

D.R. NO. 2024-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

NJ TRANSIT BUS OPERATIONS, INC.,

Petitioner,

-and-

Docket No. CU-2022-015

NATIONAL ASSOCIATION OF
TRANSPORTATION SUPERVISORS,
LOCAL 354,

Respondent.

SYNOPSIS

The Director of Representation grants the clarification of unit petition of NJ TRANSIT Bus Operations, Inc. (NJTB) to exclude Foreman I and Foremen II from the units represented by National Association of Transit Supervisors Local 354 (NATS). The Director finds that the foremen exercise independent judgment in responsibly directing and in effectively recommending discipline of maintenance employees and are therefore excluded as supervisors from the definition of employee under the New Jersey Public Transportation Act (NJPTA), N.J.S.A. 27:25-14 et. seq.

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Appearances:

For the Petitioner,
McElroy, Deutsch, Mulvaney, & Carpenter, LLC.,
attorneys
(John J. Peirano, of counsel)

For the Respondent,
Isaacs, Devasia, Castro, & Wien, LLP, attorneys
(Howard G. Wien, of counsel)

DECISION

On December 7, 2020, we certified National Association of Transit Supervisors Local 354 (NATS) as the collective negotiations representative of a unit of Foremen I and a separate unit of Foremen II employed by NJ TRANSIT Bus Operations, Inc. (NJT) in a card check representation case (Dkt. No. RO-2021-003) in which the parties had signed stipulations of appropriate unit and did not raise objections. On December 8, 2021, NATS filed an unfair practice charge (Dkt. No. CO-2022-131) against NJT for

refusing to negotiate toward collective negotiations agreements for the two units. NJT admittedly refused to negotiate after learning that the foremen may be ineligible for inclusion in any negotiations unit. On May 16, 2022, in order to clarify its obligation to negotiate, NJT filed the instant clarification of unit petition seeking to exclude Foreman I and Foreman II from the units represented by NATS.

NJT asserts that Foremen I and Foremen II are supervisory employees as defined by the Labor Relations Management Act (LRMA), 29 U.S.C. 141, et. seq., and are therefore not employees as defined by the New Jersey Public Transportation Act (NJPTA), N.J.S.A. 27:25-14 et. seq., which prohibits supervisors of NJT from being included in any negotiations unit.^{1/} NATS argues that Foremen I and Foremen II are not supervisors within the meaning of the NJPTA, and that, even if they were, the NJPTA is unconstitutional.

Prior to the clarification of unit petition being filed, NJT filed and served a position statement in the unfair practice charge case on January 1, 2022. NATS filed and served a responsive position statement on March 17, 2022. NJT filed and served a reply on March 31, 2022. On May 17, 2022, after the

^{1/} The New Jersey Employer-Employee Relations Act (EERA), N.J.S.A. 34:13A-1 et seq., by contrast, allows other New Jersey public sector supervisors to be in negotiations units.

clarification of unit petition was filed, the assigned staff agent sent the parties a request to provide information and answers to specific questions relevant to the issues raised in this case. On July 22, 2022, NJT submitted a certification of Deputy General Manager of Vehicle Maintenance John McCarthy (McCarthy Cert.) with exhibits, and NATS submitted an affidavit of counsel from Howard Wien (Wien Cert.) with exhibits. The parties were given additional time to submit a response or additional information. On September 30, 2022, NATS submitted a letter brief in rebuttal to McCarthy's certification. NATS also submitted certifications from Foreman I Anthony Francis, Foreman I Les Okulewicz, Foreman II Richard Mizerek, Foreman II Albert Bardinas, and Foreman II James Walker, all certifying that paragraphs 6 through 15 of the Wien Certification are accurate based on their personal knowledge with respect to their positions. NJT did not submit additional information.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. With respect to some of the duties that establish supervisory status under the NJPTA, no disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. As discussed in the analysis below, since a finding of the performance of any of the duties establishing supervisory status under the NJPTA makes it unnecessary to make findings with respect to all such

duties, there are no other disputed facts with respect to other duties that are material to the disposition of this case. My findings of fact are included in the analysis.

