

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

DIXIE ELECTRIC MEMBERSHIP CORP.,)
Respondent (15-CA-19954))
Petitioner (15-UC-061496))
)
and)
)
INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, LOCAL UNION)
767)
Charging Party (15-CA-19954))
Union (15-UC-061496))

Case Nos: 15-CA-19954
15-UC-061496

**CHARGING PARTY/UNION'S BRIEF IN OPPOSITION TO
RESPONDENT/PETITIONER'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Nora H. Leyland
SHERMAN, DUNN, COHEN, LEIFER & YELLIG, P.C.
900 Seventh Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 785-9300
Fax (202) 775-1950
leyland@shermardunn.com

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STATEMENT OF THE CASE

On March 7, 2011, Charging Party International Brotherhood of Electrical Workers, Local Union 757 (“IBEW” or “union”) filed a charge against the employer, Dixie Electric Membership Corporation (“DEMCO” or “employer”) for violations of Section 8(a)(1) and (5) of the National Labor Relations Act (“ACT”), 29 U.S.C. §158(a)(1) and (5), over the employer’s removal of electric systems operators and a chief electric systems operator (collectively “system operators”, “operators” or “dispatchers”)¹ from the bargaining unit, on or about December 1, 2010. (GC 1(a))²

On June 23, 2011, the Regional Director of NLRB Region 15 issued a complaint against DEMCO, alleging that DEMCO “changed the designations of the Chief Systems Operator and System Operators] from bargaining unit positions to management positions,” thereby removing those positions from the bargaining unit, in violation of Sections 8(a) (1) and (5) of the Act. (GC 1(d)) At the hearing in this matter, on November 17, 2011, the General Counsel, having previously notified the other parties, amended the complaint to specify that the employer’s unlawful

¹ The position is common throughout the electric utility industry and the terms are used interchangeably. (TR 205-06).

² The union will cite to the record in this case as follows: (1) it will reference testimony as recorded in the official transcript as “TR __,” giving the official page number (and, as needed, the name of the witness); (2) it will reference the General Counsel’s exhibits as “GC __”, the employer/respondent’s exhibits as “R __,” and the union’s exhibits as “U __”; (3) it will reference the Administrative Law Judge’s Decision as “Decision at __”; and (4) it will refer to DEMCO’s Brief in Support of Exceptions to Administrative Law Judge’s Decision as “DEMCO Brief at __.”

actions also resulted in a transfer of bargaining unit work out of the bargaining unit. (TR 10-11; GC1 (z))

When DEMCO filed its answer, on July 19, 2011, it also attempted to petition the Board for a clarification of the bargaining unit, that is, it sought a ruling that the unit be clarified to exclude the operators as supervisors under the Act. (GC 1(g) at 3-4) On July 21, 2011, the employer filed a more regularized unit clarification (“UC”) petition, which the Region processed as Case 15-UC-61496. (GC 1(k)) On August 19, 2001, the Regional Director consolidated the unfair labor practice case (15-CA-19954) with the UC petition. (GC 1(q))

The combined hearing on the two cases was conducted on October 17 and 19, 2011 in Baton Rouge, Louisiana. Administrative Law Judge (ALJ or Judge) Robert Ringler issued his Decision (ALJD) on January 24, 2012. The Judge ruled that DEMCO violated Section 8(a)(5) of the Act by (1) modifying the scope of the bargaining unit without obtaining the union’s consent or the Board’s approval; and (2) unilaterally transferring work performed by the dispatchers out of the bargaining unit without bargaining in good faith with the union. (Decision at 6-7) In addition, the Judge dismissed DEMCO’s unit clarification petition as untimely. (Id. at 9-10) The Judge did not address the status of the dispatchers as alleged supervisors. DEMCO has excepted to all three rulings.

STATEMENT OF FACTS

DEMCO is an electric utility membership corporation that distributes electric power to approximately 99,000 member/customers within a prescribed geographic

area in the State of Louisiana. (GC 21 at 1; GC 22 at 1) DEMCO and IBEW Local 767 have had a collective bargaining relationship for more than 30 years. (TR 107) The systems operators and chief systems operator (collectively “systems operators” or “operators”) have been in the bargaining unit as long as the IBEW has been representing employees at DEMCO. (TR 147)³

A. DEMCO’s Decision to Remove the System Operators from the Bargaining Unit

DEMCO’s current CEO, John Vranic, has been seeking to remove the system operators from the bargaining unit since approximately 2005. Vranic made several appeals to the union on this count, while he was still the Vice President of Planning and Systems Operations, a position he held from 1983 until 2009. (TR 184) Vranic first approached union Business Manager Floyd Pourciau in 2005, stating his opinion that the system operators would be “better off in management.” (TR 107, 109) Pourciau then discussed the matter, either the same day or the next day, with then-DEMCO CEO Henry Locklar, and advised Locklar that the union was not “in the business of giving up jobs,” and, if the company removed the operators from the bargaining unit, the union would “file Labor Board charges.” (TR 107, 108, 109) Locklar responded that the operators would not be removed from the unit. (TR 108)

³ The union and the company also refer to these operators interchangeably as “dispatchers” (TR 117, 141 (Pourciau); 173 (Brannen); 195 (Vranic); GC 16). This is not uncommon in the industry, and these positions are called a variety of names at various electric utilities: as DEMCO CEO John Vranic testified, “there’s a whole world of names for them. From different places have different names, but it’s interchangeable.” (TR 205-206) As Vranic explained further “some are called dispatchers; some are called system operators; some are called grid operators.” (TR 205). *See also* U-1 (emails relating to “dispatch salary analysis”).

And, in fact, DEMCO did not change the bargaining unit status of the systems operators at that time. (TR 110)

In the summer of 2007, Vranic again raised the subject with Pourciau of taking the systems operators out of the unit. (TR 110, 111) Pourciau again said no. (TR 110) A few days later, then-DEMCO CEO Jeff Kilpatrick called Pourciau and asked him about moving the systems operators out of the bargaining unit. (TR 110-112) Pourciau advised Kilpatrick that he was not in the business of giving up jobs and, if the company did move the system operators out of the unit, the union would file charges with the Labor Board. (TR 112) Kilpatrick replied that he would not make the change, and DEMCO did not move the operators at that time. (TR 112)

In January of 2009, Vranic himself became CEO of DEMCO (TR 128, 183), and the company began preparing to move the systems operators out of the bargaining unit in 2010. Although the company claimed it made its decision to move the operators out of the bargaining unit in August, 2010 (TR 60), it is clear that as early as May of 2010, the company had begun exploring the conversion of the operators' compensation from an hourly basis to a salary basis annual (TR 306; U 1) The company also created job descriptions for the operators sometime in October and November of 2010. (TR 67, 75-76; GC 8 and 9)

Throughout these company preparations in 2010 to remove the operators from the bargaining unit, the company did not seek to meet with or discuss its plans with the union. (TR 131)

In November of 2010, Vranic sought a meeting with Pourciau through the union's chief steward at DEMCO, Shane Pendarvis. (TR 124-25, 186-87) At a lunch meeting later that week, on November 18th (TR 145), Vranic told Pourciau that he was going "in a different direction" and making changes effective December 1, 2010. (TR 124 (Pourciau)) The change Vranic referred to was his decision to "move the dispatchers into management positions." (TR 187 Vranic) Vranic also gave Pourciau a letter at this lunch meeting, which letter announced that, effective December 1, 2010, the systems operators would be moved out of the bargaining unit and into management. (TR 124-127; GC 6) On November 17, 2001 -- the day prior to Vranic's meeting with Pourciau -- the company also mailed letters to the operators at home, informing them of the same thing. (TR 61-62; GC 7 a to d) Pourciau advised Vranic at this meeting on the 18th that the union would file charges with the Labor Board. (TR 127, 147)⁴ While the company's November 17, 2010 letter to the union (GC 6) states that job descriptions are attached, Pourciau did not receive them with the letter. (TR 130) In fact, Pourciau did not see the actual job descriptions until September of 2011, when chief steward Pendarvis obtained copies from DEMCO's Human Resources Manager, at the request of the union's attorney. (TR 130)

⁴ Vranic's recollection does not contradict Pourciau's testimony. Vranic simply recalled Pourciau responding that he would forward the company's decision on, and that "this will be probably decided at the IBEW." (TR 187)

Prior to meeting with Pourciau, May met with the systems operators to notify them that their positions would become non-bargaining unit positions. (TR 62-63, 283) The company did not invite Pourciau to attend these meetings. (TR 283)

Pourciau did not believe was being asked to bargain at the lunch meeting in November of 2010, but rather that he was being told what the company was doing. (TR 128, 158-59) Pourciau also knew, from Vranic's past actions, that Vranic has wanted to take these steps for a long time, and now that Vranic was CEO, he was finally doing it. (TR 128) In fact, Vranic did not ask Pourciau to bargain, to present proposals, or even to discuss changing the bargaining unit status of the system operators. (TR 128-29) The company did not provide the union with copies of the letters it sent to the operators, the new job descriptions or the operators' new rates of pay before the changes went into effect on December 1, 2010. (TR 132) Vranic also did not discuss any change in benefits the operators would receive on December 1, 2010. (TR 134; CG 13)

The Local Union did not file a grievance over the changes, because it did not believe a grievance was the way to address the problem (TR 152). Instead, as the union had said all along, it intended to fight the changes through the National Labor Relations Board. (TR 134, 152) The union also believed it was not obligated to bargain over such changes in the scope of the bargaining unit. (TR 162)

DEMCO's stated reasons for making the change were that: (1) it wanted the field personnel to be reporting to someone in management at all times, so that all direct reports to May are management (TR 100, 225 (May)); and (2) once the

positions are management, it gives the company “greater flexibility” to address the “changing nature of the system operators’ jobs.” (TR 195 (Vranic))

B. Subsequent Bargaining

In January of 2011, the union received the employer’s summary of its proposals for changes to the collective bargaining agreement, upon its expiration on February 28, 2011. (TR 136; GC 14). The parties met in January to read through the proposals, but no bargaining occurred at those meetings. (TR 135-36) The parties in fact agreed to leave the systems operators in the contract proposal during the January meetings. (TR 153) And, during negotiations for the renewal agreement, which took place on February 7, 2011 (TR 159), the union did not agree to eliminate the systems operators from the bargaining unit. (TR 139 (Pourciau); TR 191 (Vranic))

Instead, the union representatives drafted a document for the parties to execute recognizing that the union was not waiving its rights to contest the removal of the operators from the bargaining unit. (TR 142-43; GC 16(a)). As IBEW International Representative Glenn Brannen testified, he drafted the document in anticipation of negotiations, to make it “very clear” that the union had not agreed to take the system operators/dispatchers out of the unit. (TR 172, 173) After some discussion, and changes made by DEMCO, the parties executed a similar document. (TR 142; GC 16) This was done before the parties signed the final collective bargaining agreement (GC 18), from which DEMCO eliminated the operators. (TR 167) Moreover, by the time negotiations for the renewal contract occurred, the

systems operators had already been out of the bargaining unit for three months.
(TR 167-68)

C. The Management Rights Clause and Historic Practices Thereunder

The Management Rights clause on which DEMCO relied in making the changes in November and December of 2010 is identical in the collective bargaining agreements between DEMCO that were in place both while the changes were made and in the renewal agreement. (*Compare* GC 3 at 2 (contract in effect Feb. 28, 2007-2011) and GC 15 at 2 (contract in effect Feb. 28, 2011-2015.)

In relevant part, the clause states that:

Some of the rights retained by Company include, but are not limited to, the right power and authority to ...prepare job qualifications, establish job classifications, and discontinue job classifications...

As Vranic explained, the Company relied on this language to “discontinue the positions of system operator and chief system operator within the bargaining unit.”

(TR 190 Vranic)

Pourciau testified that, in practice, when the company wanted to establish new job classifications, they would call Pourciau in, and they would meet and reduce the decision to writing, in a memorandum of agreement, which both parties would sign. (TR 115-16) And, in fact, when the Company has changed names of bargaining unit positions in the past, in keeping with Pourciau’s understanding, the Company has negotiated those changes. (TR 117-124) For example, in the negotiations for the 2007 to 2011 agreement, the company and the union agreed to eliminate collector positions and reclassify them as connectors (TR 117; GC 3 at 36).

Also, the parties agreed to eliminate the substation technician positions and reclassify them as apparatus technicians. (TR 118-19; GC 3 at 36) And the parties additionally agreed to eliminate the substation crew leader position and reclassify it as the apparatus crew leader. (TR 119-20; GC 3 at 36) *See also* TR 122-123 and GC 4, 4(a), 4(b), 4(c) (adding senior outage customer service clerk to unit); and (TR 123; GC 5, 5(a), 5(b) (re: substation technician).

