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Transdev Services, Inc. *and* Amalgamated Transit Union Local 1764 a/w Amalgamated Transit Union, AFL–CIO, CLC, Petitioner. Case 05–RC–303421

September 30, 2024

DECISION ON REVIEW AND ORDER

BY MEMBERS KAPLAN, PROUTY, AND WILCOX

On April 28, 2023, the Regional Director issued a Decision and Direction of Election in which he concluded that the Employer's operations supervisors are supervisors within the meaning of Section 2(11) of the National Labor Relations Act and therefore could not be included in the petitioned-for voting group. In accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, on June 12, 2023, the Petitioner filed a timely request for review contending that the Employer had not met its burden of establishing that the operations supervisors are statutory supervisors. The Employer filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Petitioner's request for review is granted as it raises substantial issues warranting review. Having carefully considered the entire record, including the request for review and the opposition, we find that the Employer did not establish that the operations supervisors are statutory supervisors. Accordingly, we reverse the Regional Director and remand this case to the Regional Director to issue a revised Certification of Representative that includes the operations supervisors in the existing unit.

I. PROCEDURAL HISTORY

The Petitioner represents an existing bargaining unit of various classifications at the Employer's facility at 1601 Wicomico Street, Baltimore, Maryland.[1] On September 14, 2022, the Petitioner filed a petition seeking an *Armour-Globe* self-determination election[2] to ascertain whether the customer service representatives, dispatchers, schedulers, and operations supervisors employed at or out of the 1601 Wicomico Street facility wish to join the existing unit. The Employer contended that the operations supervisors could not be included in the voting group because they are supervisors within the meaning of Section 2(11).[3] On April 28, 2023, the Regional Director issued his Decision and Direction of Election in which he concluded that the operations supervisors are statutory supervisors because they possess the authority to discipline employees using independent judgment. He therefore excluded the operations supervisors from the voting group but directed a self-determination election for the remaining petitioned-for employees. The Petitioner prevailed in the election by a 5-0 vote, and, in the absence of objections or determinative challenges, the Regional Director issued a Certification of Representative on May 26, 2023. The Petitioner then timely filed a request for review, and the Employer filed an opposition.

II. FACTS

The Employer operates transportation services out of its Baltimore, Maryland facility. Four operations supervisors are based out of the Baltimore facility; three of them work for the Employer on a contract with the Maryland Transit Administration (MTA), and a fourth works for the Employer on a contract with the Baltimore County Department of Health. Although the Petitioner originally sought to represent all the operations supervisors at the Baltimore facility, following the hearing the Petitioner disclaimed interest in representing the operations supervisor who works on the Baltimore County Department of Health contract.[4]

The MTA operations supervisors who are based at the Baltimore facility oversee the activities of the Employer's operators and starters, address customer service issues,

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[1] The existing unit includes road supervisors, safety trainers, ready desk clerks, quality assurance employees, schedule analysts, and starter employees.

[2] See *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

[3] The Employer initially contended that an *Armour-Globe* election was inappropriate, but the parties subsequently stipulated to the appropriateness of such an election.

[4] Marshall Moore, the current operations supervisor who works on the Baltimore County Department of Health contract, testified at the hearing, and the Regional Director's findings and analysis rely, in significant part, on Moore's testimony. In this regard, the Regional Director reasoned that there was "no suggestion that the evidence pertaining" to Moore was not relevant to the MTA operations supervisors. We disagree.

As a threshold matter, as discussed below, the burden of establishing supervisory status is on the party asserting supervisory status—here, the Employer. The Regional Director's reasoning therefore improperly excused the Employer from its burden of proof.

But in any event, based on our review of the record evidence, it is clear that Moore's duties differ from those of the other operations supervisors. In this regard, the Employer's general manager testified that, because the Baltimore County Department of Health contract is significantly smaller, Moore has additional managerial-level responsibilities compared to the MTA operations supervisors (such as approving absence and time off requests and conducting internal trainings). Additionally, MTA Operations Supervisor Alexis Faulkner—who was present for Moore's testimony—testified that Moore's testimony gave the impression that Moore is involved in serious discipline, which was "completely different" from Faulkner's role, as Faulkner is not involved in suspensions and "things of that nature."

Similarly, the record reflects that Moore's work force differs from that of the MTA operations supervisors. On this count, the Employer's general manager testified that the Baltimore County Department of Health contract consists of five employees, whereas the MTA contract includes more than 300 employees. The work forces also work different hours and contain some different employee classifications.

