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Entergy Mississippi, Inc. and International Brotherhood of Electrical Workers, Local 605 and 985, AFL-CIO. Cases 15-CA-017213, 15-CA-018131, and 15-CA-018136

March 21, 2019

DECISION ON REMAND AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

The issue presented in this case, on remand from the United States Court of Appeals for the Fifth Circuit, is whether the Respondent's dispatchers possess the authority to assign field employees to places using independent judgment within the meaning of *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and accordingly are supervisors within the meaning of Section 2(11) of the Act. The court, in remanding the case, held that the Board had ignored significant evidence that arguably shows that dispatchers possess this supervisory authority.¹ In light of the court's decision, which we accept as the law of the case, we find that the evidence highlighted by the court establishes that the dispatchers assign field employees to places using independent judgment, and, accordingly, are statutory supervisors properly excluded from the bargaining unit of the Respondent's employees represented by the International Brotherhood of Electrical Workers, Locals 605 and 985 (the Unions).

Background

On August 11, 2003, the Respondent filed a unit clarification petition seeking to exclude the dispatcher job classification from the bargaining unit on the basis that the dispatchers are supervisors under the Act. The Acting Regional Director held a hearing and issued a Decision and Order on January 29, 2004, finding the dispatchers not to be supervisors as defined in Section 2(11) of the Act. The Board granted the Respondent's request for review on April 20, 2004, and on September 30, 2006, remanded the case to the Regional Director for consideration in light of the Board's issuance of *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and its related cases.

Following a second hearing, the Acting Regional Director issued a Supplemental Decision and Order on February 7, 2007, again finding that the dispatchers were not supervisors. On April 7, 2007, the Board granted the

Respondent's request for review. On December 30, 2011, the Board affirmed the Acting Regional Director's supplemental decision and found that the Respondent had failed to meet its burden to show that the dispatchers possess the authority to assign or responsibly direct field employees using independent judgment. 357 NLRB 2150 (2011).

The Respondent subsequently refused to bargain with the Unions with respect to the dispatchers, and the Unions filed the charges in this case. On October 31, 2014, the Board granted the Acting General Counsel's Motion for Summary Judgment, finding that the Respondent failed to recognize and bargain with the Unions as the exclusive collective-bargaining representative of the dispatchers. 361 NLRB 892 (2014). The Respondent filed a petition for review in the United States Court of Appeals for the Fifth Circuit, and the Board filed a cross-petition for enforcement.

On December 7, 2015, the court denied the Board's request for enforcement, holding that the Board ignored significant evidence that arguably supports a finding that dispatchers exercise independent judgment in deciding how to allocate the Respondent's field employees to repair power outages. 810 F.3d at 297. The court remanded the case to the Board to consider whether that evidence is sufficient to establish that dispatchers "assign" field employees to "places" using "independent judgment" and are therefore supervisors. *Id.* at 298.

On February 7, 2017, the Board notified the parties that it had decided to accept the court's remand and invited them to file statements of position with respect to the issues raised by the remand. The Unions and the Respondent filed position statements.²

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

Applying the law of the case, the Board has carefully considered the record³ and the parties' position statements in light of the court's remand. Taking the evidence identified by the court into account, we reverse our prior decision and conclude that the dispatchers are supervisors within the meaning of Section 2(11) because they assign field employees to places using independent judgment. We accordingly grant the Respondent's petition to clarify the existing bargaining unit to exclude the dispatchers.

² The General Counsel did not file a statement of position.

³ Official notice is taken of the "record" in Case 15-UC-149 as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). See, e.g., *Frontier Hotel*, 265 NLRB 343 (1982).

¹ *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 297 (5th Cir. 2015).

Facts⁴

The Respondent is an electric utility company that transmits and distributes electrical power throughout Mississippi. The Unions have long represented the Respondent's electrical employees, including the transmission and distribution dispatchers ("dispatchers") at issue in this proceeding. Dispatchers perform switching operations to alter the flow of electricity through the Respondent's transmission and distribution systems. Dispatchers regularly perform planned, contingency, and emergency switching to allow for repairing a section of line and to restore electricity. In contingency and emergency switching scenarios, which are not planned in advance but rather must be quickly addressed by dispatchers when unexpected outages occur, dispatchers dictate each step of switching to a field employee⁵ who performs the repair operation in the field. Emergency switching is often performed in situations that require immediate action to prevent the loss of life or property.

