Veolia Transportation Services, Inc., d/b/a Veolia Transportation *and* Amalgamated Transit Union, Local 689, associated with Amalgamated Transit Union, AFL–CIO, Petitioner. Case 05–RC–137335

May 12, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On October 27, 2014, the Regional Director for Region 5 issued a Decision and Order, in which he found that the road supervisors and lead road supervisors at the Employer's Washington, District of Columbia, and Hyattsville, Maryland, facilities did not comprise an appropriate unit for bargaining. He concluded, instead, that the road supervisors and lead road supervisors possess the authority to discipline and therefore are supervisors within the meaning of Section 2(11) of the Act. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review. The Petitioner contends that the Regional Director erred in finding that road supervisors and lead road supervisors are supervisors within the meaning of Section 2(11). The Employer filed an opposition.

On April 21, 2015, the National Labor Relations Board granted the Petitioner's request for review with respect to whether the road supervisors and lead road supervisors possess the authority to discipline or to effectively recommend discipline.[1] Thereafter, the Employer and the Petitioner filed briefs on review.

The Board has delegated this case to a three-member panel.

The Board has carefully considered the entire record in this proceeding, including the briefs on review. For the reasons set forth below, we find, contrary to the Regional Director and our dissenting colleague, that the Employer has not established that road supervisors and lead road supervisors are supervisors within the meaning of Section 2(11).

Facts

The Employer is one of several contractors that provide MetroAccess van service to the Washington Metropolitan Area Transit Authority (WMATA). Pursuant to its contract with WMATA, the Employer employs about 600 operators (also referred to as drivers) who drive the MetroAccess vans, and 13 road supervisors and 2 lead road supervisors (hereafter collectively referred to as "road supervisors"), among others.[2] The operators and road supervisors work out of two locations, one in Washington, D.C., and the other in Hyattsville, Maryland. The road supervisors report to the Employer's operational director and operational managers. In at least certain respects, as described below, the operators report to the road supervisors. The operators based in Hyattsville are currently represented by Amalgamated Transit Union Local 1764 (hereafter Local 1764), and the operators based in Washington are currently represented by Drivers, Chauffeurs, and Helpers Local Union No. 639 (hereafter Local 639).

The operators pick up, transport, and drop off WMATA MetroAccess customers using MetroAccess vans. Road supervisors spend most of their time on the road, and one of their primary duties is observing operators to ensure that the operators are complying with the policies and procedures of both the Employer and WMATA. In addition, road supervisors investigate accidents (when a van is out of active service due to a collision) and incidents (when a van is out of active service for any other reason). When observing operators, road supervisors fill out road observations reports (RORs), which contain checklists to guide the road supervisors' observations.[3] The ROR form also contains a space for written comments. If a road supervisor is summoned to the scene of an accident, the road supervisor completes an accident report kit, which similarly guides the road supervisor through a number of observations, questions, and considerations. The accident kit ultimately calls on the road supervisor to determine whether the accident was preventable, i.e., the fault of the operator, or nonpreventable. If a road supervisor encounters an incident, the road supervisor may complete an incident report. Incident reports are less detailed than RORs or accident kits, and consist largely of a space for the road supervisor's narrative description of the incident. In addition, road supervisors remove operators from service in

[1] Chairman Pearce and Member Hirozawa; Member Johnson, dissenting. The panel unanimously denied the Petitioner's motion to consolidate this case with *Diamond Transportation Services, Inc.*, Case 05–RC–134217 (2014) (not reported in Board volumes).

[2] The record provides little evidence differentiating lead road supervisors from the other road supervisors, aside from the fact that lead road supervisors have some additional duties that largely consist of conveying information from management to the other road supervisors. It is clear from the record that road supervisors do not regard lead road supervisors as their superiors.

[3] For example, there are check boxes to indicate whether an operator performed satisfactorily or unsatisfactorily when arriving at an intersection, approaching a railroad crossing, backing up, and conducting pre- and posttrip actions.

certain instances, including when they conclude, based on training they receive in "reasonable suspicion," that an operator should be tested for the presence of drugs or alcohol. The evidence concerning the road supervisors' exact role in completing these various forms, as well as removing operators for service, is discussed in more detail below.