Due to these differences, we conclude that Moore's testimony is only of limited probative value in assessing the disciplinary authority of the MTA operations supervisors. Our factual findings, and our subsequent legal analysis, accordingly focuses primarily on the testimony of MTA Operations Supervisor Faulkner and the examples of discipline in the record that implicate MTA operations supervisors.

ensure route timeliness and completion, conduct team meetings, and—according to the operations supervisor job description—initiate and issue discipline (up to suspension pending further investigation). The operators (who are represented by Teamsters Local 355) drive vehicles, facilitating travel to and from medical facilities. The starters (who are represented by the Petitioner and are part of the existing unit) dispatch operators, distribute travel plans, and communicate with operators. The MTA operations supervisors report to operations managers, who report to Arlette Whitley, the general manager of the Baltimore facility.

The Employer's disciplinary policies are set forth in its employee handbook.[5] The "Progressive Discipline" section of the handbook states that the Employer "has adopted a progressive discipline policy" that "applies to any and all employee conduct that the Company, in its sole discretion, determines must be addressed by discipline." This section further provides the Employer will "normally adhere to the following progressive disciplinary process" and lists, in ascending order of severity, the Employer's disciplinary steps: verbal warning, written warning, suspension, and termination. This section further notes, however, that the Employer "reserves the right, in its sole discretion, to decide whether and what disciplinary action will be taken in a given situation" and may "take whatever action it deems necessary to address a specific issue."[6] The "Standards of Behavior" section, which immediately follows the "Progressive Discipline" section, provides a list of 28 nonexhaustive examples of behavior that, "depending on severity," may justify the Employer imposing "discipline up to and including termination of employment." These examples include "failure to perform work or job assignments satisfactorily, safely, and efficiently" and "[v]iolation of any other established Company/departmental or state and federal regulation or action not in the best interest of co-workers, our clients, or the Company."

The "Progressive Discipline" section of the handbook also comments that "some Company polices [sic] contain specific discipline procedures." Seemingly in this vein, Arlette Whitley, the Employer's general manager, testified that "door-to-door violations," which she defined as situations in which an employee has not "fulfill[ed] their obligation as an operator to provide that service," result in an escalated disciplinary timeline: the first step is a written warning, the second step is suspension, and the third step is discharge.[7] Whitley also testified that safety violations likewise operate on a distinct disciplinary timeline: for instance, if an "individual gets three speeding violations, it's grounds for termination."[8]

Discipline is issued via employee disciplinary reports. The employee disciplinary report contains spaces for the employee's name, date, and position at the top of the form, along with a statement that the instant disciplinary action "was taken today and is to be made part of the official record of the above named employee." There follows a statement regarding progressive discipline which, notably, states that although it is the Employer's "intention to utilize this process, whenever practical," that "continued violation of Transdev policies could result in additional disciplinary action, leading up to and/or including termination," and that the Employer "recognizes there are certain offenses, that if committed by an employee, are serious enough to justify discharge, thereby superseding the progressive discipline process." The next section of the disciplinary report (hereinafter "the issuing section") provides checkboxes for the different disciplinary options available; in addition to the four levels listed in the handbook, the issuing section also includes a checkbox for "Coaching and Counseling." The following section, "Disciplinary History," provides lines labeled "Verbal Warning," "Written Warning," and "Suspension," along with a series of checkboxes to catalogue the type of violation committed. The disciplinary report also contains an "Explain Violation" section (with space for the Employer to describe the employee behavior at issue), a "Corrective Action" or "Corrective Measures to be taken By Employee" section (with space to describe such measures),[9] and signature lines for the employee and the person issuing the discipline (as well as lines for witnesses and employee representatives, when needed). Each disciplinary report in the record is signed by an operations supervisor.[10]

[5] The collective-bargaining agreement covering the operators appears to incorporate the handbook's disciplinary policy by reference. At the time of the hearing, the starters had voted to join the unit represented by the Petitioner, but the collective-bargaining agreement covering that unit does not refer to the starters, and it is therefore unclear whether the starters are covered by that agreement (which sets forth a distinct progressive disciplinary policy). See *Federal-Mogul Corp.*, 209 NLRB 343 (1974) (existing collective-bargaining agreement is not automatically applied to employees who vote to join the unit during the term of the agreement). That said, MTA Operations Supervisor Alexis Faulkner testified that progressive discipline is the same for the operators and the starters. We therefore assume, for the purposes of this decision, that the starters were also covered by the disciplinary policy set forth in the employee handbook.

[6] Similarly, the collective-bargaining agreement covering the operators reiterates the Employer's "ability to bypass a written warning or the normal steps of progressive discipline depending on the severity of the incident."

[7] "Door-to-door violations" are not mentioned anywhere in the handbook or in the collective-bargaining agreement covering the operators. The collective-bargaining agreement covering the Petitioner's existing unit refers to "door-to-door violations" in passing but does not define them.

