

**Entergy Mississippi, Inc., Employer-Petitioner and International Brotherhood of Electrical Workers, Local 608 and 985, AFL-CIO.** Case 15-UC-000149

December 30, 2011

DECISION ON REVIEW

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

The issue in this case is whether electric utility dispatchers are statutory supervisors. On February 7, 2007, the Acting Regional Director for Region 15 issued a Supplemental Decision and Order finding that the dispatchers were not statutory supervisors.<sup>1</sup>

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer-Petitioner (the Employer) filed a timely request for review. The Employer contends that the dispatchers are statutory supervisors, and therefore must be excluded from the existing bargaining unit of production and maintenance employees. On April 7, 2007, the Board granted the Employer's request for review.

Having carefully reviewed the entire record, including the parties' briefs on review, we have decided to affirm the Acting Regional Director's decision. As discussed below, we find that under the Board's decision in *Oakwood Healthcare, Inc.*, supra, 348 NLRB 686, in which the Board clarified its standard for determining supervisory status, the Employer has failed to meet its burden to show that the dispatchers are statutory supervisors.

Facts

The Employer is an electric utility company that transmits and distributes electrical power throughout Mississippi. The Employer and the Unions have a history of collective bargaining dating back to 1939. The Unions were certified to represent all permanent electrical employees engaged in operation, meter reading, maintenance, construction, storeroom, and production. Transmission and distribution dispatchers are included in this unit.

<sup>1</sup> The Employer filed the present unit clarification petition in this case on August 11, 2003, seeking to exclude the dispatcher job classification from the existing unit on the basis that the dispatchers are supervisors under the Act. The Acting Regional Director issued his Decision and Order on January 29, 2004, finding the dispatchers not to be statutory supervisors. Thereafter, the Board granted the Employer's request for review on April 20, 2004. On September 30, 2006, the Board remanded the case to the Regional Director for consideration in light of the Board's issuance of *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and its related cases.

The Employer is aligned into two operational groups—the transmission group, which manages power that is obtained from generation facilities and delivers it to distribution substations, and the distribution group, which is responsible for the construction and maintenance of distribution facilities and substations throughout the State.

The dispatchers whom the Employer wishes to exclude belong to both the transmission operations center (TOC) and the distribution operations center (DOC).<sup>2</sup> There are 17 dispatchers at the DOC and 8 dispatchers at the TOC.

The DOC dispatchers have dispatch responsibility for the entire State of Mississippi on a 24/7 basis, overseeing more than 171 distribution substations and managing over 408,000 customers. The DOC dispatchers work at either the outage management desk or the switching desk. The TOC dispatchers are the controlling authority for all switching, tagging, and clearance performed on the transmission equipment under their oversight.

Dispatchers perform switching operations to alter the flow of electricity through the transmission and distribution systems. Switching is the sequential opening and closing of switches in the transmission and distribution system to isolate a section of power lines and to interrupt the flow of electricity so that field employees can perform routine maintenance or repair a section of line that has been damaged. Switching is also performed to restore the flow of electricity to a section of power lines that has been served or repaired.

There are three types of switching that dispatchers regularly perform: planned, contingency, and emergency. Planned switching is scheduled ahead of time and is often performed in the context of maintenance or construction work, which is performed by field employees. In planned switching, the field employees assigned to perform the switching operation generally receive copies of the switching orders in advance. In a contingency switching scenario, which is not planned in advance, the dispatcher dictates each step in the switching sequence to the field employees, and the field employees write down each step as dictated by the dispatcher. The field employees then read each step of the switching sequence back to the dispatcher to ensure its accuracy. Emergency switching is often performed in situations that require immediate action to prevent the loss of life or property. The switching may be performed without a written switching order. After life and property have been secured, dispatchers revert to contingency switching and prepare a written switching order.

<sup>2</sup> As of November 2006, the TOC and DOC dispatchers have not been covered under the parties' collective-bargaining agreement. The dispatchers' title was also changed to "distribution operators."

The general process by which the dispatchers perform their duties in contingency and emergency switching scenarios is as follows: dispatchers will be notified via an alarm system, known as SCADA (Supervisory Control and Data Acquisition), or through customer calls, when electricity is down in a certain area.<sup>3</sup> The dispatcher will contact a field employee to get to the outage site. The dispatcher can pull a field employee off that employee's regular assignment to attend to the outage. Once the field employee is at the site, he will assess the scene and contact the dispatcher to relay certain relevant information regarding what he sees. The dispatcher will then develop a plan to restore power to the outage site. The dispatcher drafts a switching order and relays it to the field employee for execution. The field employee will then repeat each switching instruction back to the dispatcher (known as Echo Protocol). If a field employee notices an error in the switching order, he may bring it to the dispatcher's attention. All switching must be performed in accordance with the Employer's distribution and transmission switching, tagging, and clearance procedure.

If the switching operation is not completed by the time the field employees' shift ends, the dispatcher may request that the field employees hold over in order to resolve the outage. In an emergency or after-hours call-out situation, the dispatchers on the DOC side must call out field employees by seniority or rotation. The field employee whom the dispatcher contacts can refuse to take the assignment. The dispatchers on the TOC side will call the on-call supervisors to locate field employees after hours.

Any mistakes in switching can endanger the field employees and the public at large. It is for this reason that the dispatchers are held accountable, through disciplinary actions, for their switching errors.

