

P.E.R.C. NO. 2002-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT,

Public Employer,

-and-

Docket No. RO-H-2000-95

CWA, LOCAL 1032,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a representation petition filed by CWA, Local 1032 seeking to represent a unit of all permanent full-time regional supervisors employed by New Jersey Transit Bus Operations. The Commission concludes that regional supervisors are supervisors within the meaning 29 U.S.C. §152(11) of the NLRA and LMRA because they exercise independent judgment in suspending bus drivers; responsibly directing their work; and disciplining them.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2002-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT,

Public Employer,

-and-

Docket No. RO-H-2000-95

CWA, LOCAL 1032,

Petitioner.

Appearances:

For the Public Employer John J. Farmer, Jr., Attorney
General (David S. Griffiths, Deputy Attorney General)

For the Petitioner Weissman & Mintz, attorneys
(Judianne Chartier, of counsel)

DECISION

On March 14, 2000, the Communications Workers of America, Local 1032 (CWA) petitioned to represent a unit of all permanent full-time regional supervisors employed by New Jersey Transit Bus Operations (NJTB).^{1/} NJTB has refused to consent to an election. It alleges that regional supervisors are not employees under the New Jersey Public Transportation Act (NJPTA), N.J.S.A. 27:25-14 et seq. 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. NJTB alleges that, under that definition, regional supervisors are statutory supervisors precluded from organizing.

^{1/} Chief regional supervisors are not subjects of the representation petition.

On June 20, 2000, a Notice of Hearing issued. On July 27; August 3 and 9; September 7 and 15; and October 11, 2000, Hearing Officer Patricia Taylor Todd conducted a hearing. The parties examined witnesses and introduced exhibits. CWA filed a post-hearing brief.

On February 15, 2001, the Hearing Officer recommended dismissing the petition. H.O. No. 2001-1, 27 NJPER 134 (132051 2001). She concluded that the regionals were supervisors within the meaning of 29 U.S.C. §152(11) of the NLRA and LMRA because they exercised independent judgment in suspending bus drivers; responsibly directing their work; and disciplining them.^{2/}

On March 16, 2001, after receiving an extension of time, CWA filed exceptions to the Hearing Officer's legal analysis and some of her factual findings. It argues that she erred in interpreting the NJPTA as depriving regional supervisors of their rights under the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.; and in finding that regionals exercise independent judgment in directing, suspending, and disciplining bus operators. It maintains that any direction by regional supervisors involves routine work governed by detailed NJT regulations.

^{2/} The Hearing Officer noted that the duties found to be supervisory were performed mostly by regionals assigned to road rather than control functions. However, she found that regionals are subject to reassignment from road to control and vice versa; that the two groups are not clearly demarcated; and that control supervisors must therefore be considered supervisors. 27 NJPER at 143.

On June 4, 2001, we invited the parties to address the relevance of NLRB v. Kentucky River Community Care, Inc., 121 S.Ct. 1861 (2001). On June 11, CWA responded, urging that the decision pertains only to the NLRB's application of the supervisory status test to nurses. On June 13, NJT replied that Kentucky River supports the Hearing Officer's recommendation.^{3/}

Findings of Facts

We incorporate the Hearing Officer's comprehensive findings of fact, with some minor additions. We reject CWA's factual exceptions.

The Hearing Officer found that regional road supervisors may issue employee incident reports, or violations, when they observe a bus operator violating NJT rules and procedures. 27 NJPER at 137. We add that R-20, a list of service violations reported by road regionals in 1999 and 2000, shows that the number of violations reported each month in the central and northern divisions ranged from 58 to 132.

With respect to these violation notices, CWA argues that the Hearing Officer erred in stating that "[t]he issuance of a violation activates a course of discipline up to and including discharge according to the steps set forth in the collective agreement." 27 NJPER at 137. Read in context, the gravamen of that statement is not, as CWA suggests, that the forms completed by road regional supervisors always result in discipline or that

^{3/} CWA has also requested oral argument. We deny that request.

any discipline imposed is always upheld if grieved. Instead, we believe the Hearing Officer intended to emphasize, as does CWA, that while road regional supervisors report violations which may trigger negotiated disciplinary procedures, they do not assess penalties.

CWA also cites testimony by David McDaid, Director of Operations, to the effect that the violation forms completed by regional supervisors are sometimes removed at the hearing officer level. McDaid explained that this may occur, not because the reports are "unfounded," but because a hearing officer learns additional facts which lead him or her to conclude that discipline should not be imposed (T106). This testimony does not undermine the challenged finding and is insignificant given the Hearing Officer's conclusion that regional supervisors do not decide what penalty to impose.

Three exceptions center on the relationship between road regional supervisors and chief regional supervisors. CWA maintains that regionals require the approval of chief regionals before giving bus operators direct orders; removing them from service for a suspected drug or alcohol violation; or finding that reasonable suspicion warrants a drug or alcohol test.

The Hearing Officer described a "direct order" as an instruction repeated up to three times, followed by an explanation that, if the operator does not comply, he or she will face discipline by the garage supervisor. 27 NJPER at 144 n.13. The record supports her finding that regional supervisors may issue

"direct orders" to bus operators to correct a violation or do extra work in an emergency. CWA relies on testimony in which regional supervisors acknowledged that, although they can direct operators, they can do nothing beyond issuing a violation if they do not comply. The Hearing Officer's findings are consistent with this testimony, which goes to the nature or scope of regionals' authority to discipline operators, not their ability to issue orders.

We also agree with the Hearing Officer's finding that road regional supervisors make an "initial determination" whether reasonable suspicion exists for drug or alcohol testing and report that decision to a chief regional. 27 NJPER at 138. We add that once a regional makes this determination, he must "immediately relieve" the operator of his duties (J-5). The operator is then transferred to the garage for a further investigation by the garage supervisor and possible drug or alcohol tests (J-5).

CWA contends that a May 2000 memorandum from Chief Regional Supervisor Richard Deubel shows that, from April or May 2000 forward, Department of Transportation (DOT) regulations required chief regionals to approve drug or alcohol testing. However, the Hearing Officer credited Deubel's testimony that his memorandum was partially wrong and that it is only post-accident testing that requires chief regional approval. That testimony is supported by R-30, an April 5, 2000 memorandum from NJT's Director of Medical Services to Deubel and other chief regionals explaining

the DOT regulations. R-30 clarifies that regional supervisors will no longer perform reasonable suspicion or post-accident drug or alcohol tests and further requires that chief regionals must, based on a regional supervisor's recommendation, determine if an accident meets post-accident testing criteria. However, R-30 also states that, in a non-accident situation, regional supervisors decide whether reasonable suspicion exists for a drug or alcohol test. They then report that determination to the chief regional.

While one road regional supervisor testified that the chief had to decide whether to approve his recommendation that there was reasonable suspicion for a drug test, he continued that he "could not imagine" that the chief, who works in a control center, would disagree with his field assessment (5T1002). This testimony is consistent with a finding that a road regional supervisor makes an "initial" determination and "reports" it to a chief.

CWA also cites testimony on the related issue of whether a regional supervisor requires his or her chief's approval to remove an operator from service for a suspected violation of NJT's drug and alcohol policy. While CWA relies on Chief Regional Fred Shandler's testimony, Shandler stressed that a regional supervisor "absolutely" does not require permission before taking that action, although the removal must be reported to his or her chief (4T465-4T466). Similarly, while one regional supervisor testified that his chief could disagree with his recommendation to remove an operator for a suspected drug or alcohol violation, he added that

that had never happened (5T940). This testimony does not provide a basis for disturbing the Hearing Officer's finding, particularly since the NJT Operator Fatigue Policy requires a regional to remove an operator from duty and does not specify that the regional obtain his chief's approval (J-5).

Further, we reject CWA's exceptions to the Hearing Officer's findings that road regional supervisors may assign operators to replace absent employees and may overrule a mechanic's judgment on whether a bus can be safely operated. These findings of fact are well supported.

Similarly, the record supports the Hearing Officer's finding that a "position description questionnaire" (PDQ) for regional supervisor is an official NJT document. Further, we are not persuaded that a regional supervisor evaluation form better reflects the position's job responsibilities. The key difference between the documents appears to be that the PDQ refers to regional supervisors' responsibility to monitor "agreement employees'" performance, while the evaluation form does not. However, regional supervisors indisputably monitor bus operators' adherence to NJT rules.

Finally, CWA contends that the Hearing Officer should not have credited the testimony of regional supervisor Joseph Butterfield because his wife works for the Director of Service Supervision. The Hearing Officer found Butterfield credible and noted that his testimony was consistent with that of other regional supervisors. We have no grounds to disturb that judgment.

ANALYSIS

CWA argues that regional supervisors are not "supervisors" under the NLRA and LMRA and that, even if they are, we must then analyze their rights under our Act. We disagree on both points and endorse the Hearing Officer's analysis.

The NJPTA was enacted in 1979 and created NJT, a public corporation, to convert New Jersey's mass transit system from one of private enterprise to one owned and operated by the State. In re New Jersey Transit Bus Operations, 125 N.J. 41, 43 (1991). NJT became the employer for the workforce of the mass transit companies it acquired with federal funds. Id. at 44; N.J.S.A. 27:25-14(a). The NJPTA empowers us to enforce the rights and obligations of NJT Bus Operations and its employees, 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).

In re New Jersey Transit Bus Operations addressed "whether NJT employees' labor rights are identical (except for explicit statutory differences) and limited to those granted to all other public employees." Id. at 44. In approving our holding that the NJPTA allowed a broader scope of negotiations for NJT employees than for other public employees, the Court commented:

We hold that the Legislature intended to confer such rights on these employees as would place them in the same position they had in the private sector, subject only to the overriding responsibility and power of government to accomplish the goals of the Act. [125 N.J. at 45]

The issue in this case is whether the NJPTA confers broader representation rights on supervisory employees than they would have had in the private sector. The answer is no.

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. We are not persuaded that individuals deemed not to be "employees" under NJPTA and the LMRA must have their rights analyzed anew under N.J.S.A. 34:13A-5.3. That construction would make N.J.S.A. 27:25-14a(2) superfluous and is inconsistent with the principle that the rights of NJT employees are the same as private sector employees, subject to those restrictions imposed by NJT's responsibility to accomplish its statutory mission. We thus turn to an analysis of the NLRA, as amended by the LMRA.

