

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

**MV TRANSPORTATION, INC.<sup>1</sup>**

**Employer**

**and**

**Case 12-RC-9298**

**AMALGAMATED TRANSIT UNION  
LOCAL 1577, AFL-CIO**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

MV Transportation, Inc. (the Employer) provides paratransit services for approximately 1,500 disabled and elderly riders in Palm Beach County, Florida, pursuant to a contract with Palm Tran Connection.<sup>2</sup> On January 23, 2008, Amalgamated Transit Union, Local 1577, AFL-CIO (the Union) filed a petition with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent a unit of clericals, dispatchers and supervisors employed at the Employer's two Palm Beach County locations. More specifically, the unit sought by the Union consists of road supervisors, dispatchers, lead dispatchers, window dispatchers, the maintenance clerk and the administrative assistant. The Employer contends that the road supervisors, dispatchers, lead dispatchers, window dispatchers and maintenance

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<sup>1</sup> This is the correct name of the Employer, as amended at the hearing.

<sup>2</sup> The parties stipulated that the Employer, a California corporation with places of business located at 3301 Electronics Way, West Palm Beach Florida, and at 3040 South Military Trail, Lake Worth, Florida, is engaged in providing transit services for riders in Palm Beach County, Florida, and that during the past 12 months, it has derived gross revenues exceeding \$250,000, and has purchased and received at its West Palm Beach facility goods and materials valued in excess of \$10,000 directly from points located outside the State of Florida.

clerk are supervisors, and that the maintenance clerk and the administrative assistant are confidential employees. The Employer further argues that the employees at the two Palm Beach County locations do not share a community of interest.

A hearing officer of the Board conducted a hearing, and both parties submitted briefs. I have considered the evidence and arguments presented by the parties.

For the following reasons, I conclude that the unit sought by the Union is an appropriate unit. As I will explain, I direct that one of the road supervisor positions be eligible to vote subject to challenge.

I will first set forth the governing legal principles regarding supervisory and confidential employees. I will then provide a brief overview of the Employer's operations, after which I will discuss the relevant facts and legal analysis for each disputed position. Finally, I will discuss whether a unit consisting of both facilities is an appropriate unit.

### **1. Legal Principles**

The Board does not find that a position is supervisory, within the meaning of Section 2(11) of the Act, unless the preponderance of the evidence shows that the position has the authority to engage in one of the 12 supervisory functions enumerated in that Section, that the exercise of such authority requires the use of independent judgment, and that such authority is exercised in the interest of the Employer. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001); Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006). The

burden of proving supervisory status lies with the party asserting it (the Employer here). Possession of authority to exercise any one of the indicia of Section 2(11) is sufficient. *Id.* Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, 332 NLRB 1409 (2000). Mere inferences or conclusory statements are insufficient; a party must present evidence that the employee “actually possesses” the 2(11) authority at issue. Golden Crest Healthcare Center, 348 NLRB No. 39 (2006), slip op. p. 5.

The Board has also held that employees do not belong in a bargaining unit if they: (1) share a confidential relationship with managers who “formulate, determine, and effectuate management policies in the field of labor relations”; and (2) assist and act in a confidential capacity to such managers. E.C. Waste, Inc. d/b/a Waste Management de Puerto Rico, 339 NLRB 262, 262 fn. 2 (2003). The party asserting this exclusion carries the burden of proof. Crest Mark Packing Co., 283 NLRB 999 (1987).

## **2. Overview of Employer’s Operations**

The Employer transports eligible riders by appointment to medical appointments, jobs, and recreational activities.<sup>3</sup> The Union represents a unit comprised of roughly 108 drivers (operators), 6 mechanics and 4 utility workers employed by the Employer at its facility at 3301 Electronics Way, West Palm Beach (the West Palm Beach facility). These employees are covered by a collective-bargaining agreement.<sup>4</sup> None of the covered employees work at 3040

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<sup>3</sup> Shortly before the hearing, the Employer added a service called deviated fixed drop, which is a fixed transit route that the general public can also ride.

<sup>4</sup> The current collective-bargaining agreement expires on January 12, 2012.

South Military Trail, Lake Worth, Florida (the Lake Worth facility). The facilities are about 10 miles apart.

The Employer's three road supervisors, three window dispatchers, maintenance clerk and administrative assistant all work at the West Palm Beach facility. Also working at the West Palm Beach facility are the general manager, safety manager, maintenance manager and operations manager.<sup>5</sup> The Employer's six dispatchers, two lead dispatchers, and dispatch manager work at the Lake Worth facility.<sup>6</sup> There are no non-supervisory employees of the Employer at either facility, other than those that the Union seeks to represent in this case and the drivers, mechanics and utility workers that the Union already represents.

The general manager has ultimate supervisory responsibility for both locations, and supervises all managers. The safety manager supervises drivers and road supervisors, and it appears from the record that the operations manager also supervises drivers as well as window dispatchers. The maintenance manager supervises the maintenance clerk, mechanics and utility workers, and the dispatch manager supervises lead dispatchers and

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<sup>5</sup> At the hearing, the Employer presented the general manager, the maintenance manager, and the safety manager as witnesses. The general manager started working at the West Palm Beach facility in October, 2007, and the safety manager started there in December, 2007.

<sup>6</sup> The Employer neither owns nor leases space at the Lake Worth facility. The Employer's contract with Palm Tran Connection requires the Employer to place its dispatchers, lead dispatchers and dispatch manager at the Lake Worth facility.

dispatchers.<sup>7</sup>

The Employer operates from 3:00 a.m. until 11:00 p.m. during weekdays, and also operates on weekends, although the record does not reflect the weekend hours of operation. Twice each year, drivers bid for shifts, which are assigned to separate routes based on the starting and ending times for the shift. There are roughly 70 to 85 routes per day.<sup>8</sup> There are about 75 to 85 drivers working each weekday, 50 on Saturday and 25 on Sunday. A driver may be assigned to more than one route on a shift.

Each driver reports to the West Palm Beach facility,<sup>9</sup> where the Employer's vehicles are kept. The driver proceeds to the window dispatcher, who provides the driver with keys<sup>10</sup> and a trip manifest showing the times for each stop on the driver's route that day. The driver then performs a pre-trip inspection of his or her bus and fills out a "daily vehicle inspection" (DVI) form.<sup>11</sup>

Upon leaving the West Palm Beach facility, the driver must call a dispatcher. Each dispatcher handles 20 to 30 routes per shift. The driver is also required to call the dispatcher at every drop off and pick up, and to record on the

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<sup>7</sup> The parties agree, and the record establishes, that the general manager, safety manager, operations manager, maintenance manager, and dispatch manager have the authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline employees, or to effectively recommend such action, using independent judgment. I conclude that all of these individuals are supervisors within the meaning of Section 2(11) of the Act.

<sup>8</sup> This number changes from day to day, with more routes assigned on weekdays than on weekends.

<sup>9</sup> Drivers report at varying times, starting at 4:00 a.m., and finish as late as 11:00 p.m., depending on the shift.

<sup>10</sup> Drivers are not assigned the same vehicle every day.

<sup>11</sup> The DVI form has a checklist of the vehicle's performance features, (fluids, brakes, lights, air conditioning, etc.).

manifest the time of such drop off or pick up. After the last stop, the driver returns the vehicle to the West Palm Beach facility.<sup>12</sup>

### **3. Road Supervisors (West Palm Beach)**

#### ***Facts***

According to the job description,<sup>13</sup> the purpose of the road supervisor's job is to "monitor street operations according to client, operations, and safety department requirements" and "[s]upervise drivers to assure safe and professional operations."<sup>14</sup> The job description states that the road supervisor is to supervise drivers in performing essential job functions; remove any driver from a route who is performing in an unsafe or unprofessional manner; ensure that all operators (drivers) are fit for duty, meet uniform and equipment standards and are in possession of proper licensing and certifications; conduct site checks and road observations, documenting findings and providing necessary reports to project staff; monitor street operations for on-time performance and schedule and route adherence; respond to accidents and incidents, assisting in managing the situation as well as collecting all required information; and perform various other duties.

Road supervisors work staggered shifts. One begins work at 3:00 a.m.,<sup>15</sup> another works from 7:00 a.m. to 3:00 p.m., and the third works from 2:00 p.m. until 11:00 p.m. Road supervisors meet with each driver before the driver leaves

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<sup>12</sup> Drivers do not punch a time clock.

<sup>13</sup> The job descriptions in the record are generic job descriptions used by the Employer at its facilities throughout the United States, and may not contain additional duties required pursuant to the Employer's contract with Palm Tran Connection.

<sup>14</sup> Road supervisors work in both the Operations and Safety departments.

