customers in the last 15 years, which he did as a TSO. Thus, the testimony is inconclusive and in conflict as who makes the decision. Even assuming the NRL makes the decision, the record does not indicate how the TSO is not the self-evident choice for shedding load and fails to show independent judgment.

The Employer’s citation to STP Nuclear Operating Co. v. NLRB, 975 F.3d 507, 521–523 (5th Cir. 2020), denying enf. of 367 NLRB No. 102 (2019), is misplaced, as the Board generally
adheres to a “nonacquiescence policy” with respect to appellate court decisions that conflict with Board law, unless the Board precedent is reversed by the Supreme Court. See, for example, D.L. Baker, Inc., 351 NLRB 515, 529 fn. 42 (2007); Northcrest Nursing, 313 NLRB at 496, fn. 24. Similarly, I need not address Entergy Mississippi, Inc., 367 NLRB No. 109 (2019) (Entergy II), which is nonprecedential, decided by the Board on remand from the Fifth Circuit only as law of the case.24

The record lacks any specific detailed evidence or tangible examples of NRLs assigning BAOs or TSOs to specific places, specific times, or significant overall duties with the degree of discretion required to reflect independent judgment. See, for example, Avante at Wilson, 348 NLRB at 1057. Accordingly, I find that the evidence is insufficient for the Employer to carry its burden of establishing NRLs use independent judgment when selecting work instructions or assigning tasks to system operators and fails to show they exercise or possess the authority to assign within the meaning of Section 2(11) of the Act.

b. Responsibly to Direct

The Employer asserts that NRLs use independent judgment when directing BAOs and TSOs, citing to the examples discussed in the section above, the NRL job description, and their training. It points to a 2019 wage increase and bonuses in 2018 and 2019 as evidence of positive consequences NRLs received for the work performance of their BAOs and TSOs. Petitioner highlights the independent authority of TSOs and BAOs under the Employer’s NERC-certification and the absence of record evidence showing NRLs have ever disagreed with the actions or decisions of their TSOs or BAOs. It also distinguishes the independent judgment NRLs may use for alleged authority in operational decisions from the lack of evidence showing independent judgment in the direction of TSOs’ and BAOs’ work.

Direction is established by showing that the putative supervisor determines “what job shall be undertaken next or who shall do it.” Oakwood, 348 NLRB at 691. Direction requires the record evidence “show[] that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary.” Ibid. “[T]he threshold of corrective action for purposes of demonstrating responsible direction falls below that of other Section 2(11) indicia, including disciplinary and promotion authority.” Community Education Centers, Inc., 360 NLRB 85, 85 (2014) (citing CGLM, Inc., 350 NLRB 974, 974 fn. 2, 983–984 (2007), enf’d. mem. 280 Fed.Appx. 366 (5th Cir. 2008); Croft Metals, 348 NLRB at 722 fn. 13). Responsible direction means not only being able to take action to ensure tasks are performed correctly by an employee, but also that the alleged supervisor is “accountable for the performance of the task by the other.” Id. at 692; Golden Crest, 348 NLRB at 731, fn. 13. Thus, the authority to take corrective action, standing alone, does not confer supervisory status, when there is no evidence of accountability. Community Education, above at 85. Accountability may be shown by either negative or positive consequences to the putative supervisor’s terms and conditions of employment as a result of the alleged subordinates’ directed actions. Golden Crest, above at 731; see also, Peacock Productions, 364 NLRB No. 104, slip op. at 4.

24 However, based on the nonacquiescence policy, the Board’s underlying decision in Entergy I is precedential.
Thus, in order to establish supervisory status by virtue of responsible direction, the Employer must show by specific detailed evidence that NRLs have authority to direct employees with corrective actions, using independent judgment, and have the prospect of consequences based on the quality of the work performed.