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. Kentucky River, 121 S.Ct. at 1867; 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.

The parties stipulated that regional supervisors do not hire, transfer, layoff, recall or promote employees. Further, NJT does not except to the Hearing Officer's conclusions that regional supervisors have no authority to discharge or reward employees or to adjust their grievances. The Hearing Officer made no recommendation as to whether regional supervisors assign employees. Therefore, we focus on whether, under the applicable private sector case law, regional supervisors use independent judgment in disciplining, suspending, or responsibly directing the work of other NJT employees.

Regional Supervisors' Authority to Responsibly Direct Others

The "responsible direction" prong of §152(11) has been the subject of much litigation, with the United States Supreme Court twice holding that the NLRB's interpretation of the term was

too narrow and inconsistent with the statute. Kentucky River; Health Care & Retirement Corp. We start by outlining how the most recent of those decisions, Kentucky River, shapes our analysis.

Kentucky River rejected the NLRB's approach to assessing whether employees use independent judgment in responsibly directing other employees. The NLRB had held, often in cases involving nurses, 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. See, e.g., Providence Hosp., 320 NLRB No. 49, 151 LRRM 1177 (1996), enf'd Providence Alaska Medical Ctr. v. NLRB, 121 F.3d 548 (9th Cir. 1997). 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. The Court also criticized the NLRB for applying its limiting interpretation of independent judgment just to the "responsible direction" element of §152(11). Id. at 1869.

However, the Court did not disapprove of all aspects of the NLRB's Kentucky River decision. The Court noted that the term "independent judgment" is ambiguous as to the degree of discretion required for supervisory status. Accordingly, it 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.

Given the quoted language, Kentucky River does not foreclose CWA's argument that regional supervisors do not fall within the ambit of §152(11) because their direction of bus operators is routine and controlled by NJT procedures. However, while Kentucky River does not articulate a bright-line test for assessing when an employee responsibly directs others, it suggests that the focus should be on carefully applying the statutory language to the facts.

Within this framework, we endorse the Hearing Officer's comprehensive analysis and conclude that NJT has established that regional supervisors responsibly direct others. Regional supervisors are charged with overseeing bus operations and ensuring safe and on-time service. In that role, they have a duty to monitor operators' adherence to work rules. They patrol assigned districts; correct operators when they observe an infraction; and, if they deem it warranted, issue violation notices which will be sent to the garage supervisor and the head of the service supervision division. When they observe serious violations, they may also complete forms requiring an operator to

meet with his garage supervisor before being allowed to return to service. 27 NJPER at 136-137.

When making service adjustments to ensure on-time performance, they may alter schedules or routes and instruct operators accordingly. They may reassign an operator from one bus line to another when the original operator cannot continue due to sickness or mechanical problems with the bus. Where necessary to prevent an interruption in service, a regional road supervisor may order an operator pulling into a terminal to complete another trip. Ibid.

A regional supervisor may also remove an operator from service if he or she reasonably suspects that the operator is in violation of NJT's drug and alcohol policy or impaired. While a regional supervisor is not a bus operator's chain-of-command supervisor for matters such as payroll, imposing discipline, or authorizing overtime, ibid., one CWA witness and regional supervisor described himself as the "overseer" of bus operators (T977).

The NLRB has held that similarly situated employees were statutory supervisors. 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). All of these cases stressed the supervisors' authority to warn operators of driving infractions and issue violation reports. United Transit and New York City Omnibus also

held that the employees exercised discretion in detouring buses or adjusting routes and instructing drivers. Moreover, we agree with the Hearing Officer that regional supervisors "responsibly direct" operators when they order them to stop driving because of suspected impairments. 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).

Further case law support for our conclusion is provided by decisions involving utility company dispatchers or coordinators. These employees, like regional supervisors, oversee the service provided by their employer and, in that role, direct other employees. 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);^{4/}

While regional supervisors are guided by NJT policies and a Standard Operating Procedure (SOP) manual, those procedures are not so detailed or comprehensive as to eliminate the need for independent judgment and discretion. For example, NJT's "operator fatigue" policy incorporates a "reasonable suspicion" checklist of observations to help a regional supervisor gauge whether an operator is impaired. That document tries to guide what is often a subjective decision that is of great importance to NJT, the operator, and the public. But it does not eliminate judgment and discretion from this critical on-the-spot decision.

Similarly, the manual advises that a regional supervisor must immediately correct "unsafe acts" by an operator but leaves it to the regional supervisor's discretion to determine whether it is "necessary" to complete a violation report. And an assessment of some operator violations requires judgment -- e.g., "conduct unbecoming an employee" (J-20, "Rule Violations").

^{4/} In Mississippi Power & Light Co., 328 NLRB No. 146, 161 LRRM 1241 (1999), the NLRB held that utility systems coordinators and dispatchers were not supervisors. However, that holding was based in part on the analysis that Kentucky River disapproved. See Entergy, 253 F.3d. at 211.

Finally, with respect to service adjustments, the northern division manual advises supervisors to consider passenger convenience and choose the most logical adjustment (J-20, "Delays in Service"). But it does not direct the alterations that must be made, and thus supervisors must exercise discretion both in making adjustments and in instructing operators. The southern division procedures are even less detailed (J-16).

In sum, under private sector case law, regional supervisors' direction of bus operators is not routine in the sense that their instructions are effectively dictated by NJT procedures. Nor is it routine because the operators require little guidance given the nature of their work. 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).

Regional Supervisors' Authority to Suspend Bus Operators

Regional supervisors may remove bus operators from service for suspected violation of NJT's drug and alcohol policy or other misconduct and operators may not return to service until their garage supervisors permit. Therefore, regional supervisors have the literal authority to suspend employees.

We also conclude, as did the Hearing Officer, that this authority entails independent judgment. Regional supervisors judge the fitness of operators and do not require their chief's approval before removing an operator from service. While they are guided by NJT procedures and a "reasonable suspicion" checklist, those aids do not make this function routine or clerical. Instead, they guide a subjective and important judgment.

We recognize that the NLRB has held that the ability to suspend an employee for a flagrant violation, such as being intoxicated, does not confer supervisory status. See Beverly Enterprises, 304 NLRB No. 111, 138 LRRM 1218, 1222 (1991); Board of Social Ministry, 327 NLRB No. 57, 160 LRRM 1017 (1998). However, federal courts of appeal, including the Third Circuit encompassing New Jersey, have held that the power to suspend an employee for any violation confers supervisory status. See, e.g., Passavant Retirement & Health Center, 149 F.3d 243, 248 (3rd Cir. 1998); NLRB v. Gray Line Tours, Inc., 461 F.2d 763, 764 (9th Cir. 1972). In circumstances very similar to those here, the Sixth Circuit held that bus dispatchers were supervisors, in part because they could temporarily suspend drivers for misconduct pending review by a higher authority. Eastern Greyhound Lines v. NLRB, 337 F.2d 84, 88 (6th Cir. 1964). As an indicator of the correct analysis of supervisory status under private sector case law, the Third Circuit opinion and the other higher-level court decisions are entitled to more weight than the NLRB's decisions.

Regional Supervisors' Authority to Discipline

In interpreting this element of §152(11), we ask whether, under private sector cases, the regional supervisors' authority to write up violations constitutes the power to discipline employees or effectively recommend the same, even though they do not recommend or assess penalties. The answer is yes.

Glenmark Assocs., Inc., 147 F.3d 333, 341-341 (4th Cir. 1998) is instructive. 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 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).

On the other hand, some court and NLRB decisions hold that an employee who issues warnings does not effectively recommend discipline if he or she does not impose sanctions and the warnings do not automatically result in discipline. See, e.g., NLRB v. Hilliard, 187 F.3d 133, 147 (1st Cir. 1999); Brown & Root, Inc., 314 NLRB No. 4, 146 LRRM 1227, 1233 (1994); Lakeview Health Center, 308 NLRB No. 14, 141 LRRM 1232 (1992); Board of Social Ministry, 160 LRRM at 1017. However, under all of the circumstances here, we believe the Glenmark analysis is a more persuasive predictor of the result under private sector case law.

Regional supervisors' violation reports are the primary means by which operator performance is monitored and disciplinary proceedings initiated for poor road performance. Regional supervisors frequently write up violations and, as the Hearing Officer observed, their violation reports may be the only

eyewitness account of an operator's performance, given that garage supervisors do not monitor road performance.^{5/}

The record also shows that regional supervisors' violation reports are given weight; are an integral part of the disciplinary process; and often result in discipline. For example, an operator must be given a copy of a violation report within 72 hours; an informal hearing is held; and an operator's garage supervisor determines what action will be taken. The violation reports in evidence show that some sanction --ranging from a warning to a 30-day suspension - was imposed in every instance.^{6/} In these circumstances, we conclude that regional supervisors effectively recommend discipline. Moreover, the regional supervisors' regular role in monitoring performance and issuing violations distinguishes this case from other cases cited by CWA. See NLRB v. Meenan Oil, 139 F.3d 311, 322 (2d Cir. 1998) (oil company dispatchers did not monitor performance and simply brought customer complaints or employee absences to management's attention); Lakeview (verbal warnings issued by LPNs had no clear

^{5/} While other employees may file a report when they observe a violation of NJT procedures, they file observation reports only, not the employee incident reports that regional supervisors and other managers file upon observing a violation (J-5).

^{6/} P-1, a list of hearings scheduled in March 2000, includes a "results" column. Out of 63 violations, 16 resulted in "no action."

connection with disciplinary process); Brown & Root (safety inspectors' citations were independently investigated by supervisors).

For all these reasons, we adopt the Hearing Officer's recommendations that regional supervisors are supervisors under §152(11) because they use independent judgment in responsibly directing, suspending, and effectively recommending discipline of bus operators. With respect to the final element of the §152(11) analysis, there is no dispute that regional supervisors perform these functions in the interest of NJT. Finally, while not part of the statutory test, we note that if regional supervisors are not deemed statutory supervisors, bus operators would function without any supervision on the street. Compare Glenmark, 147 F.3d. at 341-342. We therefore dismiss the petition.