<sup>15</sup> The record does not reflect when this road supervisor's shift ends.

the West Palm Beach facility in the morning. The driver shows the road supervisor the completed DVI form for review, although the road supervisor does not always sign the DVI form. In addition, two of the three road supervisors complete “gate check forms”<sup>16</sup> on as many drivers as they can.<sup>17</sup> For the remainder of their shifts, these two road supervisors monitor drivers.<sup>18</sup> It appears from the record that road supervisors spend a substantial portion of their shifts in the field.<sup>19</sup>

The general manager testified that road supervisors have the authority to issue any discipline other than discharge. She testified that all discharges must be authorized by her. The record contains various types of personnel forms that were signed by the three road supervisors. These forms include “employee discipline forms” and “employee coaching and counseling forms,” which are clearly disciplinary forms,<sup>20</sup> as well as “employee counseling statements” and “incident reports,” which do not state on the preprinted portions whether they are disciplinary, but whose contents sometimes state that a driver was assessed

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<sup>16</sup> The gate check form contains a checklist of standard performance requirements, (uniform, fire extinguisher, proof of insurance, etc.), and the road supervisor’s certification that he or she has interviewed the driver and certifies that the driver is ready for service and not impaired by drugs or alcohol.

<sup>17</sup> The third road supervisor works mostly in the safety office in a training capacity.

<sup>18</sup> The record does not indicate how road supervisors are assigned to drivers.

<sup>19</sup> According to the job description, the road supervisor works “both in an office and field environment.”

<sup>20</sup> Employee discipline forms contain boxes to check to indicate “type of action,” whether a written warning, written warning in lieu of suspension, suspension without pay, or administrative removal from service pending possible discharge. Employee coaching and counseling forms contain similar boxes, except that they include a box for a verbal counseling and a box for a final written warning. Both forms contain lines for an “explanation of offense” and lines for a “record of conversation.”

safety points,<sup>21</sup> and that they may affect future discipline.<sup>22</sup>

The general manager testified that road supervisors prepare all of these forms, and use discretion when issuing discipline and when determining how many safety points to assess for infractions.

However, a road supervisor testified that she merely signed the disciplinary forms bearing her signature, at the direction of the safety manager, whom she testified filled them out and directed her to secure the affected driver's signature in her presence.<sup>23</sup> She testified that she has never decided independently to issue discipline, recommended discipline, or determined whether a driver should receive safety points or how many safety points to assess. She testified that when she has observed drivers committing safety infractions, such as driving while talking on a cell phone or without a seat belt, she has written up an incident report<sup>24</sup> and given it to her safety manager, who in turn has written up any resulting warnings.

The road supervisors who signed the other disciplinary forms in the record did not testify. One road supervisor signed several employee discipline forms which state that the drivers involved were observed talking on a cell phone, and assessed three safety points and a written warning for this offense. Another

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<sup>21</sup> The "Employee Handbook & Employment Guidelines" (Handbook) prescribes various numbers of safety points for enumerated "incidents," such as conviction of a minor traffic violation, a backing incident, and a passenger related incident. Employees are subject to discharge after accruing six safety points within any 18-month rolling period. Even if the issuance of safety points is not itself a form of discipline, it may lead to discipline for future safety incidents, pursuant to the Handbook.

<sup>22</sup> The general manager testified that improper conduct set forth in counseling forms and incident reports can be the basis for issuing a higher level of progressive discipline if the same employee commits future offenses of a similar nature.

<sup>23</sup> This safety manager has since been replaced by the safety manager who testified, and who assumed that position in December, 2007.

<sup>24</sup> This road supervisor testified that she does not consider incident reports to be a form of discipline.

employee discipline form signed by this road supervisor states that a driver was observed driving his vehicle without securing front row passengers, and was issued a final warning for this. This road supervisor signed another written warning stating that a driver received two safety points for failing to stop at two “STOP” signs.<sup>25</sup> The same road supervisor also signed an employee counseling statement indicating that a driver was twice observed operating his vehicle without wearing a seat belt, and was issued two safety points.

The forms signed by road supervisors that the Employer contends demonstrate their disciplinary authority include forms with the insignia “Drive Cam” affixed on them. Drive Cam is a company that operates a camera on each bus which continuously records and saves video footage when certain events occur, such as sudden stoppage. The saved video is sent to the Drive Cam headquarters in Iowa. On a daily basis, Drive Cam sends the saved footage via e-mail to the Employer’s safety manager.<sup>26</sup> The general manager testified that road supervisors are responsible for reviewing these videos on a daily basis on the computer, although she also testified that road supervisors do not review every video sent by Drive Cam, and that they are supposed to be reviewed by “whoever’s got time,” which appears to include the safety manager. The record does not reflect how the task of reviewing Drive Cam video e-mails is apportioned out among road supervisors.

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<sup>25</sup> Another employee discipline form that this road supervisor signed assessed one safety point for improperly backing, as prescribed in the Handbook, and also a written warning for this offense.

<sup>26</sup> The general manager testified that Drive Cam sends the Employer 10 to 12 such e-mails per day.

The general manager testified that the road supervisors use discretion to determine whether to counsel and/or discipline drivers involved in incidents that were recorded on Drive Cam. She testified that road supervisors also have discretion as to whether to issue safety points for infractions they view on Drive Cam.

One road supervisor signed a Drive Cam form for “hard braking,” on which is written “strong warning!” under the preprinted heading “Event Characteristics.” This road supervisor also signed a Drive Cam form for rolling through a “STOP” sign, on which is written “1 safety point,” though the form does not otherwise reflect discipline.<sup>27</sup>

The road supervisor who testified that she does not independently issue or recommend discipline testified that when the current safety manager started at the West Palm Beach facility (two months before the hearing), he changed the password for accessing Drive Cam, and that she can no longer view it. This road supervisor further testified that under the previous safety manager, when Drive Cam detected a driver committing a safety violation, the safety manager told her to counsel the driver and prepared the Drive Cam form.<sup>28</sup> She also testified that she is responsible for monitoring drivers on the road, assessing whether they commit safety infractions, reporting any such infractions to the safety manager, and counseling drivers for any infractions she observes.

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<sup>27</sup> The Handbook specifies one safety point for an “MV Citation for an unsafe maneuver or act.”

<sup>28</sup> For instance, this road supervisor testified that she wrote on one Drive Cam form “driver was counsel [sic] on holding paper” after the safety manager told her to counsel the driver for this, and that the safety manager wrote “1 safety point” on another Drive Cam form after deciding this was the appropriate discipline.

There is some evidence that road supervisors have authority to send a driver home before the driver begins or completes his route.<sup>29</sup> It appears from the record that all of the positions in dispute were required to attend training in how to detect and form a reasonable suspicion as to a driver's use of alcohol or drugs.<sup>30</sup> The Employer's witnesses testified that employees in all of the disputed positions have the authority to send drivers home upon forming such reasonable suspicion.<sup>31</sup> A road supervisor testified that those attending the reasonable suspicion training were instructed to accompany the driver suspected of substance abuse to the safety office for the appropriate substance abuse test, not to send the driver home. The record does not contain any examples of drivers being sent home for substance abuse, and the general manager testified that no driver has been sent home for substance abuse since she started four months prior to the hearing.

The general manager testified that road supervisors have sent drivers home for not having their license and for not being in uniform, although the record does not contain any specific examples that road supervisors have done

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<sup>29</sup> Sending a driver home means that the driver either does not leave the West Palm Beach base, or returns there immediately. He is not paid for the remainder of that day. The general manager testified that routes can be closed for many reasons, and that closing down a route is not always a form of discipline, but that the driver is always sent home and not paid for the rest of the shift.

<sup>30</sup> None of the employees in the recognized bargaining unit (drivers, mechanics and utility workers) have received this training, which took place at the West Palm Beach facility, roughly six months before the hearing.

<sup>31</sup> However, the maintenance manager testified that he only has this authority if he first obtains corroboration from another supervisor that the driver appears to be impaired, and that this was the procedure he was taught pursuant to the "reasonable suspicion" training.

so.<sup>32</sup> The general manager further testified that, about two to three times per month, a road supervisor sends home a driver for violations noted on the “gate check form” that the road supervisor completes when a driver departs, but the record does not contain any examples of this.<sup>33</sup>

The safety manager testified that road supervisors have the authority to immediately send home drivers who commit serious safety infractions without first seeking permission from the safety manager. A road supervisor testified that she believed the only reason she could send drivers home was for not having a license.