ANALYSIS

As a preliminary matter, I address the competing arguments of each party that their signing of stipulations of appropriate unit in the prior representation case in which we certified these units constituted a waiver of the other party's position in the instant matter. I find that the prior stipulations of appropriate unit do not operate as a waiver for either party's positions.

One stipulation and its resulting Certification of Representative included "All regularly employed level II foremen employed by NJ TRANSIT Bus Operations, Inc." and excluded "nonsupervisory employees" and "level I foremen", among other exclusions. The other stipulation and its resulting Certification of Representative included "All regularly employed level I foremen employed by NJ TRANSIT Bus Operations, Inc." and excluded "nonsupervisory employees" and "level II foremen", among other exclusions.

NJT argues that because the stipulations exclude nonsupervisory employees, the parties understood the units to consist of supervisors, and that NJT does not need to meet any burden of demonstrating that foremen are supervisors because NATS

effectively acknowledged and agreed that the foremen are supervisors. The inclusion language does not refer to the foremen as supervisory, and even if it is implied through the exclusion of nonsupervisory employees, it is not necessarily implied that the parties viewed them as being statutory supervisors, as opposed to being supervisors in a more colloquial sense and differentiated from the general hourly maintenance employees. As no factual findings were made in the representation case as to statutory supervisory status, I decline to view the stipulations as factual stipulations and a waiver of the ability of NATS to require NJT to establish statutory supervisory status for this clarification of unit petition.

Conversely, NATS argues that NJT waived its right to file this clarification of unit petition. NATS analogizes the stipulations of appropriate unit to the agreement for consent election found to constitute a waiver in Essex County Probation Department, D.R. No. 87-20, 13 NJPER 170 (¶18076 1987). Essex Cty. is distinguishable, as the objections waived were those that would invalidate an election on technical grounds that could have been raised before the election. Moreover, an agreement for consent election includes the following language which does not appear on a stipulation of appropriate unit: "the undersigned parties hereby waive a hearing and all issues that could properly be raised at said hearing."

NATS also argues that an objection that members of the historical unit were statutory supervisors was considered waived in Kenilworth Boro., D.R. No. 2003-4, 28 NJPER 379 (¶33139 2002), recon. den. P.E.R.C. No. 2003-26, 28 NJPER 438 (¶33161 2002). However, the objection was not that some historical unit members were statutory supervisors, but that they might have contributed to the showing of interest. This was not considered an "election objection", but an imprompt attack on the showing of interest, which was found to be merely an administrative concern of the agency that could be remedied by the consented-to election. There was also an objection that supervisors may have voted, which also was not considered an election objection but an eligibility challenge that had not been timely raised by a valid observer.

Gloucester Tp. Fire District #4, D.R. No. 91-6, 16 NJPER 521 (¶21228 1990), cited by NATS, is more relevant here. There, the Director found that an agreement for consent election signed by the employer "effectively" stated that a fire official was not a statutory supervisor or managerial executive because the unit description explicitly stated that the title was included in a unit otherwise generically described as including employees engaged in firefighting and excluding statutory supervisors and managerial executives. The Director also found that the agreement for consent election, which stated that the parties

waived a hearing on all issues that could be raised at hearing, waived the employer's right to file a clarification of unit petition two months after the Certification of Representative was issued after the election. Nevertheless, the Director went on to consider the merits and factually found that the fire official was not a statutory supervisor or managerial executive.

Gloucester Tp. Fire District #4.