ORDER

The representation petition is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Buchanan voted against this decision.

DATED: September 26, 2001
Trenton, New Jersey
ISSUED: September 27, 2001

H.O. NO. 2001-1

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT,

Public Employer,

-and-

Docket No. RO-H-2000-95

CWA, LOCAL 1032,

Petitioner.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Commission dismiss a petition filed by the Communications Workers of America, Local 1032 ("CWA"), seeking to represent a unit of all permanent full-time regional supervisors employed by New Jersey Transit Bus Operations. The Hearing Officer concluded that the regional supervisors are supervisors within the meaning of the National Labor Relations Act, 29 U.S.C. 152(11). As such, they are not employees within the meaning of the New Jersey Public Transportation Act and are precluded from organizing collectively.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception thereto filed by the parties, and the record, and issues a decision which may adopt, reject, or modify the Hearing Officer's findings of fact and/or conclusions of law.

H.O. NO. 2001-1

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT,

Public Employer,

-and-

Docket No. RO-H-2000-95

CWA, LOCAL 1032,

Petitioner.

Appearances:

For the Public Employer
John J. Farmer, Jr., Attorney General
(David S. Griffiths, Deputy Attorney General)

For the Petitioner
Weissman & Mintz, attorneys
(Judianne Chartier, of counsel)

**HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION**

On March 14, 2000, the Communications Workers of America, Local 1032 ("CWA") filed a timely representation petition with the Public Employment Relations Commission, seeking to represent a unit of all permanent full-time regional supervisors employed by New Jersey Transit Bus Operations (hereinafter "New Jersey Transit").^{1/} New Jersey Transit Bus Operations opposes the petition and refuses to consent to a secret ballot election. It alleges that regional supervisors, as supervisors, are not

^{1/} Chief regional supervisors are not subjects of the representation petition.

employees within the meaning of the New Jersey Public Transportation Act, N.J.S.A. 27:25-14 et seq., pursuant to the Labor Management Relations Act, 29 U.S.C. 141 et seq., and the National Labor Relations Act, specifically, 29 U.S.C. 152(11), and are therefore precluded from organizing. The Director of Representation determined that substantial and material disputed factual issues warranted an evidentiary hearing, and on June 20, 2000, issued a Notice of Hearing (C-1). On July 27; August 3; 9; September 7; 15; and October 11, 2000, I conducted hearings at which the parties examined witnesses and introduced exhibits.^{2/} Both parties filed initial post-hearing briefs by November 14. Reply briefs were due by November 22. CWA's reply brief was filed on November 15. The record closed on November 22. New Jersey Transit's reply brief was filed on November 29 and was not considered. Based upon the entire record, I make the following:

FINDINGS OF FACT

Organizational Structure of New Jersey Transit

New Jersey Transit is divided into two divisions, Northern and Southern (1T121). The Northern Division encompasses from north of Lakewood, New Jersey to Orange County, New York and

^{2/} The transcripts will be referred to as 1T (July 27), 2T (August 3), 3T (August 9), 4T (September 7), 5T (September 15), and 6T (October 11). The Commission's exhibits shall be referred to as "C-". The parties' joint exhibits will be referred to as "J-", the Petitioner's exhibits as "P-" and the Employer's exhibits as "R-". Transcripts 1T through 5T are continuously paginated.

represents about seventy percent of New Jersey Transit bus operations' service area and employee force (1T21, 1T24, 1T25). The Northern Division is further divided into northern and central districts (3T503, 3T381). There are seven bus garages and six bus terminals located in the northern district of the Northern Division, and five bus garages and one bus terminal in the central district (R-8, R-10, 1T23).^{3/} The Southern Division encompasses all areas south of Lakewood to Cape May, New Jersey, and is composed of four bus garages and four bus terminals (1T142).^{4/}

The garage is the operator's home base of employment for the beginning and end of the work day, and it is where buses are serviced, maintained and stored (1T121). Garage staff includes garage supervisors and assistant supervisors, depot masters and mechanics (1T22, 1T46, 1T114). The garage supervisor is the administrative manager of the garage and the operator's direct supervisor while the operator is in the garage (1T31, 1T174). Terminals are thinly staffed or unstaffed (1T24). Terminal staff

^{3/} The bus garages located in the northern district of the Northern Division are Greenville, Fairview, Wayne, Market Street, Meadowlands, and Oradell. The Warwick garage recently closed (1T22). The northern district also includes twelve terminals where passengers are picked up or change from one bus line to another (1T150).

^{4/} The four garages in the Southern Division are Newton Avenue (Camden), Hamilton, Washington Township, and Egg Harbor Township (R-8, 1T142). The four terminals are Atlantic City, Wildwood, Walter Rand (Camden) and New Jersey Transit's bus operations at the Greyhound bus terminal in Philadelphia (1T142, 1T160, 1T163).

may include terminal supervisors, ticket agents, customer service employees, and station starters (1T114).

Many New Jersey Transit job titles including bus operators, mechanics, depot masters, ticket agents, customer service employees, and station starters are covered under collective bargaining agreements (J-6, J-7, J-8). Employees not covered by any collective agreement include garage supervisors, spotters (contracted security employees who ride buses undercover to observe the manner of service delivery) and instructors (operational training employees of New Jersey Transit who ride buses to follow up on training) (1T42, 1T43, 3T510).

Regional Supervisors Generally

The regional supervisor position was created in or around 1974 (1T67). The position was intended to create a regional management force which would learn the entire New Jersey Transit system to supplement the garage supervisors and assistants after the field salaried employees became organized (1T67). Upon appointment, new regional supervisors ("regionals") undergo approximately six weeks of training to introduce them to all aspects of New Jersey Transit's operations (1T177, 4T863). During training, the new regionals travel with experienced road regionals in various districts to become familiar with the districts and garage locations and are instructed in how to prepare daily summaries of their work (4T863). Regional supervisors in training also sit at a control center console and are briefed on its

operation and instructed in how to complete various reports (4T863). Training also includes a safety class, evaluation of a mock accident scene and a review of New Jersey Transit's policy concerning operators under the influence or fatigued, and training in the performance of drug and alcohol testing when regionals formerly performed that duty (J-5, 4T864). Regional supervisors are evaluated annually (P-6, 4T769-4T770, 5T892).

The Position Description Questionnaire (PDQ) is a document developed by New Jersey Transit to analyze the responsibilities of a particular job for purposes of determining compensation (J-2, J-3, 1T34). The PDQs applicable to regional supervisors were created by a committee of regional supervisors, subject to the approval of higher management, and indicate that the employees who report directly to road and control regional supervisors are bus operators, depot masters when there is no garage supervisor present, ticket agents, station starters, field mechanics, and customer service representatives (1T35, 1T49). Hay points are points assigned to job duties; the more total Hay points assigned to the position, the greater the level of compensation (R-21). Two regional supervisors recently submitted a proposal to revise the PDQ to include additional duties performed by regional supervisors and to increase the number of Hay points assigned to the position because they felt that

increased supervisory duties warranted a greater salary (R-21, 3T514-3T521, 3T589).^{5/}

New Jersey Transit currently employs approximately 79 regional supervisors and 6 chief regional supervisors, assigned to work either on the road or in the control center (J-21).^{6/} Sixty-one regional supervisors work in the Northern Division and twenty-four work in the Southern Division (1T50). In the Northern Division, the Service Supervision Department, supervised by Director of Service Supervision James Gourdine and Assistant Director Fred Gilliam, and the Control Center are located in Maplewood (3T450). In the Southern Division, the Department of Street Supervision and Terminals, supervised by Supervisor of Street Supervision and Terminals Vincent Giammuso, and the Control Center are located in Camden. The Service Supervision Department

^{5/} In its post-hearing reply brief, CWA asserts that the Position Description Questionnaires are not a product of management, but were created by a few regional supervisors for the sole purpose of obtaining a wage increase. The record reflects that J-2 and J-3 were created by regional supervisors for management approval and are considered official New Jersey Transit documents, while R-21 was created by two regional supervisors on their own initiative as a proposed form of revision (3T514-3T521, 5T589-5T590). The record contains no evidence that J-2, J-3 or R-21 do not credibly represent the perception of their respective authors concerning the job duties they perform, and I credit them as such.

^{6/} Almost every regional supervisor who testified had been assigned to both the road and the control center (3T512-3T513, 4T674, 4T744, 4T829, 5T874, 5T920, 5T951, 5T980, 5T1017). Some regional supervisors currently work both on the road and in the control center intermittently as assigned (5T920, 5T980).

and the Department of Street Supervision and Terminals manage the delivery of service after the buses leave the garage or terminal and are out on the "street" (1T24, 1T25). Approximately 24 control regional supervisors, also known as "controllers", are supervised by three chief regionals in the Maplewood control center (3T409). Approximately 29 road regional supervisors, also known as field or "street" regionals, are supervised by two chief road regionals, one in the northern district and one in the central district (J-1, 1T27, 3T503). One chief regional is assigned in the Southern Division (2T257). In the Southern division, four regional supervisors report to the Atlantic City terminal, two report to the Hamilton garage, and the remainder report to the Camden Control Center (1T174-1T175).

Control regional supervisors work at computer consoles which monitor assigned bus route areas known as districts in the Northern Division and zones in the Southern Division (R-9, 1T28, 1T156, 3T379). Controller duties include communication with operators via radio, responding to requests from road regionals to contact garages concerning accidents and breakdowns, and arranging coverage for lost or extra trips by contacting the depot master at the garage to secure a replacement operator (1T145, 2T366, 5T931, 5T954). Controllers use the Computer Aided Dispatch (CAD) system, a computerized method by which information received at the control center received from operators, regional supervisors, or the public is recorded by a control regional or anyone else working at

the control center according to a format specified in the SOP manual or by hand (J-20, 3T446-3T447, 3T530, 3T594, 4T683). Controllers can communicate with bus operators by radio, or respond to a Request to Talk (RTT), or Priority Request to Talk (PRTT) in case of emergency, from the operator (J-19, 2T297, 5T1018). Only the control center can communicate with the operator in the bus, or facilitate communication from bus to bus or from regional supervisor to bus (1T26, 4T751). Operators may contact the control center for information, typically where a proper bus stop is on a particular route, or questions concerning the proper fare to charge a passenger (1T54, 4T692, 4T737).