The safety manager testified that the road supervisors are his “eyes and ears” on the road, because he cannot constantly monitor the performance of all 108 drivers. The safety manager testified that when he first arrived at the West Palm Beach facility two months prior to the hearing, road supervisors were “under the impression that a road observation was just a hi and bye. They wasn’t [sic] writing any infractions.” He testified: “I said, no, that’s not what your job is. Your job is if you find an infraction, it has to be known, it has to be noted... So I made that very clear to them.”<sup>34</sup> The safety manager also testified that he has instructed each road supervisor to more closely monitor drivers for violations of

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<sup>32</sup> The Handbook states that employees who report for work “inappropriately dressed will be sent home unpaid and directed to return to work in proper attire. If the employee’s shift needs to be covered by another employee, the employee may forfeit his/her entire day’s shift at the manager’s or supervisor’s discretion. If sent home, the employee will be issued an attendance occurrence noted as an absence.”

<sup>33</sup> The general manager testified that road supervisors have the authority to require a driver to correct any errors on the DVI form, and to send the driver home if he fails to do so. However, the record again does not contain specific examples of this.

<sup>34</sup> When asked by the Employer’s counsel a leading question as to whether he had “made it clear” to drivers that they “had to discipline and document discipline,” the safety manager answered “yes.” He did not, however, testify specifically about how he “made it clear.”

the Employer's policies, rather than consistently report that the drivers were doing a "good job."<sup>35</sup> He further testified that, in the "short term" that he has been at the West Palm Beach facility, none of the road supervisors have recommended counseling or retraining for any drivers.<sup>36</sup> The safety manager also testified that the general manager had told him that for those employees covered by the collective-bargaining agreement, she would "do the discipline..."

The road supervisor who works from 7:00 a.m. to 3:00 p.m. interviews applicants for driver positions<sup>37</sup> and recommends whether they be hired. She conducts some of these interviews alone,<sup>38</sup> and apparently designs at least some of her own questions for each interview, focusing on the applicant's driving ability. The general manager testified that an applicant cannot be hired unless this road supervisor first recommends it, that the Employer hires applicants she recommends as long as they pass the drug test and background check, and that three or four drivers were hired the day before the hearing whom this road supervisor recommended. The record does not reflect what criteria this road supervisor applies in making her recommendations, other than ensuring that the applicant has obtained the necessary licenses.

The general manager testified that road supervisors are the highest level

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<sup>35</sup> The record does not contain any policy statements, Employer memoranda or other documents conveying this apparent change in practice to employees or supervisors.

<sup>36</sup> The record does not contain any employee disciplinary forms completed by a road supervisor since December 17, 2007, when the safety manager took over at West Palm Beach.

<sup>37</sup> The Employer generally hires drivers and fills other positions from within.

<sup>38</sup> The general manager testified that the safety manager also interviews some applicants, but that the road supervisor conducts many interviews alone.

of authority at the West Palm Beach facility on weekends and week nights.<sup>39</sup>

She testified that they have “ultimate authority” to “deal with any problems that arise,” and that they can determine whether an employee needs to be sent home. The record does not contain any examples of a road supervisor sending an employee home after 7:00 p.m. or on weekends.<sup>40</sup>

The road supervisor who apparently participates in hiring also conducts classroom training for newly hired drivers, covering defensive driving, passenger assistance, how to secure the wheelchair to the vehicle, etc.

Unlike other employees, road supervisors receive a company vehicle that they are free to take home when not working, as well as a company gas card.<sup>41</sup> Unlike other employees, road supervisors have a key to the safety office, where all employee personnel files are kept.<sup>42</sup> The general manager testified that road supervisors attend “supervisory meetings,” but the record does not reflect who else attends them, how often they take place or what they concern. The record includes a statement signed by a road supervisor acknowledging damage caused by a driver to an awning pole at a destination point, and admitting that the Employer was financially liable for repairing the damage and replacing the pole.

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<sup>39</sup> The safety manager leaves work by 7 p.m. on week nights, and apparently does not work on weekends. It appears that the general manager and remaining department managers also leave by 7 p.m. and do not work on weekends. Thus, it appears that a road supervisor works alone at the West Palm Beach facility from 7 p.m. until 11 p.m. on weeknights, and on weekends. Notably, however, others involved in this operation are employed at the Lake Worth facility, including the dispatch manager.

<sup>40</sup> Contrary to the Employer’s contention in its brief, the record does not establish that the road supervisor arriving at 3:00 a.m. is the only possible supervisor working until 8:00 a.m. A window dispatcher also arrives at that time. In addition, the maintenance manager testified that he sometimes arrives at 4:00 a.m., and the record does not reflect when the operations manager arrives.

<sup>41</sup> A road supervisor testified that until the current safety manager started, she did not have to account for her gas card expenses, but that now she has to submit all receipts.

<sup>42</sup> A road supervisor testified that she is only permitted to access personnel files at the direction of the general manager.

However, the general manager testified that this was an unusual occurrence, and that road supervisors do not normally sign statements admitting the Employer's liability when a driver causes damage.

### ***Analysis***

The Employer argues that road supervisors have the authority to issue or recommend discipline, to responsibly direct, and to recommend hiring, using independent judgment.<sup>43</sup> The Employer also asserts that road supervisors have certain secondary indicia of supervisory authority. I find that the Employer has failed to establish, by a preponderance of the evidence, that two of the three road supervisors are supervisors as defined in Section 2(11) of the Act. These are the road supervisor whose shift starts at 3:00 a.m. and the road supervisor whose shift ends at 11:00 p.m. I find that the record does not establish whether the road supervisor who works from 7:00 a.m. to 3:00 p.m. is a supervisor, and I direct that she be eligible to vote subject to challenge.

To begin with, disciplinary forms signed by a road supervisor do not establish that that road supervisor prepared and completed the forms, or had input into the portion of each form detailing the driver's offense and discipline. In Wackenhut Corp., 345 NLRB 850 (2005), the employer argued that lieutenants were supervisors, relying in part upon disciplinary forms they had completed. In rejecting this claim, the Board found that "the record does not definitively establish what role they [the lieutenants] played in the issuance of the forms."<sup>44</sup> The Board emphasized that the employer had "failed to call as witnesses any of

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<sup>43</sup> It is well established that "the mere title of supervisor as applied to certain positions does not establish supervisory status under the Act." Capital Transit Co., 114 NLRB 617, 618 (1955).

<sup>44</sup> *Id.* at 854-855.

the lieutenants who signed the forms.”<sup>45</sup> The Board also noted that one of those who signed a form had testified at a related representation hearing that the form had in fact been completed by a captain, a position that both parties agreed was supervisory.

Similarly, the record here does not definitively establish that road supervisors recommended or decided upon discipline when issuing disciplinary forms that they signed. In fact, the testimony of one road supervisor who signed many of these forms – that she did not complete them, and that she had no input into whether drivers were disciplined or received safety points – casts doubt over the reliability of the forms themselves in establishing that road supervisors “actually possess”<sup>46</sup> supervisory authority. In view of the road supervisor’s testimony, and the absence of testimony from the other road supervisors who had signed these forms, it is plausible that they merely reported the infractions described on the forms to a manager, and did not determine the level of discipline indicated on the forms.<sup>47</sup>

With respect to the Drive Cam forms, one of the road supervisors testified that the previous safety manager instructed her as to what to write on these forms and how to counsel the drivers. She also testified that she no longer has access to Drive Cam videos because the safety manager, who started two months prior to the hearing, changed the password. Even assuming that other road supervisors have such access, the general manager testified that the videos

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<sup>45</sup> Id. at 854.

<sup>46</sup> Golden Crest Healthcare Center, 348 NLRB No. 39 (2006), slip op. p. 5.

<sup>47</sup> Wackenhut Corp., 345 NLRB at 854. See Ten Broeck Commons, 320 NLRB 806, 812 (1996) (merely reporting misconduct to management in written incident reports, with no recommendation regarding discipline, was not proof of supervisory authority to discipline or recommend discipline).

are to be reviewed by “whoever’s got time,” including the safety manager. In short, the record does not establish that road supervisors have the authority to use independent judgment in completing Drive Cam forms.

With respect to the authority to send drivers home for not having a license or for being out of uniform, the record does not establish that road supervisors exercise such authority.<sup>48</sup> Even assuming that road supervisors have this authority, its exercise does not require the use of independent judgment. Having a license is a legal requirement for driving, and the Handbook appears to mandate that drivers out of uniform be sent home.<sup>49</sup> Thus, “Where employees follow detailed orders or regulations issued by the employer, they do not exercise truly independent judgment within the meaning of Section 2(11).”<sup>50</sup> Also, the general manager acknowledged that drivers can be sent home for many reasons, and that it is not always a form of discipline.<sup>51</sup>

Although the safety manager testified that road operators also have the authority to send drivers home for serious safety infractions without authorization

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<sup>48</sup> Greyhound Airport Services, 189 NLRB 291, 294 (1971) (citing absence of instances in which dispatchers sent drivers home as support for finding that their authority to remove drivers from work for certain violations of employer’s rules did not demonstrate that the dispatchers were supervisors).