And May himself testified that DEMCO had never previously removed a unit classification and made it a management classification. (TR 162-63) Vranic, however, claimed that the company had removed a switchboard operator position, staffed at the time by Bobbye Cantu, from the bargaining unit and made it what appears to have been a confidential position in 2001 (TR 102-93; 204-05), ostensibly without the union's agreement. (TR 192) Vranic was unsure, however, whether the union had in fact even been notified of the change: he testified that he believed that then CEO "Mr. Henry [Locklar] would have let somebody know." (TR 193) Later, Vranic admitted that he could not "tell you whether Mr. Henry had discussions with anybody at that time or not." (TR 204) The change was made because the company was going through power contract negotiations, and, in order to make sure related phone calls remained confidential, the position was moved into the confidential/management role. (TR 200) The company produced a position guide and memorandum (GC 22), which did not reflect that any union official was advised about the change.

DEMCO did introduce evidence regarding other management positions it created after 2007, consistent with the company's technological evolution. (TR 210-11) Some of these new positions were filled by promoting bargaining unit personnel to management positions. (TR 212; R-1) No bargaining unit positions were eliminated, however. (TR 213)

D. Terms and Conditions of Employment of DEMCO's Systems Operators

1. Background

a. Overall DEMCO Structure

DEMCO, as stated, is an electric utility that provides power to approximately 99,000 customer/members. (GC 20 at 1; GC 21 at 1) During the time period including 2010 the present, DEMCO has been headed by CEO/General Manager John Vranic. (GC 20 at 1; GC 21 at 1) DEMCO is currently divided into five Departments, each headed by its own Vice President: Engineering and Operations, headed by Vice President Ronald May; Finance, headed by Vice President J. Varnado; Marketing and Member Services, headed by Vice President T. Tynes; System Operations, headed by Vice President Mike Landry; and Human Resources, headed by Vice President E. Tapia. (GC 22 at 2)⁵

⁵ Prior to December 1, 2010, Tapia was not a Vice President in charge of a Department, but was a direct report to Vranic, titled Manager of Human Resources. (GC 20 at 1)

i. Engineering and Operations

The Engineering and Operations Department comprises Vice President May, his two assistants, the system operators, the telecommunications specialists, and a number of other groups headed by acknowledged non-bargaining unit members: GIS, Facilities, Engineering, Safety and Fleet, District Offices and Lands and Right of Way. (GC 21 at 2)⁶

The six District Line Supervisors and the field personnel who report to them (*i.e.*, Crew Leaders, Linemen, Connectors, Servicemen, and Warehousemen) are located in various district offices. (TR 44) Those offices are: Central, under District Line Supervisor Pendarvis; Livingston, under District Line Supervisor Johnson (GC 21 at 8); Galvez, under District Supervisor Corkern (GC 21 at 9); Zachry, under District Line Supervisor Reilly (GC 21 at 10); St. Francisville, under District Line Supervisor J. Metz (GC 21 at 11); and Greensburg, under District Line Supervisor G. Carruth. (TR GC 21 at 7-12)⁷

The Right-of-Way Division is headed by the Manager of Lands and Right-of-Way, P Zito. (GC 21 at 15) The crew leader and arborists under Manager Zito are field positions. (TR 46-47, 49)

⁶ Prior to 12/10/11, the Outages Customer Service Clerk was a “direct report” to May (TR 70; GC 20 at 3); after the systems operators were moved out of the bargaining unit, DEMCO made the Outages Customer Service Clerk a “direct report” to the chief systems operator. (TR 49-50; GC 21 at 2 and GC 21 at 3)

⁷ The only differences prior to 12/10/2010 appear to be changes in the names of persons occupying various positions. (Compare GC 21 at 7-12 with GC 20 at 6-11)

ii. Finance Department

The field employees within the Finance Department, under Vice President Varnado and MIS Administrator L. Jenkins, and classified as connectors. (TR 42; GC 20 at 2; GC 21 at 4).

iii. System Operations

The field employees in the bargaining unit within the System Operations Department, under Vice President Landry, are classified as either: Apparatus Technicians, Electronic Technicians or Cable Locators, or Cable Locator Crew Leaders. (TR 45-46; GC 20 at 4; GC 21 at 3; GC 15, Exhibit A; TR 261 (identifying Apparatus Tech. Crew Leader Page McClure as the employee assigned to switching on the first page of R7))

b. DEMCO Pay Structure

Management employees at DEMCO are paid on a salaried basis, while bargaining personnel are paid on an hourly basis. Prior to December 1, the systems operators were paid on an hourly basis, as bargaining unit members. (TR 57; GC 3, Exhibit A at 1) DEMCO changed the operators pay, effective December 1, 2010, to an annual salaried basis. (TR 57; GC 10) When making the determination as to what the annual salaries should be, DEMCO took into consideration what the operators earnings had been in prior years, which evaluation included the overtime worked by each. (TR 306-07; U 1)

Accordingly, the chief, who was being paid at the highest hourly rate prior to December 1, 2010 (GC 7), was given the lowest annual salary when the operators

were moved out of the bargaining unit. (GC 7) Union exhibit 1, which shows the earning of the systems operators in the five years preceding their removal from the bargaining unit, shows that Bonalee Conlee, the chief, earned the least amount annually despite his higher hourly rate of pay, due to fewer overtime hours, than did the other four systems operators.⁸ While not admitting this was the reason for the discrepancy, May did acknowledge that the chief does not “typically work the same amount of overtime as the other operators do, and the hours they work “were factored in into the [new] rates of pay.” (TR 75)

Field employees, as bargaining unit members, are paid on an hourly basis, at the rates specified in Exhibit A to the Collective Bargaining Agreement. (GC 3, GC15) Union Exhibit 3, which shows the annual amounts paid to a sample lineman, apparatus or substation technician and serviceman, indicate that, with overtime, field personnel can earn amounts comparable to the amounts earned by the systems operators, both before and DEMCO removed the operators from the bargaining unit. (TR 331-334; U3) In fact, in 2010, the field employees represented on U-3 earned between \$70,000 and \$90,000 on an annual basis.

⁸ U-1 shows the historical analysis of dispatcher earnings that Vranic and May were reviewing in May of 2010 within the “scope of planning” if the systems operators were to be moved into management. (TR 306) The analysis lists the earning generated by regular hours worked, as well as by overtime hours worked, as bargaining unit employees, for a total of compensation each year from 2005 through 2009. (U-1 at 2-3) The figures on the handwritten note (page 4 of U-1) are the same as the final salaries given to the systems operators when the company moved them out of the bargaining unit. (TR 307-08; compare U-1 at 4 to GC 10)

c. Hours and Location of Work

The systems operators work 12-hour shifts, from 6:00 to 6:00, with one operator on duty per shift. (TR 39-40) These operators staff the control room 24/7. The chief systems operator works a standard company work-day: Monday through Friday, from 8:00 a.m. to 4:30 p.m., and has done so for at least eighteen to twenty. 20 years. (TR 40) The operators work in the control room, located at the headquarters office at 16262 Wax Road, Greenwell Springs. (41)

Ron May, the operators' direct supervisor (TR37), works the same schedule as the chief, *i.e.*, Monday through Friday, 8:00 a.m. to 4:30, although he is "available 24/7". (TR 69)

Normally, field employees work 7:00a.m. to 3:30 p.m., Monday through Friday, unless they are on a "duty" rotation, or are "called out," after hours. (TR 312, 314, 346) Field employees are assigned by District, to a particular geographic area in the field within that District. (TR 314)

d. Lines of Job Progression

The lines of job progression between the operators and the field employees have been historically separate, and there is no indication that this has changed.

For example, linemen, who are field employees, progress from lineman third class to lineman first class; lineman first class has, in turn, 3 steps, with lineman first class, step 3 being the highest. (TR 309; CG 3, Ex. A at 1; GG 15, Ex. A at 1) The crew leader position comes after the top lineman position. (GC 3, Ex. A at 1; GC 15, Ex. A at 1)

System operators have a similar, but separate, progression. They move from systems operator 3 to 1; then, within classification 1, they progress from Steps 1 to 3, with systems operator, first class, 3d Step being the highest. (TR 310; GC 3, Exhibit A at 1) The chief systems operator is also part of this progression, akin to a crew leader in the lineman scenario. (TR 310)

While company witnesses tried to imply that field experience is critical to becoming a systems operator (TR 274, 275), they acknowledged that not all systems operators have such experience, and that field experience is not in fact a requirement of the operator jobs. (TR 305) (*See also* GC 8 and GC 9 (job descriptions do not list prior field experience as a requirement for the positions) Moreover, the only systems operator to testify, Jeremy Bluin, explained that he received his training as a systems operator on the job, from other system operators. (TR 351-52)

2. Duties of the Systems Operators

The system operators are responsible for monitoring DEMCO's entire operating system, "to effectively operate [DEMCO's] distribution power grid by gathering real-time data concerning load, voltage and currents on particular circuits, to ensure safe switching of distribution lines and public safety, reliability and optimal operating conditions for [DEMCO's] distribution and transmission electric system." (GC 9 at 1) In addition, the operators document outages, communicate with customers and power suppliers, dispatch all outage work to the appropriate field personnel, and draft and execute "switching" procedures. (*Id.*)

In addition, the chief systems operator is responsible for programming the computer system that monitors DEMCO's power lines and substations, etc. (GC 8 at 1)

The operators monitor the system, and then make decisions based on what the data tell them, on the best way to respond to whatever the problem is. (TR 226) If there is an unusual circumstance or a particularly large outage, the operators notify May. (TR 227)

At each change of shift, the outgoing systems operator briefs the incoming operator. (TR 330) The operator then takes an overview look at all the loads on the system, and begins monitoring the system. (TR 339) During the course of each shift, the operator that is working dispatches and calls out field personnel to respond to any outages. (TR 339) The operator will direct either contractors or DEMCO employees to specific areas where there are outages. (TR 339)

Among the main things the operators monitor is whether the system is high on voltage or low on voltage (TR 351), which involves looking for a progression, either rising or falling voltage, which requires them to take action. (TR 360-61) The operators respond to these events by going into the SCADA system and moving load; contacting DEMCO's electricity supplier; and, in some cases, calling field employees to take care of any breakers that cannot be operated from the control room. (TR 361) Outages on the system are another "main thing" the operators have to monitor.

a. Tools and Guidelines Available to the Systems Operators

The operators' principal tools are the main transmission board, the DEMCO "SCADA" system, and DEMCO's Outage Management System. (GC 9 at 2; GC 8 at 2; TR 52)

The transmission board is a "static," quick reference representation of the transmission system that DEMCO owns and operates, including power lines and switch and breaker numbers. (TR 52, 91)

"SCADA" stands for "supervisory control and data acquisition." (TR 52) It is a computerized system that is a mirror representation of the transmission system. (May 90) SCADA shows the current status of all breakers and switches. SCADA also "polls" all of its points several times a second, and adjusts readings accordingly. SCADA is where the day-to-day, real time statuses change and are monitored. (TR 91) SCADA is also used to perform some tasks in the field remotely, such as opening and closing breakers. (TR 52) SCADA also provides the operator with a view of the calls that come in to DEMCO reporting electrical outages. (TR 340) This occurs through an "IVR" computer program, which actually takes the phone call, and places it in the computer system where the operator can see it. (TR 340) The operators also receive information on problems on the system via radio communications and phone calls. (TR 340)

The Outage Management System goes one step further than SCADA, down to the customer level, showing whether transformers are on or off line at the customer level. (TR 90)

The operators also have access to the Network Manager DMS Operator Guide. (GC 19) This is a software system utilized for DEMCO's outage system: it maintains the records of all of the outages that DEMCO experiences. The operators have it in electronic format on their consoles (TR 53-54)

And, the operators also utilize DEMCO's General Operating Procedures (GC 17) (TR 51) These procedures apply to the operation of the transmission and distribution system, and are the industry standard for operating electric power systems, and are available to the system operators and to field personnel. (TR 51)

b. Dispatching/Assigning Field Employees to Deal with Outages

Once the operator is aware of an outage, he dispatches a "first responder" to look at the trouble and assess what needs to be done. The dispatcher has pre-assigned instructions on which field employee to call; the instructions vary depending on when the outage arises.

Each District Supervisor makes the schedule for the field employees in his District. (TR 290) The District Supervisor and the crew leaders work cooperatively to give the crews their daily assignment. (TR 311) The crews' daily shifts are 7:00 to 3:30, in accordance with company policy (TR 312).

During regular working hours, the dispatcher determines the District and areas in which the outage is located. (TR 341-42) The operators have forms that show which serviceman is in which area, and the operator calls the servicemen in the affected area. (TR 342) During regular business hours, the servicemen are assigned to catch the trouble calls in their geographic areas, as the first responder.