The Employer asserts the 10-year NRL provided “multiple examples of how he uses independent judgment to direct the work of his crew.” However, as discussed in the section above, none of the examples contain details of the factors considered by the NRL, or his contemplative process, necessary to establish independent judgment. For instance, in the first example of a transmission line going out, the 10-year NRL testified that he used procedures such as the disturbance outage procedures and directed his BAO to build a timeline of the outage. He also directed his TSO to look at a line outage to see what switches could be put back in service to restore customer load and which field personnel or other utilities needed to be notified to respond to an outage. The NRL did not specify any factors he considered when directing the BAO or TSO beyond simply using procedures. In another example, the 10-year NRL testified that he recently told a TSO to “stop” opening a line because the NRL “wanted [the TSO] to look at the flows on the lines so that when [the TSO] opened the line [the TSO] would see how the megawatts and megaflow would change…. It was [a] training issue.” Coaching or training an employee on how to perform tasks, particularly when the NRL did not change the task or prevent the TSO from opening the line, is not giving direction, and even assuming it was direction, there is no evidence of responsibility to direct or how it involved independent judgment.

Similar to the assignment of work, the record evidence, including the tangible examples discussed in the section above, is insufficient to establish NRLs use of independent judgment when directing work because, among other things, the record fails to indicate how NRLs determine who will perform the work.

Regarding the authority to take corrective action, it is uncontroverted that NRLs coach and counsel their BAOs and TSOs, particularly unqualified trainees. Testimony regarding the impact of any reported successes or failures is limited to Assistant Manager Tiemeier; however, it appears only to meet the threshold of corrective action. See Community Education, above at 85 (finding “corrective action by recording [employee]s’ failures to follow proper procedures and by providing related training”). Thus, the evidence fails to establish that the NRLs’ coaching and counseling of other operators constitutes responsible direction of work.

Regarding the “responsible” aspect of direction, the record is clear that no NRL has been disciplined in the past decade for the performance of his crew. Testimony on negative consequences from Senior Director Hargreaves and Tiemeier is speculative, in conflict, and otherwise inconclusive. Hargreaves acknowledged his testimony was speculative and any negative consequences would be based on the specific circumstances. He gave no examples of a situation that would result in negative consequences. Tiemeier similarly testified that “failure to complete a shift” could result in discipline, although the record does not describe how an NRL (or their crew) could fail to complete a shift. Thus, the record fails to show NRLs receive negative consequences for the performance of the on-shift BAO or TSO.

See also, discussion of the examples provided by the NRLs in the Assign section, above.
The Employer argues a 2018 and a 2019 spot-on bonus demonstrate NRLs receive positive consequences for the performance of their crews; however, the underlying documents indicate these rewards were given for the NRLs’ individual actions. Specifically:

Champion of an effort to develop alarm response manuals to fill gaps with existing alarms. Works well with substation engineering to develop manuals that are operator-focused. Excels at coaching his TSO and BAO and ensuring that they continue to develop their abilities.

and

Led his shift through a challenging operating scenario during the polar vortex in January 2019. Created a spreadsheet for tracking breakers in alarm so others could stay informed of current status. Completed a post-mortem analysis of the event and proposed changes to the alarm response manuals so event could be handled better in the future.

While the latter spot-on bonus was awarded, in part, for the NRL’s leadership, nothing in the rationale suggests it was for the performance of his crew rather than his leadership and nothing in the record details directions the NRL gave to employees.

The Employer further asserts a $0.50 per hour ($1040 annual) raise given to the 10-year NRL in 2019 shows positive consequences due to his crew’s performance. The recommendation for the raise reads:

[The 10-year NRL] has done a great job mentoring [and] developing his shift and is a top performer.