[8] Safety violations appear in the handbook's "Standards of Behavior" list discussed above; the handbook does not, however, include the disciplinary timeline set forth in general manager Whitley's testimony.

[9] One employee disciplinary report in evidence omits this section entirely.

[10] Of the 19 disciplinary reports submitted into evidence, two were signed by Baltimore County Department of Health Operations Supervisor Moore, nine were signed by MTA Operations Supervisor Faulkner, and another eight were signed by Gwendolyn Talley, an MTA operations

With respect to the "Disciplinary History" section of the disciplinary reports, the record evidence indicates that this section is not actually used to document the prior disciplinary history of the employee who is receiving the disciplinary report. The Employer introduced 19 employee disciplinary reports into the record, and in the 16 instances where the "Disciplinary History" section was filled out,[11] the level of discipline recorded there was the same as the level of discipline being issued to the employee. This circumstance suggests that, notwithstanding the section's name, the typical practice is to use the "Disciplinary History" section to reiterate the level of discipline being issued by the instant disciplinary report, rather than to document prior discipline. In that regard, MTA Operations Supervisor Faulkner testified that the verbal warning referenced in the "Disciplinary History" section of one of the employee disciplinary reports referred to the discipline administered in that disciplinary report itself—not to previously issued discipline. It is unclear from Faulkner's testimony whether this particular employee disciplinary report was a special case, but there is also no testimony establishing that the "Disciplinary History" section on any of the other disciplinary reports in evidence actually documents prior discipline.

There are several disciplinary reports where the "Explain Violation" section contains some sort of reference to prior behavioral issues or discipline, but here too the evidence is at best uncertain regarding the extent to which prior discipline informs subsequent discipline. Of the 19 employee disciplinary reports in evidence, 8 involve written warnings or suspensions—i.e., higher-level discipline that therefore could, in theory, refer back to prior discipline—but of these only three contain any reference to prior disciplinary issues. The first—a suspension without pay issued for failure to clock out that was signed by Moore—states that "[t]his is a pattern that happens on the regular" but does not identify any specific prior incidents or employee disciplinary reports.[12] The second—a suspension without pay for an attendance violation that was signed by Faulkner—expressly mentions a related written warning, but Faulkner testified (without contradiction) that an operations manager both drafted this disciplinary report and decided the level of discipline to administer; Faulkner merely signed the form. Only the third—a written warning for leaving without permission that was signed by Talley—represents discipline issued by an MTA operations supervisor that expressly links the current disciplinary action to prior discipline (a prior verbal warning for the same conduct). But even then, Talley did not testify, and there accordingly is no evidence about the incident in question aside from the disciplinary report itself.[13]

Although the disciplinary forms themselves offer only limited evidence of discipline issued by MTA operations supervisors relying on prior discipline, Faulker testified that, when issuing discipline, MTA operations supervisors will check the offending employee's file and, if the employee has been disciplined within the preceding 12 months, the level of discipline will escalate. The disciplinary reports in evidence, however, suggest an inconsistent practice in this regard. The record contains two separate examples of MTA operations supervisors issuing two disciplinary reports to the same employee within a 12-month period. One operator received a verbal warning (issued by Talley) for improper dwelling on May 30, 2022 (coded as "improper conduct" in the "Disciplinary History" section); the same operator received a second verbal warning (issued by Faulkner) for leaving trash in the vehicle on September 19, 2022 (coded as "housekeeping"). A second operator received a written warning (issued by Talley) for improper dwelling on February 7, 2022 (coded as "violation of safety rules"); the same operator received a verbal warning (issued by Faulkner) for failing to properly secure a wheelchair securement on September 28, 2022 (also coded as "violation of safety rules"). The fact that the first operator received two verbal warnings within a 12-month period is perhaps explicable by the fact that they were for different types of conduct (a circumstance noted in Faulkner's testimony, although she did not explicitly state that discipline only escalates when the same or similar conduct is repeated within 12 months). But the fact that the second operator received a verbal warning for "violation of safety rules" despite having received a written warning, also for "violation of safety rules," less than 12 months before, is less explicable (and unlike the first employee, Faulkner did not connect these two disciplinary reports, despite testifying regarding both of them).

supervisor who did not testify at the hearing. Both of Moore's disciplinary reports were issued to customer service representatives (who are members of the existing bargaining unit and therefore subject to the distinct policy set forth in the current collective-bargaining agreement). All 17 of the disciplinary reports issued by Faulkner and Talley were issued to operators.

[11] The two disciplinary reports signed by Operations Supervisor Moore left this section blank, as did one of the disciplinary reports signed by MTA Operations Supervisor Talley.