(TR 313, 314) The system operator would have the information as to which serviceman is in which area, based on typical assignments. (TR 314) If the usual serviceman is absent, District Supervisor is responsible for letting the control room/system operator know who is covering that day. (TR 314) If an operator is having trouble reaching the appropriate field employee, sometimes he will call the District Supervisor at the District Office to see if the field employee is there. (TR 353) If the operator can't get anyone to come out on outages, he contacts the District Supervisor. (TR 354)

After-hours dispatching is slightly different. Field personnel take turns serving on the "duty" list after hours. (TR 312) Each "duty crew" consists of a lead lineman and a helper. (TR 298, 299) The lead lineman will be a serviceman, a crew leader, or a first class lineman – capable of most job functions in the field. (TR 298) The helper may also be a senior person, or he may be a newly hired or younger person with a lower classification, but there are always two individuals. (TR 298) These personnel are paid for the time they spend "on duty." (TR 346) Thus, for outages after hours, the dispatcher calls the assigned duty personnel, by geographic area. (TR 313, 341) District Supervisors are expected to notify the operators if the "duty" schedule changes. (GC 23; TR 285) As May testified, the operators get a "100 percent" response from the "duty call-out" personnel because that response is expected. (TR 236) The contract requires that the company have a crew on standby, or "on duty." (TR 236)

Call out lists are also used after hours, if additional personnel are needed. The company has a written “call out” procedure. (GC 23; TR 284) If the outages are beyond what the duty crew can handle, the operator calls out additional personnel, who then are paid overtime rates. (TR 346) While the employees must respond to a certain number of call outs per year, they are not obligated to respond to any particular call from an operator, that is, an employee who is not “on duty” can refuse overtime. (GC 23)

In accordance with these guidelines, the operators do not chose which field employee they dispatch, and do not call people based on their qualifications. (TR 369)⁹ As operator Bluin testified, when there are multiple crews in the field, and he needs to choose which crew to deal with which outage he will decide on the basis of (1) the crew’s “physical proximity to the location of the outage;” and/or (2) the nature of the equipment the crews have with them. For example, if an additional outage needed a bucket truck, the operator would dispatch a crew with a bucket

⁹ While Bluin testified that he is generally familiar with the skill sets of field employees (TR 344) and said he would consider whether one person “is a lot better at underground” than another and that he would “factor that in,” he provided no specific examples of when he had ever done so. (TR 344) He also admitted on cross-examination that he does not decide who is on the duty crew (TR 363), and that he does not call people out based on their qualifications. (TR 369) Further, DEMCO counsel tried to get Bluin to testify that, for underground outages, he would take into consideration the skills of the crew (TR 371), but, on cross-examination, Bluin explained that there is an actual underground outage crew. (TR 372) During regular work hours, the operator still contacts the serviceman in the area, and the serviceman contacts the “underground crew” (TR 372). If an underground outage occurs after-hours, the operator still calls the pre-assigned “duty crew.” (TR 372)

truck over a crew that is actually physically closer to the outage at issue. (TR 370-71)¹⁰

The dispatchers can also call out contractor crews, and right-of-way crews. (TR 346-47) Although there was no testimony that operators can call out “foreign” crews, that is, crews from another utility who work in the DEMCO area during a “major” occurrence, Bluin did testify that he can “direct” those crews. (TR 346-47)

The operators do not need advance permission from May to call anyone out (TR 348), but would contact him in case of an injury. (TR 348) While the operators can incur overtime costs on these call-outs, operator Bluin acknowledged that operators are “preauthorized” by the company to incur these expenses, and that the decision to work employees on overtime has already been made by others. (TR 364) The operators also have the authority to hold people over after their normal shift is finished (TR 233), but the field employee can refuse to stay. (TR 324) If the systems operator nonetheless wants the employee to remain, he has to report it to May for a decision. (TR 324)¹¹

¹⁰ While May answered his attorney’s question whether the system operators decide who the first responder will be in the affirmative (TR 230-31), he also acknowledged that the operator normally dispatches the “serviceman in that area” to “go troubleshoot the area to see what the problem is.” (TR 230) He also acknowledged, under cross-examination, that there is a list of individuals who are “on duty” to respond to whatever trouble may come up. (TR 279) For a single incident, the duty crew is called first. (TR 279) If there is additional work to be done, there is a call out list of all company employees who are available for call-out. (TR 279)

¹¹ May testified that the systems operator makes the decision to utilize the company’s resources and call out people who are not already “on duty,” but he also acknowledged that the system operators job is to restore the customers’ power, and

If an outage can be handled from the control room itself, *i.e.*, where a breaker can be switched directly from the control room via SCADA, the operators do not dispatch anyone. (TR 341-42)

c. Prioritizing Outage Dispatches

When multiple outages occur at the same time, the operators dispatch field employees according to several fairly simple guidelines. The overall goal is to restore power to as many customers as quickly as possible.” (TR 230, 318; GC 24 at 3 “N”) Accordingly, outages that affect the largest number of customers are addressed ahead of outages affecting lesser numbers of customers. (TR 341) For this reason, transmission outages are dispatched ahead of distribution outages. (TR 23; GC 24 at 2 “M”; GC 17 at 14)¹²

Some exceptions to the general rule of largest outage first, are hospitals (TR 341), or special needs customers, such as those needing electricity for an oxygen supplier. These appear on an “emergency list” in the computer and, when an outage is in an area where customers have emergency needs, the information shows up on the system operator’s computer screen. (TR 318-19)

that *someone* will be called, whether it’s an existing crew or an additional worker, if that crew is going to be tied up for a while. (TR 238)

¹² The transmission system is the higher voltage system that connects the “delivery points” of wholesale energy and the substations. The substations transform the high voltages to a lower, “distribution” voltage. (TR 299-300) If a transmission “delivery point” is lost, the company could have 60,000 members out of power. (TR 300) If a substation is lost, a smaller number of customers would lose power. (TR 301) If an outage occurs at the distribution level, it could affect a block, a street, or a neighborhood. (TR 301) So, company policy is to take care of a transmission outage first. (TR 301-02) Next, a substation outage before a distribution outage. (TR 302)

If outages are of similar size, and nothing else distinguishes one from another, the operators dispatch responders according to the order in which calls on the outages are received. (TR 343)

When a major event occurs, *i.e.*, there are numerous outages, the company opens up a District office and makes the District responsible, and the District then lets the system operators know what is going on. (TR 232) In that situation, there would be several system operators in the control room, each monitoring and “dispatching” a certain District or area. (TR 232) While a systems operator can *request* that a District supervisor open an area office (TR 334), the actual decision to open a District office is made by either May or Vranic. (TR 322, 334) *See also* GC 24 at 5.

d. Cooperative Nature of Outage Restoration Work

The field employees do not have access to the computerized information about the system that is available to the operators. (TR 281) Similarly, the operators rely on the field employee/first responder to “put eyes on the situation and get the information back to the systems operator, detailing what the problem is and what resources” are needed. (TR 228, 315) That is, when the field employee arrives at the location of the outage, he advises the operator as to what he finds. (TR 367) If the field employee needs additional personnel and/or equipment, he informs the operator, who obtains the resources for him. (TR 367-68)¹³ The field employee also

¹³ Operator Bluin said he would obtain the resources, unless there was “some question,” in which case the field worker and the operator would “come to an understanding.” (TR 367-68) As an example, Bluin posited that if someone asked

advises the operator whether he (the field employee) can make the repair himself; if not, the field employee will “request and see what other resources may be available to the system to complete the project.” (TR 228) As Vice President May testified, the person on the scene, *i.e.*, the first responder, is the one who makes the call whether repairs can be done safely. (TR 317)

This collaborative effort also is mandated by DEMCO’s General Operating Procedures for Outage Restoration. (*See* GC 17 at 14-15) In accordance with these procedures, the dispatched employee or contractor is directed to report to the operator upon arriving at the scene, and report the condition found, along with any firsthand observations, *i.e.*, line down, broken pole, etc. (*Id.* at 14) Once the trouble, or cause, is found, the field employee is expected to estimate the time necessary for repairs, notify the operator, and specify any help of materials needed. (*Id.*) If communications with the control room are down, the first responder/lineman is expected to make repairs, as needed, and notify the operator later. (*Id.*)

Similarly, field crews will call in let the systems operator know that they are working on a recloser, and the systems operator marks that on the systems map. (TR 250)

e. Switching

A switching procedure is the documentation of the steps required, line by line, that a system operator develops in order to perform a “switching” task in the

for two bucket trucks, he (Bluin) could refuse; but he acknowledged that, in fact, he has never received such a request. (TR 368) Bluin also admitted that the field employees are “good about knowing what they really need.” (TR 368)

field, such as moving load from one substation to another, or de-energizing a breaker for maintenance. (TR 93) It is undisputed that the systems operators design switching orders/procedures and participate in their execution.

Normally, someone contacts the operator to let him know that they will need a particular section of a line de-energized, either to work on it (by changing out poles or switches, etc.). (TR 349) These requests can come from a maintenance crew, a contractor, a first responder, or DEMCO's power supplier. (TR 94-95, 326-27; GC17 at 14) The operators may also be contacted on the "spur of the moment" if they need to move some load quickly. (TR 349) The operator then drafts a plan, which includes the sequential steps to be taken in the "switching" operation. (TR 349)

i. Writing Switching Orders

DEMCO's General Operating Procedures direct the operator to write the switching order and check it against the station diagram. (GC 17 at 12) The procedures also specify that all switches must be referred to, in order, by their pre-assigned numbers, and, if applicable, the circuit in which the switch is situated. (GC 17 at 12) These written procedures also require that the operator prepare the order using a standard formula:

The sequence in which the numbers are given in the switching order shall indicate the sequence of the switching operation. As an example, an order given, "open switches 3312, 3322 and 3305 and close switches 3312 and 3322" shall be executed as follows: "First, open switch 3312; second, open switch 3322; third, open switch 3305; fourth close switch 3312; fifth; close switch 3322. **No deviations from this rule are permissible!**

(GC 17 at 12 (emphasis in original) (*See also* R7 (several switching orders that all follow this prescription.)

Systems operator Bluin testified that, in drafting a switching procedure, he first finds out how the station itself is “feeding,” then he looks at the switches that must be opened or closed, and what jumpers must be moved. (TR 350) Some of the information Bluin needs to prepare a switching order is in SCADA. (TR 351) Bluin will also obtain information from the distribution map and from field employees – this last, in order to make sure that what he is seeing in SCADA is actually correct. (TR 351) Bluin considers field employees as “eyes out in the field.” (TR 351) During preparation of the switching procedure, the operator also has to make sure that overload or low voltage problems will not be created. (TR 254)

Bluin also testified that, while the system operators have discretion in some things, switching is all done “the same way.” (TR 352-53) And some switching procedures “repeat themselves over time.” (TR 353) Bluin estimated that it would have taken him approximately 30 minutes to draft the first switching order in R-7, which order is three pages long and addressed a switching sequence involving multiple locations and field workers. (TR 349-50)

If the switching order is extremely complex, Vice President May wants to see it. (TR 251) When a switching order involves multiple locations across multiple districts (as in the first three pages of R7), the District Supervisors also “may have some input” into the switching that takes place. (TR 255, 257)

ii. Assigning Personnel to Execute Switching Orders

DEMCO's "Switching Order Procedures" mandate that, when switching is done under the operators' jurisdiction, the respective *Districts* assign the unit, *i.e.*, personnel, who then remain under the jurisdiction of the control room until directed to resume their normal work routine. (GC 17 at 12)

If the system operators themselves make the assignment for switching personnel, they would simply chose the duty person, or the serviceman, or the available crew. (TR 326)

Further, the personnel who can be assigned to engage in switching are limited by DEMCO's requirement that such personnel be pre-certified to perform switching, and that they be included on the "Switching and Clearance List." (TR 71; GC 17 at 7) May testified that the importance of the Switching and Clearance List is "to have knowledge of who is capable of doing switching in the field." (TR 71) DEMCO's procedures further require that the District Supervisors and the Manager of Construction and Maintenance are responsible for designating the personnel whose names appear on the official Switching and Clearance List. (GC 17 at 7)

iii. Executing Switching Orders Cooperatively

Switching is carried out in accordance with Section 8 of the Company's General Operating Procedures, General Counsel Exhibit 17 at 12-13. These standard instructions, together with testimony on how switching is carried out, demonstrate that, similar to outage restoration work, the field employees and the operators work cooperatively to effect the switching in a safe and reliable manner.