The road regional supervisors, who are also known as field or street regionals, are assigned to units which patrol an assigned district or zone in a New Jersey Transit mobile radio equipped vehicle (R-10, 1T25). Each road regional works in coordination with the control console assigned to monitor the routes in each unit, and communicates with the control center via the mobile radio in the vehicle (1T127-1T128, 1T126). The radios in road regionals' vehicles permit communication with the control center, other road regionals' vehicles, and other staff vehicles, but not the garage or operators (1T26). Road regionals may also communicate with the control center via hand-held radio or telephone (2T211). A road regional's typical daily duties include performing line checks (checking the times that buses get to points against the headway sheets and adjusting service as

necessary to ensure on-time performance), responding to and investigating accidents and/or breakdowns, arranging for coverage for lost trips or extra trips by communicating with the control center, answering passenger inquiries, arranging detours, monitoring operators' daily performance by ensuring that operators adhere to the work rules set forth in the Transportation Employees' Service Guide, completing a daily summary of work activities, and other duties and special projects as assigned (J-19, R-12, R-24, R-26, P-10, 1T28, 2T300-2T403, 3T601, 3T392-3T393, 4T744, 4T746, 4T814, 5T875, 5T877, 5T921-5T922).^{7/}

In addition to their other daily duties, road regional supervisors in the Southern Division may be assigned by Supervisor of Street Supervision and Terminals Vincent Giammuso to represent New Jersey Transit before local or regional entities or in connection with special events (1T151-1T152, 1T175). One such regional currently represents New Jersey Transit on a project concerning the Intelligence Transportation System (traffic signs) with the Delaware Valley Regional Planning Commission (1T151). Two regionals perform drill and practical exercises several times a year with the New Jersey State Office of Emergency Management,

^{7/} A headway sheet is generated by the Service Planning Department and is a list of every run for every line which denotes where the bus should be at a particular time (P-5, 1T155, 1T168, 2T259, 4T731, 4T746, 5T880). Road regionals carry copies of the headway sheets for their district in their cars so that they have knowledge of where every bus is to be at every time (1T155).

and were called into action during Hurricane Floyd in 1999 (1T152). Two regionals represented New Jersey Transit at planning meetings for a Philadelphia boating event called Op-Sail, to provide any necessary extra service, detours, or coordination in connection with the event (1T152). Regional supervisors represented New Jersey Transit as part of a twenty-four hour, multi-agency command center established during the 2000 Republican National Convention in Philadelphia (1T152-1T153). Regional supervisor Joseph Butterfield represents New Jersey Transit at monthly meetings of a local civic association and a municipality, both located in his assigned zone in the Southern Division (R-16, R-17, 2T331-2T333).^{8/}

All regional supervisors in the Northern Division follow the Standard Operating Procedures Manual for the Service Supervision Department (J-20, 1T39). Regional supervisors in the Southern Division follow a similar document, the Department of Service Supervision and Terminals Regional Supervisor's Procedures Manual (J-16, 1T39, 1T140). These manuals set forth procedures for the service supervision departments to implement the broader

^{8/} On cross examination, Southern Road Regional Supervisor Joseph Butterfield testified that his wife is employed as an administrative assistant to Director of Service Supervision James Gourdine. CWA apparently challenges the credibility of Butterfield's testimony. However, since Butterfield's testimony concerning his duties as a road regional was generally consistent with the testimony of the other regional supervisors presented on behalf of both New Jersey Transit and CWA, I find no basis to question the credibility of his testimony.

operating procedures set forth in New Jersey Transit's Transportation Department Standard Operating Procedures Manual (J-5, 1T37-1T38).

Specific Duties of Regional Supervisors^{9/}

Regional supervisors, both road and control, have a primary responsibility to ensure that New Jersey Transit transportation service runs smoothly and on time. The goal of on-time performance requires the adjustment of service on a daily basis. Some of the occurrences which may necessitate the adjustment of service are accidents, mechanical breakdowns, operators running late, operators running ahead of schedule, operator out sick, operator lateness or failure to appear for work (operator "miss"), and operator removal from service. If an operator is running ahead of schedule or late, a control or road regional may adjust the trip's schedule to put the operator back on time (2T311, 4T700-4T705, 5T882, 5T1019). For example, if a bus is running late, the regional supervisor might transfer passengers to an on-time bus and instruct the late operator to "special", or turn on the "Out of Service" sign and drive to a certain point without picking up any additional passengers (5T882). In the case of an accident or breakdown, a road regional may adjust service by determining that a trip must be added or

^{9/} The parties have stipulated, and I, therefore, so find, that regional supervisors do not hire, transfer, layoff, recall, or promote employees (except as the source of recommendation) (1T134).

covered, and have the control center contact the garage to find an operator to cover the trip (5T908, 5T954). A road regional supervisor is not typically required to consult with a chief regional supervisor before adjusting service (4T819).

Bus operators bid on, or "pick" their preferred work assignments four times yearly pursuant to collective agreement (J-6, 1T31, 1T51, 1T79, 1T161, 3T485, 3T502, 3T485, 3T502, 4T797). While neither the regional supervisor nor the garage supervisor has the authority to permanently change the work assignment picked by an operator, a road regional may assign or reassign employees to replace absent employees, several times daily as needed (3T485, 3T502, 4T642, 4T644). For example, road Regional Supervisor Richard Gierolowicz described how two days prior to his testimony, Suburban Bus Lines, a private bus company which coordinates its service with New Jersey Transit out of New Jersey Transit's Old Bridge terminal, cut a trip and Gierolowicz covered it with a New Jersey Transit trip and operator (3T615, 4T642). A regional supervisor may reassign an operator from one bus line to another when the original operator cannot continue due to sickness or mechanical breakdown (3T544-3T546, 5T909).

When needed, a replacement or extra operator may be secured in one of several ways. A road regional may call the control center with a request for a replacement operator. The control regional will then call the depot master at the garage to secure a pull-in operator (an operator who is pulling in to the

garage at the end of the operator's contractual work day), consult the extra board, or call an operator in from home to do the trip (3T418, 3T542-3T543, 5T955). While the regional supervisor may suggest which off duty operators should be called, only the depot master contacts operators who are at home (4T652, 5T955).^{10/} The depot master is also in charge of keeping track of operators' hours in order to administer the 70-hour rule - if an operator has driven over 70 hours in eight days, the operator can't be used for pull-in or extra work (1T170, 5T963-5T964).

Regional supervisors also have authority to directly request a "pull-in" operator to cover a trip (5T876, 5T964). The operator can decline the request unless it is an emergency, when the regional can give the operator a direct order to do the trip and write a violation slip if the operator continues to refuse to do the work (3T413, 5T876-5T877, 5T909, 5T915). An emergency is an out of the ordinary situation which will cause an interruption in service requiring a response to ensure that service remains covered (5T1032). A regional's assignment of an operator to cover

^{10/} The depot master works in the garage and reports to the garage supervisor and assistant supervisor (J-19, 1T46, 1T114, 2T281, 2T288, 3T584). The depot master's duties include payroll, maintaining operator assignments, making sure that buses go in and out of the garage on time and arranging for replacement or extra operators or additional buses when needed (J-15, 2T356-2T366, 2T250, 3T463). The extra board is a rotating list of operators without regular assignments who can be assigned by the depot master to work when the regular operator for a trip is unavailable (1T80-1T81, 1T119, 1T161).

a trip may result in an extension of the operator's work day and thus overtime (2T309, 3T532, 4T739, 4T860, 5T965-5T966). However, only the garage supervisor can direct payroll to pay an operator's claimed overtime or address any payroll problems (1T174-1T175, 5T914).

When an accident, serious incident, or breakdown occurs, the operator notifies a special console at the control center which only handles accidents (R-9, 1T72, 1T154, 4T750). In case of a serious accident, or an incident which affects a major roadway, the control regional notifies appropriate management personnel by a paging system using the computer or telephone (R-17, 2T292, 3T384-3T385, 3T443, 4T753, 5T955). The control regional then notifies a road regional to respond to the scene of the accident or breakdown (1T154). The chief may tell the control regional which road regional to contact, or, in the case of a bad accident during the late night hours if there is no chief on duty, the control regional might contact the road regional who lives closest to the scene (3T440, 5T957-5T958). The control regional may also contact New Jersey Transit Police who in turn contact the local police (1T154).

The road regional is usually the first representative of New Jersey Transit to respond to an accident scene (1T154). Other persons who may respond to the scene of an accident include a chief regional if on duty; if the accident occurs during the evening hours when there is no chief on duty, the road regional

will handle it on his own (3T504, 3T451). Depending on the seriousness of the accident (i.e., involving a pedestrian or a fatality), New Jersey Transit's safety and claims department may also respond to perform its own investigation (4T761). The road regional observes how the accident happened if the vehicles are still together, gathers names of witnesses, requests an ambulance or police if necessary, photographs the scene, assists the operator, and clears up the accident scene as quickly as possible, detouring buses if necessary to keep service moving (J-16, J-20, 4T758-4T759, 5T930). The road regional relays information on damage and injuries to the accident console at the control center (3T440, 4T759), The control regional makes periodic announcements to the line affected by the accident (R-17, 3T443). The control center will also call the foreman at the nearest garage to dispatch mechanics and/or another bus (4T751, 4T762). The control center notifies New Jersey Transit and local police and makes all other calls, including for an ambulance, as necessary (4T759).

The road regional stays with the bus until mechanics arrive (4T753). With the mechanics' input, the road regional makes the final decision concerning whether the bus can be safely driven back to the garage, repaired on the spot, or a tow truck must be called (2T322, 2T360, 3T454, 4T753, 5T934). The road regional may overrule the mechanic's opinion that the bus can be

driven back to the garage if the regional disagrees (J-20).^{11/}
If the regional determines the bus is inoperable, the road regional notifies the control center which dispatches mechanics and/or another bus or operator from the nearest garage (4T751, 4T762, 5T931).