Nothing in the recommendation references the performance of his crew or details how he directed his crew. Senior Director Hargreaves testified that the NRL received the raise “because a large part of his job responsibility … is being shift supervisor, through leadership, responsibility, helping train, et cetera.” However, this testimony is general and conclusory. Neither the recommendation nor the testimony provides specific detailed evidence of how the NRL directed his crew, particularly the factors considered when giving directions. At most, this evidence shows the NRLs received rewards for their individual actions and accomplishments. See, for example, *Cook Inlet Tug & Barge, Inc.*, 362 NLRB at 1155 (finding testimony lacked specific examples or evidence illustrating accountability, even hypothetical testimony indicated captains were held accountable for own performance); *Brusco Tug & Barge*, 362 NLRB at 258, incorporating by reference 359 NLRB 486, 492–493 (finding evidence limited to conclusory assertions without delineation of for what or how putative supervisors were held accountable); *Entergy I*, 357 NLRB at 2155–2156 (finding coaching and counseling for allowing uncomfortable employee to proceed with work to be for putative supervisor’s own failure to recognize warning signs); *Lynwood Manor*, 350 NLRB 489, 490–491 (2007) (no specific evidence introduced or proffered to show adverse consequences due to failures in subordinates’ performance); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (finding no evidence of material consequence, or that putative supervisors were informed such consequences might result, from subordinates’ performance and, although putative supervisors were evaluated based on direction, evidence did not show what action might be taken as a result of this rating); *Oakwood*, above at 695 (finding
discipline to putative supervisor for failing to make fair assignments showed only that they “are accountable for their own performance or lack thereof, not the performance of others” [emphasis in original]).

Accordingly, the evidence fails to establish NRLs receive any job-affecting consequences for the performance of their crewmembers.

2. Hire

The Employer asserts Tiemeier’s testimony that he will “very likely” follow an NRL’s recommendation on whether or not to hire a BAO candidate, along with the example of two recently hired BAOs, establishes that NRLs effectively recommend hiring using independent judgment. Petitioner maintains NRLs only sporadically participate in interviews and the evidence fails to show the Assistant Manager relies on NRLs’ hiring recommendations without conducting their own assessments.

The Board will find the authority to hire where putative supervisors determine which applicant will fill a vacancy based on their independent assessment of the applicant—what skills are needed and whether candidates have the appropriate skills or qualifications. More often, Board decisions involve whether a putative supervisor effectively recommends hiring. The Board has also held that the authority to effectively recommend against hiring a job applicant can establish supervisory authority. Sheraton Universal Hotel, 350 NLRB at 1118 (citing HS Lordships, 274 NLRB 1167, 1173 (1985); Berger Transfer & Storage, Inc., 253 NLRB 5, 10 (1980), enf’d. 678 F.2d 679 (7th Cir. 1982), supplemented by 281 NLRB 1157 (1986)). This includes situations where hiring requires mutual agreement or consensus involving a putative supervisor. See generally, USF Reddaway, Inc., 349 NLRB 329, 333–334, 340 (1997); Lawson Milk Co., 143 NLRB 916, 919–920 (1963).

As with all supervisory functions, a hiring recommendation is not effective in the absence of a contention or finding that such recommendation is relied on without further inquiries. Republican Co., 361 NLRB at 97 (citing Waverly-Cedar Falls Health Care, 297 NLRB 390, 392 (1989)); see also Adco Electric Inc., 307 NLRB 1113, 1124 (1992), enf’d. 6 F.3d 1110 (5th Cir. 1993). Thus, without additional evidence, a putative supervisor does not effectively recommend hiring where acknowledged supervisors also interview candidates. Republican Co., above at 98 (citing J.C. Penney Corp., Inc., 347 NLRB 127, 128–129 (2006); Ryder Truck Rental, 326 NLRB at 1387 fn. 9, 1388; Waverly-Cedar Falls, above). Likewise, a hiring recommendation has not been shown to be effective where the influence of the recommendation on the ultimate decisionmaker is not known. Pacific Coast M.S. Industries Co., Ltd., 355 NLRB 1422, 1425–1426 (2010); see also Third Coast Emergency Physicians, P.A., 330 NLRB 756, 759 (2000); F. A. Bartlett Tree Expert Co., 325 NLRB 243, 245 (1997). Compatibility recommendations are insufficient to support a finding of hiring authority. Tree-Free Fiber Co., 328 NLRB 389, 391 (1999) (citing Anamag, 284 NLRB 621, 623 (1987)); Willis Shaw Frozen Food Express, Inc., 173 NLRB 487, 488 (1968). Similarly, effective recommendation to hire will not be found where the role of a putative supervisors is limited to assessing the technical qualifications or skills of an applicant. Republican Co., above at 98 (citing Aardvark Post, 331 NLRB 320, 320-321 (2000); The Door, 297 NLRB 601, 601–602 (1990)).
Thus, for NRLs to be found statutory supervisors by effectively recommending for or against hiring, the Employer must show by specific detailed evidence that their recommendations stem from independent judgment and are followed without further inquiry an overwhelming majority of the time.