The field employees may be linemen, servicemen, or troublemen. The field employees are in a separate management structure from the dispatchers. They are employed in 1 of the 14 networks within Entergy's distribution operations. A network is a specific geographic territory. Each network has a network manager and an opera-

tions coordinator. The network manager supervises the network itself, and the operations coordinator has primary oversight of the field personnel, including assigning them their regular work assignments during the day.<sup>4</sup> These regular assignments include engaging in turn on/turn offs, running services, and working on assigned crews.

#### The Acting Regional Director's Supplemental Decision and Order

The Acting Regional Director, applying *Oakwood Healthcare*, supra, found that the dispatchers do not assign or responsibly direct field employees within the meaning of Section 2(11). Accordingly, she found that the Employer's dispatchers are not statutory supervisors, and, thus, dismissed the Employer's petition to clarify the bargaining unit to exclude the disputed dispatcher positions.

Specifically, the Acting Regional Director found that during normal business hours, the dispatchers route field employees to trouble locations during unplanned outages. However, such assignments are not permanent in nature and are either completely structured based on the Employer's territorial designation of the field employee, or through established callout lists. Further, the Acting Regional Director found that although the dispatchers inform field employees where they are to go, the evidence fails to establish that these "assignments" are made with any supervisory discretion as required by *Oakwood Healthcare*, supra. Thus, the Acting Regional Director concluded that the Employer failed to show that its dispatchers made judgments that were free of the control of others and not controlled by detailed instructions when routing field employees to outage locations. Moreover, the Acting Regional Director found that the Employer's dispatchers neither appoint field employees to a time, nor assign daily overall duties to field employees.

As to responsible direction, the Acting Regional Director concluded that while the dispatchers direct field employees by guiding them through each step of the switching order, there is no evidence that they are accountable for their direction of field employees. The dispatchers, according to the Acting Regional Director, are not disciplined for the mistakes made by field employees, or vice versa. Instead, the Acting Regional Director determined that the dispatchers are accountable for the performance of their *own* duties, not the performance of field employees.

<sup>3</sup> Dispatchers use two computer programs in the performance of their jobs—SCADA and AM/FM. SCADA is a computerized system that provides dispatchers with data concerning the load, voltage, and amps on breakers and circuits in the substations. SCADA sends an alarm to the dispatchers in the TOC and DOC when a circuit experiences a sudden change in voltage or when a breaker trips. The AM/FM monitors customers' calls regarding outages and predicts the device that has malfunctioned in the area. With the information provided by the SCADA and AM/FM, the dispatchers use remote terminal units, which are connected to breakers and switches in substations, to remotely operate the affected breakers and switches.

<sup>4</sup> The Employer and the Unions recognize the network managers and the operations coordinators as supervisory, nonbargaining unit positions.

Moreover, even assuming that the dispatchers have even a limited degree of accountability for the performance of field employees, the Acting Regional Director found that the dispatchers do not use independent judgment in directing such employees. In this respect, she concluded that the evidence reflects that switching operations must be performed within guidelines set by the Employer. The dispatchers use a variety of computer programs and a manual for switching scenarios which, in the Acting Regional Director's view, greatly reduces any discretionary choices available to the dispatchers.

#### Parties' Contentions

##### A. Employer

The Employer contends that the dispatchers are statutory supervisors. It argues that the Board should return to the standard enunciated in *Big Rivers Electric Corp.*, 266 NLRB 380 (1983), because it is the only case which resulted in the consistent treatment of this job classification for nearly 20 years. The Employer claims that the Board erred in *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), by overruling *Big Rivers* on the basis that the dispatchers were not supervisors because the assignments and direction they provided flowed from their "professional or technical training." This rationale, the Employer notes, has been rejected by two Federal courts, and has been expressly disavowed by the Board itself in *Oakwood Healthcare*, supra.

Further, the Employer asserts that under *Oakwood Healthcare*, supra, the dispatchers are statutory supervisors because they assign field employees to a location, to a specific time, and to significant overall tasks. Moreover, the Employer contends that the dispatchers exercise independent judgment when assigning the field employees because they must determine how many employees to assign to a trouble incident; the type and number of field employees to call out; the order in which to assign the trouble cases to employees; how long employees will work on their assignment; when employees will be reassigned to other trouble incidents; and when employees will be released from work.

With respect to responsible direction, the Employer claims that the dispatchers have to direct field employees in every step that must be undertaken to resolve a trouble situation. They are also, according to the Employer, responsible for taking corrective action if a field employee makes an error, and are subject to adverse consequences for their failure to properly manage field employees.

The Employer also contends that the dispatchers exercise independent judgment when responsibly directing the field employees because they must determine what location field employees should report to first; the order

in which power will be restored to customers; whether it is safe to begin work; and whether additional resources are necessary; all of which require the dispatcher to weigh certain variables. Moreover, the Employer claims that the drafting of the switching order requires professional and technical judgment.

##### B. Unions

The Unions, in contrast, claim that because *Oakwood Healthcare* represents the Board's most recent statement of law in this area, and because the Board remanded this case for further consideration in light of *Oakwood Healthcare*, the analysis in *Big Rivers* and other pre-*Oakwood Healthcare* cases is now irrelevant. Therefore, in the Unions' view, the Acting Regional Director properly applied *Oakwood Healthcare* and correctly found the dispatchers not to be statutory supervisors.

Additionally, the Unions contend that the Employer's invitation to the Board to establish a "per se" rule that utility industry dispatchers are supervisors is misguided. According to the Unions, the Employer's solicitation "flies in the face of well-established Board law that determining supervisory status is a fact-intensive proposition, which requires 'examination of all the evidence in the case.'"