The two collective-bargaining agreements covering the operators set forth disciplinary policies. Local 639's agreement sets out a four-step policy—oral reprimand, written reprimand, suspension, discharge—and states that the Employer "generally" follows those steps for "most" infractions, but reserves the right "to repeat steps as necessary or skip steps entirely for more serious infractions." The agreement includes a nonexhaustive list of infractions "sure to earn much more than a simple verbal warning." Local 1764's agreement describes discipline as "progressive" and sets out a similar four-step system (policy review/documented verbal counseling, written warning, second written warning, suspension). Twelve enumerated "serious" infractions, however, are grounds for immediate discharge, although the Employer may impose a lesser penalty for such infractions. Local 1764's agreement further provides that all disciplinary processes "will be performed by a General Manager or their designee," who "shall give a fair and impartial hearing to all employees," including "corrective interviews through the disciplinary process."

Two road supervisors, Brian Jackson and Thomas Holtz, generally described road supervisors' role in discipline. According to Jackson and Holtz, when road supervisors observe operators violating WMATA or Employer policies and procedures, they counsel the offending operator. A road supervisor can decide whether to memorialize a counseling in writing, using an ROR; both Jackson and Holtz stated that they would consider factors like the experience level of the operator and the severity of the misconduct in deciding whether to memorialize a counseling in writing.[4] Both Jackson and Holtz specified that they would, however, memorialize a counseling if they witnessed an operator repeating behavior for which that operator has already been counseled. When road supervisors document a counseling on an ROR, they turn the ROR over to the administrative assistant for the Employer's operations director. Holtz testified that he did not know what happens to an ROR after he turns it in,[5] and both Holtz and Jackson stated that they do not keep copies of RORs for themselves or otherwise keep track of discipline. Although Jackson and Holtz characterized counseling—whether documented or not—as part of "progressive" discipline, Jackson acknowledged that, unless documented, verbal counseling has no effect on an operator's job status. In addition, Holtz explained that management provides road supervisors with a document called the "hot list," which contains "the top 10 or the top 20 operators out in the field that might have committed a violation more than once . . . and they ask us to look out for these specific drivers that have committed these violations over and over again . . . and they'll ask us to go post up at that location [where an operator in question is expected to be that day] to observe that driver to see if they commit any infractions."[6]

Despite this generalized testimony about RORs, there is only one specific example of an ROR in the record. On that ROR, Jackson checked "unsatisfactory" boxes for "Door-to-Door Performed" and "Wheelchair Securements Properly Stored"; at the bottom of the form, Jackson wrote that he had counseled the operator.[7] Jackson testified that he could not specifically recall what occasioned this counseling, and there was no further testimony about this incident.

When asked if he recommends discipline, Jackson answered in the affirmative and stated that he has done so more than 25 times in the past year. He further stated that his recommendations are "usually" followed, but that his recommendations may not be followed due to "other variables." Jackson did not indicate if these recommendations were contained in RORs or made by some other means. Jackson also testified that discipline is handled on a case-by-case basis and is "a collective effort sometimes," particularly with respect to suspensions and terminations. For his part, Holtz testified that management may, depending on the severity of the violation, conduct further investigation when he memorializes a counseling on an ROR. Holtz said that he has never recommended discipline while working for the Employer, although he has encountered situations where "someone in safety or operations comes to me and asks me for my opinion" on whether discipline should be implemented based on Holtz' presence at the scene. Neither Jackson nor Holtz offered a specific example of any of these actions.

[4] Jackson elaborated that he only "rarely" memorializes counselings in writing. Holtz did not indicate how frequently he notes any verbal discussion he has with an operator on an ROR. He also stated that he did not have to write up an operator until the second time he witnessed a particular infraction.

[5] Jackson stated that RORs are eventually placed in the operator's personnel file.

[6] Jackson did not testify about the "hot list."

[7] The ROR appears to indicate that the operator in question worked out of the D.C. location.