As DEMCO's Switching Order Procedures explain, "[t]he safe execution of a switching order depends, to a large extent, upon each person involved." (GC 17 at 12) Accordingly, either the operator or the field employee can stop the switching mid-point. As the Procedures specify: "if, during the process of executing the order, either the person issuing the order *or the person executing the order* has reason to believe that any further switching could be in error...he shall stop at that point." (GC 17 at 12) (emphasis added) Vice President May also confirmed that a field employee can stop the switching, if he or she sees something that is not as it should be. (TR 328)

Further evidence of the cooperative nature of switching are the facts that: (1) sometimes the operator can open or close the switch from SCADA, and they will do that step, while others switches have to be manually opened or closed by field personnel (TR 94); (2) there are things a field employee can do in the field that the operator cannot see on the computer system, such as closing a switch, so the field person has to tell the operator that the switch has in fact been closed (TR 293-94); and (3) the operator can modify the procedure during switching, if for example, the switching did not go as the operator planned it: *e.g.*, if a field employee opened the designated switch and it caused DEMCO customers to lose power. (TR 356) As Bluin explained, this occurs when the reality in the field does not match what he saw on his map system when drafting the procedure. (TR 356) The operator would make the adjustment based on what he sees on his computer and on what the field employee doing the switching tells him. (TR 356)

Accordingly, the operator and field personnel employ what is commonly known as “echo protocol” during switching. (TR 327-28) That is, the operator communicates each step verbally, the field person hears the information and communicates it back to ensure that the instructions are clear, and then he performs the step. (TR 257, 327-28) *See also* GC 17 at 12 (“to avoid misunderstandings and prevent accidents, all orders concerning switching operations ... must be repeated by the person receiving the order to the one giving same”)

When the switching is completed, the order goes in a “completed” basket and then gets filed. (TR 260)

3. Accountability/Responsibility of System Operators

The employer presented ample testimony and exhibits in support of its contention that the operators are “responsible” and “accountable.” None of it, however, had to do with the operators’ responsibility or accountability for the work of the field employees they purportedly supervise.

For example, May testified that the operators are responsible for the operation of the system, so if something changes during switching or there is a problem, he has full authority to stop, analyze and proceed or make changes as warranted. (TR 261) But, as stated above, it is also “the responsibility of *each employee* to report any situation or condition which is not “normal,” or that may affect the transmission or distribution [of electricity]. This would include, but is not limited to, changes that will leave open points, line feeds, phase feeds, circuit

configurations or other equipment, line(s) or portion(s) thereof, whether underground or overhead, in an other than normal condition.” (GC 17 at 37 (emphasis added))

In addition, the operators are “responsible” for making sure the switching is completed and the paperwork is completed and filed. (TR 256-57) And operators are “responsible for all the outages that take place.” (TR 228-29) They are responsible for ensuring that they’re able to prioritize and make sure that the outages are handled appropriately. (Id.)

May asserted that the operators are responsible for the work that the crews “do in the field” (TR 229), but failed to offer any facts in support of this conclusory statement. On the contrary, May’s testimony confirmed that the systems operators are not responsible and/or accountable for field employee errors. Indeed, May acknowledged that if a field employee makes an error, for example, during switching, the systems operator will not be disciplined for the field employee’s actions. (TR 327) May also stated, plainly, that “[t]he system operator cannot be responsible for an action that a field employee takes.” (TR 294, 295)

Moreover, systems operators do not recommend discipline for field employees, and have, at most, a reportorial duty with regard to field errors. As May testified, if a field employee makes an error, the incident would go to May through the District Line Supervisor, and appropriate action taken. (TR 296) And operator Bluin testified that he “imagined” that, if a field employee refused to do something that he directed the field employee to do, he would contact Ron May. (TR 348) Bluin

stated, however, that he has never had that happen (TR 348), and that he has never recommended discipline for any field employee. (TR 359) *See also* R7.

Instead, the field employees' acknowledged supervisors, the District Line Supervisors, have the authority to recommend discipline for field employees (TR 268) If the "situation warrants an investigation," one is conducted. (TR 288) The field employee would be involved in the investigation, along with acknowledged supervisors; but the systems operator would only "possibly" be involved. (TR 288) Moreover, field employees also have reportorial responsibility: they have the obligation to report any safety violations to management. (TR 321, 392)

In the end, the employer presented evidence of the operators being held "accountable" or "responsible" only for their *own* errors. For example, during a switching incident, a line actually became overloaded and sagged, causing an outage. (TR 272) The systems operator had failed to make sure the last step of the switching was completed, as there was a shift change going on; and the operator was counseled to avoid letting distractions to prevent him from completing what he should have completed. (TR 273)

4. Changes in System Operators Terms and Conditions of Employment "Over the Years"

CEO John Vranic testified, vaguely, that, as the system operators roles changed over the years, "they were more and more in a supervisory role." (TR 196) The only detail he provided was that, in his opinion, dispatchers quit being dispatchers when they went from handling outages from 4:30 p.m. to 8:00 a.m. to

“24 hour” coverage -- “when they were receiving calls 24 hours a day versus just eight hours through the nights, through the night shift.” (TR 197) Vranic, however, did not know when this change occurred. (TR 197)

Regardless of any such changes, however, the company continued to recognize the operators as bargaining unit employees until 12/1/2010. (TR 196-97)

5. Changes in Systems Operators’ Terms and Conditions of Employment on or after December 1, 2010

The record evidence establishes that the changes on December 1, 2010 were largely cosmetic, and that nothing of substance in their work, or in their interactions with field employees, changed.

a. Duties

Vice President May explained that the operators’ “job responsibilities were “vastly similar, were real similar.” (TR 66) He explained that the change was more ephemeral: “[w] hat’s different is that they now have the authority and the direction to interact with other managers to provide input on various levels of problems that they have in the field,” and to rectify consumer complaints, whereas, prior to December 1, “they did not have that direct authority from the company.” (TR 66)

CEO Vranic confirmed this when he testified that the system operator classification has not changed, but the level of oversight and authorization to do what needs to be done has been “enhanced by moving them to the management side.” (TR 198) Again, the only solid changes Vranic identified were the 24/7 schedule, and certain technological advances. That is, he explained that the

dispatchers are present 24 hours a day, and watch the “big picture” for the company, and they have been doing so “for a number of years.” (TR 186) And, at about the same time they went on 24/7 coverage, the company started working with an automated system, “CADOPS,” which has the ability to “pull inputs from multiple sources from the SCADA” system, and which they monitor 24/7 (TR 186) The operators’ responsibilities increased over the years with technological improvements. (186)

Indeed, when the Administrative Law Judge asked Vranic whether there has been any effort by the company to expand the operators’ role and expand their training to bring them more in line with other management positions (TR 194), Vranic responded primarily in terms of technological advances. As he stated:

Additional systems are being introduced and put in front of them to operate on, to improve the outage restoration and such. They’re also being introduced to additional training of the basic electricity, electric flow, power flow. The concepts which are kind of engineering roles right now, they’re being introduced into that through the courses they’re taking.

(TR 194) Finally, Vranic mentioned that the operators are also being brought into management training classes, discussed below at subsection d. (TR 194)

b. Job Descriptions

It is undisputed that the systems operators did not have written job descriptions prior to December 1, 2010 (TR 61), and that DEMCO, in consultation with its attorneys, created job descriptions for the systems operators, in October – November 2010 (TR 67, 75-76), in anticipation of removing the operators from the bargaining unit. (TR 67, 198-99)

The union does not challenge the general descriptions of the system operators' and chief system operator's duties and qualifications, as set forth in GC 8 and 9, to the extent that they are not conclusory or are not contradicted by other record evidence.

For example, the following statements in the job descriptions are legal conclusions, and thus of no evidentiary value to the Judge in making his determination: (1) the myriad references in GC 8 and GC 9 to the operators' exercise of "discretion" and "independent judgment," particularly in "assigning" and "responsibly directing" the work of field employees; and (2) such blanket statements that that the operators have ultimate "responsibility" and "accountability" for the entire switching process.

Further, as set forth above, the following statements are not supported by, and are, in some cases, contradicted by, the testimony of the employer's own witnesses: (1) statements that the operators are "responsible for evaluating the role of field employees in the commission of switching errors and reporting any instances of field employee's failure to abide by Switching, Tagging and Clearance procedures or any instances of field employee's failure or refusal to follow instructions from the Operator"; (2) the statement that "approximately 70% of the Operator's day is spent assigning work to and directing field employees;" and (3) the statement that the operators are "responsible for participation, as needed, in any disciplinary proceedings for field employees who fail to follow, Switching, Tagging and Clearance procedures or who fail to follow instructions form the Operator." (GC 9; GC 9)

c. Salary

It is undisputed that DEMCO changed the operators' remuneration to management-type salaries effective December 1, 2010, as set forth above at section D.1.b.

d. Training

After December 1, 2010 the operators participated in a four-part course on general management concepts. (TR 213; R3) Not all operators attended all sessions, however. Operator Bluin testified that he only attended one class because he had scheduling issues. (TR 358)

e. Direct Report

One difference between the organization chart as it existed prior to and after December 1, 2010 is that, prior to December 1, 2010, the outage customer service clerk was a "direct report" to May; following December 1, 2010, the clerk position is a "direct report" to the chief systems operator. (TR 49-40, 70; GC 21 at 3)

Spring Seymour was the outage clerk when that position was a direct report to May. (See GC 20; TR 70) Susan Donley was Ms. Seymour's replacement, and, at the time Donley made "call outs" (September 2010) (R5 at 4), she would also have been a direct report to May. (TR 239) Sometime after DEMCO removed the operators from the bargaining unit, Susan Donley became a "direct report" to chief systems operator Conlee. Conlee was "involved" in the promotion of Susan Donley to the position of outage customer service clerk 2/c, in May of 2011, in that he completing the candidate appraisal. (May TR 265-266, 328; R-8) It is unclear how

much discretion was involved in the decision, however, as Donley was the only applicant and possessed the minimum qualifications necessary. (R-8) Moreover, the job is not a “field” employee position, but a clerk position.

The job is currently vacant. (TR 266)

6. Other Factors

a. Non-Attendance at Supervisory Meetings

The record indicates that, other than the management training sessions, not all of which all operators attended, the employer does not consider the operators’ attendance at supervisory/management meetings necessary. For example, shortly after making the operators “management,” May met with his District Line Supervisors, Rights-of-way crew leaders, etc., at a meeting at which one topic was the change of operators “from the bargaining unit into management.” (TR 220; R4) None of the five system operators were in attendance at this meeting for supervisors (R4), and were the only allegedly supervisory personnel in the group reporting to May directly that was not represented. (Compare R4 and GC 21 at 2) That was so, even though a number of topics were discussed that the employer alleges the system operators are “responsible” for, and which would normally be of interest to any supervisory personnel in the department, particularly those who are allegedly overseeing the whole system. These topics include: (1) an update of all projects and jobs taking place in the district and departments; (2) damages to the system, and mismarked “locates;” (3) the necessity of keeping open lines of communication with the control room; (4) the policy on callouts, and which

employees potentially faced discipline if they did not increase their response rates; (5) charging time to proper categories; (5) grooming policies; (6) the “electronic use” policy; (7) the scheduling of vacations; (8) a recent accident implicating safety concerns; (9) theft of copper; (10) monthly substation inspections; (11) the necessity for additional equipment in the field in cold weather; (12) improper disposal of meter seals; (13) the necessity of making sure that information comes in accurately from the field on “company numbers and other information associated with a job,” so that the system can be updated regularly; (14) a new rule on 25k VA units, and the need to abandon old units and use only the new ones; (15) an update on the status of circuit completions. (R4)

b. Operators Considering themselves “Supervisors”

In response to a question from DEMCO’s attorney whether operator Bluin considered himself to be “supervising” field employees during switching, Bluin answered “In a way, yes.” (TR 349) In response to a second question from DEMCO’s attorney whether Bluin considers himself to be the supervisor of the field employees working in the Districts, Bluin again answered hesitantly: “Yes. I don’t think like that, but, yes. I mean, we’re directing them where we want them to go, you know, what switches we want them to open, you know, and that would be to me a supervisory situation there.” (TR 354)

SUMMARY OF ARGUMENT

Judge Ringler correctly determined that DEMCO violated Section 8(a)(5) of the Act by unilaterally removing the systems operators and chief systems operator (collectively “operators” or “dispatchers”) from the bargaining unit mid-term. Because such a change in the scope of the unit is a permissive subject of bargaining over which neither party is obligated to bargain, DEMCO could only make this change lawfully in one of two ways: by obtaining the union’s agreement, or the Board’s permission. *Holy Cross Hospital*, 319 NLRB 1361, 1364 (1995); and *Mt. Sinai Hospital*, 331 NLRB 895, 908 (2000). Because the employer did neither, it violated Section 8(a)(5) by unilaterally changing the scope of the bargaining unit.

The Judge also determined correctly that DEMCO further violated Section 8(a)(5) by transferring bargaining unit work out of the unit when it removed the operators. Such a transfer of unit work is a mandatory subject of bargaining, over which DEMCO failed to bargain with the union to impasse. *Mt. Sinai*, 331 NLRB at 907-908. Finally, the IBEW did not waive its right to negotiate over the transfer of unit work, either by contract, or by its actions or inactions. *Mt. Sinai*, at 908-09.