If there is a need to replace rail service with bus service due to a rail breakdown, the rail chief authorizes the request for buses and a control regional then calls garages to ask the garage supervisor or depot master to determine which buses and/or operators are available to run extra shuttle service (R-22, R-23, 3T528-3T534, 3T592, 5T953-5T954). The chief determines which garages should be called, usually starting with the garage closest to the rail emergency and calling others if more buses are needed (5T954). The control regional supervisor calls the garage and instructs the depot master to send out an operator to cover

^{11/} Road Regional Supervisor Robert Hayes, appearing on behalf of CWA, testified on redirect examination that if a mechanic was summoned to the accident scene and disagreed with the regional supervisor's opinion that the bus was inoperable, the mechanic's decision would prevail, and Hayes would let the bus go (5T941, 5T946). However, on recross examination, Hayes testified that as a former Repairman A or road mechanic for New Jersey Transit, he has 12 years experience working on buses and that in his present capacity as a regional supervisor, if he tells a mechanic with less experience that the bus can't move, the mechanic will agree with him (5T919, 5T941, 5T944). I find it credible that a regional supervisor with Hayes' self-described level of mechanical experience would not permit a bus to be driven back to the garage if he believed the bus to be unsafe. Therefore, I credit Hayes' testimony on recross that he would override the mechanic's decision that the bus could be safely driven back to the garage if Hayes disagreed.

the work (3T584). The depot master contacts operators who are in the garage or at home and gives the control regional a list of operators who are currently driving buses who can be contacted by the control center (5T955). The chief will usually advise the control regional to send the road regional nearest the scene of the rail substitution (5T957-5T958). If the chief is not on duty, the controller may make his or her own decision to send the road regional nearest the scene (5T966-5T967).

New Jersey Transit may be notified by local municipalities or local police departments that a road must be closed due to an event or planned road construction (1T15, 1T149-1T150, 2T210). However, most detours are unplanned due to accidents or breakdowns (1T149). After the control center is advised of the need for a detour, a controller will send a road regional out to create a detour for the operators (1T150). A road regional must determine the best and safest alternate route based upon the regional's knowledge of the layout of streets, traffic pattern, and bus routes in the area (1T150, 5T933). The regional must first run the proposed route to ensure that it is safe for the passage of the bus (1T151, 2T210). The regional will generally advise the local police of the detour chosen, and might have to work with the police to reroute a detour that the police have proposed, but which the regional feels is unsafe for the buses (1T151, 2T210). The regional may also create a customer notice to put on the bus stops in the affected area to let customers know where to catch the bus (1T150).

Road regionals function generally as "overseers" of operator performance (5T977, 4T825). Road regionals are authorized and required to correct operators who are in apparent violation of the work rules set forth in Transportation Employees Service Guide, and particularly if the regional supervisor observes the operator driving unsafely (J-19, 4T827, 4T829, 4T866, 5T887, 5T977). If necessary, a road regional supervisor can personally stop a bus or call the control center to stop the bus so that the regional can instruct the operator to drive safely, or correct another apparent violation, such as debris in the bus window (1T156, 4T762, 4T827, 4T828, 5T937, 5T1004, 5T1006).

If a road regional observes a serious violation, he/she may issue an incident report, or violation, to the operator (J-9, J-11, J-12, J-13; R-27, P-11, 2T336, 4T747).^{12/} Typical rule violations include operators running ahead of or behind schedule, improper uniform, insubordination, and incivility (J-11, J-12, J-13, J-20, P-2, P-11, 3T539, 3T548-3T550, 3T580-3T582, 4T794). A violation may also be issued if an operator fails to, or refuses a direct order to, correct a violation, or to do extra work in an

^{12/} A depot master may also complete incident reports to memorialize that an operator called in sick or failed to show up for the operator's daily assignment (known as "operator miss") (2T250-2T252, 3T480, 5T985, 6T13).

emergency (3T396, 3T413, 3T548-3T550, 5T909, 5T877).^{13/} The regional supervisor has the authority to determine that the reason given does not justify the refusal to do extra work and issue a violation for insubordination (5T909). The road regional can also give an operator suspected of being fatigued or under the influence of drugs or alcohol a direct order to stop driving the bus (4T851).

The road regional supervisor completes the violation form up to, but not including, the portion of the form indicating "Action Taken", which is left blank (4T747). A copy of the form is sent to the operator's home garage supervisor by fax and interoffice mail, and a copy is given to the operator by the regional supervisor, garage supervisor, or depot master within 72 hours of the alleged infraction (2T209, 4T749, 5T881, 6T15). Pursuant to the collective agreement covering operators, an operator must be notified by copy of the violation form within 72 hours, or the violation form must be torn up and the operator will not be disciplined for the infraction (the 72-hour rule) (2T209, 5T881, 6T15). The regional supervisor will describe the incident

^{13/} A direct order is an instruction repeated up to three times followed by an explanation of the consequences of not following the order (2T207, 4T713). A direct order differs from an instruction in that failure to follow a direct order may lead to disciplinary consequences up to and including discharge (2T207, 4T765). A road regional does not have to consult a chief regional before issuing a direct order (3T413, 6T12). After issuing a direct order, the regional may contact the chief regional to advise what has transpired (5T878).

in detail on the violation form and may attach supplementary memoranda describing the conduct observed (5T881). For example, when Southern Division road regional supervisor Joseph Butterfield investigated a customer complaint that an operator was stopping the bus along the route to purchase food at Dunkin' Donuts, causing the operator to run late, Butterfield issued the operator violation forms for four separate infractions related to the operator's conduct along with a supplemental report summarizing Butterfield's observations (J-13, 2T336-2T338).

For a particularly serious infraction, the road regional supervisor may also complete a slip requiring the operator to meet with the garage supervisor before being permitted to return to work, known as an employee notice, "see-me" slip, "invite," or a "Dear John", indicating that the time and date for the employee to report will be determined by the garage supervisor (J-10, 1T73, 3T628, 4T707, 4T714, 4T747). A regional may also complete a "see-me" slip when there has been an accident after hours requiring the operator to be tested under federal drug testing guidelines for CDL (commercial driver's license) operators and no garage supervisor is available (J-10, 4T749, 4T857).

In the Southern Division, regional supervisors who complete violation slips on operators also record the violation on the "R" drive, a computerized summary created by Vincent Giammuso, to record all disciplinary infractions written by regional supervisors for organized employees in the Southern Division

(J-17, 1T146, 1T165). The "R" drive functions as a reference for Giammuso and other Southern Division regional supervisors of the number and types of infractions being recorded against operators and other organized employees (1T146).

The issuance of a violation activates a course of discipline up to and including discharge according to the steps set forth in the collective agreement pertaining to the employee (J-6, J-7, J-8, 1T75, 3T548, 5T907). The penalty is solely determined by the garage supervisor or assistant supervisor (2T249, 3T539, 3T540, 4T750, 5T881-5T882). After the regional supervisor completes the incident report, he or she usually has no further knowledge of the action taken unless the regional supervisor is called to appear as a witness at a disciplinary hearing (2T279, 4T468, 4T856).

Although regional supervisors may not ignore violations which implicate safety, and have no general authority to relax work rules, a regional supervisor has some discretion in determining whether to write a violation if the regional determines the operator's noncompliance with a rule is explained or justified; for example, if an operator is not following the proper route due to a police detour, or has loosened the tie of his uniform because the bus or the weather is unreasonably hot (J-19, 2T283, 2T316-2T317, 3T424-3T425, 3T429, 3T433, 3T559-3T562, 3T564, 4T829).

For example, one Saturday at the Wayne garage when there was no chief on duty, a controller informed road Regional Supervisor Robert Royer that the 5:45 a.m. run for a certain bus had not left the garage (5T889). Royer was checking on a large number of detours necessitated by the Dominican parade which was taking place in New York, and told the controller he would check on the run later (5T889). When Royer went to the Rahway terminal, the bus was not there for the next trip at 8:30 a.m. and the operator was not signed on to the system. Royer subsequently found out that the operator called in late and signed on to the system when he arrived at 8:35 a.m. (5T889-5T891, 5T900). The depot master had told the operator to go out without signing on, and had never informed the control center, resulting in a loss of two trips (5T890, 5T891). Royer had written a violation to the operator for a "no show", but upon hearing the operator's explanation, tore up the violation because he determined it wasn't the operator's fault (5T890-5T891). Royer wrote the results of his investigation on his daily summary and gave it to his chief for the chief's information in addressing complaints (5T889-5T891).

A regional supervisor may even correct an operator when the regional supervisor is not on duty. On Regional Supervisor Martin Moore's day off, while in his personal car, Moore saw an operator "cut the route" (take a shortcut), cutting out about four blocks from the route. Moore called the control center and found

there was no detour in effect. Moore told the garage supervisor to give the operator an "invite" in Moore's name and Moore would complete the paperwork when he came in the next day (J-10, 4T706). Moore understands that the operator was penalized a day off without pay by the garage supervisor as a result of Moore's observation (4T708).

Regional supervisors may be subject to discipline as well (3T569, 3T656, 4T758-4T759). In July 2000, road Regional Supervisor Keith Strulowicz received verbal counseling and a memo to his personnel file after Strulowicz failed to delay the scheduled departure of a particular bus as instructed by Chief Regional Supervisor Michael Ferrarelli (P-9, 4T789).

Pursuant to New Jersey Transit's Operator Fatigue Procedure, a road regional supervisor, upon personal observation or passenger complaint, may determine that an operator must be removed from service (J-5, 1T39-1T41). Removal is understood to mean the operator is taken out of service by the regional supervisor until authorized to return to work by the operator's garage supervisor, as opposed to suspending the operator from work for a finite period of time (2T275, 2T289, 3T612, 3T614, 3T541). Reasons for removal include the regional's reasonable suspicion that the operator is fatigued or sick, is engaged in inappropriate conduct jeopardizing the safety of others (such as fighting with a coworker or passenger), or is otherwise unable to safely operate a bus at that time (J-5, 3T417-3T418, 3T604, 4T676, 5T905).