With respect to their role in accident investigations, once a road supervisor is summoned to the scene of an accident, he or she gathers as many facts as possible (through interviewing witnesses, the operator, and physical evidence) and, based on these facts, determines whether the accident was preventable. After completing the accident packet and recording the preventability determination on the cover sheet, the road supervisor turns the packet in to the safety department. Jackson testified that sometimes he makes preventability determinations on his own, but other times it is a collective decision made with the safety department. Jackson also indicated that his preventability determination is not final and can be overruled by the safety department. For example, if the van's Drive-Cam was operating, other management officials view the video and may overrule the road supervisor's preventability determination on that basis. In addition, Jackson said that after he turns in the accident packet, "there's a discussion with the driver" and "there's a lot of things that goes into that to determine kind of what the final discipline will be." Jackson stated that his preventability determination may result in discipline, but he does not fill out any forms for discipline; instead, the operations manager handles that. There are two specific examples of accident investigations in the record. In the first example, an operator hit a clearance sign and knocked loose a light on top of the van. The accident kit indicates that Jackson deemed the accident preventable, but Jackson admitted that he could only vaguely recall the accident. That said, he commented that his determination was "likely" based on the facts he gathered "and then also in conjunction with the safety supervisor," who may have been aware of relevant policies of which Jackson was not aware. In the second example, one vehicle hit another, which in turn rear-ended the operator's van. Holtz deemed this accident nonpreventable based on his investigation of the scene, without management input, but his determination was later overturned because the safety department concluded that the operator had been in an incorrect lane.[8]

With respect to the authority of road supervisors to remove operators from service, Jackson testified that if he observes misconduct egregious enough to warrant it, he can remove the offending operator from service "with no questions asked" and send the operator back to base for any necessary retraining, but the safety director actually initiates any retraining in such cases. Jackson characterized pulling an operator from service as "recommending" retraining, specifying that the safety director makes the formal decision on whether the operator will be formally retrained. Door-to-door violations, improper wheelchair securement, improper attire, U-turns, and the use of electronic devices may warrant pulling an operator from service. Jackson said that he uses "judgment" in deciding whether to pull an operator out of service, and would consider the type of violation involved, or whether he believed an operator was able to perform his or her duties effectively or safely. There are policies and rules, however, that require an operator to be removed from service in accident situations, regardless of the road supervisor's preventability determination. After removing an operator from service, the road supervisor notifies dispatch to handle any rescheduling issues arising from the removal, as well as his or her own supervisor and an operations manager. Although Jackson reiterated that there are no questions asked when he decides to remove an operator from service, Holtz stated that the supervisor at the dispatch call center has the authority to overrule his removal determinations. Jackson stated that removing an operator from service constitutes discipline because the operator does not earn any more money for the day when he or she is removed from service, and "9 times out of 10" the associated paperwork goes in the operator's personnel file. For all this generalized testimony, however, there are no examples—save perhaps one discussed below—of a road supervisor's actually removing an operator from service while working for the Employer (as opposed to other WMATA contractors).[9] Indeed, Jackson admitted that he has never removed an operator from service while working for the Employer.

Road supervisors are trained and empowered to initiate drug and alcohol testing based on "reasonable suspicion," and in such situations the road supervisor removes the operator from service. Holtz and Jackson each testified that making the "reasonable suspicion" determination requires independent judgment, in that a road supervisor needs to know what signs to look for and needs to draw on his or her personal experience. After removing the operator from service, the road supervisor contacts the safety department and escorts the operator to a testing facility. According to Holtz, in the sole incident about which he testified, he removed an operator from service based on "reasonable suspicion," but he did not escort the operator for testing until an operations manager stat-

[8] In addition to these two examples, Holtz stated that he once had to testify at an unemployment hearing in order to defend a preventability determination he had made that had led to the termination of an operator. Holtz did not provide any details regarding that preventability determination, however.

[9] Although it appears, from the testimony of Holtz and Jackson, that there are similarities between the Employer and the prior contractor for whom Holtz and Jackson worked, there is no testimony from the Employer's management establishing that the Employer follows the same policies as the prior contractor.

ed that there was probable cause for testing. It is unclear whether this incident took place since Holtz began working for the Employer or when he was previously working for another WMATA contractor.[10] In any event, for "reasonable suspicion" situations, road supervisors do not determine if an operator is actually impaired or otherwise accuse the operator of wrongdoing, and although an operator is administratively suspended until test results return, if the test comes back negative the operator is paid for the time he or she was suspended.