[12] As indicated above, evidence regarding Moore's alleged supervisory authority is of limited probative value with respect to the petitioned-for MTA operations supervisors, particularly given MTA Operations Supervisor Faulkner's statement that Moore's involvement with higher-level discipline (such as the suspension documented on this disciplinary report) was "totally different" than Faulkner's disciplinary involvement. Further, this specific disciplinary report was issued to an employee in a classification (customer service representative) that the MTA operations supervisors do not supervise (and which, moreover, is subject to the distinct disciplinary policy set forth in the collective-bargaining agreement covering the existing unit).

[13] Faulkner additionally testified that after issuing a verbal warning (which is in the record) to an operator for operating her vehicle with the lights out, the operator engaged in the same conduct the next day and that Faulkner therefore referred the operator to the safety department for further discipline. The record does not, however, contain any indication that the operator was actually disciplined for the second violation.

Apart from the fact that the disciplinary reports themselves do not demonstrate an automatic progression of discipline based on prior infractions, the record also indicates that operations supervisors can repeat steps rather than escalate discipline. In this regard, when asked whether operations supervisors can repeat steps, General Manager Whitley answered, "yes" and commented that "I know that has happened before." When asked whether operations supervisors have ever repeated counseling, verbal warnings, or written warnings specifically, Whitley responded that she could not "sit here and say yes, and I can't here and say—sit here and say no."

As indicated above, the vast majority of the evidence and testimony pertains to verbal and written warnings issued by MTA operations supervisors. The operations supervisor job description states that operations supervisors can suspend employees without pay, but there are only two examples in the record. Faulker signed one suspension without pay at the directive of Operations Manager Christopher Johnson, but she did not decide to issue the discipline (or to do so at that level). Indeed, Faulkner testified that she was instructed by Johnson that operations supervisors handle verbal and written warnings while operations managers handle suspensions and terminations. General Manager Whitley similarly testified that she was unaware of any instances of operations supervisors issuing a suspension (or termination) without talking to a manager.[14] Whitley also described an incident where an operations supervisor recommended removing an operator from service after observing the operator almost hit another operator with their car. According to Whitley, after the safety department reviewed the relevant security footage and investigated, management terminated that operator's employment. There are, accordingly, no examples of MTA operations supervisors deciding to issue discipline greater than a written warning.[15] There is also no specific evidence that verbal or written warnings, by themselves, are job-affecting discipline. When asked whether operations supervisors issue "job-affecting discipline," the steward for Teamsters Local 355 (which represents the operators) replied, "yes" but offered no elaboration; asked the same question, General Manager Whitley said "absolutely" because "failure to do so [correct misbehavior] actually will lead to further discipline."[16]

III. ANALYSIS

Section 2(11) of the Act sets three requirements for establishing supervisory status. Purported supervisors must possess at least 1 of the 12 enumerated supervisory functions, exercise independent (as opposed to routine or clerical) judgment in applying that authority, and exercise that authority "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001). The party asserting supervisory status bears the burden of proof and must establish it by a preponderance of the evidence. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (citations omitted). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). Conclusory statements without supporting evidence do not establish supervisory authority. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Lynwood Manor*, 350 NLRB 489, 490 (2007). "[P]aper authority" which is not exercised does not prove supervisory status. *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). And supervisory status is not established where the record evidence is "in conflict or otherwise inconclusive." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

To confer supervisory status based on the authority to discipline, "'the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel.'" *Lucky Cab Co.*, 360 NLRB 271, 272 (2014) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)). Warnings that simply bring substandard performance to the employer's attention without recommendations for future discipline serve nothing more than a reporting function and are not evidence of supervisory authority. See *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings that are merely reportorial and not linked to disciplinary action affecting job status are not evidence of supervisory authority). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

That said, "[a] warning may qualify as disciplinary within the meaning of Section 2(11) if it 'automatically' or 'routinely' leads to job-affecting discipline, by operation of a defined progressive disciplinary system." *The Republican Co.*, 361 NLRB 93, 99 (2014) (citing *Oak Park Nursing Care Center*, 351 NLRB 27, 30 (2007));

[14] The operations supervisor job description expressly provides that "[i]nvoluntary termination issues must be handled jointly with the Operations Manager." Although there was testimony that upper management considers verbal and written warnings in deciding whether to terminate an employee, there was no elaboration on what this consideration entails.

[15] Although Operations Supervisor Moore issued a suspension, as explained above, Faulkner characterized this authority as "completely different" from the MTA operations supervisors' disciplinary authority. Moreover, Moore herself testified that although she has the power to issue suspensions, she involves a manager and human resources; Moore also testified that suspensions have to be approved by somebody else.