A road regional supervisor may determine whether an operator must be removed if the regional believes that due to an operator's demeanor, the operator is unfit to safely operate the bus. For example, while Southern Division Road Regional Supervisor Michael Pote was assigned to work in the Camden control center, he received a call from an operator who claimed he was being threatened by a passenger (2T222). Pote instructed the operator to stay where he was and Pote would have New Jersey Transit Police respond to the location (2T222). The operator responded to Pote using a profanity and stated that he would not stay at the location. Pote sent New Jersey Transit police and also instructed the road regional on duty to go to the location. When the road regional arrived Pote explained that he was removing the operator from service due to Pote's concern that the operator's agitated demeanor did not permit continued safe operation of the bus (2T223). Pote wrote a violation to the operator for conduct unbecoming, with a supplemental explanatory memo (R-19, 2T224). A copy of the violation was served on the operator with instructions not to return to work until he had seen his garage supervisor (2T224). Pote is not sure what discipline resulted from the violation but believes the operator subsequently resigned (2T241).

The regional supervisor does not have to get prior permission from a chief regional supervisor before removing an operator from service, but may alert the chief regional supervisor

that the action was taken and the chief will typically agree with the regional's recommendation (1T56, 2T241, 3T466, 3T503, 3T598, 5T940). For example, when Northern division Road Regional Supervisor Robert Royer removed an operator due to the operator's poor demeanor and refusal to take a bus, Royer informed the chief and the chief recommended that the operator be taken out of service (5T906).

A road regional supervisor may determine that an operator need not be removed from service. Northern Division Road Regional Supervisor Keith Strulowicz received a customer complaint that an operator was driving erratically. When Strulowicz interviewed the operator, she explained that she had to change lanes quickly because a car cut her off (4T776). Strulowicz completed the Operator Fatigue form, and came to the conclusion that the operator was not impaired; Strulowicz told the chief regional the operator was capable of remaining in service and the chief agreed (J-5, 4T776, 4T855).

An operator may also be removed from service if the regional supervisor suspects the operator to be under the influence of drugs or alcohol in violation of New Jersey Transit's Drug and Alcohol-Free Workplace Policy (J-14). Such observations may also be made by spotters, instructors or other employees (J-5).

A control regional may accept a complaint over the radio that an operator is impaired and send a road regional to the

scene, or a road regional, based upon personal observation, may suspect an operator should be removed and investigate (4T681). If a road regional at a garage or terminal observes suspicious signs in an operator, the regional has the authority to not let the operator leave the premises based on his observations, and would advise the control center to send a second regional to confirm the first regional's suspicions (4T849-4T850). A depot master can also alert the control center if the depot master suspects an operator to be under the influence while the operator is still in the garage (3T462).

If an operator is suspected of being fatigued or in violation of the drug/alcohol policy, the regional supervisor interviews the employee concerning why the employee may appear fatigued (J-5, 4T773 -4T774). The regional supervisor makes the initial determination of whether the operator should be removed from service due to suspected fatigue, violation of the drug and alcohol policy, or unsafe operation and returns the operator to the garage where the garage supervisor will complete the investigation (J-5, 1T56-1T57, 5T1001-5T1002). If the garage supervisor is not on duty, the road regional supervisor interviews the operator concerning why the operator appears fatigued (1T57). A second regional supervisor or other New Jersey Transit supervisor may complete a checklist of additional observations including whether the operator can walk or stand and the operator's manner of speech and demeanor (J-14, 1T57, 5T1000,

6T26). The operator is then referred to the medical department for alcohol and/or drug testing and further evaluation (1T56, 4T774). The road regional may advise the chief regional of the steps taken in the investigation and advise the control center that the operator was removed so a replacement can be secured (2T241, 3T598).

Prior to April 5, 2000, regional supervisors were authorized to conduct reasonable suspicion and post-accident drug alcohol testing (R-30). In May 2000, a memorandum was issued to all regional supervisors by Chief Regional Supervisor Richard Deubel stating that a chief regional would determine whether reasonable suspicion or post accident testing was appropriate based on the road regional's report at the scene of an accident or information received from the control center (P-4, 4T783-4T784, 4T844). On behalf of CWA, Regional Supervisor Keith Strulowicz testified that his understanding of New Jersey Transit's drug and alcohol testing policy is that if he believes an operator to be under the influence, a second regional must confirm Strulowicz' suspicion and then the chief regional would make the decision whether the person would be tested (4T845, J-5, P-4). Strulowicz testified that previously regionals made that determination but no longer do so pursuant to a memorandum issued in April or May 2000 (4T843). On rebuttal for New Jersey Transit, Chief Regional Supervisor Richard Deubel testified that he had since learned that his memorandum was partially erroneous (6T22). Deubel explained

that the regional supervisor on the scene must make the reasonable suspicion determination and report it to the chief regional, but that pursuant to federal guidelines, the chief regional must ultimately decide whether post-accident drug/alcohol testing should be conducted (R-30, 6T7, 6T22, 6T27). Deubel further testified that he learned that the information he included in the May 2000 memorandum was incorrect two weeks prior to giving testimony in this matter (6T22). Based upon all of the testimony and documentary evidence, I find that the regional supervisor on the scene makes the initial determination whether reasonable suspicion exists for drug/alcohol testing based upon the regional's personal observations of the operator, and reports that determination to the chief regional.

In the Southern Division, eight regional supervisors rotating yearly substitute, or "backfill" for the four garage supervisors, two terminal supervisors, the chief regional supervisor, and the supervisor of street supervision and terminals when those individuals are on vacation (1T143). When a regional supervisor backfills for another position, the regional assumes those duties in place of the regional's regular duties for the time specified, with no difference in compensation (1T162, 2T238). Alternating yearly, a regional supervisor is permanently assigned to the Greyhound terminal and the Walter Rand terminal in Camden (1T142, 1T143). That regional supervisor oversees the ticket agents, starters, terminal workers and cleaners at Walter

Rand and the ticket agents and starters in Philadelphia (1T144). One terminal supervisor supervises both Atlantic City and Wildwood (1T163, J-1). The regional supervisors in the Atlantic City area who report to the Atlantic City terminal oversee the terminal operations in the terminal supervisor's absence, including overnight (1T144, 2T302). The regional supervisors who backfill for the terminal supervisor at the Atlantic City terminal perform the same responsibilities as the regional supervisor at Walter Rand and Philadelphia, with a higher traffic volume (1T145).

When backfilling, the regional supervisor may act as a hearing officer at the first step of the grievance procedure and conduct a disciplinary hearing, making a final decision on discipline up to and including discharge (1T129, 1T188, 2T228). Regional Supervisor Michael Pote backfills for Supervisor of Service Supervision and Terminals Vincent Giammuso for four to five weeks a year, and also backfills for the garage supervisor and assistant supervisor at the Washington garage, six weeks a year (2T214, 2T240). While backfilling for Giammuso, Pote has conducted disciplinary hearings and suspended operators roughly ten times, including suspending one employee for thirty days for violation of New Jersey Transit's's drug and alcohol policy, and suspended another employee for four days for violations including operating off route and leaving the bus unattended (2T230). Pote has not discharged anyone (2T229). Regional Supervisor Joseph Butterfield conducted two hearings while backfilling for an

assistant garage supervisor for 12 weeks, issuing a warning to an operator for failure to follow the established route and recommending counseling for an operator miss (2T328-2T329, 2T369).

Regional supervisors may also be called as witnesses in disciplinary proceedings (2T279, 4T648). Other than the disciplinary hearings conducted by Southern Division regionals when backfilling for managerial personnel, regional supervisors have no authority to discharge operators from employment (3T411, 3T544).

A regional supervisor may settle an operator's complaint, or an argument between two operators, "on the street" (1T189, 1T192, 2T233, 2T281, 3T619, 4T650, 4T709-4T710, 4T738, 5T896-5T898). On the weekend when there is no garage supervisor available, a road supervisor at a garage might handle a situation between a depot master and a disruptive operator by calling the police (3T585). Regional supervisors may also settle fare disputes between operators and passengers or operators and ticket agents, by determining the appropriate fare (2T310, 3T621, 3T650, 4T694, 4T839, 4T840). Regional supervisors may also instruct operators to let passengers ride free in an emergency (3T536, 4T840).

Except where a regional supervisor in the Southern Division conducts a hearing when substituting or "backfilling" for a higher management employee, neither road nor control regional supervisors have any input into the decision of grievances filed

pursuant to collectively negotiated grievance procedures (1T129, 3T414, 4T695, 4T796, 5T884). Grievances filed by operators pursuant to collectively negotiated grievance procedures are not presented to the garage supervisor (1T189). The regional supervisor may provide the garage supervisor with all information necessary to process the grievance, but has no specific role in the disposition of the grievance (2T235).

Road or control regionals may write a memorandum to the personnel file of an operator or other employee praising the employee's job performance on a particular project or overall (2T232, 2T371, 3T413, 3T456, 3T617, 4T796). A regional supervisor may also speak with the garage or terminal supervisor about an operator's good performance or submit a written description of operator performance to justify an award (2T371, 3T617, 4T645). While a garage supervisor might use such information in determining whether a part-time driver should be made full time, regional supervisors do not have the authority to give an employee a raise, additional vacation time, or a promotion (3T599-3T600). Road Regional Supervisor Martin Moore has let operators go home early with pay for the day on a limited basis; for example, because of a breakdown where Moore had secured a replacement operator (4T689). Road Regional Supervisor Richard Gierolowicz has given a driver a trip off for sickness or personal business with the expectation that the operator would help out at another time in an emergency (4T645-4T646, 4T658).

ANALYSIS

The New Jersey Public Transportation Act, N.J.S.A. 27:25-1 to -24 (NJPTA) was passed in 1979, creating New Jersey Transit, a public corporation, for the purpose of converting New Jersey's mass transit system from one of private enterprise to one owned and operated by the State. Matter of New Jersey Transit Bus Operations, 125 N.J. 41, 43 (1991). New Jersey Transit became the employer for the workforce of the mass transit companies it acquired with federal funds. Id. at 44, N.J.S.A. 27:25-14(a). Under the NJPTA, the enforcement of the negotiable rights and obligations of New Jersey Transit Bus Operations and its employees were placed within the jurisdiction of the Public Employment Relations Commission as further prescribed in the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Matter of N.J. Transit Bus Operations, 125 N.J. at 53, N.J.S.A. 27:25-14(c). In carrying out its jurisdiction over New Jersey Transit, the Commission is to be guided by the relevant Federal or State labor law and practices developed under the Labor Management Relations Act (LMRA), 29 U.S.C. 141 et seq. N.J.S.A. 27:25-14(a).