#### Analysis

##### A. Legal Precedent

The alleged supervisory status of electric utility dispatchers is not an unfamiliar issue for the Board. For decades the Board had found electric utility dispatchers, similar to those at issue in this case, were not statutory supervisors. The Board reasoned that these employees did not exercise independent judgment in carrying out switching orders or in the assignment of field employees during outages or other emergencies. However, because the courts of appeals uniformly denied enforcement of these decisions,<sup>5</sup> the Board revisited the issue in *Big Rivers Electric Corp.*, supra at 380, and concluded that such employees actually exercised supervisory authority. Specifically, the Board found that such employees responsibly directed other employees and that their assignment of employees to carry out switching directives involved the use of independent judgment. Supra at 382.

Nearly 20 years later, pursuant to the First Circuit's suggestion that the Board reexamine its views in this

<sup>5</sup> See, e.g., *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971); *Monongahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981); *Detroit Edison Co.*, 216 NLRB 1022 (1975), enf. denied 537 F.2d 239 (6th Cir. 1976); *Maine Yankee Atomic Power Co.*, 239 NLRB 1216 (1979), enf. denied 624 F.2d 347 (1st Cir. 1980); *Southern Indiana Gas & Electric Co.*, 249 NLRB 252 (1980), enf. denied 657 F.2d 878 (7th Cir. 1981).

area, see *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 626 (1st Cir. 1994), cert. denied 514 U.S. 1015 (1995), the Board, in *Mississippi Power*, supra, 328 NLRB 965, overruled its decision in *Big Rivers*. The Board majority explained that, in weighing the supervisory status of electric utility dispatchers, it had previously failed to give appropriate weight to the “quasi-professional, quasi-overseer” nature of that job category. 328 NLRB at 969. The Board also observed that, in *Big Rivers* and its progeny, it had placed too great an emphasis on the inherent complexity of the dispatchers’ duties and on the potential adverse consequences to the well-being and safety of the public and employees that might result from the dispatchers’ misjudgments. Id. at 969–970. Ultimately, drawing from the charge nurse supervisory cases, the Board in *Mississippi Power*, supra, concluded that the exercise of even critical judgment by dispatchers based on their experience, expertise, know-how, or formal training and education did not, without more, constitute the exercise of supervisory judgment. See *Providence Hospital*, 320 NLRB 717, 725 (1996), enf. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997) (registered charge nurses not supervisors even though they “at times must make immediate life-or-death decisions”). Accordingly, the Board concluded that the electric utility dispatchers in that case were not statutory supervisors.

Subsequently, two circuits refused to accept the *Mississippi Power* rationale, finding that the Board relied on an interpretation of independent judgment that was rejected by the Supreme Court in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). See *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001); *Public Service of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001). The Fifth Circuit, in *Entergy Gulf States* (which involved the Employer’s sister company), considered whether 10 operations coordinators (OCs) at an electrical utility were statutory supervisors under the Act. The OCs were responsible for monitoring the status of power lines; receiving reports of power outages; and coordinating repairs with field workers. OCs were also responsible for writing “switching orders” and faxing the orders to field workers. The field workers would then call the OC and read back the switching orders as they executed them. During multiple power interruptions, OCs prioritized repairs using guidelines.

In finding the OCs to be supervisors, the court concluded that the Board’s reversal of *Big Rivers* in *Mississippi Power* was unwarranted. The court noted that the Board’s holding in *Mississippi Power*—that the use of technical and professional expertise in making complex decisions did not render an employee a supervisor—was

no longer viable in light of *Kentucky River*. *Entergy Gulf States*, supra, 253 F.3d at 211. The court found that the dispatchers used independent judgment in responsibly directing others because they operated without supervision and directed field workers after hours; they independently decided whether to open up an area office and how many workers to initially call on duty; they had the discretion to prioritize repairs in a particular area and move field workers between jobs; and had considerable responsibility for safe switching orders and timely power restorations. Id. at 210–211. Accordingly, the court determined that the OCs effectively directed field operations during emergencies and after hours, and thus were supervisors under the Act.

The court in *Public Service of Colorado*, supra, also refused to follow the Board’s decision in *Mississippi Power*. The employees at issue there were transmission operators, whose main duties were to design and oversee the implementation of “switching procedures.” After a switching order was prepared, the transmission operator was responsible for reading the step-by-step procedures to the field personnel over a telephone. The Regional Director, relying on *Mississippi Power*, found that the transmission operators did not exercise independent judgment in assigning or directing the work of field employees. The Board affirmed the Regional Director, and the court denied enforcement. In the court’s view, *Mississippi Power* and its references to charge nurse cases placed it within the umbrella of *Kentucky River*. 271 F.3d at 1220–1221. The court further stated, “[i]f the Board wishes to introduce a new standard for interpreting when a person responsibly directs employees, it should do so forthrightly and explicitly so that it may be ‘required to apply in fact the clearly understood legal standards that it enunciates in principle.’” Id. at 1221.