In addition to the evidence regarding road supervisors' role in discipline, there was testimony concerning their alleged authority to reward operators. Jackson explained that road supervisors carry out safety incentive programs developed by the safety department. Jackson testified about a recent "safety blitz," for which he was given three $25 gift cards. A "safety message" was posted each day during the blitz, and Jackson was instructed to approach operators on a predetermined route and ask if they knew the safety message. Jackson said that after observing an operator on this route, he would, "if I chose, just approach them based off the safety list," ask if they knew the safety message, and if the operator recited it "correctly or at least to my satisfaction, I will give them the gift card." Holtz elaborated on this program slightly, stating that the week before the hearing, he had intended to give a card to an operator, but when he observed that the operator was not wearing his safety vest, that automatically eliminated the operator from eligibility for the gift card. Holtz explained that the lead road supervisor who had given him the gift cards and safety message list had instructed him not to give a card to any operator who failed to follow proper procedures.

THE REGIONAL DIRECTOR'S DECISION

Based on the foregoing facts, the Regional Director concluded that road supervisors possess the authority to discipline operators. First, the Regional Director found that the evidence "clearly establishes" that the Employer's operators are subject to a progressive disciplinary system, as set forth in the operators' two collective-bargaining agreements. Next, the Regional Director found that road supervisors can orally counsel, orally warn, and issue written warnings to operators, all of which "are explicitly contemplated by the progressive discipline systems" set forth in the collective-bargaining agreements. The Regional Director noted that although some road supervisor decisions require evaluation by, or collaboration with, higher management, "others begin and end with" the road supervisors, "who the record indicates have the power to issue disciplinary actions that are recorded and placed in employee personnel files." The Regional Director found that this "gives rise to an inference that road and lead supervisors are vested with the power to issue disciplinary actions" under the collective-bargaining agreements, and thus possess the authority to discipline operators. While acknowledging that many road supervisor decisions are dictated by Employer and WMATA policies, the Regional Director nevertheless found that road supervisors exercise independent judgment because they consider the experience level of an operator and the severity of the infraction in deciding whether to memorialize a coaching, and Jackson testified that "how he routinely approaches his responsibilities with such flexibility and case-by-case consideration." Finally, the Regional Director found that the cases relied on by the Petitioner are distinguishable from this case because they did not involve a progressive disciplinary system, did not involve warnings issued by road supervisors that were placed in personnel files, and involved clear record evidence that road supervisors were so constrained in their decision making to preclude the exercise of independent judgment. The Regional Director found it unnecessary to decide whether road supervisors recommend discipline or reward operators, although on this last count he stated that the record "contains clear evidence" that road supervisors have exercised the authority to reward employees, but it was "less clear" that this evidence satisfied the Employer's evidentiary burden. The Regional Director also concluded that secondary indicia supported finding that the road supervisors are statutory supervisors.[11]

POSITION OF THE PARTIES

The Petitioner contends that this case is "virtually identical" to *Diamond Transportation Services, Inc.*, Case 05–RC–134217 (2015) (not reported in Board volumes), a case in which the Board denied review of the Regional Director's finding that another WMATA contractor had not established that its road supervisors possess the authority to discipline. Likewise, the Petitioner argues that this case is "remarkably similar" to *Lucky Cab Co.*, 360 NLRB No. 43 (2014), a case in which the Board found that an employer had not shown that its "road supervisors" possessed the authority to discipline. In addition, the Petitioner contends that the authority to remove operators from service does not establish the road supervisors' disciplinary authority, because road supervisors only take such action in response to "truly

[10] This is the only specific example in the record of a road supervisor's actually removing an operator from service for any reason.

[11] The Regional Director found that the evidence does not establish that the road supervisors possess the authority to assign or to responsibly direct operators.

egregious violations," and any discipline is administered by other individuals at a later time. Similarly, the Petitioner argues that the road supervisors' role in accident investigations does not amount to discipline. More generally, the Petitioner asserts that any actions the road supervisors take are prescribed by WMATA and thus amount to following instructions without the use of independent judgment. Finally, the Petitioner argues that all road supervisors working for all WMATA contractors ought to be treated the same way under the Act, and that because the Board has found that other WMATA contractors' road supervisors are not statutory supervisors, it should make that same finding here.