For the instant matter, as stated above, the stipulations of appropriate unit did not have the same language as an agreement for consent election waiving all issues that could be raised. The parties merely stipulated that a unit described as including foremen was appropriate, not that the employees actually performing foremen duties were not excludable by any statute. Moreover, Gloucester Tp. Fire District #4 is against the weight of our case law, which holds that a statutory exclusion argument can be raised at any time and cannot be waived. Maplewood Tp., D.R. No. 2007-13, 33 NJPER 105 (¶36 2007), req. for rev. den. P.E.R.C. No. 2008-2, 33 NJPER 203 (¶72 2007); Egg Harbor Tp., D.R. No. 2005-4, 30 NJPER 391 (¶126 2004); Park Ridge Boro., D.R. No. 2006-8, 32 NJPER 23 at n.3 (¶12 2006); Eastampton Tp., D.R. No. 2000-5, 26 NJPER 43 (¶31014 1999); Warren Cty., H.O. No. 89-1, 14 NJPER 552 (¶19232 1988), adopted P.E.R.C. No. 89-66, 15 NJPER 30 (¶20013 1988). Accordingly, as in Gloucester Tp. Fire District #4 itself, I will review the merits of the statutory

exclusion argument raised in this case; i.e., NJT's argument that the foremen are excluded from the definition of employee under the NJPTA and any negotiations unit as supervisors pursuant to N.J.S.A. 27:25-14a(2).

The New Jersey Public Transportation Act (NJPTA), N.J.S.A. 27:25-14 et seq. empowers the Commission to enforce the rights and obligations of NJT Bus Operations and its employees. The NJPTA incorporates the definition of "employee" in the National Labor Relations Act (NLRA), as amended by the Labor Management Relations Act (LMRA), 29 U.S.C. §141 et seq., and directs that we be guided by the federal or State labor law and practices developed under the LMRA. N.J.S.A. 27:25-14(c).

N.J.S.A. 27:25-14b provides that employees of bus companies acquired by NJT "shall have and retain their rights to form, join, or assist labor organizations and to negotiate collectively through exclusive representatives of their own choosing." However, that section is limited by N.J.S.A. 27:25-14a(2), providing that the term "employee" does not include "supervisors" as defined under the LMRA. Individuals deemed not to be "employees" under NJPTA and the LMRA do not have to be analyzed anew under the EERA. NJT and CWA, 27 NJPER 363

29 U.S.C. §152(3) excludes supervisors from the definition of employee. 29 U.S.C. §152(11) in turn defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

Employees are statutory supervisors if: (1) they have authority to engage in one of the listed supervisory functions; (2) their exercise of such authority is not routine or clerical, but requires independent judgment; and (3) their authority is held in the employer's interest. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 121 S. Ct. 1861 at 1867, 149 L. Ed. 2d 939 (2001) (Kentucky River); NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994). Assessment of supervisory status is fact-intensive, Caremore, Inc. v. NLRB, 129 F.3d 365, 371 (6th Cir. 1997), and the burden of proof is on the party asserting that an employee is a supervisor. Kentucky River. However, if any one of the twelve statutory indicia of supervisory status is shown, the remaining duties need not be analyzed. NJT and CWA, 27 NJPER 134 (citing Passavant Retirement and Health Center v. NLRB, 149 F.3d 243, 247 (3rd Cir. 1998)).

The Commission used the United States Supreme Court's decision in Kentucky River to shape its analysis of the "responsible direction" prong of §152(11). NJT and CWA. Kentucky River rejected the NLRB's approach to assessing whether

employees use independent judgment in responsibly directing other employees. The NLRB had held that employees do not exercise independent judgment when their direction to less-skilled employees is based on their professional or technical training, skills or experience. In rejecting this interpretation, the Court reasoned that by contrasting independent with routine or clerical judgments, the statute focused on the degree of discretion exercised by an employee, but did not authorize the categorical exclusion of certain kinds of judgments.^{2/}

However, the Court agreed that many nominally supervisory functions may be performed without the degree of discretion required to qualify for statutory supervisor status. Further, it agreed that "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." Id. at 1867. The Commission found that Kentucky River did not foreclose an argument that employees do not fall