In *Oakwood Healthcare*, supra, 348 NLRB 686, the Board clarified the meaning of the terms “assign,” “responsibly to direct,” and “independent judgment” under Section 2(11) of the Act.<sup>6</sup> The Board defined “assign” as the act of designating an employee to a place (such as a location, department, or wing); appointing an individual to a time (such as a shift or overtime period); or giving significant overall tasks to an employee. Id. at 689. The term “responsibly to direct” involves a finding of accountability, so that “it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary,” and also that “there is a prospect of adverse consequences for the putative supervisor,” arising from

<sup>6</sup> See also *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

his or her direction of other employees. *Oakwood Healthcare*, 348 NLRB at 692. Finally, consistent with the Supreme Court's *Kentucky River* decision, the Board adopted an interpretation of the term "independent judgment" that applies regardless of the 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. "In short, professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare*, 348 NLRB at 692. Specifically, the Board defined the term independent judgment as requiring that "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," provided that the act is "not of a merely routine or clerical nature." *Id.* at 692–693. Judgment is not independent if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of higher authority, or in the provisions of a collective-bargaining agreement." *Id.* at 693.

Therefore, contrary to the Board's holding in *Mississippi Power* that the dispatchers' exercise of critical judgment based on their experience or expertise does not constitute the exercise of supervisory judgment, the Board has since clarified its interpretation of supervisory independent judgment to include those judgments exercised as a result of one's professional expertise, as long as it is exercised in relation to 1 of the 12 indicia of supervisory authority.

Contrary to the Employer, we believe that a reversion to *Big Rivers*, *supra*, a case predating *Oakwood Healthcare* by over 20 years, is unwarranted. The former case was decided under a different standard for determining supervisory status than the one set forth in *Oakwood Healthcare* pursuant to the Supreme Court's guidance in *Kentucky River*. For the Board to revert to a standard that does not follow the principles set forth in *Oakwood Healthcare* would ignore the significant doctrinal developments in this area of law. We therefore reject that approach and apply the *Oakwood Healthcare* standard to the facts of this case. We find, under *Oakwood Healthcare*, that the Employer has failed to establish that the dispatchers at issue are statutory supervisors.

#### *B. Application of Oakwood Healthcare to the Present Case*

##### 1. Responsible direction of field employees

We find that the Employer established that its dispatchers have the authority to direct field employees in

the step-by-step instructions of a switching order. However, contrary to the Employer, we do not find that the dispatchers are accountable for the actions of field employees they direct. The Employer presented no evidence that any dispatcher has experienced any material consequences to his terms and conditions of employment, either positive or negative, as a result of his performance in directing field employees.

To show accountability, the Employer introduced several exhibits purporting to show the dispatchers' accountability for certain actions. For instance, it presented an exhibit showing a dispatcher being held accountable for failing to properly staff a trouble location with enough field employees, which resulted in an unacceptable outage time. In another example, a dispatcher was disciplined for writing an incorrect switching order after receiving misinformation from a field employee at the scene. In the Employer's view, these disciplinary notices show that the dispatchers are held "accountable" within the meaning of the Act. We disagree.

*Oakwood Healthcare* specifically states that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." 348 NLRB at 692 (emphasis added). Applying this definition of "responsible direction," the Board in *Croft Metals*, *supra*, 348 NLRB 717 found that lead persons responsibly directed their employees. The Board stated:

The record reveals that the Employer has disciplined lead persons by issuing written warnings to them because of the failure of their crews to meet production goals or because of other shortcomings of their crews. This specific showing of "some adverse consequence [befalling the lead persons] providing the oversight if the tasks performed are not performed properly" adequately satisfies the *Oakwood Healthcare* "accountability" standard for purposes of responsible direction.

*Id.* at 722.<sup>7</sup>

Here, the Employer has not shown that the dispatchers are held accountable, as defined in *Oakwood Healthcare*

<sup>7</sup> Contrary to our dissenting colleague's assertions, "accountability," as defined in *Croft Metals*, requires that the purported supervisors be responsible "for the job performance of the employees assigned to them." 348 NLRB at 722. To satisfy this requirement, the dispatchers in this case must be shown to have been held accountable for the "failure . . . [or] shortcomings" of the field employees, like foremen are responsible for the performance and output of their crews, and not simply for their own failures. *Id.* The Employer failed to carry its burden of proof on this issue as discussed below.

and *Croft Metals*, for the work of the employees they direct. Rather, the evidence proffered by the Employer actually demonstrates that the dispatchers are accountable for their own work, i.e., their own failures and errors, and not those of the field employees. The following examples illustrate this point:

- A verbal warning was issued to dispatcher James Thompson for “not paying attention to details prior to closing the case.” An Employer witness testified that the dispatcher failed to get certain information from the field employee prior to closing the case. The dispatcher was held “accountable for getting” the information.
- An email in which a dispatcher is being held “accountable” for failing to call in more help during an outage.
- A written warning was issued to dispatcher Chris Townsend for failing to act according to the switching, tagging, and clearance guidelines. The dispatcher failed to issue a clearance so that the field crew could work in a safe environment (“In this case, all of the information was readily before you but you failed to stop the field personnel and allowed them to begin repairs without a clearance order.”). Field employees were not disciplined.
- Switching Error Investigation Report involving dispatcher who had written an incorrect switching order. The report indicated that the field employee did not discover the error in the switching order. The dispatcher was coached and counseled for his error. The field employee was not disciplined.
- Switching Error Investigation Report involving dispatcher who had written an incorrect switching order. The report indicated that the field employee contributed to the error by assuming that the order was written correctly. The order, however, was written out of sequence. The dispatcher was disciplined, and the field employee was not.

The above incidences do not shed light on the dispatchers’ “responsible” direction of field employees’ work. Rather, they show that the dispatchers are disciplined for their own work deficiencies, e.g., failing to write proper switching orders and failing to follow the switching, tagging, and clearance procedures. In the above instances, the field employees may not have caught the errors in the switching orders, but it is not

their work deficiencies that led to the disciplinary notices. It is the dispatchers’ own work that was at issue.