When there are multiple unplanned outages, dispatchers must decide which outage to handle first, and they consider a range of discretionary factors in making these decisions on how to allocate the Respondent's field employees to perform repairs. See 810 F.3d at 299. Dispatchers may initially be required to choose which customers to prioritize for repairs. For example, a dispatcher may use her judgment to prioritize industrial customers. However, a dispatcher may also choose to prioritize other customers, such as residential customers, if the outage occurred at a time the industrial customer's factory was not operating. Dispatchers may also prioritize outages that affect customers with special medical or other needs or that affect large numbers of residential customers. As the court observed, if simultaneous outages occur affecting high-priority clients, "there is no simple rule to guide the dispatcher's decision in who to help first." *Id.* at 298. Rather, dispatchers must use their judgment to decide whether to send the repair crew to a trouble location affecting the most customers, or to a hospital, or a factory, without the use of written guidelines.

Dispatchers weigh additional factors in allocating field employees to a place to perform repairs. They consider logistical considerations such as whether a field employee can quickly repair a trouble spot en route to a high-priority outage, whether an outage is likely to cause damage to the Respondent's facilities, or whether an un-

repaired outage from the previous day elevates the risk posed by a new outage. Further, dispatchers consider the number of customers affected, the location of the trouble, the prospect of additional trouble, and the weather. Trouble calls can be reprioritized based on real-time changing situations, and dispatchers can send field employees to one location and then reassign them to another trouble spot if necessary. Although dispatchers have a list of priority customers to consider when deciding the order of repairs, dispatchers are authorized to make a judgment call that restoring power to a lower-priority client will be faster or safer at that moment in time. In sum, dispatchers are required to rely on their knowledge, experience, and judgment in prioritizing multiple outages. As the court explained, "there are no standard operating procedures within Entergy for . . . which kind of account[] [is] to be turned on first. . . . Dispatchers apparently learn how to prioritize the clients through the mentoring process." 810 F.3d at 297–298 (internal quotation marks omitted).

Further, dispatchers may use their judgment to decide that there is more trouble than one field employee can handle and to reassign additional field employees the dispatcher deems necessary to handle the repair. There are no guidelines dictating when the dispatcher should reassign employees or how many to reassign. Once dispatchers make the judgment that additional field employees are needed to perform repairs, they utilize on-call lists governed by the parties' collective-bargaining agreement that set forth which field employees are available to be summoned for on-call assignments. The on-call lists do not, however, dictate when dispatchers should dispatch additional employees, how many employees to dispatch, or when to hold over employees from their regular shift. See *id.* at 297.

Analysis

Section 2(11) of the Act defines a "supervisor" as an individual holding the authority to engage in or effectively recommend any 1 of the 12 listed supervisory functions (e.g., "assign" and "responsibly to direct"), so long as the individual uses independent judgment in doing so. It is well established that the "burden of proving supervisory status rests on the party asserting that such status exists." *Oakwood Healthcare, Inc.*, supra, 348 NLRB at 694 (quoting *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Id.* Purely conclusory evidence does not satisfy that burden. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Supervisory status is not proven where the record evidence "is in conflict or oth-

⁴ The facts are fully discussed in the Board's decision reported at 357 NLRB 2150 and are summarized here to reflect the evidence highlighted by the court for the Board to consider on remand.

⁵ A field employee may be a lineman, serviceman, or troubleman employee.

erwise inconclusive.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Assignment is “the act of designating an employee to a place,” “appointing an employee to a time,” or “giving significant overall duties” to an employee. *Oakwood Healthcare*, 348 NLRB at 689. A supervisor must also exercise his or her Section 2(11) authority using independent judgment. “[T]o exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* at 692–693. A “judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* at 693.

The Board, in its initial decision in this proceeding, applied the analytic framework set forth in *Oakwood Healthcare*. The Board assumed that the dispatchers’ allocation of the Respondent’s field employees during unplanned switching repairs constitutes assignment under Section 2(11) but found that the evidence did not establish that these assignments involved the exercise of independent judgment. 357 NLRB at 2156. Although the court agreed with the Board that *Oakwood Healthcare* was the applicable test, it found that the Board had ignored significant relevant evidence arguably showing that dispatchers use independent judgment in assigning field employees to places. 810 F.3d at 296–297. Therefore, the sole question before the Board on remand is whether the evidence underscored by the court establishes that dispatchers use independent judgment in assigning employees to places.⁶

Applying the law of the case and reviewing the evidence identified by the court, we find that the dispatchers use independent judgment in assigning employees to places by prioritizing outages, determining how many employees should be sent to address a given outage, and deciding to reassign field employees or hold them over from their regular shift or to summon additional on-call employees to work. As the court emphasized, in cases of multiple trouble spots, dispatchers decide whether issues can be dealt with sequentially or must be dealt with simultaneously. In making such decisions, dispatchers may decide to divert a crew from one trouble spot to another or to postpone any response.