^{2/} The NJPTA provides that we be "guided" by the law "as developed" under the LMRA, but there is no clear indication that the New Jersey Legislature intended that every change in private sector labor case law (from what the Legislature understood it to be upon passage of the NJPTA) be followed by the Commission. In NJT and CWA, the hearing officer's recommended decision, adopted by the Commission, found that it would be inappropriate to resolve competing court decisions based solely off of the NLRB's decisions. 27 NJPER 134. Since the Commission has already reviewed the case law in NJT and CWA, I will rely on the contemporary standards cited within that decision.

within the ambit of §152(11) if their direction of other employees is routine and controlled by NJT procedures. NJT and CWA.

The hearing examiner had found that although a garage supervisor was an operator's direct supervisor in the garage, the regional supervisors became responsible for monitoring operator performance when they left the garage. NJT and CWA, 27 NJPER 134. The Commission found the following duties to constitute the regional supervisors' responsible direction of others: overseeing bus operations and ensuring safe and on-time service; monitoring others' adherence to work rules; patrolling assigned districts; correcting others when they observed an infraction; issuing violation notices which were then sent to other supervisors in the command; completing forms requiring an operator to meet with his garage supervisor before being allowed to return to service after serious violations were observed; altering schedules or routes and instructing operators accordingly to ensure on-time performance; reassigning an operator from one bus line to another when the original operator could not continue due to sickness or mechanical problems; ordering an operator pulling into a terminal to complete another trip when necessary to prevent an interruption in service; and removing an operator from service if the regional supervisor reasonably suspected that the operator is in violation of NJT's drug and alcohol policy or impaired. NJT

and CWA, 27 NJPER 363. Compare Fairfield Tp., P.E.R.C. No. 92-115, 18 NJPER 299, 300 n.1 (authority to prevent an unfit employee from working goes with the responsibility to see that assigned work is performed correctly and safely). The Commission also found noteworthy that a regional supervisor, despite not being a supervisor with respect to bus operators for matters such as payroll, imposing discipline, and authorizing overtime, had nevertheless described himself as an "overseer" of bus operators. NJT and CWA.

The Commission cited cases that held that similarly situated employees were statutory supervisors, stressing the supervisors' authority to warn operators of driving infractions and issue violation reports. See San Diego Transit Corp., 182 NLRB No. 66, 74 LRRM 1145 (1970); United Transit Co., 106 NLRB No. 149, 32 LRRM 1602 (1953); New York City Omnibus Corp., 104 NLRB No. 83, 32 LRRM 1179 (1953). These cases also held that the employees exercised discretion in detouring buses or adjusting routes and instructing drivers. The Commission found further support in cases where employees oversaw service and, in that role, directed others. See Entergy Gulf State, Inc. v. NLRB, 253 F.3d 203 (5th Cir. 2001) (electricity corporation's operations coordinators exercised independent judgment in supervising others where they issued individualized switching orders to field workers and, in emergencies, prioritized repairs; directed field workers to move

from one project to another; and called up workers to address after-hours power outages); NLRB v. Prime Energy Ltd.

Partnership, 224 F.3d 206 (3rd Cir. 2000) (shift supervisors at power co-generation plant were statutory supervisors where they monitored and directed plant operations; had authority to hold plant operators over at the end of a shift; and stabilized plant operations in emergencies without prior plant manager approval).

See also Southern Indiana Gas & Electric Co. v. NLRB, 657 F.2d 878 (7th Cir. 1981); Maine Yankee Atomic Power Co., 624 F.2d 347 (1st Cir. 1980); NLRB v. Detroit Edison Co., 537 F.2d 239 (6th Cir. 1976); Arizona Public Service Co. v. NLRB, 453 F.2d 228 (9th Cir. 1971).