[16] Moore stated that disciplinary reports are taken into account for employee evaluations but—aside from commenting that somebody who did not come to work should not get a bonus and describing how an employee told Moore that the employee had received a lower raise than the employee wanted "because of her attendance"—did not elaborate on how precisely the disciplinary reports adversely affect evaluations.

Veolia Transportation Services (*Veolia I*), 363 NLRB 902, 909 (2016) (same). It is the Employer's burden to prove the existence of such a system, as well as the role warnings issued by putative supervisors play within it. *The Republican Co.*, 361 NLRB at 99; *Veolia I*, 363 NLRB at 909. If an ostensibly progressive system is not consistently applied, progressive discipline has not been established. See, e.g., *Ken-Crest Services*, 335 NLRB 777, 777–778 (2001); *The Republican Co.*, supra, at 99 fn. 8; *Veolia Transportation Services* (*Veolia II*), 363 NLRB 1879, 1884–1885 (2016).

Here, the Regional Director found supervisory status by virtue of the operations supervisors' role in the disciplinary process.[17] More specifically, he concluded that the operations supervisors independently issue warnings without consulting higher-ranking individuals, that these warnings automatically and routinely lead to job-affecting discipline through a progressive system, and that the operations supervisors exercise independent judgment in determining whether to issue discipline and at what level.

As a preliminary matter, we emphasize that the foundation of the Regional Director's conclusion that MTA operations supervisors possess the authority to discipline is his finding that the disciplinary reports issued by the MTA operations supervisors are part of a progressive disciplinary system. The Regional Director did not indicate that these disciplinary reports would, absent the purportedly progressive policy, constitute discipline within the meaning of Section 2(11), nor does the record support such a finding. Board precedent is clear that written or verbal warnings that do not, by themselves, affect job status or tenure do not establish supervisory authority. See, e.g., *The Republican Co.*, 361 NLRB at 99; *Ten Broeck Commons*, 320 NLRB at 812; *Passavant Health Center*, 284 NLRB 887, 889 (1987). Nearly all the evidence regarding the MTA operations supervisors' disciplinary authority pertains to verbal and written warnings; although two witnesses answered "yes" when asked whether operations supervisors issue "job-affecting discipline," conclusory and unsupported testimony does not establish supervisory authority under Board precedent. See *Volair Contractors*, 341 NLRB at 675.[18] Although there is some evidence that operations supervisors are involved in suspensions, the reference to the authority to issue suspensions in the job description is, without more, mere paper authority. Faulkner—the only MTA operations supervisor who testified—plainly stated that she lacked the ability to issue suspensions without consulting higher managers. General Manager Whitley corroborated this statement. Faulkner testified that the one suspension bearing her signature was issued at the directive of an operations manager, who had decided to issue discipline at that level. The evidence accordingly does not establish that MTA operations supervisors can issue suspensions without independent investigation.[19] Finally, General Manager Whitley's testimony regarding the incident in which an operations supervisor recommended removing an operator from service also entailed the involvement of upper-level management, with the Employer's safety team independently investigating the incident.[20]

Turning now to the Employer's purportedly progressive discipline policy, we find, contrary to the Regional Director, that the available evidence is too limited and conflicting to establish the role that the MTA operations supervisors' warnings play within the Employer's alleged progressive disciplinary system, and that the evidence also indicates that the system is not consistently applied.

To begin, we find that the Employer has not established that its disciplinary system is, in fact, progressive. Although the employee handbook and the disciplinary reports describe the Employer's policy as progressive, both documents also grant the Employer broad latitude to deviate from the ostensibly progressive steps. Thus, the "Progressive Discipline" section of the handbook states that the Employer will "normally adhere to the following progressive disciplinary process" but "reserves the right, in its [the Employer's] sole discretion, to decide whether and what disciplinary action will be taken in a given situation" and may "take whatever action it deems necessary to address a specific issue." The employee disciplinary report form similarly reserves discretion for the Employer to deviate from progressive discipline, noting that "Transdev

[17] The Regional Director explicitly stated that operations supervisors do not hire, suspend, or discharge employees, and that there was no evidence that they transfer, lay off, recall, promote, reward, responsibly direct, or adjust grievances of employees. No party seeks review of these findings. The Regional Director did not make any findings or conclusions with respect to assignment, the remaining Sec. 2(11) indicium, but there is similarly no contention before us that the MTA operations supervisors exercise this authority using independent judgment. In any event, based on our review of the record we conclude that, to the extent the MTA operations supervisors make assignments within the meaning of *Oakwood Healthcare*, 348 NLRB at 689–693, the record does not establish that they do so using independent judgment. In this regard, the testimony regarding assignments was limited to operations supervisors' role in scheduling, and both witnesses who discussed scheduling commented that employee schedules were "already done" and "already set, pretty much."