The Judge further correctly determined that DEMCO’s unit clarification (UC) petition was untimely. Although DEMCO also raised the alleged supervisory status of the dispatchers as a defense to its unfair labor practice violations, the Judge did not otherwise rule on the question. In the event the Board decides to address the question, as the Judge did in *Mt. Sinai Hospital*, 331 NLRB 895, 900-904 (2000), it is the union’s position that the operators are not supervisors, in accordance with the

standards set forth by the Board in 2006, in the *Oakwood Trilogy*¹⁴, and in accordance with the Board's assessment of those standards when applied to other operators/dispatchers, in *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (Dec. 31, 2012), *Appalachian Power*, Case 11-RC-006654 (Decision on Review and Order, Dec. 30, 2011); and *Avista Corporation*, Case 19-RC-15234 (Decision on review and Order, Apr. 11, 2011).¹⁵

In Section I of its Argument, the IBEW will demonstrate that DEMCO's actions effected an unlawful change in the scope of the unit. In Section II, the IBEW will present its argument that DEMCO unilaterally transferred bargaining unit work out of the bargaining unit, and that the union did not waive its right to bargain with the employer over this change, either by contract, or by action and/or inaction. In Section III, the union will demonstrate that the operators were not supervisors at the time DEMCO removed them from the bargaining unit.

¹⁴ Because the Board's proscription against unilateral mid-term changes in the scope of an agreed-upon bargaining unit applies even to supervisors (*Holy Cross*, 319 NLRB at 1364), the supervisory status of the operators as of December 1, 2010, is not a relevant defense to the charge that DEMCO unilaterally removed the operators from the bargaining unit, and thus unlawfully changed the scope of the unit.

¹⁵ In addition, the Board may also wish to address the supervisory status of the dispatchers now, in order to effect full compliance with compliance of its order, should it decide the employer's actions otherwise violated Section 8(a)(5). Otherwise the employer might be able to frustrate the Act's remedial purposes by, for example, delaying compliance with an order that it return the operators to the bargaining unit and, in the meantime, change their duties so that they do in fact become supervisory. A ruling at this point in time that the operators were not supervisors when DEMCO removed them from the bargaining unit would thus improve the chances of full compliance with any Board order that DEMCO restore the *status quo ante* as it existed prior to December 1, 2010, that is, to a time when the operators, by the Board's determination, were not supervisors.

ARGUMENT

I. THE JUDGE CORRECTLY RULED THAT DEMCO UNLAWFULLY CHANGED THE SCOPE OF THE BARGAINING UNIT

The Judge correctly ruled that DEMCO unlawfully changed the scope of the bargaining unit, in violation of Section 8(a)(5).

It is well-settled that once a position has been included in a bargaining unit, either by Board determination or consent of the parties, an employer cannot remove the position from the bargaining unit without the consent of the parties, or of the Board. *Holy Cross Hospital*, 319 NLRB 1361, 1361 n.2 (1995) *Mt. Sinai Hospital*, 331 NLRB 895, 898 (2000).

A. DEMCO Did Not Obtain the Union's Agreement before Removing the Operators from the Bargaining Unit

It is undisputed that the employer did not obtain the union's permission before removing the operators from the unit. As IBEW Business Manager Floyd Pourciau testified, without contradiction, current DEMCO CEO John Vranic made at least two unsuccessful attempts (in 2005 and in 2007) to obtain the union's consent to move the operators to "management." (TR 107, 109, 110-11) Both times, in response, the union stated that it did not want to give up bargaining unit jobs, and that it would file Board charges if DEMCO made the change. (TR 107-09, 112)

After Vranic became CEO, DEMCO began preparations to move the operators out of the bargaining unit – this time without giving the union advance notice or seeking its consent. Although DEMCO representatives claim that they made the decision to move the operators in August of 2011 (TR 60), there is

evidence that, as early as May of 2011, Vranic and Vice President Ron May were discussing what salaries the operators would receive once their positions were moved out of the unit. (TR 306) Moreover, as plans progressed throughout September, October and November, DEMCO management did not notify or involve the union in deliberations. (TR 131) DEMCO did not even, for example, notify the union that it was drafting job descriptions, meeting with affected employees, or preparing formal letters to those employees regarding their move out of the bargaining unit in October and November of 2011. (TR 283)

Instead, on or about November 18, 2010, Vranic met with Pourciau and presented the union with a letter that announced DEMCO's intentions to move the operators to management effective December 1, 2010. (TR 124) There is no testimony by Vranic that Pourciau agreed to this proposal and there is certainly no documentary support.

In contrast Pourciau testified, without contradiction, that he did not agree, either at the meeting on November 18, 2010, or the pre-bargaining session in January 2011, or at the contract renewal bargaining session on February 7, 2011, to the exclusion of the operators from the bargaining unit. (TR 127, 147, 153) In addition, as Glenn Brannen testified, the union came to the bargaining session on February 7, 2011, with a document it had drafted in order to make it absolutely clear that the IBEW was not agreeing to exclude the operators, and in fact intended to challenge the exclusion by filing a Board charge. (TR 139, 142-43; GC 16(a)) The parties revised the document and executed it before they signed the collective

bargaining agreement from which DEMCO had eliminated the operators. (TR 142, 167; GC 16)

Moreover, that Vranic was announcing a *fait accompli* on November 18 and not even seeking the union's permission, or even input, is underscored by the facts that management had already agreed upon salaries and job descriptions for the operators in their new, non-bargaining unit iterations, and had already mailed met with the operators and notified them of the changes, and had sent them formal letters announcing the changes. (TR 62-63, 283; GC 7 a-d)

Thus, there can be no serious argument that the employer either sought or obtained the union's agreement to exclude the operators from the bargaining unit.

B. DEMCO Failed to Seek the Board's Approval by Timely Filing a Petition for Unit Clarification

As stated, absent the union's agreement, DEMCO needed the Board's permission to remove the operators from the bargaining unit. DEMCO could have attempted to obtain the Board's permission by filing a unit clarification petition *before* it removed the operators, near the end of the contract term, *i.e.*, in December of 2010, or in January or February of 2011. *Shop Rite Foods*, 247 NLRB 883 (1980).

DEMCO could have sought the Board's permission to remove the operators from the bargaining unit before doing so, by filing a unit clarification petition shortly before the collective bargaining agreement expired. As the Board explained in *Shop Rite Foods*, 247 NLRB at 884, it will entertain unit clarification petitions shortly before the expiration of a collective bargaining agreement because, "[a]t that time, when the parties are preparing for negotiations on a new agreement, unit

clarification may spare them an unnecessary labor dispute.” The Board explained that it viewed a petition filed 101 days prior to contract expiration to be within this window period. *Id.* See also *University of Dubuque*, 289 NLRB 349 (1988) (finding a UC petition timely when filed within ninety-eight days of the planned commencement of negotiations for a renewal agreement, even though the contract would not expire for 280 days from the date of filing).

DEMCO did not, however, attempt to file a unit clarification petition in the time it had before the collective bargaining agreement expired. Instead, DEMCO simply made the unilateral changes at issue effective December 1, 2010, approximately ninety days prior to the expiration of the collective bargaining agreement -- on February 28, 2011 (GC 3) --- ironically, during the very period in which the Board would have entertained a UC petition. (GC 3)

Moreover, as the Judge correctly ruled, DEMCO also failed to file a timely-after-the-fact unit clarification petition. (Decision at 9-11) As the Judge noted, DEMCO did not file its unit clarification request until July of 2011 – between 121 and 143 days after the execution of the renewal contract. (Decision at 10) Even then, DEMCO only filed the UC petition as a defense to the Complaint the Region issued in the unfair labor practices case. (GC 1(g))

Indeed, as the Judge noted, it would be a misuse of the Board’s processes to permit an employer, under these circumstances, “to unilaterally absolve its unfair labor practice liability by filing a UC petition.” (Decision at 10) Put another way, such permission would “frustrate the Board’s remedial powers.” (Decision at 10) As

the Judge also observed, DEMCIO effectively conceded this point in its brief, when it asserted that a finding that the operators were unlawfully removed from the bargaining unit in December 2010 would only result in a remedial period of three months. (Decision at 10 and n. 15) To the contrary, a finding that DEMCO violated the Act when it removed the operators from the unit should result in an order to restore the *status quo ante*, requiring DEMCO to return the operators to the bargaining unit, and bargain with the union over their terms and conditions of employment. *See Mt. Sinai Hospital*, 331 NLRB at 912 (section on remedy). Logically, as part of restoring the *status quo*, DEMCO will also have to undo any post-December 1, 2010 changes it made to the operators' duties that arguably would render them supervisors.¹⁶

C. DEMCO's Defense to this Ruling is Without Merit

DEMCO's sole defense to the Judge's ruling on this violation is that the operators were in fact supervisors and therefore not subject to the Act when it removed them in December 2010. (DEMCO Brief at 7-16) As the Judge found, however, even if the unit in question did contain supervisors, the Board and the courts, in the interests of effectuating the Act's policy of stabilizing the established labor relations climate, will not permit the employer to repudiate the inclusion of such supervisors mid-term, as the employer did here. *Holy Cross Hospital*, 319 NLRB at 1364 (citing *Union Plaza Hotel & Casino*, 296 NLRB 918 (1989), *enforced*

¹⁶ Thus, DEMCO will have to undo the change it made, after December 1, 2010, to the chief systems' operators duties by giving him a direct report (the outage customer service clerk), and involving him in the promotion process for that individual. (TR 49-50, 70; GC 21 at 3; R 8)

sub nom., E.G.H., Inc. v. NLRB, 949 F.2d 276 (9th Cir. 1991). Accordingly, an assertion that operators were supervisors when DEMCO removed them from the bargaining unit cannot be a defense to that unilateral removal. This defense is additionally without merit because, as demonstrated below at Section III, the operators at issue were not supervisors at the time the employer removed them from the unit.

The employer, therefore, violated Section 8(a) (5) of the Act by unilaterally altering the scope of the unit, and its unlawful actions must be rescinded and it must restore the operators to the bargaining unit, and continue to bargain with the union over their terms and conditions of employment. *See Mt. Sinai Hospital*, 331 NLRB at 912.

II. THE JUDGE ALSO RULED CORRECTLY THAT DEMCO UNLAWFULLY TRANSFERRED BARGAINING UNIT WORK OUT OF THE UNIT

As the Judge also ruled, DEMCO further violated Section 8(a)(5) the Act because its removal of the operators from the unit in December 2010 effected a unilateral transfer of bargaining unit work outside of the unit without affording the union an opportunity to negotiate over the decision or its effects. (Decision at 7) *See Mt. Sinai Hospital*, 331 NLRB at 908; *Suzy Curtains, Inc.*, 309 NLRB 1287 (1992); *Tesoro Petroleum Corp.*, 192 NLRB 354 (1971); and *Hampton House*, 317 NLRB 1005 (1995). Because such a change is a mandatory subject of bargaining, an employer is obligated to bargain to impasse with the union prior to implementation. *Mt. Sinai Hospital*, 331 NLRB at 907-908.

DEMCO argues that the union waived its right to bargain over the change, both contractually and by its actions and/or inactions. This defense is, however, meritless.

First, if a union waives its right to bargain in the language of a collective bargaining agreement, that waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 US 693 (1983). Indeed, as the Board ruled in *Johnson-Bateman Co.*, 295 NLRB 180 (1999) a contract clause must specifically include subject at issue, and bargaining history must show that the matter at hand was fully discussed and consciously yielded before a waiver by contract can be found.

In this instance, the Management rights clause clearly does not reference the alteration in the scope of the unit, the transfer of bargaining unit positions out of the unit, or the transfer of bargaining work out of the unit, as among the management rights to which the parties have agreed. Moreover, there is no bargaining history that shows that the parties ever discussed such subjects, let alone agreed to them. And the employer has also failed to prove that the union has ever, in practice, agreed that the employer could unilaterally remove a bargaining unit position from the unit. See discussion, above, at Section I.

Moreover, the union did not waive its bargaining rights by inaction, because, as demonstrated above, at Section I, DEMCO employer presented it with a *fait accompli*, over which any attempt to bargain would have been futile. In addition, the union expressly reserved its right to challenge the employer's removal of the

operators from the renewal bargaining agreement, *before* the parties executed the agreement, thus making it absolutely clear that it was not waiving any rights at all.

III. THE OPERATORS WERE NOT SUPERVISORS UNDER THE ACT WHEN DEMCO REMOVED THEM FROM THE BARGAINING UNIT

As stated, the IBEW agrees with the Judge that DEMCO's UC petition was untimely. The union will, however, address the supervisory status of the operators as it relates to DEMCO's defense that it has not violated the Act because the operators were supervisors when it removed them from the bargaining unit on December 1, 2010. (DEMCO Brief at 7-16)

As demonstrated below, the current law and the record evidence do not support the employer's contention that the operators engaged in supervisory activities in relation to field employees prior to December 1, 2011.¹⁷ Moreover, while DEMCO appears to rest its case on the supervisory duty of "responsible direction" (DEMCO Brief at 9-10), the union will also address the supervisory duty of "assignment," which was an issue at the hearing, and also appears to be an issue in the cases addressing the supervisory status of electric system dispatchers/operators in general.