<sup>49</sup> Although the Handbook appears to give a manager or “supervisor” discretion to deduct an entire day’s pay from the offending employee, this was not further explained in the record.

<sup>50</sup> Wackenhut Corp., 345 NLRB at 854; See also Oakwood Healthcare, Inc., slip op. at 8 (“judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or the provisions of a collective-bargaining agreement.”)

<sup>51</sup> In Capital Transit Co., 114 NLRB 617 (1955), the parties disputed the status of inspectors, who monitored bus operators. The employer contended that they were statutory supervisors because they monitored compliance with the employer’s safety rules and regulations, and because they had the authority to relieve an operator found driving in violation of safety rules, or in a reckless or dangerous manner. The Board concluded that the authority to relieve operators did not confer the authority to suspend them, and that the inspectors did not thereby exercise supervisory authority. Id. at 628-629.

from him,<sup>52</sup> there is no evidence that a road supervisor has exercised such authority, and the road supervisor who testified believed she lacked it.

The Board has held that the party seeking to establish supervisory status cannot rely on “testimony [that] is utterly lacking in specificity.”<sup>53</sup> “Although Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise, the evidence still must suffice to show that such authority exists.”<sup>54</sup> In short, the Employer failed to adduce such evidence, or to demonstrate that road operators have supervisory authority to issue or recommend discipline, or to send drivers home except for violating well-defined Employer policies. The Employer carries the burden of proof, and failed to sustain it.

The Employer also argues that road supervisors responsibly direct drivers using independent judgment. Again, “the testimony is utterly lacking in specificity.”<sup>55</sup> While the safety manager who started work two months before the hearing testified that he directed road supervisors to more closely monitor drivers and report more violations, the record does not contain any documents showing how, if at all, this new policy was implemented, or whether it was even communicated to road supervisors. Even if the safety manager told the road supervisors to begin reporting more violations, there is no specific evidence that he told them they had the authority to issue or recommend discipline, or that the

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<sup>52</sup> The safety manager testified further that he did expect to be notified if a driver was taken off the road.

<sup>53</sup> Avante at Wilson, Inc., 348 NLRB No. 71 (2006) (slip op. at 2); accord Chevron Shipping Co., 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority).

<sup>54</sup> Avante at Wilson, Inc., slip op. at 2.

<sup>55</sup> Id.

safety manager's new policy gave road supervisors independent judgment in determining which infractions to focus on or how to assess safety points.<sup>56</sup>

The Employer claims that road supervisors also have secondary indicia of supervisory authority. The Employer asserts that no one with more authority is on duty at the West Palm Beach facility in the early mornings, late evenings and on weekends. But the maintenance manager sometimes arrives at 4:00 a.m. and occasionally works on weekends,<sup>57</sup> and the record does not reflect how early or late the operations manager works, or whether he or she works on weekends. Moreover, no evidence was presented as to the issues faced by road supervisors in the late evenings and on weekends.<sup>58</sup> In addition, "nothing in the statutory definition of 'supervisor' implies that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor."<sup>59</sup>

The general manager's generalized testimony that road supervisors attend "supervisory meetings" also does not support the Employer's position; the general manager failed to identify how often they take place, what topics are addressed, or who else attends.<sup>60</sup> Receipt of a company vehicle and gas card is not usually considered an indication of supervisory status. The single instance in

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<sup>56</sup> The general manager testified that road supervisors can require drivers to make corrections indicated on the gate check form, and to revise the DVI form, but even if this occurs, it does not reflect the use of independent judgment, as the forms spell out in detail the actions that the driver is required to take before leaving the base.

<sup>57</sup> This is discussed in the section on the maintenance clerk below.

<sup>58</sup> The Employer cites American River Transportation, 347 NLRB No. 93 (2006), regarding the role of road supervisors when managers are not at work. In that case though, the towboat pilots worked two busy 6-hour shifts each day navigating barges on the Mississippi and Illinois rivers, a "complex and skilled undertaking," that required pilots to evaluate time of day, speed and direction of wind, weather, depth and width of the river channel, speed of the current, size and configuration of the tow, barge draft, and numerous other factors. It appears from the record that the road supervisor's responsibilities when no manager is present are not nearly as exacting.

<sup>59</sup> Ken-Crest Services, 335 NLRB 777, 779 fn. 16 (2001)

<sup>60</sup> For example, if the other "supervisors" attending these meetings include the other disputed positions that I find to be non-supervisory, this would undermine the Employer's argument.

which a road supervisor signed an acknowledgement of the Employer's liability for damage caused by a driver does not establish that this happens routinely, or that such authority is bestowed on road supervisors.<sup>61</sup>

I also note that the secondary indicia of supervisory status cited by the Employer cannot alone establish supervisory status, absent a preponderance of evidence establishing at least one of the primary indicia.<sup>62</sup>

In its brief, the Employer argues that if I find that road supervisors are not statutory supervisors, this would mean that the ratio of rank-and-file employees to supervisors would be too high. However, the Employer did not directly present evidence as to the supervisory structure for drivers, and thus there may be other driver supervisors not addressed in the record. Further, it appears that the safety manager, operations manager, and dispatch manager, as well as the general manager, all oversee drivers to some extent. In any event, this is only a secondary indicia of supervisory authority.

Based upon the foregoing, and the record as a whole, I find that the road supervisor whose shift starts at 3:00 a.m. and the road supervisor whose shift ends at 11:00 p.m. are not supervisors.

However, the record does not establish whether the road supervisor who works from 7:00 a.m. to 3:00 p.m. is a supervisor. She may effectively recommend hiring if, as the general manager testified, she interviews applicants for driver positions, sometimes alone, designs some of her own questions, and

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<sup>61</sup> The Handbook instructs drivers not to discuss the circumstances of accidents with outside entities except the police, and to direct inquiries to the general manager and area safety manager.

<sup>62</sup> Ken-Crest Services, 335 NLRB at 779.

makes a recommendation to the general manager, and if no applicant is hired unless she recommends it. The key issue is whether the general manager (or another manager) independently reviews candidates after this road supervisor has made a recommendation. The authority effectively to recommend “generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed.” ITT Lighting Fixtures, 265 NLRB 1480, 1481 (1982). The record does not reflect whether such independent investigation occurs.<sup>63</sup>

Thus, I direct that this road supervisor is eligible to vote subject to challenge.

#### **4. Dispatchers and Lead Dispatchers (Lake Worth)**

##### ***Facts***

##### ***Dispatchers***

There are six dispatchers, all of whom work at the Lake Worth facility.<sup>64</sup> They work staggered shifts from 4:00 a.m. to 11:00 p.m.<sup>65</sup> They are responsible for maintaining communication with each of the roughly 20 to 30 drivers assigned per dispatcher, modifying the driver’s schedule as needed throughout the driver’s shift, and ensuring on-time service.<sup>66</sup> Dispatchers have little work-related contact with road supervisors and window dispatchers working at the West Palm Beach facility, although they must constantly communicate with drivers.<sup>67</sup>

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<sup>63</sup> I also note that this is the only road supervisor who trains new drivers.

<sup>64</sup> This facility is a large room, about 14 feet by 22 feet, in which employees of the Employer have a work space. It appears from the record that about five to seven dispatchers working for other companies also use the room, but that the Employer’s employees have their own work space, which is not enclosed.

<sup>65</sup> Dispatcher hours are shorter on Sundays.

<sup>66</sup> Dispatchers work in the Operations department.

<sup>67</sup> The general manager testified that dispatchers are required to take a test at the West Palm Beach facility once per year. As explained below, all supervisors and employees in the positions

According to the dispatcher's job description, the purpose of the job is to "provide direction to and maintain two-way communication with all operators (drivers) while monitoring system performance and making scheduling adjustments where necessary..." The dispatcher must assign stand-by or extraboard drivers in the event of driver absences, increased service volumes or in order to minimize service disruptions as a result of traffic, vehicle malfunctions, driver problems and/or emergencies; provide drivers with updated information on cancellations and directional assistance; monitor trip status, making reassignments as necessary to ensure on time performance; and cooperate with Palm Tran Connection to provide assistance to passengers,<sup>68</sup> among other duties.<sup>69</sup>

If a driver is involved in an accident, dispatchers have the authority to direct the driver to remain at the location pending the arrival of a road supervisor and emergency services. There is evidence of a dispatcher using such authority on one occasion.<sup>70</sup> The general manager testified that if the driver refuses the

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in dispute are required to attend one safety meeting each month, which takes place at the West Palm Beach facility.