The Employer agrees with the Regional Director's conclusions, and offers the following arguments in support of his disciplinary findings. First, the Employer asserts that road supervisors discipline operators by coaching and counseling them in the field and exercising discretion in deciding whether to memorialize these actions on RORs—which the Employer asserts are not independently investigated—as well as by deciding whether to remove an operator from service, which results in unpaid suspension. Second, the Employer contends that road supervisors effectively recommend discipline, as shown by Holtz' testimony that management has sought his input in disciplinary matters, as well as Jackson's testimony that he has never been overruled in removing an operator from service or in submitting an ROR, and that management regularly follows his recommendations for retraining operators. The Employer also argues that because road supervisors' preventability determinations are "routinely upheld," accident reports constitute effective recommendations (at least when there is no Dash-Cam video). The Employer adds that incident reports, accident reports, and RORs "directly and independently lead" to discipline because higher management always takes the facts as set forth in these documents as true. Finally, the Employer argues that road supervisors possess the authority to reward, as shown by their role in the "safety blitz."[12]

[12] In addition, the Employer renews its argument that the road supervisors possess the authority to responsibly direct. The Employer did not formally request review of the Regional Director's finding to the contrary, but has consistently advanced this argument in each of its filings, including its opposition to the Petitioner's request for review. Assuming, without deciding, that this issue is properly before the Board, we reject this contention and affirm the Regional Director. Although the Employer claims that road supervisors would be "held accountable" for improperly placing an operator back in service, the record contains no evidence to support this assertion. Further, this argument involves a road supervisor's being held accountable for his or her own job performance, rather than facing adverse consequences for an operator's deficient performance, and thus does not meet the Board's test for "accountability" as set forth in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

The Employer has also consistently advanced, including in its opposition and brief on review, two procedural arguments that the Regional Director did not address. First, the Employer asserts that, when the Petitioner amended its petition to exclude the classification of safety trainers, the Regional Director should have issued an order approving this "partial withdrawal" of the petition. The Employer cites no authority in support of this argument, aside from Sec. 102.60 of the Board's Rules and Regulations, which gives no indication that amending a petition to exclude a previously sought classification should be treated as a partial withdrawal of the petition. We therefore reject this argument as meritless. Second, the Employer contends that the Region erred by failing to provide notice of the proceedings in this case to Local 639 and Local 1764, whom the Employer asserts are interested parties who will be affected by the petition. The Employer bases this assertion on its further claim that if the road supervisors are not statutory supervisors, they should be covered by the existing collective-bargaining agreements because they occasionally perform driving work and the existing agreements apply to "all drivers." Here too, the Employer has offered no legal support for this argument. In any event, the relevant collective-bargaining agreements are defined by classification (they refer to "drivers" and "operators" interchangeably), not by work performed, and the Employer proffers no evidence as to how often road supervisors perform driving work. We therefore also reject this argument.

ANALYSIS

Legal Principles

Section 2(11) of the Act defines a "supervisor" as an individual who has the authority, inter alia, to discipline, reward, or effectively recommend such action, so long as the individual uses independent judgment in doing so.[13] The authority to effectively recommend generally means that "the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997). The burden to prove

[13] As in *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015), the dissent would apply a new test for supervisory status that focuses on the "practical realities of the workplace" instead of the detailed definition contained in the Act. For the reasons set forth in *Buchanan Marine*, supra, slip op. at 2, we disagree with the dissent's proposed standard, which is not grounded in the text of the Act and does not appropriately consider the indicia of supervisory status enumerated in Sec. 2(11). See also *WSI Savannah River Site*, 363 NLRB No. 113 (2016).