[18] Although General Manager Whitley did offer some slight elaboration on her affirmative answer, that elaboration appears to rely on the role the warnings play in the Employer's purportedly progressive disciplinary policy, a distinct issue we address momentarily. Moore's testimony regarding the role of disciplinary reports in evaluations is not probative of the MTA supervisors' disciplinary authority and, in any event, her testimony was far too imprecise to establish that disciplinary reports are themselves job-affecting discipline.

[19] As indicated above, Moore's involvement in a suspension without pay is not probative of the MTA operations supervisors' authority in this area; in any event, Moore also testified that she could not issue a suspension without consulting higher-level management.

[20] Aside from the fact that the removal-from-service recommendation was independently investigated, the Board has long held that such responses to "flagrant" violations do not involve independent judgment. See, e.g., *Veolia II*, 363 NLRB at 1886; *Loffland Bros. Co.*, 243 NLRB 74, 75 fn. 4 (1979).

recognizes there are certain offenses, that if committed by an employee, are serious enough to justify discharge, thereby superseding the progressive discipline process."[21] The Board has found that similar reservations have prevented an employer from establishing that discipline is, in fact, progressive. Cf. *Lucky Cab*, 360 NLRB at 273 (record did not establish progressive policy where handbook stated that employer "may exercise its discretion in utilizing forms of discipline" and that "no formal order or system is necessary" and steps could be skipped). Furthermore, the "Standards of Behavior" section of the handbook provides a list of 28 nonexhaustive examples of behavior that "depending on severity," may justify Employer "discipline up to and including termination of employment." Several of these examples are broad enough to encompass virtually any type of employee misconduct, such as "failure to perform work or job assignments satisfactorily, safely, and efficiently" or "[v]iolation of any other established Company/departmental or state and federal regulation or action not in the best interest of co-workers, our clients, or the Company." Under similar circumstances, the Board has concluded that discipline is not, in fact, progressive. See *Veolia I*, 363 NLRB at 909 ("[t]he Employer has made no effort to square this list—which appears to reserve the right to discharge an employee for virtually any offense—with its supposedly progressive disciplinary policy.").

Even if the Employer's disciplinary system is progressive, the documentary evidence shows that it is not consistently applied. In determining whether progressive discipline is consistently applied, the Board has examined circumstances including differential treatment of employees[22] and whether rule violations actually result in escalating disciplinary steps.[23] Here, the record contains only a single illustration of an MTA operations supervisor issuing a warning that resulted in progressive discipline as outlined in the employee handbook: the written warning (issued by Talley) that expressly references an earlier verbal warning for the same conduct and consequently escalates the disciplinary step. In contrast to this lone example, there are seven other instances of written warnings that make no reference to earlier discipline; one example of an employee receiving two written warnings within a year (albeit for different types of conduct); and, importantly, 1 example of an employee receiving a written warning for a safety violation and then, less than 8 months later, receiving a verbal warning for another safety violation. The Employer has provided no explanation for any of these circumstances, which indicate different treatment for different employees as well as a lack of escalation despite repeat violations. See *The Republican Co.*, 361 NLRB at 100 fn. 8; *Ken-Crest Services*, 335 NLRB at 777–778.[24]

In addition, testimony from General Manager Whitley also suggests inconsistent application of progressive discipline. In this regard, notwithstanding the four sequential steps (verbal warning, written warning, suspension, and termination) set forth in the employee handbook and on the disciplinary report form, Whitley revealed that at least two types of violations—safety violations and "door-to-door" violations—instead operate on three-step systems. Safety violations are defined in the employee handbook[25] and appear on the disciplinary report form, but "door-to-door" violations are not defined in the handbook and do not appear on the disciplinary report form. Whitley defined "door-to-door" violations as situations in which an employee has not "fulfill[ed] their obligation as an operator to provide that service," but this vague definition offers no meaningful delineation between conduct to which the handbook's four-step progressive discipline policy applies and conduct to which the unwritten three-step "door-to-door" policy applies. Absent such delineation, the Employer cannot show it is consistent in how it applies progressive discipline.

Further, Whitley also offered conflicting testimony about whether and to what extent MTA operations supervisors repeat disciplinary steps. Initially, when asked whether operations supervisors can repeat steps, Whitley answered "yes." When subsequently asked whether she was aware of operations supervisors having done so, her response was more equivocal ("I can't sit here and say yes, and I can't here and say—sit here and say no"), but any implication that operations supervisors may repeat steps is problematic for finding a progressive discipline policy, as it undercuts a theory of disciplinary progression. See, e.g.,

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[21] The collective-bargaining agreement covering the operators similarly reiterates the Employer's discretion to skip steps depending on the severity of the violation.