<sup>68</sup> For example, Palm Tran Connection occasionally contacts the Employer to ask for an "ETA" (estimated time of arrival) for a particular passenger. The dispatcher is responsible for locating the driver assigned to that route, asking his ETA for the passenger, and relaying that information to Palm Tran Connection.

<sup>69</sup> Dispatchers also call passengers or Palm Tran Connection when a passenger fails to keep an appointment.

<sup>70</sup> The record contains a "provider incident report," (a Palm Tran Connection form), signed by a dispatcher and prepared by the same dispatcher and a lead dispatcher. This document states that a driver called in at 7:25 a.m. to report that a passenger had fallen upon entering the vehicle, and that the driver had left the scene after calling the road supervisor and paramedics but before they arrived. The document states that the dispatcher then directed the driver to return to the accident scene, and that the driver had not done so by the time paramedics arrived 20 minutes later. The document states that the dispatcher then called the driver to find his location, and that the road supervisor then told the dispatcher that the driver's route must be closed down. The document states that the dispatcher then informed the passenger's doctor's office that the passenger would be late because of a minor accident. (The passenger was OK.)

dispatcher's instruction, the dispatcher has the authority to shut down the driver's route, send the driver home, and assign a different driver to pick up the stranded passengers.<sup>71</sup> However, the record does not contain examples of this.

Moreover, in the portion of the dispatcher's job description titled, "problem solving and decision making," a hypothetical situation is described in which a driver cites safety concerns for refusing to drive a vehicle that has been found safe by maintenance, and there are no spare vehicles and no maintenance staff available. The dispatcher is instructed to "get the work covered, and report the operator's actions to management."

Dispatchers have the authority to record sick time for drivers who call from home before the start of their shifts. However, the Employer does not authorize dispatchers (or anyone) to require employees to work when sick. Moreover, the Employer does not pay employees out sick. Instead, the Handbook specifies the consequences of calling in sick,<sup>72</sup> and the dispatcher does not use independent judgment in such situations.<sup>73</sup>

The general manager testified that dispatchers also have the authority to require drivers to work overtime, as when no one is home when a passenger who

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<sup>71</sup> The general manager testified that dispatchers learn they have this authority from other dispatchers during on-the-job training.

<sup>72</sup> According to the Handbook, an unexcused absence is where an employee calls in at least one hour prior to the start of the employee's shift, and this constitutes an "occurrence." Calling in less than an hour in advance constitutes one and one-half occurrences. Employees are permitted to accrue 7 occurrences within a floating 12-month period before receiving a written warning, and 10 before being discharged.

<sup>73</sup> Although the general manager testified that the dispatcher has discretion as to whether to assess an occurrence when a driver calls in sick, the Handbook mandates an occurrence and the general manager could not identify examples of the exercise of such discretion. In addition, she later testified that dispatchers do not give "points," apparently referring to occurrences.

cannot be left alone is dropped off. The record does not contain any examples of this.

The Employer uses a scheduling program called Trapeze to track each driver's stops throughout his shift. Trapeze shows where and when each driver is scheduled to make each stop. Dispatchers adjust Trapeze throughout each shift to reflect real time changes to the driver's schedule or manifest that are necessitated by delays as well as by cancellations and add-ons (stops not previously scheduled on the trip manifest).<sup>74</sup>

#### *Lead Dispatchers*

The two lead dispatchers also work at the Lake Worth facility, performing many of the same duties as dispatchers. One works from 3:00 p.m. to 11:00 p.m. (the evening dispatcher),<sup>75</sup> and this was the only lead dispatcher to testify.

The job posting for "evening lead dispatcher" says it is a "supervisory position that oversees all of the evening dispatch activities. [Evening lead dispatchers] act as the senior staff when the dispatch manager is out of the office. This individual must be able to perform all the tasks of a general dispatcher; however, more attention to supervision and leadership will be placed on this individual. The Lead Dispatcher should spend more time away from an actual channel and more time maneuvering trips, planning ahead and supporting the dispatch staff." Six months of previous dispatch experience is required.

The evening lead dispatcher testified that he decides which routes to modify when Palm Tran Connection places an add-on or a cancellation into the

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<sup>74</sup> It appears from the record that lead dispatchers also do this.

<sup>75</sup> The record does not reflect the hours of work for the other lead dispatcher.

Trapeze program.<sup>76</sup> He testified that as a result, he has exercised the authority to tell drivers to make additional stops or to change their routes. Because the dispatch manager leaves at about 4:00 p.m. every day, the evening lead dispatcher is the highest ranking Employer representative at the Lake Worth facility from 4:00 p.m. to 11:00 p.m. every evening.

The general manager testified that lead dispatchers have required drivers to remain with passengers who cannot be left alone, even if the driver wants to continue on to the next stop.<sup>77</sup>

The general manager testified that lead dispatchers have exercised the authority to discipline drivers who refuse their instructions. The record contains evidence of incident reports completed by one lead dispatcher, who did not testify. One incident report states that the lead dispatcher had sent a driver back to the base (the West Palm Beach facility) for being disrespectful. According to the incident report, the driver was asked for his ETA at a certain location and after answering, "You should know," was asked for his current location, and responded, "Guess." According to the incident report, the lead dispatcher then told the driver that she believed he was tired, and directed the driver to drop off the passenger and return to the base.<sup>78</sup> The same lead dispatcher completed an incident report stating that she closed a driver's route and recommended that he be retrained in how to run a manifest on time. According to the incident report,

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<sup>76</sup> For example, he sometimes assigns a driver to a particular passenger whose stop has been added on based upon whether the driver has previously served that passenger.

<sup>77</sup> The record includes a "provider incident report" completed by a lead dispatcher, stating that a driver remained with a passenger who was locked out of her home, despite having three more passengers to drop off. It is not clear from the document whether the driver was instructed to remain or did so on her own.

<sup>78</sup> The general manager testified that being sent back to the base is the same as being sent home for the day.

the lead dispatcher called the driver about being late on his pick-ups, and the driver responded, "If I'm late, I'm late."<sup>79</sup>

In contrast, the evening lead dispatcher testified that he does not have the authority to discipline employees or close a driver's route. He testified that since becoming lead dispatcher six months prior to the hearing, he has not prepared any incident reports concerning dispatchers. While he also testified that he has the authority to document in incident reports occasions when dispatchers fail to follow his directions, he testified that he does not recommend whether to issue them discipline, but simply hands the incident report to the dispatch manager.

The general manager testified that lead dispatchers participate in interviewing applicants for dispatcher positions,<sup>80</sup> and that the Employer usually follows their recommendation on whether to hire the applicant.<sup>81</sup> The general manager also testified that lead dispatchers make recommendations as to whether to retain dispatchers who have completed a 30-day or 90-day probationary period, and that she (the general manager) follows these recommendations. She testified that she would never hire a dispatcher not recommended by the lead dispatchers because lead dispatchers have to work directly with newly hired dispatchers.<sup>82</sup> She also testified that lead dispatchers have the authority to approve vacation requests by dispatchers.<sup>83</sup>

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<sup>79</sup> Both of these incident reports were from October, 2007.

<sup>80</sup> The Employer usually hires dispatchers from among its drivers.

<sup>81</sup> The general manager or dispatch manager is also present for these interviews.

<sup>82</sup> The general manager testified that she received the approval of the lead dispatchers to hire all three dispatchers hired since she started work for the Employer. The record does not reflect whether she rejected others recommended by the lead dispatchers.

<sup>83</sup> The safety manager approves vacation requests for those employed at the West Palm Beach facility.

The evening lead dispatcher testified that he is not involved in the interviewing process or hiring of dispatchers, and that the Employer has not asked his opinion as to whether applicants for dispatcher should be hired.

### ***Analysis***

The Employer maintains that dispatchers have the authority to responsibly direct and assign drivers as well as to discipline them by occasionally sending them home. The Employer further argues that lead dispatchers have supervisory authority to responsibly direct drivers, to discipline drivers and dispatchers, and to recommend hiring. For the following reasons, I find that neither dispatchers nor lead dispatchers are supervisors.

Dispatchers and lead dispatchers do not use independent judgment in directing drivers. They primarily rely on the driver's prearranged schedule. When they adjust routes because of add-ons and cancellations, they are not exercising supervisory independent judgment, but using authority that is incidental to their main role of ensuring that passengers are served on time.