¹⁷ The employer logically cannot defend its actions on the basis of any claim that the operators became supervisors *after* it removed them from the bargaining unit. Consequently, the IBEW will not address the question whether the operators *became* supervisors after the employer unlawfully removed them from the bargaining unit.

The IBEW will first set forth the applicable legal principles to be used in assessing supervisory status. The union will then demonstrate that DEMCO failed to meet its burden of factual proof under the correct standards.

A. The Relevant Legal Standard

1. General Legal Principles Regarding Supervisory Status

DEMCO correctly set forth some of the general legal principles applicable to supervisory status, but neglected to mention any of the following relevant principles. (DEMCO Brief at 8-9)

First, it is well-established that the party asserting supervisory status (here, DEMCO) bears the burden of proving such status by the preponderance of the evidence. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)).

Second, determining supervisory status is a fact-intensive proposition, which requires “examination of all the evidence in the case.” *United States Gypsum Co.*, 118 NLRB 20, 25 (1957); *see also Entergy Gulf States v. NLRB*, 253 F.3d 203, 208 (5th Cir. 2001) (whether an employee is a supervisor is a question of fact). Consequently, the party asserting supervisory status cannot sustain its burden by relying on conclusory statements made by witnesses, without supporting evidence. *See, e.g., Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (purely conclusory evidence of accountability is insufficient; evidence of *actual* accountability is required); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006);

Volair Contractors, 341 NLRB 671, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); and *American Radiator Corp.*, 119 NLRB 1715, 1718 (1958). This is particularly true when the witnesses rely on “words of art reflecting legal conclusions,” like, for example, “conclusory statements that the individuals can ‘effectively recommend’ changes in the status of employees, . . . that they ‘exercise independent judgment,’” (*United States Gypsum Co.*, 118 NLRB 20, 25 (1957)), or that they are “accountable” in myriad respects (*Golden Crest*, 348 NLRB at 731). Similarly, the Board “must look beyond job titles to employees’ actual authority and responsibility.” *NLRB v. Dickerson-Chapman*, 964 F.2d 493, 497 (5th Cir. 1992); and *Demco New York Corp.*, 337 NLRB 850, 855 (2002).

Third, DEMCO also neglected to note that an individual only has the status of supervisor under 2(11) if he/she exercises “independent judgment *in connection with* one or more of the 12 specific functions listed by the provisions of the Act.” *Oakwood Healthcare*, 348 NLRB at 694 (emphasis added). The Board explained in *Oakwood*, for example, that a nurse can make a professional judgment (*e.g.*, that a patient requires a certain degree of monitoring) without transforming into a supervisor and thus, that a charge nurse is not automatically a “supervisor” because he or she exercises professional, technical or experienced judgment as a professional employee. *Id.* at 694. The important question is whether the alleged supervisor uses independent judgment in interacting with those she allegedly supervises. *See, e.g., NLRB v. Brown & Sharpe Manufacturing Co.*, 169 F.2d 331, 335 (1st Cir. 1948) (“it is not of consequence that the [putative supervisors] have been found to use

their independent judgment with respect to *some* aspects of their work; *the decisive question is whether they have been found to possess authority to use their independent judgment with respect to the exercise by them of some one or more of the specific authorities listed in §2(11) of the Act as amended.*” *Id.* at 334 (emphasis added). *See also Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994) (it is appropriate to distinguish between the independent judgment and discretion used by a highly trained employee in performing his or her *own functions*, and the judgment such individuals use when interacting with other employees).

2. Current Standard for Assessing the Supervisory Status of Electric Systems Dispatchers/Operators

DEMCO correctly asserts that the standards for assessing the supervisory status of electric system dispatchers/operators have changed over the years. (DEMCO Brief at 9) DEMCO errs, however, in disregarding all legal precedent that post-dates the decision of the Court of Appeals for the Fifth Circuit in *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001). As set forth below, the law has changed substantially since *Entergy Gulf States*, and does not support the arguments DEMCO makes in relying on that case.

As DEMCO noted, in response to criticisms from several courts of appeals regarding the Board’s assessment of the supervisory status of electric system dispatchers/operators, the Board revised its view in 1983 and held that such dispatchers were supervisors, because they assigned and responsibly directed the work of field employees. *See Big Rivers Electric Corp.*, 266 NLRB 380 (1983). In 1999, however, the Board overruled *Big Rivers*, and held that electric system

dispatchers do not assign and responsibly direct field employees. See *Mississippi Power & Light Co.*, 328 NLRB 965 (1999) (“MP&L”).

At least two appellate courts, including the Court of Appeals for the Fifth Circuit (as DEMCO noted), rejected the Board’s reasoning in *Mississippi Power*. See *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001); and *Public Service of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001). The appellate courts argued, in essence, that the Board’s assessment of “independent judgment” in *Mississippi Power* was contravened by the Supreme Court’s decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). In that case, the Court had struck down the Board’s view of supervisory independent judgment because it had attempted to distinguish it from “professional” or “technical” judgment, and had asserted that the exercise of the latter two did not render one a supervisor.

DEMCO’s reliance on *Entergy Gulf States* might be more effective if the law on supervisory status had remained static after *Entergy Gulf States*. But it has not. In response to the Supreme Court’s decision in *Kentucky River*, the Board re-evaluated its standards for assessing supervisory status. In doing so, the Board paid particular attention to the supervisory functions of “assignment” and “responsible direction,” and the concept of “independent judgment” in relation to those two functions. The Board issued its revised rules in 2006 a trio of cases that became known as the *Oakwood Trilogy*. Those cases are: *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

The Board has had three occasions to rule on the application of the *Oakwood Trilogy* to the question of the supervisory status of dispatchers/electric system operators, such as those at issue here. In all three, the Board found that the dispatchers were *not* supervisors. See *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (Dec. 30, 2011); *Appalachian Power Co.*, Case 11-RC-006654 (Decision on Review and Order, Dec. 30, 2011); and *Avista Corp.*, Case No. 19-RC-15234 (Decision on Review and Order, April 11, 2011).

But, to DEMCO, it is as if these Board decisions do not exist. DEMCO underscores its omission of these decisions by stating quite erroneously that Board continues to adhere to *Mississippi Power*. (DEMCO Brief at 9-10) In so doing, DEMCO does reference one of the three dispatcher cases -- *Avista Corp.* -- but it ignores the Board's ruling in 2011 and, instead, references only that of the Regional Director in 2009. (DEMCO Brief at 11 (citing *Avista Corp.*, Case No. 19-RC-15234 (Sept. 4, 2009))). Indeed, when the Board affirmed the Regional Director's decision that central distribution dispatchers are not supervisors in *Avista*, the Board expressly stated that it was *not* relying on the Director's analysis under *Mississippi Power*, but was relying on the Director's analysis under *Oakwood Healthcare*. See *Avista Corp.*, Case 19-RC-15234 at 2 n.2 (Decision on Review and Order, April, 11, 2011).

Thus, despite DEMCO's nostalgia for rulings it views as more favorable to its case, the relevant legal standards to be applied in here are those described below, as set forth in the *Oakwood Trilogy* in 2006, and as applied by the Board in

Entergy Mississippi, Avista Corp. and *Appalachian Power* in 2001. The Fifth Circuit's disagreement, in *Entergy Gulf States* (2001), with the standards set forth in *Mississippi Power & Light* (1999), is, therefore, irrelevant to the resolution of this case, as those standards are no longer being applied by the Board.

3. Supervisory "Assignment" Under the *Oakwood Trilogy* and *Entergy Mississippi*

The Board in *Oakwood* defined "the term 'assign' to refer to the act of designating an employee to a *place* (such as a location, department, or wing), appointing an employee to a *time* (such as a shift or overtime period), or giving *significant overall duties*," as opposed to "ad hoc instruction[s] that [an] employee perform a discrete task." The putative supervisor must, moreover, have "the ability to *require* that a certain action be taken[, not] merely to *request*" it. *Golden Crest*, slip op. at 3 (emphasis in original).

As with each of the twelve §2(11) functions, the authority to "assign" is only considered supervisory if its exercise "is not of a merely routine or clerical nature, but requires the use of independent judgment." In discussing the definition of independent judgment in relation to the authority to assign, the Board explained in *Croft Metals* that:

"[t]he authority to effect an assignment . . . must be independent . . . it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'"

Croft Metals, 348 NLRB at 721, quoting *Oakwood*, 348 NLRB at 693 (brackets in original). The judgment must not "be dictated or controlled by detailed instructions,

whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement,” unless the policies, etc., “allow for discretionary choices.” *Oakwood*, 348 NLRB at 693.

And, as discussed, the individual must exercise independent judgment *in connection with* his or her authority to make assignments, and not simply in the other aspects of his or her job. *Id.*; *Brown & Sharpe Manufacturing Co.*, 169 F.2d at 333-34; and *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d at 625.

In applying these standards to dispatcher/operators in *Entergy MS*, the Board found that such dispatchers were not supervisors on the basis of their authority to “assign” employees. First, the Board noted that, although the dispatchers may in fact assign field employees to a “place” – in the sense of directing them to a particular outage spot, and reassign them to the next outage spot, the record did not show the dispatchers used “independent judgment” in making these assignments. *Entergy MS*, slip op. at 7. Instead, the Board observed, the dispatchers used a computer program that notified them of trouble (outage) locations, and usually assigned to these trouble spots employees already assigned to the specific area, which assignments are made known to the dispatchers on a daily basis by the field offices. *Id.*

Second, the Board found that the dispatchers did not assign field employees to a working time. Entergy had based its argument on this point on the fact that dispatchers can assign overtime to field employees, and the Board noted that, to establish such authority as supervisory, “the evidence must show that the field

employees can *require* the field employees to work the overtime assigned them.” *Id.* (emphasis in original) (citing *Golden crest Health Care*, 348 NLRB at 729). And the evidence in *Entergy MS* was insufficient to do so. *Entergy MS*, slip op. at 7.

Third, the Board ruled that the dispatchers in *Entergy* also did not assign “significant overall duties” to the field employees because, in that case, “operations coordinators” and not the dispatchers, prepared the daily work assignment for field employees (including their obligation to work on outages), thus assigning them their significant overall duties. The Board viewed whatever re-assignment the dispatchers might make to the field employees as merely “*ad hoc*” instruction, that is, telling field employees that their trouble work needs to get done before their routine work. *Id.*

4. Supervisory “Responsible Direction” Under the *Oakwood Trilogy* and *Entergy Mississippi*

The Board in *Oakwood Healthcare* interpreted the supervisory function “responsibly to direct” to apply to a person on the shop floor who has “men under him” and decides “what job shall be undertaken next or [sic] who shall do it, provided that the direction is both ‘responsible’ and carried out with independent judgment. *Oakwood*, 348 NLRB at 691.¹⁸

¹⁸ The Board, in an apparent typographical error, misquoted the words of Senator Flanders whose amendment added the phrase “responsibly to direct” to the definition of supervisor. *Oakwood*, 348 NLRB at 691. The error lies in the Board’s use of the disjunctive “or” rather than the conjunctive “and.” The Board did quote the Senator correctly in footnote 27, when it cited to the legislative history and noted that Flanders had stated that one exercises the authority “responsibly to direct” when he or she decides “what job shall be undertaken next *and* who shall do

The Board additionally determined 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. *Oakwood*, 348 NLRB at 692.

Thus, in order to prove supervisory status on the basis of the authority “responsibly to direct,” DEMCO has to establish not only that the dispatchers direct the field employees using independent judgment, but must also prove that they are *accountable* for field employees’ work performance.

For example, in *Golden Crest Healthcare*, 348 NLRB at 730, the Board explained that telling an employee to perform certain specific tasks is “direction” under § 2(11). The Board, however, did not find supervisory status in that case because the employer failed to prove the alleged supervisors were held accountable for the actions of the employees they “directed.” And, in *Croft Metals*, the Board explained further that “direction” also includes the authority to “move employees when necessary to do different tasks” and to “make decisions about the order in which the work is to be performed.” 348 NLRB at 722. While finding that the alleged supervisors in *Croft Metals* did in fact “direct” employees under this standard, and were held accountable for their direction, the Board again did not find supervisory status on the basis of such direction and accountability, because the putative supervisors did not exercise independent judgment in their direction of

it.” *Oakwood*, 348 NLRB at 691 n.27 (citing to NLRB, Legislative History of the Labor Management Relations Act of 1947 at 1303) (emphasis added).

employees, but that the judgment they did exercise was merely “routine and clerical.” 348 NLRB at 722.