Nor can we agree with the Employer or our dissenting colleague that another example in the record shows conclusively that dispatchers are accountable for the work deficiencies of field employees. In that instance, a field employee opened the wrong switch, which in turn knocked out four substations. The field employee notified the dispatcher that he grabbed the wrong switch, and the dispatcher fixed the problem immediately. The field employee erred, and the Employer testified that the dispatcher was “coached and counseled” for this error. The reasoning for the coaching, according to the Employer, was that the dispatcher could sense that the field employee was “uncomfortable” in the field, but still allowed him to progress with the work. In other words, the dispatcher was coached based on his own failure to act despite warning signs, not based simply on “the job performance of the employees assigned to” him.

Moreover, this evidence that the dispatcher was held accountable is negated by the fact that the copy of the “coaching and counseling” session was not placed in the dispatcher’s personnel file; this fact offsets any adverse consequences that may have befallen the dispatcher because the Employer’s disciplinary policy directs that the supervisor “document the counseling (sign and date document) and place documentation in the employee’s departmental file.” Here, the Employer did not do that. Accordingly, there were no adverse consequences against the dispatcher for his “failure to responsibly direct.”<sup>8</sup>

In instances where a field employee has erred in the field, that field employee will normally be disciplined by his immediate field supervisor. The dispatchers neither take part in disciplining the field employees nor are they held responsible for the field employees’ work deficiencies.<sup>9</sup>

<sup>8</sup> *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB 579 (2010), cited by the dissent, does not support a contrary conclusion. Although verbal warnings in *Altercare*, like counselings here, were part of the employer’s progressive disciplinary system, there was no evidence in *Altercare* that supervisors were directed to document verbal warnings and place them in employees’ personnel files. Here, however, the Employer’s progressive disciplinary system directs supervisors to document counselings, and the fact that this was not done following the substation knockouts indicates that the dispatcher was not held accountable for the field employee’s error. Moreover, even assuming, as the dissent suggests, that this dispatcher was held accountable for the field employee’s error in this particular incident, this one instance cannot overcome the weight of the evidence discussed above demonstrating that dispatchers are not held accountable for the failures of field employees.

<sup>9</sup> Because we find that the dispatchers do not “responsibly” direct employees, it is unnecessary to address the issue of whether they exercise independent judgment in this context.

In sum, we conclude—as the Board did in *Oakwood Healthcare* with respect to charge nurses, that the evidence shows only that the dispatchers “are accountable for their *own* performance or lack thereof, not the performance of *others*, and consequently is insufficient to establish responsible direction.” 348 NLRB at 695.

#### Assign

As stated above, to “assign” within the meaning of *Oakwood Healthcare* is the act of designating an employee to a place (such as a location, department, or wing); appointing an individual to a time (such as a shift or overtime period); or giving significant overall tasks to an employee. We find that the Employer has not met its burden to establish that its dispatchers are supervisors based on authority to “assign” employees under the foregoing definition.

**Place:** Dispatchers assign field employees to a location. During trouble outages, the dispatcher will isolate the location of the problem, and will assign the field employees to this location so that they may begin resolving the trouble order. Dispatchers also may reassign field employees to other locations once the trouble has been resolved at the initial site.

Even assuming that this form of temporary assignment to a place of work constitutes assignment rather than direction as those terms are used in Section 2(11), the record does not establish that the dispatchers assign field employees to trouble locations using independent judgment. The location of the outage, which is pinpointed using the AM/FM computer system, dictates where the field employee will be assigned. Moreover, when an outage occurs in a specific area, the field employee assigned to that specific territory will be asked to handle the outage. Dispatchers know where field employees are assigned because the local network offices fax daily assignment sheets to the dispatchers, which list all of the field employees assigned to that particular network and where they are working.

Because the dispatchers utilize a computer program that notifies them of trouble spot locations, and usually assign to trouble spots employees already assigned to that specific area, the dispatchers do not exercise independent judgment in assigning employees.

**Time:** There is no dispute that dispatchers have the authority to assign overtime to field employees during outage situations. However, to establish that this authority is supervisory, the evidence must also show that the dispatchers can *require* the field employees to work the outage overtime assigned them. *Golden Crest Healthcare*, supra, 348 NLRB at 729 (“the party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a cer-

tain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken”). Here, the Employer concedes that dispatchers cannot require field employees to work emergency callout overtime, but argues that dispatchers can require field employees to work beyond their 8-hour shifts to repair outages or other trouble spots.

In support of this contention, the Employer cites the testimony of John Scott, the distribution dispatch manager, and William McCorkle, a former field employee. Contrary to our dissenting colleague, we find that this testimony fails to establish that dispatchers can require that field employees remain on the job after their shifts. Scott’s testimony was in response to a single question whether field employees “can refuse to work once they’re on the clock.” He replied that “[i]f there’s a major—I guess, if there’s a major critical emergency at home, [the dispatcher] may have to go address that issue, but, no. For the most part, [field employees] are required to stay at work and continue to work until released” by the dispatcher. McCorkle’s testimony was slightly more extensive. He explained that the usual practice of a dispatcher is to find a replacement if a field employee reports that he cannot remain beyond his shift to work overtime. In response to the hearing officer’s question whether, in the event that a replacement could not be found, a dispatcher could “do anything” to the field employee if he refused the overtime assignment, McCorkle testified that the dispatcher could do nothing. Upon further questioning by the Employer’s attorney, however, McCorkle changed his testimony and stated that the dispatcher could make the field employee remain on the job if a replacement could not be found, and that the field employee “could be subject to discipline [by his] supervisor” if he refused the assignment.