The NJPTA further provides that employees of private mass transit bus companies acquired by New Jersey Transit "shall have and retain their rights to form, join, or assist labor organizations and to negotiate collectively through exclusive representatives of their own choosing." N.J.S.A. 27:25-14b. However, N.J.S.A. 27:25-14(a)(2) provides that these rights are

subject to the limitation that the term "employee" does not include "supervisors" as defined under the LMRA.

29 U.S.C. §152(11) of the National Labor Relations Act (NLRA) 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.

Therefore, the threshold question to be answered in this matter is whether the duties of New Jersey Transit's regional supervisors render them "supervisory" pursuant to the LMRA, as defined through §2(11) of the NLRA. If regional supervisors are not "supervisory" pursuant to the definitions set forth in the NJPTA and LMRA, they may organize collectively under the Commission's jurisdiction pursuant to the NJPTA and the PERC Act. Conversely, however, if the regional supervisors' duties are "supervisory", regional supervisors are not "employees" within the meaning of the New Jersey Public Transportation Act and have no rights to collective organization under the PERC Act.

The United States Supreme Court has required three questions to be answered in the affirmative for an employee to be deemed a supervisor under §2(11):

First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require 'the use

of independent judgment'? Third, does the employee hold the authority in the interest of the employer'?

NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573-574 (1994).

Supervisory status is determined by individual job duties, not by title or job classification, and is determined in the disjunctive, meaning that an employee may be classified as a supervisor if he or she meets any one of the 12 enumerated personnel action tests. Passavant Retirement and Health Center v. NLRB, 149 F.3d 243, 247 (3rd Cir. 1998) (only one of the twelve statutory indicia need be shown to support a finding of supervisory status for LPN charge nurse), NLRB v. Gray Line Tours, 461 F.2d 763, (9th Cir. 1972). Therefore, in analyzing whether regional supervisors are "supervisory", I will first determine which, if any, of the twelve listed duties, regional supervisors are authorized to perform, in conjunction with the determination of whether those duties require the exercise of independent judgment, and finally, whether such authority is exercised in the interest of New Jersey Transit.

I have found, pursuant to the parties' stipulations, that regional supervisors do not hire, transfer, layoff, recall, or promote employees. I have further found as fact that regional supervisors have no authority to discharge employees, reward employees or adjust grievances filed pursuant to collectively negotiated grievance procedures. Therefore, the analysis herein will be confined to regional supervisors' authority to discipline, suspend, assign, or responsibly direct employees, or to effectively recommend the same.

For the reasons that follow, I find that regional supervisors are supervisors within the meaning of §2(11), because they have the authority to responsibly direct operators, to discipline operators, or to effectively recommend such action, and to suspend operators. I further find that, because regional supervisors have a degree of discretion in the exercise of these duties, that they exercise those duties using independent judgment.

The issue to be determined herein was identified as the nature and extent of regional supervisors' supervisory authority over bus operators, depot masters, ticket agents, station starters, field mechanics, and customer service representatives. There was some testimony concerning the authority of a control regional supervisor to give a depot master instructions to send out operators to cover work; road regional supervisors' authority to issue violations to station starters, ticket agents, and mechanics; and the supervisory authority of Southern Division road regional supervisors over ticket agents, starters and other terminal personnel when backfilling at the Atlantic City, Walter Rand (Camden) and Greyhound (Philadelphia) terminals. However, the record reflects, and I find, that such authority, to the extent exercised, is insufficient to sustain a determination that regional supervisors possess actual supervisory authority as to depot masters, ticket agents, station starters, field mechanics, and customer service representatives. My analysis and determination of supervisory status herein will be confined to the extent of the regional supervisors' authority concerning bus operators.

The Independent Judgment Standard

The determination of supervisory status is a highly fact specific inquiry. NLRB v. Prime Energy Ltd. Partnership, 224 F.3d 206, 209 (3rd Cir. 2000); Passavant, 149 F.3d at 249. Conflict has arisen in the several circuit courts of appeals which have recently considered the question in the context of licensed practical nurses employed by health care institutions (the "charge nurse" cases), primarily due to a difference in the standard used to determine whether an individual exercises "independent judgment" in the performance of job duties.

Several circuits have deferred to the standard utilized by the NLRB, which finds a distinction between the "independent judgment" exercised by statutory supervisors and the judgment routinely exercised by professional employees. NLRB v. Hilliard Development Corporation, 187 F.3d 133 (1st Cir. 1999). Professional judgment, or incidental supervisory authority, is considered a lower tier of judgment than independent judgment, which is true supervisory authority concerned with genuine management prerogatives as contemplated by §2(11). Id. at 142. In these "charge nurse" cases, the NLRB has held that where the judgment exercised by nurses in assigning and directing employees was indistinguishable from the judgment that professional nurses routinely exercise, "independent judgment" under §2(11) was not established. Ibid. (district or charge nurses who had authority to send an employee home, but had limited authority to assign work, and did not recommend disciplinary

measures, were not supervisory); Beverly Enterprises-Massachusetts, Inc. v. NLRB, 165 F.3d 960, 964 (D.C. Cir. 1999) (nurses not supervisory where purported authority was not exercised, but was merely "paper power"); NLRB v. Grancare, Inc., 170 F.3d 662, 668 (7th Cir. 1999) (licensed practical nurses exercised assignment, scheduling and disciplinary powers over nursing assistants in fairly routine, preordained ways, more like "straw bosses" than foremen); Beverly Enterprises-Minnesota Inc. v. NLRB, 148 F.3d 1042, 1046 (8th Cir. 1998) (nurses' authority to discipline nursing assistants was limited to the power to verbally reprimand, and obligation to report policy violations and accidents was merely a reporting function and not an "integral" part of the disciplinary process); Providence Alaska Medical Center v. N.L.R.B., 121 F.3d 548, 554 (9th Cir. 1997) (charge nurses' authority to assign work to other registered nurses at the beginning of each shift was a routine activity and nurses' authority to authorize overtime was more clerical than supervisory).

The circuits which defer to the NLRB standard have held that true supervisors are those who are part of management's team, as opposed to minor supervisory employees who exercise some authority but not enough to be considered more than "one of the gang" or part of the regular work force. Grancare, 170 F.3d at 668, Providence, 121 F.3d at 554. True supervisors are "above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees,'" such that "their essential managerial duties are best defined by the words 'direct responsibility.'" Providence, 121 F.3d at 554.

Other circuits have accorded a less deferential view to the NLRB standard. These circuits give the term "independent judgment" an expansive reading, so that decisions which may appear at first glance "routine", but which require the exercise of discretion, qualify as the exercise of independent judgment. NLRB v. Attleboro Associates, 176 F.3d 154, 168, 171 (3rd Cir. 1999), Beverly Enterprises-Virginia v. NLRB, 165 F.3d 290, 298 (4th Cir. 1999); Caremore Inc. v. NLRB, 129 F.3d 365, 370 (6th Cir. 1997).

CWA urges that due to the tension in the circuits concerning the applicable standard, only NLRB precedent should be applied to analyze supervisory status herein, and not that of the circuit courts. CWA further argues that only the courts, not the Commission, have the authority to interpret the NJPTA to deprive regional supervisors of their employee rights under the PERC Act.

Preliminarily, this argument begs the question - if regional supervisors are deemed "supervisory", they are not "employees" under the NJPTA and thus have no rights under the PERC Act. Since the Commission is charged in this instance with applying the relevant Federal or State labor law and practices developed under the Labor Management Relations Act (LMRA), it would be inappropriate to base that analysis solely upon decisions rendered by the NLRB. See Caremore, 129 F.3d at 371 ("...it is the courts, not the [NLRB] who bear the final responsibility for interpreting the law.").

I find that regional supervisors exercise independent judgment whether the broader or narrower analysis of that concept is applied. As set forth below, regional supervisors are far more than "one of the gang" of the employees they supervise. Rather, road and control regional supervisors bear a great deal of responsibility for ensuring that New Jersey Transit bus service runs smoothly and on time. Regional supervisors have daily authority to exercise discretion to ensure that operators perform properly in furtherance of this goal.

Regional Supervisor Authority to Responsibly Direct Employees

I find that regional supervisors are supervisors within §2(11) because they responsibly direct operators. Although the garage supervisor is the operator's direct supervisor while the operator is in the garage, the record reflects that the regional supervisor, not the garage supervisor, becomes responsible for monitoring operator performance once the operator leaves the home garage and is operating the bus. After leaving the garage, the operator is no longer in communication with the garage supervisor, but communicates primarily with regional supervisors in the control center and, in particular, is accountable solely to the road regional supervisor for the operator's work performance. Thus, regional supervisors function as the operators' "supervisors on the street."

"An employee responsibly directs others when the employee is 'answerable' to the employer for other employees' "discharge of a

duty or obligation." Providence, 121 F.3d at 554. The record is clear that road regional supervisors are responsible for monitoring operators' observance of New Jersey Transit's work rules and policies, and reporting observed infractions, as part of a fundamental goal of maintaining safe, on-time performance. In this way, it is the duty and responsibility of regional supervisors to ensure that operators properly execute the operators' job duties on behalf of New Jersey Transit.

This is clearly illustrated by the regional supervisors' authority to issue a direct order to an operator. The record reflects that a regional supervisor may issue a direct order to an operator to correct rule infractions or inappropriate behavior, or to perform extra work as needed in an emergency situation. Importantly, in order to maintain safe performance, a regional supervisor may issue a direct order to an operator to stop driving the bus if fatigued or suspected to be under the influence of drugs or alcohol. A regional supervisor is authorized to issue a violation for an operator's failure or refusal to follow a direct order, initiating the course of the disciplinary process.