The disconnect between the dissent's approach and the Act is underscored by the dissent's argument that if the road supervisors are not found to be supervisors for purposes of the Act, then "615 field personnel are supervised exclusively by four . . . or . . . 14 people [, and] such a finding fails the 'test of common sense.'" One cannot make this argument except by ignoring a basic legal fact: the finding that the road supervisors are not statutory supervisors simply means that they "may vote whether to be represented for purposes of collective bargaining, and be represented as part of a unit that selects a representative." *Buchanan Marine*, supra, slip op. at 2. The finding does not mean that the road supervisors cannot monitor the performance of other employees or that they cannot report their findings to the Employer. Nor does it mean that they cannot issue orders to other employees, or that the Employer cannot discipline other employees for failure to obey such orders. See id.

supervisory authority rests with the party asserting it. See *Oakwood Healthcare*, supra at 694 (citing *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001)). 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. *Lynwood Manor*, 350 NLRB 489, 490 (2007).[14] Lack of evidence is construed against the party asserting supervisory status. See *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). Supervisory status is not established where the record evidence "is in conflict or otherwise inconclusive." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Discipline

To confer supervisory status based on the authority to discipline, "the exercise of disciplinary authority must lead to personnel action without the independent investigation or review of other management personnel." *Lucky Cab*, supra, slip op. at 2 (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)). Warnings that simply bring substandard performance to the employer's attention without recommendations for future discipline serve nothing more than a reporting function, and are not evidence of supervisory authority. See *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000) (warning merely reportorial where it simply described incident, did not recommend disposition, and higher authority determined what, if any, discipline was warranted); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings that are merely reportorial and not linked to disciplinary action affecting job status are not evidence of supervisory authority). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ohio Masonic Home*, *Inc.,* 295 NLRB 390, 394 (1989). The Board has found that putative supervisors do not possess disciplinary authority where counselings, warnings, or reports do not constitute an initial step in a progressive disciplinary system, and thus do not impact job status. See, e.g., *Vencor Hospital-Los Angeles*, 328 NLRB at 1139. Cf. *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (write-ups documenting infractions merely represented the possibility of discipline, given lack of evidence they were prerequisite to discipline or routinely resulted in discipline), reversing *Wilshire at Lakewood*, 345 NLRB 1050 (2005).

"A warning may qualify as disciplinary within the meaning of Section 2(11) if it 'automatically' or 'routinely' leads to job-affecting discipline, by operation of a defined progressive disciplinary system." *The Republican Co.*, 361 NLRB No. 15, slip op. at 7 (2014) (citing *Oak Park Nursing Care Center*, 351 NLRB 27, 30 (2007)). It is the Employer's burden to prove the existence of such a system, as well as the role warnings issued by putative supervisors play within it. Id. If an ostensibly progressive system is not consistently applied, progressive discipline has not been established. See, e.g., *Ken-Crest Services*, 335 NLRB 777, 777–778 (2001) (verbal warnings not disciplinary, notwithstanding purported progressive discipline system, because employees could receive numerous counselings and verbal warnings without further discipline); *The Republican Co.*, supra, slip op. at 7 fn. 8 (progressive discipline not established where, inter alia, testimony indicated employees had been suspended without prior warning, but other employees received multiple verbal warnings without any escalation); *Ten Broeck Commons*, 320 NLRB at 809 (warnings not disciplinary where no showing of "premeditated discipline based solely on the receipt of a certain, set number of warnings").

We find, contrary to the Regional Director and our dissenting colleague, that the available evidence is too vague, limited, and conflicting to establish the role that the road supervisors' warnings (in the form of RORs) play within the Employer's alleged progressive disciplinary system, and other evidence suggests that the system is not consistently applied. To begin, each collective-bargaining agreement articulates a slightly different disciplinary policy, with a different set of steps and a different set of conditions under which the Employer reserves the right to deviate from them.[15] Of particular note, Local 639's agreement reserves the right to repeat disciplinary steps as necessary, and to skip steps for a nonexhaustive list of "serious" infractions. Given these qualifications, the Employer has not established that this

[14] See also *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) ("[g]eneral testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony" (citations omitted)).