The record evidence is inconclusive. As discussed above, it shows that NRLs participation in the hiring process is limited to an interview panel and the evidence is limited to the five Interview Guides completed by one NRL in October and November 2021 for a single round of hiring to fill two BAO vacancies. While Tiemeier testified that he intends to include an NRL on interview panels for BAO candidates, he did not indicate any time other than the recent round of BAO hiring when an NRL participated in the process during the past 10 years he has been Assistant Manager. He acknowledged that he participates on the interview panel and is the final decision maker, and that there are circumstances in which he will not follow an NRL’s recommendation.

Regarding the five known BAO candidates, the record contains no details of the NRL’s specific influence on the two candidates that were hired (or the three that were not) beyond the NRL simply scoring them the highest. The record does not reveal the scores given by interviewers other than the NRL, including Tiemeier, or whether additional BAO candidates were interviewed and, if so, whether the same NRL (or any NRL) was involved. Importantly, nothing in the record contains an actual recommendation to hire the two candidates who were eventually hired. Given the lack of detail, including the lack of an actual recommendation and the unknown influence of other interviewers, along with Tiemeier’s participation on the interview panel, I cannot conclude that NRLs effectively recommend hiring using independent judgment.

Accordingly, I find that the evidence is insufficient to establish NRLs possess or exercise the authority to effectively recommend for or against hiring, within the meaning of Section 2(11) of the Act.

3. **Promote (or Demote)**

The Employer argues NRLs effectively recommend promotion of BAOs to Senior BAO, of TSOs to Senior TSOs, of TSOs-in-training to qualified TSO, and have effectively recommended demotion\(^{26}\) of a TSO-in-training to BAO.

The Board has found the authority to promote, or effectively recommend promotion, where the putative supervisors could recommend promotion, each one had the authority to block a promotion (because promotion required the consensus of all the putative supervisors), and where consensus had been reached to recommend promotion and the recommendation had never been overridden. *Entergy Systems & Service*, 328 NLRB 902, 902–903 & fn. 3 (1999). Compare *U.S. Gypsum Co.*, 116 NLRB 1140, 1141–1143 (1956) (declining to find recommendations effective where they were not always accepted and evidence did not show how often recommendations were made). While Section 2(11) of the Act does not include the authority to evaluate employees in its enumeration of supervisory functions, the Board analyzes a putative

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\(^{26}\) I further note the analysis does not change to the extent the Employer posits that demotion is a form of discipline.
supervisor’s evaluation of subordinates to determine whether it is an effective recommendation of promotion, reward, or discipline. “If the evaluation does not, by itself, directly affect the wages and/or job status of the individual being evaluated, the Board will not find the individual performing the evaluation to be a statutory supervisor on that basis. There must be a direct correlation between the employee’s evaluation and their wage increases and/or job status.” Modesto Radiology, 361 NLRB at 889 (citing Williamette Industries, 336 NLRB at 743; Ten Broeck Commons, 320 NLRB at 813). However, an individual who only reports on technical competence does not effectively recommend hiring. See generally, Republican Co., 361 NLRB at 98 (holding assessment of technical skills or qualifications is not an effective recommendation for or against hiring).

Thus, for NRLs to be found statutory supervisors by effectively recommending promotion or demotion, the Employer must show by specific detailed evidence that an NRL can block a promotion or that they can recommend a promotion and their recommendations are followed without further investigation.

The record evidence is at best hypothetical, in conflict, and inconclusive. Initially, the record fails to establish that becoming qualified as TSO affects an employee’s job status and is, therefore, a promotion. Assistant Manager Tiemeier testified that qualification does not result in a change to pay or any other similar terms or conditions. According to Tiemeier, the only change is that a qualified TSO can work independently without instruction. Further, the record establishes that Tiemeier and the training coordinator conduct a final evaluation to qualify a TSO (or BAO). Thus, the evidence is insufficient to show NRLs effectively recommend promotion by qualification.