[22] *The Republican Co.*, 361 NLRB at 100 fn. 8 (progressive discipline not established where some employees had been suspended without prior warning while other employees received multiple verbal warnings without disciplinary escalation).

[23] *Ken-Crest Services*, 335 NLRB at 777–778 (finding multiple verbal warnings without further discipline to not constitute a progressive discipline policy).

[24] We note, too, that although the disciplinary report form includes a "Disciplinary History" section, not 1 of the 19 disciplinary reports in evidence uses this section to record earlier, less-severe discipline. As noted above, three of the disciplinary reports leave this section blank, the other 16 record the same level as the level being issued by the disciplinary report, and Faulkner testified that in at least one of these instances the "Disciplinary History" section was in fact only recording the level of discipline being issued, rather than any prior discipline. The fact that the disciplinary reports do not consistently (and seemingly only rarely) refer to prior discipline also indicates that the Employer does not maintain or consistently apply a progressive disciplinary policy. See, e.g., *Veolia II*, 363 NLRB at 1885 fn. 18 (noting that in cases where the Board has found supervisory authority based on the operation of a progressive disciplinary system—including *Oak Park Nursing Care*, 351 NLRB 27—the record typically contains evidence of subsequent discipline expressly referencing prior discipline).

[25] As noted, the handbook does not outline the three-step process for safety violations, nor did Whitley define the three specific steps in her testimony. We observe that Whitley's statement that safety violations entail a three-step process is difficult to square with the two disciplinary reports discussed above, the first of which involved a written warning, the second a verbal warning.

Veolia II, 363 NLRB at 1884–1885 (testimony suggesting that operators were being repeatedly warned for the same violations without discipline escalating indicated that progressive policy was not consistently applied).

Under the foregoing circumstances, we find that the Employer has not established that it maintains or consistently applies a progressive disciplinary system. At the very least, the unexplained discrepancies discussed above demonstrate that the record evidence regarding progressive discipline is "in conflict or otherwise inconclusive," which forecloses finding supervisory status. *Phelps Community Medical Center*, 295 NLRB at 490. As discussed above, in the absence of an established progressive policy, the warnings issued by the MTA operations supervisors do not constitute job-affecting discipline. It is accordingly unnecessary to assess whether the MTA operations supervisors exercise independent judgment with respect to issuing warnings. Further, absent a showing that MTA operations supervisors possess the authority to discipline, the secondary indicia of supervisory authority on which the Regional Director relied are immaterial. See *Ken-Crest Services*, 335 NLRB at 779.

We accordingly find that the Employer has not established that MTA operations supervisors possess the authority to discipline and that the Employer accordingly has not met its burden of establishing that MTA operations supervisors are supervisors within the meaning of Section 2(11).[26]

Based on the foregoing analysis, the Regional Director incorrectly excluded the three MTA operations supervisors from the petitioned-for voting group. In the subsequent election, however, the remaining employees voted 5-0 to join the existing unit; the inclusion of the MTA operations supervisors therefore could not have changed the outcome of the election. The Petitioner therefore contends that the MTA operations supervisors can simply be included in the existing unit.

This is, so far as we can tell, a novel procedural circumstance, and we agree with the Petitioner's proposed resolution. The MTA operations supervisors are not supervisors and therefore should have been included in the voting group in the first instance. Had they been included in the voting group, the outcome of the election would not have changed. Of note, the Employer stipulated that inclusion of the MTA operations supervisors in the voting group would be appropriate absent a supervisory finding, so there is no contention that they cannot properly be included in the existing unit on community-of-interest grounds. And including them in the unit at this juncture will result in only a modest increase in unit size (the existing unit is approximately 32 employees, excluding the 3 operations supervisors). Any further proceedings at this point are neither necessary nor expeditious and would, in effect, penalize the Petitioner for the Regional Director's error.[27]

We shall therefore remand this case to the Regional Director to issue a revised Certification of Representative that includes the operations supervisors in the existing unit.[28]

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[26] In light of our conclusion that the Employer has not met its burden of establishing the supervisory status of the MTA operations supervisors, it is unnecessary to pass on the Petitioner's request for adverse inferences or its claim that the Employer should have been precluded from raising any arguments or issues as to this petition. It is therefore also unnecessary to address the Employer's responses to these arguments.