The Commission acknowledged that regional supervisors were guided by NJT policies and a Standard Operating Procedure (SOP) manual, but found those procedures were not so detailed or comprehensive as to eliminate the need for independent judgment and discretion, where they, for example, incorporated a "reasonable suspicion" checklist of observations to help a regional supervisor make the critical on-the-spot decision of whether an operator was impaired; where the manual left it to the regional supervisors' discretion to determine whether it is "necessary" to complete a violation report for "unsafe acts"; where an assessment of some operator violations, like "conduct unbecoming an employee" required judgment; and where the manual

advised regional supervisors to consider passenger convenience and choose the most logical service adjustment but left the discretion to the supervisors to make the adjustments and instruct operators. NJT and CWA.

The Commission found that the regional supervisors' direction of bus operators was not routine in the sense that their instructions were effectively dictated by NJT procedures or in the sense that the operators required little guidance given the nature of their work. NJT and CWA. Contrast J.C. Brock Corp., 314 NLRB No. 34, 146 LRRM 1193 (1994) (production line coordinator did not exercise independent judgment where line changes she directed were a function of which product was being processed and employees "automatically" knew when to switch); Tri-City Motor Co., Inc., 284 NLRB No. 77, 125 LRRM 1247 (1987) (auto parts manager did not direct work and work was routine and did not need supervision).

With respect to the disciplinary element of §152(11), the Commission found that the regional supervisors' authority to write up violations constituted the power to discipline employees or effectively recommend the same, even though they did not recommend or assess penalties. NJT and CWA. The Commission found Glenmark Assocs., Inc., 147 F.3d 333, 341-341 (4th Cir. 1998) more persuasive than contrary court and NLRB decisions.

In Glenmark, the Court considered the status of RNs and LPNs who were responsible for correcting patient aides when they did not properly care for a patient or follow facility procedures. 147 F.3d at 336-337. The nurses could choose to counsel the aide; file a written "verbal correction notice" with the Director of Nursing; or do both. Ibid. The Court rejected the NLRB's position that the nurses did not effectively recommend discipline because they did not have the final word on what action would be taken.

Glenmark reasoned that by filing a report that triggered an investigation - and by deciding that step was necessary - the nurses used independent judgment in effectively recommending discipline. Id. at 342. It stressed that the nurses were the highest-ranking employees at the facility for long periods, and that they were often the only witnesses to whether aides were properly performing their duties. Ibid.; compare Attleboro Assocs. v. NLRB, 176 F.3d 154, 165 (3rd Cir. 1999); Caremore, 129 F.3d at 370 (nurses effectively recommended discipline where they issued disciplinary notices to aides, some of which included penalty recommendations); see also Camden Cty., D.R. No. 88-3, 13 NJPER 663 (¶18251 1987) (employees effectively recommended discipline where they were expected to bring incidents to a general supervisor's attention and had authority to issue oral warnings; and where their recommendations were given weight).

In NJT and CWA, the Commission found that regional supervisors' violation reports were the primary means by which operator performance was monitored and disciplinary proceedings initiated for poor performance. They frequently wrote up violations and their violation reports could be the only eyewitness account of performance. The Commission noted that while other employees may file observation reports only, the regional supervisors filed employee incident reports. NJT and CWA at Footnote 5. The regional supervisors' violation reports were given weight and were an integral part of the disciplinary process, often resulting in discipline. Accordingly, the Commission found that regional supervisors effectively recommended discipline. NJT and CWA.

In the instant matter, NATS acknowledges that foremen assign work functions, including for emergency repairs. (Wien Cert. 8.a.i., .b.i). Foremen II are required to be knowledgeable of NJT rules, to recognize violations, and to report violations to Foremen I through a disciplinary slip form where the Foremen II selects the violation that the Foremen II believes to be applicable, which may trigger the multistep grievance process. (Wien Cert. 8.a.v). Foremen I review the work of Foremen II to ensure that repair and maintenance work is completed. (Wien Cert. 8.b.ii.a). Foremen I inform Foremen II of the work that needs to be completed, who in turn ordinarily inform the relevant workers

and follow up with them to verify the work was performed. (Id.). The Foremen I then follow up with the Foremen II to verify that the Foremen II had confirmed with the workers that the work had been performed. (Id.). In the absence of Foremen II, Foremen I have these direct communications with the workers. (Id.). Foremen I also perform walk-arounds to ensure that repair and maintenance staff members have proper equipment to perform their work. (Id.). Foremen I assess the repair or maintenance work to be performed and whether it should be performed by building maintenance staff or other NJT staff (called the "DIN" crew, who perform heavy repairs). (Wien Cert. 8.b.ii.b).