Regarding promotion to the Senior BAO or Senior TSO position, the record is devoid of detailed tangible examples. The record also contains no evidence regarding an NRL actually blocking a BAO or TSO from being promoted to Senior BAO or Senior TSO. However, Tiemeier responded affirmatively, “I would; correct,” to the hypothetical question of whether he would “listen to [the] recommendation” (emphasis added) of an NRL against promoting a TSO to Senior TSO. He further testified that he does, and has done, “his own independent evaluation” to validate an NRL’s recommendation to promote a TSO to Senior TSO. Thus, the evidence is insufficient to show NRLs effectively recommend promotion to Senior BAO or Senior TSO.

Regarding the authority to effectively recommend promotion from BAO to unqualified TSO, the record contains a single example of a previously demoted TSO-in-training returning to that status after five years of development with an NRL. Tiemeier’s testimony is in conflict. While he initially claimed he would not have repromoted the BAO without the “support” of the NRLs, he then acknowledged that he took the NRL input “very highly,” but did “some independent evaluation” to confirm what he had heard. Given the dearth of other examples, the unique circumstances of this occasion, the lack of details surrounding the recommendation, and Tiemeier’s independent evaluation, I cannot conclude that the NRLs effectively recommend promotion or effectively block promotion from BAO to unqualified TSO.
The Employer also asserts a TSO-in-training was qualified based on the effective recommendation of an NRL. In that example, the TSO-in-training was assigned “to follow [the NRL’s] shift … so he can get a read on how she is doing and what she needs to work,” which culminated in weekend shifts where the qualified TSO was absent and the TSO-in-training performed work as a qualified TSO under the NRL. On October 10, 2021, the NRL then emailed the Assistant Manager that the TSO-in-training “has completed all her JPMs supported by sign offs from her peers,” “[she] worked this weekend as a qualified TSO,” and “[she] deserves to be qualified ASAP.” On October 15, 2021, Assistant Manager Tiemeier emailed the system operators that the TSO-in-training “completed her[] final qualification today and meets the qualifications to work independently at the TSO desk.” When asked if he had planned to qualify the TSO-in-training prior to the NRL’s e-mail, Tiemeier testified that he had not. Specifically:

Q. And before [the NRL] sent you this e-mail on Page 1 on a Sunday, did you have any idea or plan to fully qualify Heather that Friday?

A. I did not have any plans to qualify her on that Friday.

Tr. 205. However, the record does not specify that the NRL’s e-mail caused Tiemeier to qualify the TSO-in-training instead of the independent evaluation Tiemeier and the training coordinator perform following completion of all JPMs. Thus, even assuming qualification constitutes promotion, the evidence is too vague and limited to this one incident for me to conclude that NRLs effectively recommend qualification.

Regarding the authority to effectively recommend demotion, the Employer provided a single example of TSO-in-training being given a choice between a PIP or demotion to the BAO position. The documents in record evidence express concern that the TSO-in-training had difficulty and was not successfully completing tasks; however, they did not contain any recommendations, either for demotion or against qualification. Tiemeier’s testimony regarding the demotion is too vague to demonstrate it would not have been offered but for the NRLs. Specifically, Tiemeier stated: “So, again, whether it was their idea, I’d say multiple NRLs brought it up.” Thus, this falls short of specific detailed testimony that the NRLs recommended the TSO-in-training be demoted (i.e., “we want the TSO-in-training demoted or to have the option of demotion”) rather than emphasized to Tiemeier that the operator in question, though struggling with the TSO position, was a very good BAO.

27 I note the Employer does not assert, nor does the evidence indicate, that NRLs have the ability to block qualification of a BAO-in-training or TSO-in-training. Specifically, no NRL testified to factors they consider when signing off on a trainee’s JPM or if, or how, they evaluate trainees. To the extent the record contains written reports from NRLs to Assistant Manager Tiemeier regarding TSOs-in-training, these reports do not reference JPMs other than to note one TSO-in-training had already completed her JPMs and do not contain explicit recommendations against promotion. Rather, the documents contain facts and observations. Accordingly, I find the evidence insufficient to establish that NRLs have the authority to block the qualification of other employees.