And, in *Entergy MS*, the Board ruled that the dispatchers at issue did not “responsibly direct” field employees because they were not held accountable for any actions of any field employees. That is, even if dispatchers direct field employees’ work, they are still not the field employees’ supervisors if they do not experience any “material consequence to [their] terms and conditions of employment, either positive or negative, as a result of [their] performance in directing field employees.” *Entergy MS*, 357 NLRB No. 178, slip op. at 5 (citing *Oakwood Healthcare* and *Croft Metals*). And, in *Entergy MS*, the record established that the dispatchers were held accountable only “for their *own work*, *i.e.*, their own failures and errors, not those of the field employees.” *Entergy MS*, , slip op. at 6. In contrast, when field employees erred, the field employee normally was disciplined by his immediate field supervisor. *Id.*

5. Supervisory Independent Judgment Under the *Oakwood Trilogy* and *Entergy Mississippi*

It is undisputed that that the Board in *Oakwood* rejected its briefly held view, set forth in *Providence Hospital*, 320 NLRB 717 (1996) and rejected by the Supreme Court in *Kentucky River*, 532 U.S at 717-20, that professional or technical judgment is exempt from being classified as supervisory independent judgment.

It is equally clear, however, that the Board in *Oakwood* retained its long-held precept that an individual has the “status of supervisor under 2(11) if he/she exercises independent judgment *in connection with* one or more of the 12 specific

functions listed by the provisions of the Act” (*Oakwood*, 348 NLRB at 694 (emphasis added)), thus reiterating that an employee may exercise professional or technical judgment in performing his or her *own work* without being a supervisor. *Id.* at 692 and 694. The Board explained, for example, that a nurse can make the professional judgment that a patient requires a certain degree of monitoring without transforming into a supervisor, and thus that a charge nurse is not automatically a “supervisor” because he or she exercises professional, technical or experienced judgment as a “professional employee.” *Id.* at 694.

In maintaining that it is the critical confluence of independent judgment with a supervisory function that makes an individual a supervisor, the Board is remaining faithful to interpretations of supervisory independent judgment that go back to the first cases decided after the Taft Hartley amendments added the definition of supervisor to the Act. In agreeing with the Board’s decision that certain quasi-professional employees were not supervisors in *NLRB v. Brown & Sharpe Manufacturing Co.*, 169 F.2d 331, 335 (1st Cir. 1948), for example, the court explained, “it is not of consequence that the [putative supervisors] have been found to use their independent judgment with respect to *some* aspects of their work; *the decisive question is whether they have been found to possess authority to use their independent judgment with respect to the exercise by them of some one or more of the specific authorities lists in §2(11) of the Act as amended.*” *Id.* at 334 (emphasis added). *See also Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994) (it is appropriate to distinguish between the independent judgment and

discretion used by a highly trained employee in performing his or her *own functions*, and the judgment such individuals use when interacting with other employees).

B. DEMCO has Failed to Meet its Burden of Proving that the Operators Engage in Supervisory Assignment or Direction of Field Employees

In asserting that the electric system operators in this case are supervisors, DEMCO, as stated, ignores both the *Oakwood Trilogy* and its application in other dispatcher/operator cases (as decided by the Board itself, rather than by its Regional Directors). Moreover, the factual assertions DEMCO makes in support of its exceptions fall into four categories: that is, they are either irrelevant, conclusory, unsupported by record evidence, or simply inadequate to sustain its burden of proof. Although DEMCO does not expressly discuss supervisory “assignment,” the union will address the employer’s factual and legal assertions in the context of the relevant supervisory criteria, both of assignment and responsible direction.

1. The Operators Do Not “Assign” Field Employees Using Independent Judgment

Although DEMCO makes the conclusory assertion that “the operators assign field employees to areas, shifts or crews on occasion” (DEMCO Brief at 11), the record does not support this assertion and thus DEMCO has not proven that the operators assign field employees to “significant overall job duties,” or to their “place,” or to a “time” using “independent judgment” within the meaning of supervisory assignment as set forth in the *Oakwood Trilogy*.

(a) Significant Overall Tasks

First, it is clear that the District Line Supervisors, and not the operators, give the field employees their daily assignments, including their assignments to be the first responder during the day shift, as the serviceman in a particular geographic area; or to be the first responder after hours, as a member of the duty team; or to perform a switching operation. (TR 290, 311, 312; GC 17)

Indeed, when trouble occurs during the day, operators call the pre-assigned serviceman. (TR313-14) And, when trouble occurs after hours, the operators call the pre-assigned duty crew. (TR 298-99, 312, 341, 346) If additional resources are needed, the operators call the pre-determined “call-out” list. (TR 284; GC 23) Field employees who are not “on duty” are not required to respond to any particular call-out by the operator. (GC 23)

And, with regard to switching, the Districts assign the field personnel. (TR GC 15 at 12) If the operator makes the assignment, he simply calls the designated serviceman, duty person, or available crew. (TR 326) Moreover, the choice of whom to assign is curtailed by the fact that the switcher must be pre-cleared to engage in switching, that is, his name must be placed on the Switching and Clearance List by either the District Manager or the Manager of Construction and Maintenance. (GC 17 at 7)

It is clear from the foregoing that the operators do not assign employees to their overall job duties but, rather, alert them to the need to perform one or more of the duties they have already been assigned by their acknowledged supervisors. Like the lead persons in *Croft Metals*, who do not “prepare the posted work

schedules for employees, appoint employees to production lines, departments or shifts...or give significant overall duties, the operators do not determine the overall tasks field employees must accomplish on any given day; they simply have the authority to move those employees among their pre-assigned tasks, “to ensure that the work gets done.” *See Croft Metals*, 348 NLRB at 721-22. *See also Entergy MS*, 357 NLRB No. 178, slip op. at 8 (dispatchers make only *ad hoc* assignments, as in *Croft Metals*).

(b) Place

As explained, the field employees are assigned by their direct supervisors to geographic areas, and then routed to specific trouble spots by the dispatchers when an outage occurs. This routing is no different than telling an employee that a specific job needs to be done. And because, as explained above, the operators’ *ad hoc* designation of job duties is insufficient to establish supervisory status, the *ad hoc* routing of field employees to the locations where they must perform those duties must be insufficient as well. Indeed, any other rule would make supervisory status turn, not on what the putative supervisor actually does, but rather on whether his or her actions are characterized as designating *duties* or designating *places* in which to perform those duties.

Moreover, as the Board observed in *Entergy MS*, such assignment and reassignment is not done with the use of “independent judgment,” where dispatchers make the assignments, as here, in accordance with computer programs that notify them of the location outage, employer-provided goals and common sense.

Entergy MS, slip op. at 7. In addition, the Board noted in *Entergy* that the dispatchers are generally assigning employees to trouble spots in areas to which they are already pre-assigned by their actual supervisors. *Id.* Here, the record shows, as set forth above, that dispatchers are similarly assigning field personnel to areas in which they have been pre-assigned to address “trouble” calls.

DEMCO makes reference to an occasion in which an operator allegedly reassigned a crew from one parish to another and asserts this is evidence that operators use “independent judgment” in making such assignments. (DEMCO Brief at 14 (citing to TR 315 and R-8)) The cited record, however, does not support DEMCO’s assertion that this ever occurred.¹⁹ Moreover, even if it had occurred, it is the only such incident referenced, and would thus be considered *de minimus* at best and insufficient to establish supervisory status.

(c) Time

As stated, field employees are assigned to shifts and are scheduled for planned overtime by their own direct supervisors, not by the operators. Moreover, the ability to incur overtime is not supervisory in this case, because the operators do

¹⁹ The testimony on TR 315 describes only the actions of the first responder, when he arrives on site, determines what the problem is and relays the information back to the operator. And Respondent’s Exhibit 8 (Exhibit R-8) comprises documents DEMCO asserts supports its contention that Bonalee Conlee is the direct supervisor of an outage clerk. Furthermore, union counsel can represent that she searched the entire transcript for the name of the operator who was supposed to have taken this action (Sibley) and found no reference to the incident in relation to (1) Sibley’s name or (2) either of the two parishes between which such reassignment was supposed to have been made.

not have the authority to *require* a field employee to work past the end of his shift, or to come in when he is off-duty, in response to a call-out. (TR 324; GC 23)

“It is well-established that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken.” *Golden Crest*, 348 NLRB at 729 (emphasis is original). And DEMCO has failed to establish that dispatchers can require employees to accept overtime.

The employer asserts that the operators can hold field personnel over until the operators decides to release them (Brief at 15, citing TR 263, lines 15-25 and 265, lines 1-5). But a review of the *full* record indicates that, while the operators do have the authority to hold people over after their normal shift is finished (TR 233), the field employee can refuse to stay. (TR 324) If the systems operator nonetheless wants the employee to remain, he has to report it to May for a decision. (TR 324)

(d) Independent Judgment

In order for the act of assigning to be supervisory, it also must involve independent judgment. As the Board explained in *Oakwood*, in assigning employees, a supervisor’s authority must be independent, that is, the assigner must form an opinion or evaluate the skill level of the employees in relation to the assignment. *Oakwood Healthcare*, 348 NLRB at 695. In this case, DEMCO has proven the opposite, that is, they do not take into account the skill level of the field employees in assigning them. Instead, the operator assigns the field employee that

has been pre-assigned to the time and area, and calls out additional help in accordance with a pre-determined list. (TR 284, 289, 299, 312, 313-14, 342, 346, 353, 354; GC 23) Moreover, it is the first responder, *i.e.*, *the field employee* who estimates how long the job will take and the numbers of additional employees and equipment the job will require. (TR 228, 315, 317, 367-68)

As operator Jeremy Bluin testified, when there are multiple crews in the field, and he needs to choose which crew to deal with which outage he will decide on the basis of (1) the crew's "physical proximity to the location of the outage;" and/or (2) the nature of the equipment the crews have with them. For example, if an outage repair required use of a bucket truck, the operator would dispatch a crew that had possession of a bucket truck over a crew that was actually physically closer to the outage at issue. (TR 370-71)

While DEMCO asserts that the operators "call field personnel with skill sets that best fit the issue they are trying to resolve" (DEMCO Brief at 14 (citing TR 44, lines 8-14), the record as a whole shows that they do so, not based on individual's skill sets, but in accordance with the obvious and self-evident choice. It is absolutely clear that the operators do not chose which field employee they dispatch, and do not call people based on their qualifications. (TR 369) While Jeremy Bluin testified that he is generally familiar with the skill sets of field employees (TR 344) and said he would consider whether one person "is a lot better at underground" than another and that he would "factor that in," he provided no specific examples of when he had ever done so. (TR 344) He also admitted on cross-examination that he

does not decide who is on the duty crew (TR 363), and that he does not call people out based on their qualifications. (TR 369)²⁰

DEMCO argues, nonetheless, that “individuals with a greater skill set in restoring underground power outages are chosen by the operators for those types of problems.” (DEMCO Brief at 14) Bluin explained on cross-examination, however, that there is an actual underground outage crew that handles underground outages. (TR 372) During regular work hours, the operator still contacts the serviceman in the area, and the serviceman contacts the “underground crew” (TR 372). If an underground outage occurs after-hours, the operator still calls the pre-assigned “duty crew.” (TR 372)

DEMCO also asserts that operators “know who to choose to operate an 18 wheeler” (DEMCO Brief at 14), but the employer does not cite to the record in support of this assertion and, as stated, Bluin testified that, when special equipment is needed, he calls the crew with that equipment, even if it is not the closest crew. (TR 370-71)

DEMCO further asserts that dispatchers can also call out contractor crews, and non-DEMCO crews, but even assuming they can, contractor crew members are by definition not *DEMCO* employees, and it is well-established that an employer

²⁰ Further, DEMCO counsel tried to get Bluin to testify that, for underground outages, he would take into consideration the skills of the crew (TR 371), but, on cross-examination, Bluin explained that there is an actual underground outage crew. (TR 372) During regular work hours, the operator still contacts the serviceman in the area, and the serviceman contacts the “underground crew” (TR 372). If an underground outage occurs after-hours, the operator still calls the pre-assigned “duty crew.” (TR 372)

cannot establish supervisory status based on the alleged supervision of another employer's employees. *Franklin Hospital Medical Center*, 337 N.L.R.B. 826, 826-827 (2002)

Thus, the operators have “no choice or flexibility concerning the personnel . . . assigned to them,” and instead must simply utilize the field employees “selected and hired by others.” *Croft Metals*, 348 NLRB at 722. Indeed, in calling on these pre-selected field employees, the operators are constrained by decisions made by the field employee's supervisors and by the terms of the collective bargaining agreement. As far as the operators are concerned, the servicemen, duty crews and field employees on the call out lists, are simply among the “assets” they are supposed to utilize in addressing outages. Because they do not “choos[e] among the available staff” and instead, regardless of the nature of the problem, simply treat the field employees interchangeably and call them pursuant to detailed instructions, the operators do not exercise the kind of “meaningful . . . discretion” that *Oakwood* has defined as “independent judgment” in making assignments. *Croft Metals*, 348 NLRB at 723.²¹

²¹ DEMCO also argues that the operators prioritize the order in which power is restored, and have always done so. (DEMCO Brief at 15) Although the employer does not explain the relevance of this factor to supervisory status, one would normally view it as relevant to “independent judgment.” In this case, however, the operators' actions in prioritizing the order in which outages are to be handled are dictated by established company policy and common sense, and are thus, despite the impact they may have, of a routine and clerical nature. Established policy is that the largest outages, including transmission outages, are addressed first; the only exceptions are in cases of necessity (medical or otherwise) and the operators are alerted to those situations by the computer. (TR 23, 239, 318-19, 341, 343) All other things being equal, the outages are addressed in the order received. (TR 343)

2. The Operators do Not “Responsibly Direct” Field Employees

The Board in *Oakwood Healthcare* interpreted the supervisory function “responsibly to direct” to apply to a person on the shop floor who has “men under him” and decides “what job shall be undertaken next or [sic] who shall do it.” Such direction alone is not sufficient to confer supervisory status, unless it is also involves the use of “independent judgment.” *Oakwood*, 348 NLRB at 691. Moreover, the Board has held that the supervisory “responsibility” actually means “accountability.”