NJT's Maintenance Standard Operating Procedures ("MSOP") state that Foremen I and II are "responsible" for dissemination and review of the MSOP with employees, responsible for appropriate "oversight" and quality control to ensure full adherence to the MSOP, and responsible to ensure that safety guidelines and PPE requirements are followed. (McCarthy Cert. Exhibit F, § 3.0).

I find that the foremen oversee maintenance operations, ensure safe and timely maintenance service to NJT, monitor others' adherence to work rules, correct others when they observe an infraction, issue violation notices, and complete forms requiring workers to meet with them when violations are observed,

which are duties found by the Commission to constitute responsible direction. NJT and CWA, 27 NJPER 363.

When Foremen I or II witness a serious incident, they serve a "see-me" slip and report the incident to higher ranking officials. (Wien Cert. 11). The see-me slips are referenced in the report generated by the Employee Performance System (EPS), which lists incidents of discipline within the maintenance department and the names of those who initiated the process. Foremen I and II are included in those names. (McCarthy Cert. Exhibit G and B). The reported violations include, among other things, abuse of equipment (excessive speed), conduct unbecoming an employee, creation of a hostile work environment, respect for authority, refused work, unauthorized absence from assigned work location, and uncivil or discourteous behavior (Id.). These types of violations would involve the use of independent judgment in deciding to report the incidents. Indeed, conduct unbecoming an employee was specifically found by the Commission to be a type of violation that required independent judgment in assessing. NJT and CWA. Accordingly, the foremen's decisions to write up these kinds of violations, which often lead to discipline, constitute the power to discipline employees or effectively recommend the same, even if they do not necessarily recommend or assess penalties. NJT and CWA; Glenmark Assocs., Inc.

Another reported violation was a failure to follow a direct order. Foreman II Simon Puryear reported that he called every serviceman to the fuel stand to start servicing buses that had backed up, that he told one employee to get off his laptop and start pulling buses, that the employee argued that he shouldn't have to service any buses, that Puryear directly told him that the buses were getting backed up to the street and that he needed everyone to service them, that the employee refused to service any buses and stayed in the break room on his laptop, and that Puryear told him to go home. (McCarthy Cert. Exhibit G and B). Being able to issue direct orders to reassign employees as situations change so as to maintain operational and service commitments indicates responsible direction. Furthermore, the ability to issue direct orders and initiate the disciplinary process for the failure to follow them indicates disciplinary authority. See NJT and CWA, 27 NJPER 134 ("[W]hen a trip is lost due to an accident or breakdown and must be replaced, a regional supervisor might be required to issue a direct order to an operator to do additional work to address the immediate need to maintain service, and determine whether to write a violation initiating the disciplinary process if the operator refuses. In such instances, the regional supervisor exercises authority in a non-routine manner in order to fulfill New Jersey Transit's objective of providing on-time transportation service").

Foremen I have timekeeping responsibilities for garage employees in the form of double checking the Clerk's report of attendance time clock issues in the Garage Daily Overtime Report. (Wien Cert. 8.b.ii.c). If Foremen I verify that employees have worked less than eight hours, the Foremen I make an entry on the Employee Production System, recording the shortage as a lateness or early departure and a violation of the NJT's time and attendance rules. (Id.). The system generates a disciplinary slip when employees exceed a pre-programed amount of time and attendance violations, and the Foreman I deliver the slip to the employees and their union, or instruct the Foremen II to do so. (Id.). The Foremen I meet with the employees and their union in a Step I hearing and explain the basis for the disciplinary slip (Id.). However, I agree with NATS that, with respect to the system-generated disciplinary slips and grievances regarding time and attendance violations, the ATU collective negotiations agreement is so comprehensive on the penalties for each violation and the exceptions that the Foremen I exercise no real independent judgment at the Step 1 hearings on these issues. (Wien Cert. Exhibit H, Sec. 18(3)(A), (B)).