28 Although not specifically argued by the Employer, I find that signing off on JPMs is no more than reporting observations or assessing technical skills and does not constitute effective recommendation. Further, the record indicates that the training coordinator or any qualified system operator—BAO, TSO, NRL—may sign off on a trainee’s JPM for which they are already qualified.

29 As noted above, the Employer acknowledges a PIP is not discipline.
Accordingly, I find the evidence is insufficient to sustain the Employer’s burden of showing NRLs effectively recommend promotion, including by qualification, or demotion.

4. Secondary Indicia

As explained above, secondary indicia can support a finding of supervisory status but only where evidence indicates the existence of at least one of the primary indicia. The record reveals the existence of several secondary indicia. Specifically, the Employer describes the NRL position as supervising the actions of TSOs and BAOs and Employer trainings hold NRLs out as having final authority in the control center. The NRLs are generally responsible for control center operation outside of regular business hours and have the responsibility to monitor, coach, and report on other employees’ work. Although paid hourly, the base range for NRLs’ annual earnings, using a standard 2080-hour work year, is 15 percent higher than the Senior BAO and Senior TSO and only 3 percent lower than Assistant Manager’s annual salary.

However, other secondary indicia weigh against a supervisory finding. As noted above, NRLs are paid hourly and have the same terms and conditions as the Employer’s other hourly nonunion employees, including BAOs and TSOs. If, as the Employer argues, all NRLs are supervisors then there would be at least one supervisor for every two employees in the control center. Pennsylvania Power & Light Co., 122 NLRB 293, 296–297 (1958) (finding employees nonsupervisory where ratio would be highly disproportionate); see also Arizona Public Service Co., 310 NLRB 477, 481 (1993) (finding reactor operators to be employees when supervisory finding would lead to four purported supervisors and no employees in the control room supervising six auxiliary operators).

III. 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, and it will effectuate the purposes of the Act to assert jurisdiction in this case.\(^{30}\)

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.

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\(^{30}\) As stipulated by the parties: “Northern States Power Company, a Minnesota Corporation, d/b/a Xcel Energy, is a Minnesota Corporation with an office and place of business in Minneapolis, Minnesota, where it is engaged in electric power and gas distribution. During calendar year 2021, a representative period, the Employer received revenue from the sale or performance of services in excess of $50,000 directly from customers located outside the state of Minnesota and earned gross revenue in excess of $250,000.”
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Balancing Authority Operators (BAOs), Senior BAOs, Transmission System Operators (TSOs), Senior TSOs, and Network Reliability Leads (NRLs) employed by the Employer at its facility located at 414 Nicollet Mall, Minneapolis, Minnesota.

Excluded: All managers, confidential employees, and guards and supervisors as defined by 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 International Brotherhood of Electrical Workers, Local 160.

A. ELECTION DETAILS

I direct that the election be conducted by mail ballot, in accordance with the stipulation of the parties.

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Region 18, on March 15, 2022, at 4:30 p.m. 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.

If any eligible voter does not receive a mail ballot by March 22, 2022, or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 18 office by March 23, 2022, in order to arrange for another mail ballot kit to be sent to that employee.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 18 office, by close of business, 4:30 p.m., on April 5, 2022.

The mail ballots will be commingled and counted at the Region 18 office located at 212 Third Avenue South, Suite 200, in Minneapolis, Minnesota at 2:00 p.m. on April 6, 2022. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties’ representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. VOTING ELIGIBILITY

Eligible to vote are TSOs and Senior TSOs in the unit who were employed during the payroll period ending March 5, 2022, and BAOs, Senior BAOs, and NRLs in the unit who were

31 Petitioner waived all ten days of the 10-day voter list period.
employed during the payroll period ending **March 6, 2022**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail-ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board’s designated office.

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, and, in a mail-ballot election, before they mail in their ballots to the Board’s designated office; 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 March 10, 2022. 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.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlrb.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.nlrb.gov](http://www.nlrb.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 10 business 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.

Pursuant to Section 102.5(c) of the Board’s Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency’s web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. 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.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. 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.

Although 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, all ballots
will be impounded where a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: March 8, 2022

/s/ Jennifer A. Hadsall

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Attachment