We find the foregoing testimony of Scott and McCorkle speculative, lacking in specificity, and insufficient to satisfy the Employer’s burden of establishing that dispatchers possess the supervisory authority to require field employees to work overtime after their scheduled shifts. See *Golden Crest Healthcare*, supra, 348 NLRB at 731 (“purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue”); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority). Dispatch Manager Scott, in response to the only question he was asked on this issue, summarily testified that dispatchers can require field employees to remain on the job and work overtime until

released, but he failed to particularize his testimony, such as by describing actual incidents where dispatchers denied field employees' requests to be excused from overtime assignments, or refusals by field employees to accept a dispatcher's overtime assignment and the consequences, if any, for the refusal.

Although Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise, the evidence still must suffice to show that such authority actually exists. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004). Scott's testimony does not show the existence of supervisory authority to require field employees to work overtime beyond their 8-hour shift. He failed not only to substantiate his assertion that dispatchers possessed this authority, but he was also equivocal in stating that this authority existed only "for the most part." Further, there is no evidence that Scott or any other managerial official informed dispatchers that they possessed this authority. To the contrary, the only dispatcher who testified on this point, Tony DeLaughter, understood that he did not possess this authority. He testified that he "can ask a [field employee] to stay on and work, but as far as forcing him, I don't have the authority to force him to stay."

Where, as here, putative supervisors have not been notified by management that they are vested with a supervisory power, the Board will decline to find supervisory status. See, e.g., *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004). Scott's testimony therefore fails to establish that dispatchers have supervisory authority to require overtime by field employees.

McCorkle's testimony is no more probative of the Employer's position than Scott's. Although McCorkle's testimony could be read to suggest that dispatchers could require field employees to work overtime beyond the end of their shift, he did not cite any specific instance when this had occurred. When pressed by the hearing officer as to "what makes you believe [a dispatcher] has the authority to make you stay," McCorkle answered that he "could be subject to discipline" if he refused the assignment. Again, he did not testify that this ever happened to him or any other field employee. Further, he acknowledged that if discipline were to issue for refusing a dispatcher's overtime assignment, the discipline, if any, would be imposed by the field employee's supervisor, not by the dispatcher. Thus, McCorkle's testimony, rather than establishing dispatcher power to require field employees to accept overtime assignments, demonstrated that this authority is possessed by the field employee's own supervisor.

For the foregoing reasons, we conclude that the Employer has failed to show that dispatchers either possess

or exercise the supervisory authority to require field employees to remain on the job at the end of their 8-hour shift to perform an overtime assignment.

**Significant Overall Duties:** It is undisputed that the task of assigning trouble orders to the field employees is the responsibility of the dispatcher. However, this assignment does not constitute an assignment of "significant overall duties" within the meaning of *Oakwood Healthcare*. To illustrate its point of assignment of significant overall duties, the Board stated that assigning an employee to restock shelves in a housewares department would generally qualify as "assign" within the Board's construction. *Oakwood Healthcare*, 348 NLRB at 689. However, choosing the order in which the employee will perform discrete tasks within that assignment, such as restocking toasters before coffeemakers, would not be indicative of exercising authority to "assign." *Id.*

Here, the operations coordinators prepare the daily work assignments for the field employees. This work includes hooking up houses, turning meters on, and doing some construction work. When trouble occurs, such as a power outage, the dispatchers have the authority to remove field employees from their assigned tasks to work on a trouble case. This reassignment is not an assignment of significant overall duties but mere *ad hoc* instruction, i.e., trouble work needing to get done before routine work. By contrast, the assignment by the operations coordinators is the assignment of significant overall tasks.

Accordingly, applying our *Oakwood Healthcare* test for assignment, we find that the Employer's dispatchers do not possess the authority to assign field employees within the meaning of the Act. See also *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1423-1424 (2010).

#### Conclusion

For the foregoing reasons, we find that the transmission and distribution electric utility dispatchers are not supervisors and should continue to be included in the collective-bargaining unit. Accordingly, we shall clarify the bargaining unit to find that they properly are included.

#### ORDER

The National Labor Relations Board clarifies the collective-bargaining unit represented by the International Brotherhood of Electrical Workers, Locals 605 and 985, AFL-CIO, specifically to provide that the classifications of transmission dispatcher and distribution dispatcher are included.

MEMBER HAYES, dissenting.

I would grant the Employer's petition and clarify the unit to exclude the electric utility dispatchers. Contrary



to the majority, I find that these dispatchers are statutory supervisors under Section 2(11) of the Act because they use independent judgment in responsibly directing field employees in the performance of tasks in response to power outages and other problem situations and assigning field employees to carry out their orders related to these matters and to executing switching orders.

#### Responsible Direction of Field Employees

My colleagues acknowledge that the dispatchers have authority to direct field employees in carrying out the complex switching orders. They further agree that the dispatchers are held accountable for the exercise of this authority, but they conclude that the evidence shows only that the dispatchers are disciplined for their own work deficiencies. Thus, they argue that the Employer has failed to prove the dispatchers' accountability for the "failures and errors" of the field employees, as required to find Section 2(11) responsible direction under *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006). I disagree and find that the Employer's evidence establishes that the dispatchers responsibly direct because they are held accountable for their oversight and judgment when directing field employees.