Foremen I also serve as Step I officers for non-attendance violations, and penalties comply with progressive discipline practices based on the number of prior violations in a given category of discipline listed on the EPS List. (Wien Cert. 10,

Exhibit I). Foremen 2 periodically conduct Step 1 disciplinary hearings. (McCarthy Cert. at 3).

NJT provided grievance documents showing Foremen I and II presiding over discipline cases at Step I on behalf of management. (McCarthy Cert. Exhibit H). The documents are entitled "Employee's Incident" and Foremen I and II are listed under the "Reported By" field. Their description and remarks of the incident are on the forms. The violations include failure to follow instructions/rules (no mask/safety vest), poor performance, and nonpossession of a valid CDL licence. The forms also indicate who was present at the Step I hearing and what actions were taken (e.g., counseling, written warning, suspension). (Id.). The Commission found the filing of employee incident reports as opposed to mere observation reports to be noteworthy. NJT and CWA at Footnote 5. Here, as in NJT and CWA, violation reports are the primary means by which performance is monitored and disciplinary proceedings initiated and such reports could be the only eyewitness account. Accordingly, these grievance documents also show that foremen are supervisors.

NJT provided a transcript from an arbitration proceeding where a Foreman I and a Foreman II testified. (McCarthy Cert. Exhibit I). The Foreman II had discovered the grievant sleeping on the job and initiated the disciplinary process. The Foreman I had presided over the Step 1 hearing. At the arbitration, the

Foreman II described himself as being "in charge" of repairmen, servicemen, and cleaners, and answered in the affirmative when asked if he was a "supervisor". When the Foreman I was asked who he supervised, he answered "Foreman II's" and indicated that he was "second in charge" for the garage. (Id.). In NJT and CWA, the Commission found relevant that a regional supervisor, despite not being a supervisor with respect to matters such as payroll, imposing discipline, and authorizing overtime, had nevertheless described himself as an "overseer" of bus operators. NJT and CWA. Although an employee's self-labeling is not definitive as to whether they are a statutory supervisor, there are enough other primary indicia of supervisory status that the foremen's self-labeling is relevant and further evidence that they are performing statutory supervisory duties. Similarly, the clause in the ATU CNA for hourly maintenance employees that provides that NJT will not allow foremen to participate in physical labor that will take away work from hourly maintenance employees or assign a "working foremen" to a shift where a full-time foreman is in "direct charge", is further evidence of the supervisory role of foremen, as it is indicative of the perception of foremen that the hourly employees have and NJT's efforts to avoid conflict. (McCarthy Cert. Exhibit D. § 13(G)).

Foremen serve as acting superintendents whenever superintendents are absent. (McCarthy Cert. at 3). For example,

the Wayne and Oradell Superintendents delegated their authority via written memoranda to Foremen 1 while they were absent from November 19, 2021, to November 29, 2021, indicating that they would be "back-filling" the Superintendent positions. (McCarthy Cert. Exhibit E).^{3/} The Superintendent position is higher in the chain of command, and superintendents have also initiated the disciplinary process via employee incident reports. (McCarthy Cert. Exhibit G and B).

Accordingly, the duties found above (other than those with respect to time and attendance violations for which NJT rules limit the independent judgment of foremen), show that Foremen I and Foremen II use independent judgment in responsibly directing and in effectively recommending discipline of maintenance employees. The duties performed by the foremen are related to achieving NJT's mission of providing safe and prompt transportation to its customers, and they therefore exercise their authority in the interest of the employer. §152(11); NJT and CWA, 27 NJPER 134, citing NLRB v. Health Care & Retirement Corp, 511 U.S. 571, 577.