In cases involving the status of dispatchers who direct drivers moving freight, the Board has held that the dispatchers direct the drivers so as to "move the freight in the most expeditious and lucrative manner for the [employer]," and that the dispatchers are not exercising supervisory authority to responsibly direct the drivers, but instead "exerting direction and control over the movement of equipment, and the direction of personnel by them occurs only as an incidental result."<sup>84</sup> Similarly, when dispatchers and lead dispatchers alter routes to account for traffic congestion, late passengers, add ons, and cancellations, they

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<sup>84</sup> Pilot Freight Carriers, 221 NLRB 1026, 1027 (1975).

are doing so to move the passengers (analogous to freight for a trucking employer) as expeditiously as possible, rather than exercising supervisory independent judgment. The only incident report in the record signed by a dispatcher does not indicate her use of independent judgment in directing a driver to follow what appears to be an established Employer policy of remaining with (in this case, returning to) an injured passenger until paramedics arrived.<sup>85</sup>

Neither dispatchers nor lead dispatchers use independent judgment to assign drivers. When dispatchers and lead dispatchers adjust drivers' routes to account for contingencies such as add-ons and cancellations, they are regulating workloads rather than using independent judgment.<sup>86</sup>

With respect to discipline, for the same reasons set forth in discussing the disciplinary forms signed by road supervisors, the record fails to definitively establish that the lead dispatcher who signed several incident reports (and who did not testify) prepared them without consulting a manager.<sup>87</sup> It is possible that the lead dispatcher merely reported the driver's conduct to a manager.<sup>88</sup> This seems plausible in view of the fact that the evening lead dispatcher testified that he lacks authority to issue discipline or send a driver home, and that while he has

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<sup>85</sup> The incident report stating that a lead dispatcher directed a driver to remain with a passenger who was locked out of her home does not explain whether the lead dispatcher was following employer guidelines or used her own discretion.

<sup>86</sup> Oakwood Healthcare, Inc., slip op. 9 (assignment made for the purpose of equalizing workloads do not reflect the use of independent judgment). Similarly, when adjusting drivers' routes, dispatchers and lead dispatchers are "choosing the order in which the [driver] will perform discrete tasks," rather than designating significant overall duties to the drivers. *Id.*, slip op. 4.

<sup>87</sup> Wackenhut Corp., *supra*.

<sup>88</sup> See Ten Broeck Commons, 320 NLRB 806, 812 (1996). Mere reporting of misconduct to management does not establish supervisory authority. Carlise Engineered Products, 330 NLRB 1359, 1360 (2000).

authority to document incidents when drivers refuse his instructions, he does not recommend discipline, but merely reports the incident to the dispatch manager.

Finally, incident reports are not themselves forms of discipline. Although the incidents they report may lead to discipline, there is no evidence in the record that this was the case with the incident reports completed by the lead dispatcher. I also note that the record does not contain any incident reports indicating that any dispatchers sent any drivers home,<sup>89</sup> and that the dispatcher's job description directs the dispatcher to report to management if a driver refuses an assignment, but it does not authorize the dispatcher to issue discipline.

In St. Petersburg Limousine Service, 223 NLRB 209 (1976), the Board found that dispatchers who transmitted dispatch instructions by phone to bus and limousine drivers were not supervisors, even though they assigned drivers to vehicles, directed drivers to change routes to avoid traffic congestion, called in reserve drivers according to seniority,<sup>90</sup> and had the authority to pull drivers off their shifts for violating certain well-defined employer rules and for refusing pickups. The Board reasoned that the dispatchers' primary responsibility was to facilitate expeditious transportation for passengers to and from the airport. The Board found that their authority to assign vehicles and give directions to drivers in accord with the employer's policies and the collective-bargaining agreement covering the drivers was incidental to their function and did not require the use of independent judgment. *Id.* at 210. The Board also found that the authority to pull

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<sup>89</sup> The incident report involving the driver who was sent home after leaving an injured passenger before paramedics had arrived indicates that the road supervisor closed that driver's route.

<sup>90</sup> The drivers were covered by a collective-bargaining agreement.

drivers off their shifts and call in reserve drivers did not require the use of independent judgment.

The Employer argues that lead dispatchers have the authority to hire dispatchers. However, the evening lead dispatcher has not participated in any way in the hiring process for dispatchers. Although the Employer apparently does not hire dispatchers whom the daytime lead dispatcher recommends against hiring, the record does not contain any examples of the exercise of this authority, nor does the record establish that the Employer always hires applicants recommended by the daytime lead dispatcher. Moreover, the daytime lead dispatcher interviews candidates in the presence of the general manager or the dispatch manager, and the record does not establish that she designs her own interview questions. In sum, the record fails to demonstrate that lead dispatchers exercise supervisory authority to hire or recommend hiring of dispatchers.

Based upon the foregoing, and the record as a whole, I find that dispatchers and lead dispatchers are not supervisors.

#### **5. Window Dispatchers (West Palm Beach)**

##### ***Facts***

There are three window dispatchers, all of whom work at the West Palm Beach facility, in an office immediately to the right of the front entrance. One window dispatcher works from 3:00 a.m. to 1:00 p.m. on Monday through Thursday, and from 6:00 p.m. to 10:00 p.m. on Sunday. The record does not reflect the hours worked by the other two window dispatchers, except that one works during evening hours (the evening window dispatcher).

The evening window dispatcher prints the schedule each night for all drivers for the next day. The schedule depends on the passenger stops reserved for the next day through Palm Tran Connection, and each driver's previously assigned routes, which are established when the driver bids for a shift twice each year. The evening window dispatcher has to make minor adjustments to the schedules to account for vacations and other leave. He does so according to driver seniority.<sup>91</sup> The general manager testified that the evening window dispatcher has limited discretion in adjusting routes.<sup>92</sup>

The window dispatcher who starts work at 3:00 a.m. testified<sup>93</sup> that she distributes trip manifests and keys to drivers once they start arriving at 4:00 a.m. She determines which vehicle to assign to each driver.<sup>94</sup> This window dispatcher receives the DVI forms that drivers have completed, and inputs each driver's departure time, mileage and vehicle number.<sup>95</sup> She is not trained in manipulating driver route data in Trapeze, although she does use the computer to perform her duties.

The window dispatcher who begins at 3:00 a.m. testified that when a driver fails to appear for a route, she assigns a "standby" driver. The Employer assigns a certain number of drivers as standby drivers each day. They are scheduled to arrive every 30 to 60 minutes, starting at 3:00 a.m., and are

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<sup>91</sup> This is required by the collective-bargaining agreement covering drivers.

<sup>92</sup> The evening dispatcher also collects trip manifests and keys from returning drivers.

<sup>93</sup> The other window dispatchers did not testify.

<sup>94</sup> The record does not reflect how she assigns vehicles or what degree of variation there is among them.

<sup>95</sup> A window dispatcher and the administrative assistant check Trapeze against the trip manifest for each driver's shift to make sure that the manifest is accurate. The record does not reflect which window dispatcher performs this function.

required to remain on the premises for 4 hours to see if they are needed, after which they can go home.

The window dispatcher who starts at 3:00 a.m. testified that when a dispatcher calls her to say that a driver's route has been shut down for some reason, she must call in a driver scheduled off that day (not a standby), according to a driver seniority roster.<sup>96</sup> This window dispatcher testified that she does not have discretion to bypass the seniority roster.

The window dispatcher who starts at 3:00 a.m. testified that although she has the authority to send home drivers who report for work appearing overly tired or otherwise unfit to drive, she was told by the current general manager that she has to get permission before sending home a driver. She further testified that she has never issued or recommended discipline, or been asked whether she thought a driver should be disciplined for any infractions she has reported.

The general manager testified that the window dispatcher who starts at 3:00 a.m. has the discretion to send drivers home or direct them not to report for work, without first contacting a supervisor, if she determines that the driver is not fit for duty, is not in uniform, or appears to be under the influence of drugs or alcohol. The record contains one example of the exercise of such responsibility by a window dispatcher. This is an incident report, signed by a window dispatcher, stating that a driver called in saying he had been drinking all night and was feeling dizzy but could come in if needed. The incident report states that the window dispatcher told the driver that this would present a safety hazard,

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<sup>96</sup> The use of seniority to assign off-duty drivers is also dictated by the collective-bargaining agreement covering the drivers.

that he should not report for work, and that he would be assessed an attendance point.

The general manager also testified that window dispatchers have the discretion to assess attendance points<sup>97</sup> when drivers report late. For example, the window dispatcher can decide not to assess points under extenuating circumstances. The record does not include any examples.

The safety manager testified that, in his presence, the general manager instructed the window dispatcher arriving at 3:00 a.m. that she has the authority to send drivers home if they report unfit for driving, and to call in a replacement driver if no standby is available, without first obtaining permission. The same window dispatcher testified that the safety manager was present when the general manager told her that she had to secure permission first.<sup>98</sup>

### ***Analysis***

The Employer contends that window dispatchers have the supervisory authority to require off-duty drivers to work when standbys are not available. However, it is clear from the record that window dispatchers follow a seniority roster in calling in off-duty drivers, and thus do not exercise independent judgment.<sup>99</sup> I also note that the record does not clearly establish that window dispatchers were told that they can call in off-duty drivers without first consulting the safety manager.