⁶ We accordingly decline to consider the Respondent’s argument that the Board has been inconsistent in supervisory cases involving utility industry dispatchers, which is beyond the scope of the court’s remand. We further reject the Respondent’s contention that a fully-constituted Board is needed to evaluate the record in this case.

Dispatchers consider a range of factors when prioritizing outages, including whether a priority customer is affected, the location of the trouble spots, whether additional trouble is likely to occur, current and future weather conditions, and whether a particular outage is likely to cause damage to the Respondent’s property. There are no standard operating procedures or rules for dispatchers to follow when prioritizing outages; rather, dispatchers rely on their training and knowledge to best respond to outages as they occur. Additionally, dispatchers may decide that a field employee can complete a quick repair on the way to a larger outage affecting a high-priority client. The broad discretionary authority possessed by the dispatchers in making prioritization decisions is co-extensive with their discretionary reassignment of employees to perform unplanned repairs. In sum, the dispatchers make complex decisions regarding prioritization of outages and the number of employees to dispatch to effect repairs based on their own judgment, guided by a wide range of discretionary factors.

Critically, the dispatchers’ decisions regarding outage prioritization and reassigning field employees necessarily result in the dispatchers sending particular field employees to particular places in multiple outage situations. Indeed, it is the dispatchers’ exercise of independent judgment that determines the places to which field employees will be sent. That being the case, the *Oakwood Healthcare* standard has been met: the dispatchers undisputedly assign employees to places, and these places are selected based on the exercise of independent judgment because dispatchers prioritize outages free from the control of others, prioritization decisions entail discerning and comparing data, and these decisions are not dictated or controlled by detailed instructions. See *Oakwood Healthcare*, supra, 348 NLRB at 693.⁷

The Unions’ principal argument is that a finding of supervisory status for the dispatchers based on assignment duties is precluded because the dispatchers do not assess the skills of individual field employees and match them to specific repair jobs.⁸ We find this contention meritless under the terms of the court’s remand.

The court’s remand clearly contemplates supervisory status for the dispatchers, even absent individual skill assessment, based on their utilization of a high level of

⁷ The Unions correctly note that “allocation of resources and prioritization of outages” are not supervisory indicia set forth in Sec. 2(11). We are not, however, finding that prioritization of outages by itself establishes the dispatchers’ supervisory authority. Instead, we find that, based on the facts of this case, the prioritization of multiple outages establishes that the dispatchers exercise independent judgment in assigning employees to places.

⁸ Rather, as noted, individual employees are selected pursuant to the parties’ on-call lists.

independent judgment in assigning field employees to a place to perform repairs. As the court advised, the on-call lists used to determine which employees will be available to perform unplanned repairs “don’t tell the dispatcher when or how many people to dispatch or when to hold [field employees] over [from their regular shift].” 810 F.3d at 297. The court hardly deemed dispositive of the supervisory issue the use of on-call lists in lieu of individual skill assessment.

In sum, taking the evidence identified by the court into account, we find that it establishes that the dispatchers exercise “independent judgment” within the meaning of Section 2(11) of the Act when assigning field employees to places.

Conclusion

We conclude, contrary to the Acting Regional Director, that the evidence establishes that the dispatchers are statutory supervisors within the meaning of Section 2(11) because they assign field employees to places using independent judgment. Accordingly, we shall dismiss the complaint in Cases 15–CA–017213, 15–CA–018131, and 15–CA–108136, reopen Case 15–UC–000149, and grant the petition to clarify the unit to exclude the dispatchers.

ORDER

IT IS ORDERED that the complaint in 15–CA–017213, 15–CA–018131, and 15–CA–108136 is dismissed.

IT IS FURTHER ORDERED that Case 15–UC–000149 is reopened, the Acting Regional Director’s Supplemental Decision and Order granting the petition for unit clarification is reversed, and the unit is clarified to exclude the dispatchers.

Dated, Washington, D.C. March 21, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member