Similar duties have been held to support a finding of supervisory status. The Third Circuit has held shift supervisors at a cogeneration plant to be supervisory within the meaning of §2(11), where shift supervisors assigned various tasks to plant operators, had the authority to discipline plant operators and had done so, and exercised responsibility in directing the work of the plant

operators, particularly in the event of an emergency. Prime Energy, 224 F.3d at 210. The NLRB has held "street supervisors," of a transportation company, who worked in squad cars patrolling routes; had authority to discuss violations of the employer's rules and regulations with an offending operator and warn him of possible disciplinary action; to file a violation report in more serious cases, resulting in the operator being interviewed by higher management; to suspend indefinitely an operator who was in flagrant violation of the rules, such as under the influence of alcohol, pending further action by management; and to provide additional information where disciplinary action was contemplated by higher management, responsibly directed the employer's bus operators in their work and were supervisors within the meaning of §2(11). United Transit, 106 NLRB 1047 (1953). Much of the same authority held supervisory in Prime Energy and United Transit exists under the facts of this matter.

The goal of on-time performance may require regional supervisors to adjust service in various ways, many times daily. CWA argues that regional supervisors do not responsibly direct work using independent judgment within the meaning of the NLRA because the adjustment of service is a routine function. Although regional supervisors are instructed to follow standard operating procedures in handling the types of incidents anticipated in the manual, this fact does not compel the conclusion that the exercise of their duties is routine. For example, the adjustment of service in a

non-emergency situation may involve the mere adjustment of a trip's schedule to put the operator back on time, several times daily in a fairly routine manner. However, when 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. Similar authority has been held to prove supervisory status. See Prime Energy, 224 F.3d at 211 (shift supervisors at a cogeneration plant who "weighed the relative urgency of immediate and unforeseen problems and directed plant operators to undertake necessary tasks" in a non-routine manner requiring the use of independent judgment, were supervisory). Thus, I find that regional supervisors have the authority to responsibly direct bus operators in the performance of the operator's duties.

Regional Supervisor Authority to Discipline Operators

I also find that regional supervisors are supervisors within §2(11) because they have the authority to discipline operators, or to effectively recommend such action, by virtue of the road regional's authority to initiate discipline by issuing violation slips to operators for infractions of New Jersey Transit's operating rules. The issuance of a violation form initiates the

steps of the contractually negotiated discipline procedure, subjecting the operator to a course of discipline up to and including discharge. In NLRB v. Attleboro Associates, the Third Circuit held that where a charge nurse's decision to complete a disciplinary notice became part of a nursing assistant's permanent personnel file and could lead to termination, the charge nurses effectively recommended discipline using independent judgment within the meaning of §2(11), and were supervisors for that reason alone. Attleboro, 176 F.3d at 165. In Glenmark Associates, Inc. v. NLRB, charge nurses had independent authority to exercise their own judgment where the charge nurses assigned and instructed certified nursing assistants on proper job performance, effectively recommended discipline by the issuance of written verbal correction reports as the first step in the collectively negotiated disciplinary process, and were the only witnesses to the nursing assistants' job performance. Glenmark Associates, Inc. v. NLRB, 147 F.3d 333, 340, 342 (4th Cir. 1998); see also Caremore, 129 F.3d at 369-70 (licensed practical nurses who evaluated and completed disciplinary notices relating to aides, choosing from more than 35 categories of violations descriptions and providing a written narrative, found supervisory; disciplinary notices were given weight by the nursing home administrator in determining appropriate discipline, and were not routine). 129 F.3d at 369, 370. Here, as in the above-cited cases, the regional supervisor, based on personal firsthand observation, makes an on-the-spot determination of what

infractions have apparently been committed and determines whether those infractions are serious enough to warrant a written violation report. Further, the regional supervisor, upon investigation, may exercise discretion and determine that the issuance of a violation slip is not warranted, as in Glenmark:

[A licensed practical nurse] could choose not to file the verbal correction report and instead only orally counsel the [certified nursing assistant] on whatever problem he was experiencing. By filing a written report with the Director of Nursing, the LPN made an independent judgment to bring improper behavior to the attention of the administrator who would follow-up on the report. 147 F.3d at 342.

I find that the exercise of the regional supervisor's discretion in investigating and referring disciplinary infractions for possible further action by higher management constitutes the exercise of independent judgment.

CWA argues that regional supervisors are not supervisors within §2(11) because regionals do not have the authority to discipline New Jersey Transit's employees within the meaning of §2(11). Some circuit courts of appeals have declined to find supervisory status where an employee has the authority only to report infractions warranting discipline, without recommending a penalty. Hilliard, 187 F.3d at 147. Others have found that such action constitutes the effective recommendation of discipline. See Glenmark, 147 F.3d at 340, 342 (charge nurses effectively recommended discipline by the issuance of written verbal correction reports as the first step in the collectively negotiated

disciplinary process, and were the only witnesses to the nursing assistants' job performance); see also New York City Omnibus Corporation, 104 NLRB 579 (1953) (NLRB found that bus supervisors who could suspend bus operators for serious infractions such as drunkenness, and report other infractions without recommendation, resulting in the employee being called in or other action by higher management, responsibly directed the work of bus operators, noting that, "(v)ery often these supervisors (were) the only link between top management and the drivers."). The record herein reflects that although regional supervisors do not recommend a specific penalty, the violation reports they submit may be the only eyewitness account of an operator's performance and conduct, and are highly significant as the employer's preliminary investigation of an infraction which may lead to discipline. Since the regional supervisor can initiate discipline by issuing a violation form, operators are initially answerable to regional supervisors for deficiency in the operator's job performance, and then to the operator's garage supervisor and/or higher management. Therefore, the violation forms submitted by regional supervisors serve much more than a mere reporting function, but are an integral part of the disciplinary process. Cf. Beverly Enterprises-Minnesota Inc. v. NLRB, 148 F.3d at 1046.

Although the road regional's report may not constitute the employer's final disciplinary action:

[t]he relevant consideration is effective recommendation or control rather than final authority...the [NLRA] does not preclude supervisory status simply because the

recommendation is subject to a superior's investigation. Caremore, 129 F.3d at 370, citing Glenmark, 147 F.3d at 342.

See also Eastern Greyhound Lines v. NLRB, 337 F.2d at 87, 88, citing NLRB v. Southern Airways, 290 F.2d 519, 524 (5th Cir. 1961) ("The very fact that the Employer considered that these recommendations [of discipline] justified the time and expense of an investigation reflects the substantial significance attached to them"). I therefore find that regional supervisors have the authority to effectively recommend discipline.

Regional Supervisor Authority to Suspend Operators

I further find that road regional supervisors have the authority to remove operators from service, for misconduct or suspected violation of New Jersey Transit's drug/alcohol policy. These determinations are, again, based on the regional's first hand personal observation and a result of the regional's on-the-spot decision, and do not require the prior approval of higher management. As such, they constitute the exercise of independent judgment. In Glenmark, charge nurses had the authority to immediately suspend nursing assistants for serious breaches of patient care protocol, a decision requiring the nurse to assess the seriousness of the incident and determine that the CNA's immediate removal from the presence of patients was appropriate. The court found that the charge nurses' authority to take this non-routine action without prior management approval or consultation constituted the exercise of independent judgment. 147 F.3d at 343. See also

Eastern Greyhound, 337 F.2d at 87, 88 (dispatchers were authorized to determine whether a driver was in fit physical and mental condition to operate his run, and to make an on-the-spot decision in whether the circumstances, in his independent judgment, required taking a driver off a bus).

Once removed from service, an operator may not return to work until authorized to do so by the operator's garage supervisor. The removal of an operator from service constitutes the regional supervisor's authority to suspend, and is clearly disciplinary in nature. "It can scarcely be denied that sending a man home is discipline or that it does require the use of independent judgment." See Prime Energy Ltd. Partnership, 224 F.3d at 211, citing Warner Co. v. NLRB, 365 F.2d 435, 439 (3rd Cir. 1966); Passavant, 149 F.3d at 247 (charge nurses' authority to send nurses aides home for flagrant conduct violations, such as resident abuse, was clearly disciplinary in nature); Gray Line Tours, Inc., 461 F.2d at 764 (dispatcher's authority to send employees home if improperly dressed or for refusing to operate a certain bus or charter constituted the power to suspend, qualifying dispatcher as a supervisor within the meaning of §2(11)); Eastern Greyhound, 337 F.2d at 88 ("(w)hile the dispatcher's action is responsible for suspending the driver only until higher authority reviews its propriety, this does not make the driver any the less suspended by the dispatcher's action").

Finally, I find that regional supervisors exercise their authority in the interest of New Jersey Transit. The United States Supreme Court in NLRB v. Health Care & Retirement Corp. determined that charge nurses employed at a nursing home exercised their authority in the interest of the employer, saying that,

"[since] patient care is the business of a nursing home, it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer." Health Care, 511 U.S. 571, 577.

Here, it is apparent that virtually all of the duties performed by regional supervisors are related to achieving New Jersey Transit's mission of providing safe and prompt transportation to its customers. Therefore, it similarly follows, pursuant to the Supreme Court's reasoning in Health Care, that regional supervisors exercise their authority in the interest of New Jersey Transit.

Since only one of the twelve statutory indicia must be shown, and I have found that regional supervisors have the authority to perform three of the twelve duties required for a finding of supervisory status, and utilize independent judgment in the performance of those duties, I need not analyze whether any of the remaining duties performed by regional supervisors are supervisory. Passavant, 149 F.3d at 247.

Although the record reflects that the duties I found supervisory are primarily performed by road regional supervisors, the record suggests that regional supervisors are subject to temporary or permanent reassignment from the road to control, and

vice versa, at any time. Further, there does not appear to be any practical line of demarcation between the class of regional supervisors assigned to the road and those assigned to the control center; therefore, if road regionals are found supervisory, control regionals must be found supervisory as well. I, therefore, infer that regional supervisors may be assigned to either the road or the control center at any time, and find that all regional supervisors have supervisory status as described herein.

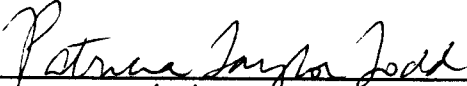
Based upon the above findings and analysis I make the following:

CONCLUSION

Regional supervisors employed by New Jersey Transit Bus Operations are supervisors within the meaning of the National Labor Relations Act, 29 U.S.C. 152(11). As such, they are not employees within the meaning of the New Jersey Public Transportation Act and are precluded from organizing collectively.

RECOMMENDATION

Accordingly, I recommend that the representation petition be dismissed.



Patricia Taylor Todd
Hearing Officer

DATED: February 15, 2001
Trenton, New Jersey