Contrary to the majority's narrow interpretation of the phrase, a supervisor's "responsible direction" under *Oakwood Healthcare* is not based simply on being accountable for the errors and mistakes of the employees directed. Rather, accountability focuses on the supervisor's own conduct and judgment in exercising oversight and direction of employees in order to accomplish the work.<sup>1</sup> As expressed in *Oakwood Healthcare*, the critical inquiry is whether the person delegated authority to direct and oversee the performance of a task by other employees is accountable for the employees' success or failure in accomplishing the task for the employer. *Oakwood Healthcare*, supra at 692.

In *Croft Metals, Inc.*, 348 NLRB 717 (2006), one of the *Oakwood Healthcare* companion cases, the Board applied the *Oakwood Healthcare*'s definition of "accountability" and concluded that the lead persons respon-

sibly directed their crews. The lead persons in *Croft Metals* were responsible for overseeing production in their assigned area through a variety of tasks "all to achieve management-targeted production goals." Id. at 722. In words echoing the broad interpretation of accountability in the legislative history, the Board found that the lead persons "instruct employees how to perform jobs properly, and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filled and production completed in a timely manner." Id. When the lead person failed to exercise that authority or failed to take corrective action—taking too long to load the trucks, not moving people to promptly correct a problem, not keeping the employees occupied—the lead person was warned about his own deficiency as a supervisor. Thus, the evidence establishing accountability "for the performance of the task by the other" in *Croft* was based on how effectively the lead person exercised his delegated directional authority.

Here, the Employer's evidence includes a number of instances establishing that the dispatchers are accountable for how well they direct the field employees to promptly and properly correct problems when they occur. As cited but dismissed by the majority, a dispatcher was held accountable when he failed to assign enough field employees to a trouble spot, resulting in a lengthy outage. Another dispatcher similarly was held accountable for failing to call in more help during an outage; another received a written warning because he allowed the field crew he was directing to begin repairs without the required clearance necessary for the employees to safely perform the work.

In still another example erroneously discounted by the majority, a dispatcher was "coached and counseled" for an incident involving a field employee's error. The field employee was "uncomfortable" executing a switching order, but the dispatcher allowed him to proceed; the field employee knocked out four substations when he opened the wrong switch. When the field employee notified the dispatcher, the dispatcher fixed the problem immediately. The majority dismisses this as evidence that the dispatcher was disciplined for a field employee error because a copy of the "coaching and counseling" was not placed in the dispatcher's personnel file as required by the Employer's disciplinary policy. *Oakwood Healthcare*, however, does not require that an "adverse consequence" must be some formal discipline or even that every incident must result in an adverse consequence.<sup>2</sup>

<sup>1</sup> As discussed in *Oakwood Healthcare*, 348 NLRB at 691 fn. 27, the phrase "responsibly to direct" was added to Sec. 2(11) by Senator Flanders because of his concern that the definition of supervisor seemed to "cover adequately everything except the basic act of supervising." He observed that, under "some modern management methods," a supervisor with limited authority for most of the 2(11) functions would nonetheless carry out "essential managerial duties" using:

personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.

<sup>2</sup> Moreover, even though the dispatcher's supervisor did not document this coaching in the employee's file, the supervisor testified that he considered it to be disciplinary and, given the circumstances, unlike-

I further find that the Employer has satisfied its burden of proving that such responsible direction is exercised using “independent judgment” under *Oakwood Healthcare*. When dealing with problems that arise, and when drafting and directing the execution of switching orders, the dispatchers must take into account various considerations to prioritize responses, determine the number and type of employees needed at each location, and prepare and handle possible contingencies as they become known. The dispatcher must determine what and when to switch at each site, taking into account: the data gathered using monitoring systems, customer impact, personnel safety, current weather conditions, the weather forecast, all with other variables. The dispatcher, therefore, exercises a significant degree of discretion and judgment in balancing all these considerations, and then directing the field employees based on his assessments.<sup>3</sup>

#### Assignment of Field Employees

The majority correctly defines the term “assign” as 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 . . . to an employee.” *Oakwood Healthcare*, supra at 689. Unlike the majority, however, I find that the evidence demonstrates that dispatchers “assign” field employees to a “place,” a “time,” and “significant overall duties” in response to problems and executing switching orders.

**Place:** There is no dispute that dispatchers assign field employees to a location to resolve problems and may reassign field employees from one location to another. The majority, however, concludes that the dispatchers do not assign employees to locations using “independent judgment” because a computer system monitored by the dispatchers displays the location of the trouble spot, dictating the assignment, and, normally, the field employee assigned to that specific geographical area will be asked to handle the outage.

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ly to be forgotten. See *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB 579, 580 (2010) (finding verbal warnings not documented in employees’ personnel folder as required by employer’s policy were nevertheless discipline for purposes of progressive discipline where supervisor would likely remember it).

<sup>3</sup> The majority does not reach this issue. The Acting Regional Director, in the Supplement Decision and Order, dismissed the dispatchers’ judgment as circumscribed by the switching, tagging, and clearance guidelines and the dispatcher training manual. The evidence, however, notably the testimony of Distribution Dispatch Manager John Scott, establishes that neither document tells the dispatcher what and where to switch, what the current voltage readings are, what loads are available, what lines are in and out of service, or how many field employees are required to restore the service.