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<sup>97</sup> It appears from the record that employees use the word "point" instead of "occurrence."

<sup>98</sup> The window dispatcher testified that she was told by the current general manager that she has to obtain permission before calling in an off-duty driver when a standby is not available, but that under the previous general manager, she occasionally called in an off-duty driver on her own. The general manager did not testify about such a conversation, and thus did not corroborate or dispute the testimony of either the safety manager or the window manager.

<sup>99</sup> Oakwood Healthcare, Inc., slip op. at 8.

The record does not demonstrate that window dispatchers use independent judgment in sending drivers home. The window dispatcher who told a driver not to report when the driver informed her that he had been drinking all night and was dizzy was merely implementing common sense, and the Employer's policy against giving keys to an impaired driver.<sup>100</sup>

With respect to the printing of each driver's daily routes and route adjustments, the general manager admitted that the window dispatcher has limited discretion in this regard, relying on established driver shifts and daily reservations made through Palm Tran Connection for the initial routes, and adhering to driver seniority in making adjustments. These tasks do not require independent judgment, nor does the routine assignment of standby drivers.<sup>101</sup>

There is no evidence in the record that a window dispatcher has issued or recommended discipline, and the evening window dispatcher has never done so. Although it appears that a window dispatcher assessed an attendance occurrence when a driver who had been drinking all night called in to report that he was still "dizzy," this decision by the window dispatcher did not require independent judgment. Moreover, the Handbook appears to leave little discretion regarding how many occurrences to assess for attendance violations.

Based upon the foregoing, and the record as a whole, I find that the window dispatchers are not supervisors.

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<sup>100</sup> See also Capital Transit, 114 NLRB at 624 (relieving intoxicated driver pursuant to employer's policy was not an exercise of supervisory independent judgment).

<sup>101</sup> The record also does not demonstrate the window dispatcher's use of independent judgment in assigning vehicles to drivers.

## **6. Administrative Assistant (West Palm Beach)**

### ***Facts***

There is one administrative assistant, who works in the accounting office adjacent to the general manager's office at the West Palm Beach facility. There is a connecting door between these two offices, and the administrative assistant works frequently in the general manager's office. It appears from the record that the general manager supervises the administrative assistant.

The administrative assistant oversees trip reconciliation (the daily harmonizing of each driver's trip manifest and Trapeze), inputs the hours worked per day for each employee into the Employer's payroll program, processes payroll information and reviews pay checks for accuracy,<sup>102</sup> handles employee benefits forms, responds to employee payroll and benefits inquiries, and assists the general manager with office work.<sup>103</sup> The administrative assistant also handles I-9 forms,<sup>104</sup> life, health and dental insurance forms, FMLA forms, and other forms in personnel files, including disciplinary documents. No one else has consistent access to these documents, other than the managers.<sup>105</sup>

The general manager testified that, based upon her experience with collective-bargaining negotiations throughout her career, she believed that the

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<sup>102</sup> The general manager testified that after the administrative assistant enters data into the payroll program, the Employer's corporate office determines the earnings, taxes and other deductions on each employee's check. It appears from the record that at the time of the hearing, the pay checks were written by the corporate office because the printer at the West Palm Beach facility was not working.

<sup>103</sup> The general manager testified that the administrative assistant is her "right-hand person."

<sup>104</sup> These are United States Government forms concerning the employee's immigration status.

<sup>105</sup> A window dispatcher and a road supervisor work frequently in the accounting office as well, but only the road supervisor is trained as backup for the administrative assistant and has access to the same personnel records.

administrative assistant probably prepared payroll and benefit records that the Employer used when formulating collective-bargaining proposals during negotiations with the Union involving the drivers, mechanics and utility workers in 2007. However, the general manager did not begin working at the West Palm Beach facility until after these negotiations were completed, and she testified that she did not know whether the administrative assistant assisted the Employer.<sup>106</sup>

### ***Analysis***

The Employer argues that the administrative assistant is a confidential employee. I find that she is not.

To begin with, there is no evidence in the record that the administrative assistant participates or assists in the preparation and formulation of collective-bargaining proposals and positions, only that she prepares payroll and benefit records that may be used in negotiations. The general manager's speculative testimony that, based upon her experiences with other employers, she presumes that the administrative assistant prepared documents that the Employer used during negotiations with the Union in 2007, is insufficient to carry the Employer's burden of proving that the administrative assistant is a confidential employee.

Second, there is insufficient evidence that the general manager herself formulates, determines and effectuates management policies in the field of labor relations. As general manager overseeing two facilities, it is likely that she effectuates labor relations policies, but that is not enough; she "must formulate and determine such policies, at least in a meaningful way."<sup>107</sup> The Employer did

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<sup>106</sup> The administrative assistant did not testify.

<sup>107</sup> Waste Management de Puerto Rico, 339 NLRB 262, 282.

not present evidence regarding the formulation and determination of its human resources policies, other than the Handbook, which indicates that it applies to all MV Transportation, Inc., employees across the country.

Even assuming that the general manager does formulate, determine and effectuate management policies in the field of labor relations, there is no evidence that the administrative assistant assists in this capacity. Nor is the fact that the administrative assistant handles personnel records sufficient to establish that she is a confidential employee. The Board has long held that “mere access to personnel files is insufficient to invest one with confidential employee status.”<sup>108</sup>

Based upon the foregoing, and the record as a whole, I find that the administrative assistant is not a confidential employee.

### **7. Maintenance Clerk (West Palm Beach)**

There is one maintenance clerk, who works in the maintenance area at the West Palm Beach facility. This area consists of a large shop located next to the main office. It is roughly 40 feet wide and 90 feet long, and consists of two service bays for the Employer’s vehicles, and an adjacent tire shop that appears to belong to another company. The mechanics and utility workers work in the service bays, while the maintenance manager and the maintenance clerk work at a desk located in a corner of the shop. The maintenance manager works about 12 hours per day, sometimes arriving as early as 4:00 a.m., and he sometimes

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<sup>108</sup> John Sexton & Co., 224 NLRB 1341, 1341 (1976); Chrysler Corp., 173 NLRB 1046, 1048 (1968). The mere fact that the administrative assistant may have access to managerial salaries, as stated in the Employer’s brief, does not make her a confidential employee.

works weekends. The maintenance clerk works from 8:00 a.m. to 4:30 p.m. and only on weekdays.

The maintenance manager testified that the maintenance clerk works mostly with him, although the maintenance clerk also works with the general manager and the operations manager in their offices. The maintenance clerk spends 80 per cent of his time working on a computer performing a variety of data entry functions, such as recording mileage on the Employer's vehicles and time records for employees in the maintenance department, tracking periodic maintenance inspections and other types of repair reports, and closing out work orders. The maintenance clerk is responsible for ensuring that records on all Employer vehicles are properly filed and readily available for audits. He also approves invoices for payment.<sup>109</sup> The maintenance clerk closes out all DVI forms, using a program called Fleet Focus, which tracks the mileage on each vehicle and indicates when particular maintenance tasks should take place.

The maintenance manager testified that the maintenance clerk has custody of "confidential" documents used in the disciplinary process.<sup>110</sup> He testified that on one occasion, the maintenance clerk detected that a mechanic had submitted a suspect work order. The work order appeared to claim that this mechanic had performed more repairs than he could have performed in the time indicated on the paperwork. The maintenance clerk reported this to the

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<sup>109</sup> The maintenance manager testified that the checks are paid by the corporate office, and that the general manager reviews invoices before they are paid. He testified that the maintenance clerk's role is to verify that expenses incurred by the maintenance manager were for stated purposes.

<sup>110</sup> The maintenance manager testified that none of the mechanics or utility workers are permitted to see an invoice or work order, other than one who has performed work on the same vehicle.

maintenance manager, who then conducted an investigation and discovered that the mechanic had documented using spare parts that were still on the shelf. The mechanic was discharged as a result.<sup>111</sup>

The maintenance manager does not participate or assist in collective-bargaining negotiations. He testified that he responds to Union grievances filed on behalf of mechanics and utility workers. When he is absent, the maintenance clerk receives the grievance documentation from the Union but does not respond in substance, instead giving it to the maintenance manager upon the latter's return.

When the maintenance manager is absent,<sup>112</sup> the maintenance clerk assigns mechanics to specific tasks, such as periodic maintenance inspections, matching the skill level required by the task with the mechanic's skills and years of experience.<sup>113</sup> The maintenance clerk also responds to road calls from drivers in the absence of the maintenance manager, if necessary assigning mechanics and utility workers to provide roadside assistance.<sup>114</sup> The maintenance clerk receives and maintains time off requests submitted by mechanics and utility workers, although he has no role in approving such requests.<sup>115</sup>

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<sup>111</sup> The record does not indicate that the maintenance clerk made a disciplinary recommendation.