Member Kaplan agrees with his colleagues that the Employer has not met its burden of proving that its MTA operations supervisors are Sec. 2(11) supervisors with the authority to discipline pursuant to a progressive discipline system. He finds that, regardless of its written policies, the Employer has presented insufficient evidence that the verbal and written warnings issued by the operations supervisors automatically or routinely lead to job-affecting discipline. See, e.g., *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Passavant Health Center*, 284 NLRB 887, 889 (1987).

[27] We do not agree with our dissenting colleague that the inclusion of the operations supervisors in the certified unit compromises the employees' "right to make an informed choice in a representation election." *Hamilton Test Systems, New York, Inc. v. NLRB*, 743 F.2d 136, 142 (2d Cir. 1984). As our dissenting colleague acknowledges, *Hamilton Test Systems* is not directly applicable. *Hamilton Test Systems* involved a representation election conducted in the context of an initial organizing campaign where the unit described in the election notice differed significantly from the unit that was certified by the Board. The unit in *Hamilton Test Systems* was reduced by 50%, the number of classifications decreased from five to three, and a change of 1 vote would have altered the outcome of the election. Id. at 140–141. In these circumstances, the court found that the postelection unit modification precluded an informed choice by employees in the certified unit where the employees may have believed that a smaller unit would provide insufficient bargaining power or would produce divisiveness and tension in the workplace. Id. at 141. In contrast to the initial organizing context of *Hamilton Test Systems*, the employees in this case were voting on whether to join an existing bargaining unit. Further, as discussed above, the inclusion of the 3 operations supervisors does not significantly change the scope or character of the approximately 32-person unit. Nor could their inclusion have changed the outcome of the election, because the Petitioner prevailed by a 5-vote margin. The policy considerations in *Hamilton Test Systems* are therefore not implicated here. Accordingly, rather than conducting a self-determination election among the operations supervisors as our dissenting colleague suggests, we find, on these facts, that issuing a revised Certification of Representative is the best approach. Finally, our colleague's views of the Union's strategic decisions notwithstanding, the Union's request for review of the Regional Director's decision was made in accordance with our rules, and for the reasons explained above, under all of the circumstances the issuance of a revised Certification of Representative is an appropriate outcome.

[28] This case presents a novel remedial question. Based on the principles discussed below, Member Kaplan would not instruct the Regional Director to issue a revised Certification of Representative. It is Member Kaplan's view that if the Union wants to add the operation supervisors to the extant unit, the operation supervisors should have the opportunity to vote whether they want to be included.

In *Hamilton Test Systems, New York, Inc. v. NLRB*, 743 F.2d 136, 142 (2d Cir. 1984), the Second Circuit noted that it would not enforce Board orders "when the Board has effectively denied employees the right to make an informed choice in a representation election." Although that case arose in a different context, there are similar concerns here. One of the predicates for making an "informed choice" is being given a choice in the first place. Because the operations supervisors were improperly excluded from voting in the May 18, 2023 election, they have not cast any ballots for or against representation. Accordingly, it cannot be said

ORDER

The Regional Director's finding that MTA operations supervisors are supervisors within the meaning of Section 2(11) of the Act is reversed. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. September 30, 2024.

Marvin E. Kaplan, Member

David M. Prouty, Member

Gwynne A. Wilcox, Member

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that the operations supervisors will have been given "the right to make an informed choice," let alone any choice, if they are simply added to the extant unit by Board fiat.

Additionally, the Union made a deliberate, strategic decision to file its request for review challenging the operations supervisors' exclusion *after* the election had already occurred. Had the Union filed this request for review *before* the election, it could have requested (pursuant to Sec. 102.67(j) of the Board's Rules and Regulations) that the operations supervisors be permitted to vote under challenge, thereby giving the Board the opportunity to avoid the instant situation. The Union should not reap a windfall from its strategic decision at the expense of employees being able to exercise their statutory right to vote for or against union representation. Furthermore, unlike his colleagues, Member Kaplan does not believe a concern about a union being "penalized" should be a consideration when employees are being denied the right to express their choice whether or not to be represented by a union.

In light of these concerns, Member Kaplan would turn to well-established Board precedent to resolve this novel scenario. In *Photype, Inc*., 145 NLRB 1268, 1274 (1964), a union demanded recognition of employees by claiming they were an accretion to an existing unit. The Board disagreed that the employees were an accretion but found that directing a self-determination election would permit the employees to "express their desires with respect to being included in the existing bargaining unit" and would therefore be the best course of action. Although this is not an accretion case, Member Kaplan would apply the same logic here and direct the Regional Director to conduct a self-determination election for the operations supervisors unless the Union notifies the Region within 10 days that it is not interested in participating in such an election. It is his view that doing so would best effectuate the policies of the Act by promoting the exercise of employee choice and ensure that employees have a fully informed say in whether and by whom they are represented.