Thus, in order to prove that the operators are supervisors because of their direction of field employees, DEMCO has to prove: (1) the operators “have men under them;” (2) the operators decide what job the field employee shall undertake next and/or which field employee shall do which job; (3) that such directions are accompanied by the use of independent judgment; and (4) that the operators are held “accountable” for the quality of the field employees’ work.

While the operators at DEMCO may in fact direct the field employees in a minimal sense, they do not meet the additional requirement that they have “men under them,” or that their direction require involves independent judgment, or that the operators are “accountable” for the work of the field employees.

Dispatching under such procedures is routine and clerical and not performed using supervisory independent judgment “free of the control of others.” See *Entergy MS*, slip op. at 6.

(a) The Operators and Field Employees are not in a Hierarchical Relationship

The statement that a supervisor who “responsibly directs” the “men under him” logically presupposes some sort of departmental or group hierarchical relationship between the purported supervisor and the supervised employee. And such a relationship simply does not exist between the operators and field employees.

First, purely as a matter of organizational structure, the operators and field employees are not within each other’s chains of command. The field employees in Engineering and Operations are under the supervision of their District Line Supervisors, who are in turn responsible to Vice President May, while the operators report directly to May. (GC 20 at 3; GC 21 at 2) And the field employees in Finance and System Operations are not even in the same Department as the operators, and work under different Vice Presidents. (GC 20 at 2,3,4; GC 21 at 2,3,4)

Second, the field employees and operators have never even been part of the same job progression. (TR 309, 310; GC 3, Ex. A; GC 15, Ex. A) And although prior field experience may enhance an operator’s job performance (TR 274-75), DEMCO has never made it a pre-requisite or requirement for the job. (TR 305)²²

It is also clear from a functional standpoint that the operators and field employees engage in a collaborative process involving reciprocal responsibilities, rather than in a hierarchical one. Thus, when an operator becomes aware of an

²² DEMCO attempts to distinguish the Regional Director’s decision in *Avista Corp.*, by arguing that most of DEMCO’s operators do have experience in field operations. (DEMCO Brief at 11) This was not a critical point in *Avista*, however. Moreover, as stated, DEMCO has never made field experience a requirement of the operators’ job, and not all operators have such experience. (TR 305)

outage, the operator calls whichever serviceman or duty crew is already assigned for that geographic area to respond. (TR 313-14) When the serviceman or duty crew arrives on the scene, they assess the situation and advise the operator as to the nature of the problem, how long the repairs are estimated to take and whether they need additional help. (TR 228, 315) If additional resources are needed, the field employee tells the operator who and what he needs. (TR 367-68) Although DEMCO's witnesses attempted to hedge on this point, operator Bluin admitted that he has never refused this type of request, and acknowledged that the field employees in fact know "what they really need." (TR 368)

Moreover, the operators and field employees are dependent on one another for the information they need to do their respective jobs, and thus work collaboratively. The operators have information from the computer system that the field employees do not have (TR 281), and the field employees can see what is actually going on in the field, which the operator cannot see. (TR 228, 293-94, 315) Even during switching, the dispatcher and the field employee read the instructions back and forth to one another, in "echo protocol." (TR 327-28) Either the operator or the field employee can stop the switching procedure, if they find a problem. (TR 328; GC 17 at 12) Indeed, the operator may have steps to take in the switching, such as opening or closing a switch that he can do via SCADA, while the field employee must open or close switches that can only be operated manually. (TR 94) Such collaborative decision-making argues against finding the operators to be the

field employees' supervisors. *See, e.g., Avista Corp.*, Case 19-RC-15234, slip op. at 9 (Decision and Direction of Election, Sept. 4, 2009).²³

(b) DEMCO Failed to Prove that the Dispatchers Use Independent Judgment When “Directing” Field Employees

Even assuming, for the sake of argument, that DEMCO has proven that the operators direct the field employees, it has failed to prove that they use the independent judgment necessary to make them statutory supervisors.

As stated, supervisory independent judgment involves the formation of an opinion or evaluation by discerning and comparing data and the utilization of a degree of discretion that rises above the routine or clerical. *Croft Metals*, 348 NLRB at 721. The judgment, moreover, must not be “dictated or controlled by detailed instructions,” unless they “allow for discretionary choices.” *Oakwood*, 348 NLRB at 693.

The relevant inquiry is the operators' judgment *when interacting with field employees*, not when performing their own work tasks. *Oakwood*, at 692, 694; *Northeast Utilities Service Corp v. NLRB*, 35 F.3d at 625; *NLRB v. Brown and Sharpe Manufacturing Co.*, 169 F.2d at 335. Yet, the employer presented no

²³ DEMCO's acknowledgment that “the Operators often operate equipment that allows them to fix a problem without using a field employee” (DEMCO Brief at 11) tends to support the collaborative nature of the work, rather than bolster a claim of supervisory status.

evidence, beyond conclusory statements, that the dispatchers exercise any independent judgment in their interaction with field personnel.²⁴

(c) DEMCO Failed to Prove that the Operators are “Accountable” for the Field Employees

As the *Oakwood* trilogy makes clear, “responsibly” in the context of “responsibly to direct” means that the purported supervisor is “accountable” for work of the employees he or she allegedly supervises. 348 NLRB at 692. Thus, even if the operators do direct field employees using independent judgment, they are not supervisors unless they are also held accountable for the field employees’ errors. And DEMCO clearly has not been able to meet its burden of proving that point.

As stated, to be accountable: (1) the alleged supervisor must be able to take corrective action against the employee; *and* (2) there must be the prospect of adverse consequences to the alleged supervisor, if he or she fails to take the corrective action. *Id.*

With regard to “corrective action,” the Board explained in *Croft Metals*, that “verbal warnings” or “escorting non-compliant employees to the company’s

²⁴ Instead, DEMCO relies on statements about the scope and complexity of the operators’ jobs that are conclusory, or that describe the operators’ work at times when they are not interacting with field personnel. For example, DEMCO asserts that “the operators have a true managerial role” (DEMCO Brief at 11); they “utilize technology that constantly monitors the power system” (*id.* at 12); “create switching orders almost daily for things like construction projects or to transfer loads from one source to another source” (*id.* at 13); they “work independently” (*id.* at 14); they are the “highest ranking employees at DEMCO at nights and on weekends” (*id.* at 15); and they “resolve customer complaints.” (*Id.*)

personnel office or higher plant supervisors” are examples of such supervisory corrective action. *Croft Metals*, 348 NLRB at 722 n. 13.

With regard to “adverse employment consequences,” the Board explained in *Golden Crest* that the phrase refers to “material consequences to [the supervisor’s] terms and conditions of employment, either positive or negative, as a result of [his or her] performance in directing” other employees. 348 NLRB at 731. For example, *written warnings* issued to lead persons because of the failure of their crews to meet production goals, or because of other shortcomings of their crews, are evidence of “adverse consequences.” *Id.* On the other hand, evaluation forms on which putative supervisors were rated for their performance on “directing” other employees, did not evince “adverse consequences,” because there was no evidence that any action, either positive or negative, had been, or even might have been, taken as a result of the evaluation score on this factor. *Id.*

DEMCO made a number of assertions that the operators are accountable for the field employees, but provided no actual evidence of accountability, as defined by the Board in *Oakwood*, *Croft Metals* and *Golden Crest*. Instead, DEMCO relied on evidence that, *after* it removed the operators from the unit, it gave them reportorial responsibilities with regard to field employee errors and/or misconduct. (DEMCO Brief at 13-14 (citing TR 267, 269, 270, 287)) And reportorial authority is not “accountability.” (*cite*)

In addition, other examples of “accountability” DEMCO provided establish only that operators may be held accountable for their *own* errors. In this vein,

DEMCO asserted that operators “could be subject to coaching or discipline for utilizing unnecessary field personnel” (DEMCO Brief at 12) Also, while DEMCO asserted that operators are “held accountable when switching orders are not completed” (DEMCO Brief at 11 (citing TR 355); DEMCO Brief at 13 (citing TR 256, 257, 273)), the incident referred to demonstrated only that the *operator* was being held responsible (via a coaching session that did not result in any written document) for his *own error*. (TR 273)

Moreover, there is abundant evidence in the record that an operator *cannot* take corrective action against a field employee for failing to follow his instructions. Thus, if a trouble call will run over the field employee’s shift, the dispatcher cannot do anything to a field employee who has to leave at the end of his shift. (TR 324) Even May testified that the operator would have to report to him in such situation. (*Id.*) DEMCO witnesses also acknowledged that operators “cannot be responsible for an action that a field employee takes.” (TR 294-95)²⁵

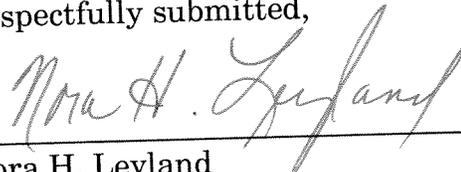
²⁵ DEMCO also attempts to rely on the fact that it gave the Chief Systems Operator a “direct report” after December 1, 2010, to establish (presumably) that all of the operators are “accountable” for field employee actions. (DEMCO Brief at 15) This evidence is, however, insufficient for at least two important reasons. First, the reassignment was made *after* the unilateral removal of the operators from the unit; thus, if that action is found unlawful, the “direct report” situation will have to be undone. Second, at the time of the hearing, there was no one in the position (TR 266), and supervisory status cannot be based alleged authority over a vacant position. *Accord Joseph C. Szabo & Raymond A. Longworth, Partners*, 101 N.L.R.B. 318, 321-22 (1952) (where employee has no subordinate working under him, he therefore has no occasion to exercise any supervisory authority).

In summary, DEMCO has failed to meet its burden of proof that the operators engage in supervisory assignment or in supervisory responsible direction in their interactions with field employees.

CONCLUSION

For all of the foregoing reasons, the Board should affirm the Judge's rulings that DEMCO violated Section 8(a)(5) and (1) of the Act when it unilaterally removed the systems operators from the bargaining unit. In addition, the Board should rule that the systems operators are not supervisors, in accordance with its recent rulings in *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (Dec. 30, 2011) and related cases. Finally, the Board should affirm the remedy set forth by the Judge, including restoration of the *status quo ante*, as set forth in *Mt. Sinai Hospital*, 331 NLRB 895, 912 (2000).

Respectfully submitted,



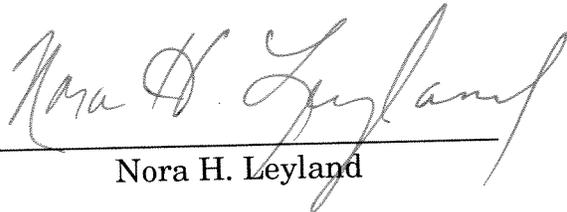
Nora H. Leyland
SHERMAN, DUNN, COHEN, LEIFER & YELLIG, P.C.
900 Seventh Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 785-9300
Fax (202) 775-1950
leyland@shermardunn.com

STATEMENT OF SERVICE

On May 18, 2012, I served the foregoing Brief in Opposition upon the following by electronic mail:

M. Kathleen McKinney, Regional Director
Beauford D. Pines, Counsel for the Acting General Counsel
NLRB Region 15
600 South Maestri Place, 7th Floor
New Orleans, LA 70130-3413
TEL: (504) 589-6361
FAX: (504) 589-4069
NLRBRegion15@NLRB.gov
Beauford.Pines@NLRB.gov

David J. Shelby, II
M. Lenore Feeney
Taylor Porter
P.O. Box 2471
Baton Rouge, LA 70821
TEL: (225) 387-3221
FAX: (225) 215-8730
david.shelby@taylorporter.com
Lenore.feeney@taylorporter.gov



Nora H. Leyland