<sup>112</sup> The record does not reflect how often the maintenance manager is absent.

<sup>113</sup> The Employer classifies mechanics as level "A," "B," and "C." At the time of the hearing, the Employer employed more than one level A mechanic and more than one level C mechanic. The maintenance manager testified that the maintenance clerk uses discretion in choosing which A or C level mechanic to assign, based upon his knowledge of the expertise and experience of each mechanic.

<sup>114</sup> There are no examples of such incidents in the record.

<sup>115</sup> Other than receiving these requests, it does not appear from the record that the maintenance clerk has work-related contact with mechanics and utility workers.

## ***Analysis***

The Employer claims that the maintenance clerk is a confidential employee because he has custody of disciplinary records and receives first step grievance forms from employees covered by the collective-bargaining agreement. However, as stated above, “mere access to personnel files is insufficient to invest one with confidential employee status.”<sup>116</sup> Also, the fact that the maintenance clerk may act as a conduit for step one grievance forms does not establish confidential status.<sup>117</sup>

In its brief, the Employer contends that the maintenance clerk’s role in approving invoices for payment (though the general manager later must also review them) requires the use of independent judgment, and that the maintenance clerk is therefore exercising supervisory authority. Even if approving invoices requires independent judgment, it is not supervisory independent judgment, which must be employed in carrying out one of the functions listed in Section 2(11) of the Act. There is nothing in the record to suggest that approving invoices for payment is a supervisory function.

The fact that the maintenance clerk reported a suspect work order that had been completed by a mechanic, and that the Employer later discharged this mechanic, does not establish that the maintenance clerk exercised the authority to recommend discipline. It does not appear that the maintenance clerk made a

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<sup>116</sup> John Sexton & Co., 224 NLRB 1341, 1341 (1976); Chrysler Corp., 173 NLRB 1046, 1048 (1968).

<sup>117</sup> Lincoln Park Nursing Home, 318 NLRB 1160, 1164 (1995) (“merely having access to files containing confidential material, including records of grievances, does not establish confidential status”).

disciplinary recommendation, and the maintenance manager independently investigated the mechanic's conduct.<sup>118</sup>

Finally, although the maintenance clerk assigns mechanics and utility workers to specific tasks in the absence of the maintenance manager, this does not establish that he is a supervisor. Assigning employees to discrete tasks is not supervisory assignment.<sup>119</sup> Even if the maintenance clerk occasionally exercises supervisory assignment authority in the absence of the maintenance manager, this appears to be an infrequent occurrence, and there is no evidence that the maintenance clerk performs any of the other supervisory functions of the maintenance manager.<sup>120</sup>

#### **8. Appropriateness of Dual Location Unit**

The Employer argues that a unit including employees in both the West Palm Beach and Lake Worth facilities is not appropriate because they do not share a community of interest.

All employees and supervisors at both locations, including drivers, are required to attend at least one of four monthly safety meetings held at West Palm Beach.<sup>121</sup> The dispatchers and lead dispatchers, who work at Lake Worth, have little other work-related contact with the road supervisors, window dispatchers, the maintenance clerk and the administrative assistant, who work at West Palm Beach, although they have regular and frequent contact with drivers. One road

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<sup>118</sup> Ten Broeck Commons, 320 NLRB 806, 812 (1996) (mere reporting of poor performance without recommendations for discipline does not establish supervisory status).

<sup>119</sup> See Oakwood Healthcare, Inc., *supra*, slip op. at 9.

<sup>120</sup> Victor's Café 52, Inc., 321 NLRB 504, 513 (1996); Mack's Supermarkets, 288 NLRB 1082, 1088 (1988) ("to become a statutory supervisor by substituting for one the substituting employee must possess the full extent of the supervisory authority that the substituted-for supervisor possessed").

<sup>121</sup> It appears from the record that drivers attend all four meetings.

supervisor travels to the Lake Worth facility every day to pick up paperwork, although this appears to be brief interaction. A road supervisor testified that she never goes into the maintenance shop.<sup>122</sup>

All applicants are interviewed at the West Palm Beach facility. As stated, the Employer generally hires drivers and fills other positions from within.<sup>123</sup> One current lead dispatcher and one current window dispatcher were hired as dispatchers and transferred into their current positions. The general manager has ultimate supervisory responsibility over employees at both locations, and must approve any discharges. All employees receive the same benefits<sup>124</sup> and are governed by the Employer's Handbook. All personnel files are maintained in the safety office at the West Palm Beach facility.

The Board has long held that a unit may be certified even if it is not the most appropriate unit, as long as it is an appropriate unit.<sup>125</sup> In determining whether a petitioned-for multi-facility unit is appropriate, the Board evaluates the following factors: employees' skills and duties; terms and conditions of employment; employee interchange; functional integration; geographical proximity; centralized control of management and supervision; and bargaining history.<sup>126</sup>

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<sup>122</sup> This road supervisor also testified that she visits the "dispatch room" twice per week. It appears from the record that she was referring to the window dispatcher's office at the West Palm Beach facility.

<sup>123</sup> The record does not reflect whether this is the case for the maintenance clerk and administrative assistant.

<sup>124</sup> The record does not establish wage or salary rates.

<sup>125</sup> Morand Bros. Beverage Co., 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7<sup>th</sup> Cir. 1951); P.J. Dick Contracting, Inc., 290 NLRB 150 (1988).

<sup>126</sup> Basha's, Inc., 337 NLRB 710, 711 (2002).

Based upon the foregoing, and the record as a whole, I find that the petitioned-for unit composed of both the West Palm Beach and Lake Worth facilities is an appropriate unit. Most importantly, the functions performed at both facilities are highly integrated. The road supervisors and window dispatchers are in constant verbal communication with the drivers, as are the dispatchers and lead dispatchers, in a coordinated attempt to provide on-time service to passengers. In this regard, the fact that both locations have positions with the title “dispatcher” suggests that each facility is integral in coordinating drivers’ movements. The Employer’s sole customer, Palm Tran Connection, requires that the Employer place dispatchers at the Lake Worth facility. In this context, the absence of face-to-face contact between employees at the two locations is less significant.

In addition, labor relations policies covering the two facilities are controlled by the general manager, who retains sole authority to discharge employees, and the Handbook covers all employees. All employees are subjected to the same hiring process and the Employer generally fills the positions in dispute from existing drivers without regard to whether the open position is at West Palm Beach or Lake Worth. One of three window dispatchers transferred from a dispatcher position, as did one of two lead dispatchers, indicating permanent interchange. While there does not appear to be much temporary interchange, there are only 16 employees at issue, somewhat reducing the significance of that factor.

I recognize that the two facilities are 10 miles apart, and that other than monthly safety meetings, the only work-related contact among employees in this unit is a daily visit to Lake Worth by a road supervisor. Nonetheless, I find those factors outweighed by the factors showing that the petitioned-for unit is an appropriate unit.

## **9. Conclusions and Findings**

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

C. The Union claims to represent certain employees of the Employer.

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.

E. The following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time road supervisors, window dispatchers, dispatchers, lead dispatchers, administrative assistants and maintenance clerks employed by the Employer at its facilities located at 3301 Electronics Way, West Palm Beach, Florida, and at 3040 South Military Trail, Lake Worth, Florida, excluding all other employees, guards and supervisors as defined in the Act.<sup>127</sup>

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<sup>127</sup> The road supervisor who works from 7:00 a.m. to 3:00 p.m. may vote subject to challenge.

### **Direction of Election**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective-bargaining by Amalgamated Transit Union, Local 1577, AFL-CIO. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

### **Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees

engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. North Macon Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **March 14, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the list will be

made available to all parties to the election, please furnish two copies of the list.<sup>128</sup>

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

### **Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **March 21, 2008**. The request may not be filed by facsimile, but may be filed electronically.<sup>129</sup>

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<sup>128</sup> The list may be submitted by facsimile transmission to (813) 228-2874, or electronically, as well as by hard copy. See [www.nlr.gov](http://www.nlr.gov) for instructions about electronic filing. Only one copy of the list should be submitted if it is sent electronically or by facsimile.

<sup>129</sup> See [www.nlr.gov](http://www.nlr.gov) for instructions about electronic filing.

DATED at Tampa, Florida this 7<sup>th</sup> day of March, 2008.

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Rochelle Kentov, Regional Director  
National Labor Relations Board, Region 12  
201 E. Kennedy Boulevard, Suite 530  
Tampa, Florida 33602