But even in the simplest situation involving only one trouble location, the dispatcher must still use his own judgment. He exercises his discretion in deciding whether to send an employee to the location because immediate attention is required, which type of employee to send given the type of problem, and how many employees should be sent. When multiple trouble locations are involved, the dispatcher must decide whether issues can be handled sequentially or must be dealt with simultaneously. In such circumstances, the dispatcher may additionally be required to determine whether to divert a crew currently working on a particular problem to another trouble spot, callout or assign additional personnel, or postpone any response. Moreover, although the majority is correct that field employees are usually assigned to locations in their geographic areas, the dispatchers’ authority to assign and reassign employees encompasses sending them to locations outside their regular areas to resolve problems that the dispatchers determines have priority.

Finally, in making the above assessments and prioritizing assignments, the dispatcher considers a range of variables including the number and type of customers affected, the locations of the trouble spots, the prospect for additional trouble, and the current and future weather conditions.

**Time:** Likewise, it is undisputed that dispatchers have the authority to determine when overtime is necessary and assign overtime to field employees during outage situations.<sup>4</sup> The majority, however, contends that this does not reflect effective assignment because the dispatchers cannot *require* field employees to work the outage overtime after their scheduled shifts.<sup>5</sup> Contrary to the majority, I find that the testimony of the Employer’s distribution manager, John Scott, and former field employee William McCorkle establishes that dispatchers can *require* field employees to remain on the job to work overtime.<sup>6</sup>

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<sup>4</sup> Under the terms of the parties’ collective-bargaining agreement, dispatchers cannot require field employees to respond to an emergency callout to work overtime, but this does not resolve whether a dispatcher can hold over field employees.

<sup>5</sup> *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006) (“putative supervisor [must have] ability to *require* . . . [not] merely to *request* that a certain action be taken”).

<sup>6</sup> The majority contends that Scott’s testimony was equivocal and failed to substantiate his assertion that dispatchers possess authority to require overtime. To the contrary, Scott’s testimony essentially reflected that, absent a “critical emergency at home,” the dispatcher could require the employee to remain on the job. This interpretation is consistent with McCorkle’s testimony that a dispatcher will usually try to find a replacement if a field employee notifies the dispatcher that he cannot remain beyond his shift. Significantly, Scott’s testimony clearly points to the dispatcher as the person with authority to “address that issue.”

The majority discounts McCorkle's testimony that the field employee "could be subject to discipline [by his] supervisor" if he refused the dispatcher's assignment to stay on the job in the absence of evidence that he or any other field employee had ever been disciplined. The absence of examples of discipline does not show the dispatchers' lack authority to require them to stay, however, but only that field employees routinely comply with the dispatcher's direction. See *NLRB v. Prime Energy Ltd. Partnership*, 224 F.3d 206, 210 (3d Cir. 2000) ("The mere fact that the Regional Director found only one instance where a shift supervisor sent a plant operator home is hardly a reasonable basis to conclude that the authority was lacking. It simply suggests that the authority was rarely needed.").<sup>7</sup> More significantly, McCorkle testified that in the past he had been required by a dispatcher to stay over after he had asked to be relieved but the dispatcher could not find a replacement.

Further, contrary to the majority, that any discipline of a field employee would have been imposed by the field employee's supervisor does not show the dispatchers lack authority to require employees to stay. It demonstrates only that the dispatcher cannot directly discipline a field employee.<sup>8</sup> The critical point is that the field employee's discipline by his supervisor would be for disobeying a dispatcher's direction to remain on the job and demonstrates that dispatchers indeed possess such authority.

<sup>7</sup> See also *NLRB v. Detroit Edison Co.*, 537 F.2d 239, 243 (6th Cir. 1976) (rejecting Board's argument that electric utility supervisor only requests field employees because they cannot not directly discipline where only one instance in 40 years of field employee refusing to obey supervisor's direction); *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 232 (9th Cir. 1971) (utility company's system load supervisors have supervisory authority when no employee ever failed to carry out supervisor's requests even though "couched in nondemanding terms").

<sup>8</sup> The Employer has not claimed that the dispatchers possess this separate indicia of supervisory authority.

**Significant Overall Duties:** The majority does not dispute that the dispatchers reassign field employees to handle problems that occur, including executing switching orders. But the majority dismisses these reassignments to resolve power outages and the like as merely *ad hoc* instruction, and contends that only the operations coordinators, who prepare the field employees' daily work schedule, assign the field employees "significant overall duties." I disagree.

The record reflects that dispatchers often direct the field employees for 30–50 percent of the workday. When reassigned by the dispatcher, the field employees must perform other than their usual tasks at the dispatcher's direction, such as providing information about the conditions at the location, executing the steps in switching order to direct, redirect, or isolate the electrical power, repairing damaged equipment, and submitting information about an outage's cause and duration for necessary for required governmental reports. Moreover, the execution of a switching order itself cannot be viewed as a single, discrete task because one switching order can involve many individual steps, sometimes performed by multiple field employees at different geographic locations which may take several hours to complete. In my view, the reassignment of field employees in these circumstances constitutes the assignment of "significant overall duties."<sup>9</sup>

### Conclusion

In sum, I find that the record shows the dispatchers clearly meet the *Oakwood Healthcare* definition for individuals who responsibly direct and assign work within the meaning of Section 2(11) of the Act. I would therefore grant the Employer's petition and clarify the unit to exclude the dispatchers because they are statutory supervisors.

<sup>9</sup> The majority minimizes these reassignments as akin to instruction to "restocking toasters before coffeemakers." See *Oakwood Healthcare*, *supra* at 689. But these emergency assignments of field employees by the dispatchers do not simply involve the order in which assigned tasks are accomplished, but instead involve performance of a panoply of complex tasks, certainly as broad as "stocking a shelf," which was found to be a discrete overall task in *Oakwood Healthcare*. *Id.*