[15] In this regard, we disagree with the Regional Director's finding that road supervisors orally counsel, orally warn, and issue written warnings, and that each of these levels of discipline is contemplated by the disciplinary systems set forth in the collective-bargaining agreements. The record does not establish that oral counseling is distinct from oral warning, and there is no evidence of a road supervisor issuing a written warning (of which, under Local 1764's agreement, there are two types). That said, the Regional Director is correct that both agreements on their face contemplate oral counseling/warning as the initial disciplinary step (Local 639's agreement referring to it as "oral reprimand" and Local 1764's agreement referring to it as "policy review/documented verbal counseling").

policy is progressive. Cf. *Lucky Cab*, supra, slip op. at 3 (progressive disciplinary policy not established where handbook stated that employer could exercise discretion in utilizing forms of discipline, no formal order was necessary, and steps could be skipped).[16]

Although Local 1764's agreement does not share these characteristics, further evidentiary problems prevent the Employer from establishing that its ostensibly progressive disciplinary system is consistently applied, or the role that RORs play within it. First, the evidence about road supervisors' disciplinary authority does not distinguish between operators subject to Local 639's and Local 1764's agreement. There is accordingly no way to tell which agreement a road supervisor's putatively disciplinary action implicates. In other words, even though Local 1764's agreement articulates a progressive policy, the record does not establish that any of the disciplinary actions in evidence were taken pursuant to that policy, as opposed to Local 639's policy, which is not progressive. Second, even if we assume that the testimony about discipline refers to actions taken pursuant to a progressive policy, Road Supervisor Holtz testified that the Employer provides road supervisors with a "hot list" containing the names of operators who have committed the same infraction "over and over again." This testimony suggests that operators are being repeatedly warned for the same violations without discipline escalating, and there is no further evidence clarifying the nature of the "hot list" or how an operator's name appears on it. Significantly, the existence of the "hot list," the road supervisors' orders to keep a particular eye out for operators who appear on the list, and the testimony by Jackson and Holtz that they memorialize counseling on RORs with at least some regularity indicate that the Employer should have had numerous concrete examples of RORs readily available. Yet the record contains only a single example of an ROR—one that recorded only a verbal counseling (the circumstances of which Jackson could not even recall). It is at best unclear which of the two collective-bargaining agreements the operator involved was subject to, and the record in fact suggests that he was subject to Local 639's agreement which, as already discussed, does not articulate a progressive policy.[17] Further, there is no testimony of any kind concerning what was done with this ROR once Jackson turned it in. Given Jackson's inability to recall this ROR, there is no indication why he decided to memorialize it, or if he did so because of some prior infraction by that operator. Moreover, there is no suggestion that a higher level of discipline was ever based on this—or any other—ROR. Indeed, there is no evidence establishing that the operator who was the subject of Jackson's ROR actually ever suffered any adverse consequence as a result of that ROR. Cf. *Ohio Masonic Home*, 295 NLRB at 393–394 (although documented oral reprimands and written warnings were placed in employee personnel files, the record did not establish that they automatically led to any further discipline or adverse action against employees). As there are no examples of higher levels of discipline referring to prior infractions, we find that the Employer has not established that it actually applies a progressive disciplinary policy. See *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1749 fn. 13 (2011) (progressive system not established where, inter alia, there were no instances of higher levels of discipline referring to prior infractions).[18] Under these circumstances, we find that the Employer has not established that it consistently applies a progressive disciplinary system, nor has it established the role that warnings play within its disciplinary system.[19]

As the Employer has not established that it has, or consistently applies, a progressive disciplinary policy, it accordingly has not shown that RORs are anything more than counselings, warnings, or reports that make no recommendation for discipline and do not automatically lead to discipline. See *Vencor Hospital-Los Angeles*, supra at 1139; *Ohio Masonic Home*, 295 NLRB at 394. Further, Jackson's testimony that discipline can be a col-

[16] To be clear, our finding that the Employer has not established that Local 639's disciplinary policy is progressive does not fully resolve whether road supervisors possess the authority to discipline, as the road supervisors also operate under Local 1764's policy. In any event, the dissent errs in arguing that we are somehow passing judgment on the substance of the agreement between the Employer and Local 639 merely because we have concluded that, contrary to the agreement's use of the word "progressive," the disciplinary policy contained therein is not in fact progressive.

[17] As noted above, the ROR appears to indicate that the operator in question was based in Washington and covered by Local 639's agreement.

[18] In cases where the Board has found supervisory authority based on the operation of a progressive disciplinary system, the record typically contains evidence of subsequent discipline expressly referencing prior discipline. See *Oak Park*, 351 NLRB at 28–29 (counseling form expressly referenced prior discipline); *Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1046 (2003) (two warning notices signed by putative supervisor referenced in later discipline).