I therefore find that Foremen I and Foremen II are supervisors within the meaning of the National Labor Relations Act, 29 U.S.C. 152(11). As such, they are not employees within

^{3/} In NJT and CWA, backfilling was explained as the assumption of duties of another position for the time specified. 27 NJPER 134.

the meaning of the New Jersey Public Transportation Act and are precluded from organizing collectively.

NJT had raised a conflict of interest argument and NATS argues that prior to the 1947 LMRA amendments to the NLRA which added the supervisory exclusion, the NLRB had refused to place supervisors in the same unit as subordinates due to the tension between the supervisor's loyalty to fellow union members and the loyalty to the employer, and that the addition of the supervisory exclusion made this line of reasoning moot. NATS argues that conflict has never been held to exist where supervisors were in a separate units (from those they supervise) represented by separate labor organizations. NATS argues that there is thus no conflict of interest where the Foremen I and Foremen II are in separate units from the hourly maintenance employees.

While I agree that there is no conflict of interest in having the foremen in separate units from the maintenance employees, the NJPTA excludes supervisors as defined under 29 U.S.C. §152(11) within the meaning of employee as used in the NJPTA when granting employees rights under the EERA, including collective negotiations rights enforceable through the Commission. N.J.S.A. 27:25-14. In NJT and CWA, the Commission dismissed the representation petition that was seeking a unit of only regional supervisors, even though those they supervised would not have been in the same unit. While separate units of

other supervisory public employees are appropriate under the EERA, a unit of NJT supervisors is inappropriate because they are not employees granted rights under the EERA by the NJPTA.

To this point, NATS argues in its position statement that the NJPTA is unconstitutional because it violates equal protection. NATS argues that the New Jersey Legislature has disparately treated NJT supervisors (who are excluded from representation under the NJPTA) and other New Jersey public sector supervisors (who can be represented under the EERA) without a rational basis, creating a "second class status" for NJT supervisors. NATS acknowledges that the New Jersey Supreme Court in In re New Jersey Transit Bus Operations and Amalgamated Transit Union, et al., 125 N.J. 41, 43 (1991) (NJT and ATU) held that the Legislature, through the NJPTA, intended to confer rights on NJT employees as would place them in the same position they had in the private sector, but argues that no administrative or judicial authority has explained how preservation of this status quo (resulting in different representational rights between NJT and other New Jersey public sector supervisors) is a rational consideration. NATS points to Turnpike Authority v. Council 73, 150 N.J. 331, 352-53 (1997), where the New Jersey Supreme Court explained the differences between public and private employer interests and stated "In affording supervisors organizational rights under the [EERA], we infer that the

Legislature appropriately took into account the differences between private and public sector labor negotiations.” NATS argues that equal protection at a minimum requires the government to treat like cases alike.

The Commission has stated that we do not have jurisdiction to rule on the constitutionality of a statute that we are charged with implementing. Union Cty. College, P.E.R.C. No. 2019-35, 45 NJPER 319 (¶84 2019), aff'd 47 NJPER 70 (¶19 App. Div. 2020). Given that the Commission has previously found that the NJPTA and EERA treat supervisors differently and that the New Jersey Supreme Court has in general addressed the NJPTA (though not specifically the supervisor exclusion), further analysis of this constitutional argument is inappropriate. See NJT and CWA, NJT and ATU.

ORDER

NJT's clarification of unit petition is granted to exclude Foremen I and Foremen II from their respective units.^{4/} This decision is effective immediately.

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Representation

DATED: August 10, 2023
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by August 21, 2023.

^{4/} As these units were limited solely to these titles, there are no longer any employees within the units. The related unfair practice charge (Dkt. No. CO-2022-131) remains pending for now.