[19] In disagreeing with our analysis of the Employer's disciplinary system, the dissent incorrectly charges that we are requiring the Employer to meet its burden by something more than a preponderance of the evidence. The Board has consistently held that to prove supervisory status by a preponderance of the evidence, a party must present detailed, specific evidence and cannot rely on conclusory testimony or evidence that is inconclusive or otherwise in conflict. See *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 3 (2015). As thoroughly explained above, the evidence the Employer has presented in this case has not met that standard.

laborative effort with managers, without any specificity as to what this collaboration entails or how often it occurs, suggests that road supervisors do not consistently exercise independent judgment with respect to whatever discipline results from their RORs. In addition, this generalized testimony about collaborative discipline, combined with Holtz' acknowledgement that higher management independently investigates RORs, prevents the Employer from establishing that RORs are not independently investigated. Again, there is no testimony at all about what happens to an ROR after a road supervisor turns it in (aside from Jackson's statement that the ROR ends up in the operator's personnel file), there are no examples of an ROR actually resulting in adverse consequences for the operator (or being relied on for subsequent discipline), and there is no testimony from any higher management even suggesting that they do not independently investigate RORs. In fact, Local 1764's agreement appears to expressly contemplate independent investigations by the "General Manager or their designee." Although Jackson and Holtz stated that their RORs are not always independently investigated, neither of them offered any specific examples and, by their own testimony, they are not in a position to know what transpires after an ROR is submitted to the administrative assistant to the operations director. These circumstances, too, prevent the Employer from demonstrating that road supervisors possess the authority to discipline.

We also reject the Employer's argument that removing operators from service constitutes discipline.[20] First, neither collective-bargaining agreement gives any indication that removal from service is part of discipline. Second, there is only one example of a road supervisor's actually removing an operator from service, and this was based on Holtz' "reasonable suspicion" determination that the operator was impaired. Aside from the fact that it is unclear whether Holtz made this determination when working for the Employer (as opposed to another contractor), the Board has long held that removing an operator from service for "flagrant" violations—such as being drunk—does not involve independent judgment. See *Phelps Community Medical Center*, 295 NLRB at 492. Third, although Jackson claimed that there are "no questions asked" when he decides to remove an operator from service, he admitted that he has never done so while working for the Employer, and Holtz stated that dispatch has the authority to overrule a road supervisor's decision to remove an operator from service. Further, by Holtz' own account, when he removed the operator from service due to "reasonable suspicion," he did not actually escort that operator for testing until a manager determined that there was probable cause to do so.[21] Fourth, without any further examples of a road supervisor removing an operator from service, there are no examples of operators actually suffering adverse consequences for being removed from service, nor is there any testimony from managers establishing that they routinely deny pay to removed operators based solely on the road supervisor's decision to remove them from service.[22] We accordingly find that the Employer has not established that removal from service constitutes discipline, that it involves independent judgment, or that the removed operators are penalized without an independent investigation by higher management.

We further find that the Employer has not established that road supervisors possess the authority to effectively recommend discipline. As already discussed, RORs contain no recommendation of any kind, and in the absence of a progressive disciplinary policy, these types of documents are merely reportorial and do not establish the authority to effectively recommend discipline. See, e.g., *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 890 (1997); *Vencor Hospital-Los Angeles*, 328 NLRB at 1139.[23] Additionally, as also discussed above, the lack of evidence concerning what happens to an ROR after it is submitted, combined with indications that higher management is involved in deciding whether to issue discipline and has overruled RORs, prevents the Employer from showing that road supervisors' "recommendations"

[20] The Regional Director appears to have concluded that the authority to remove operators from service (with a resultant loss in pay) does not constitute discipline sufficient to confer supervisory status. For the reasons discussed below, we need not decide whether removing an operator from service might, under other circumstances, constitute disciplinary authority within the meaning of Sec. 2(11).

[21] The record is also clear that in "reasonable suspicion" situations, a removed operator is nevertheless paid for his or her time if the test comes back negative.

[22] The only evidence that removed operators are not paid is Jackson's testimony that if he removes an operator, that operator will not earn any more money that day. There are, however, no examples of an operator actually suffering this adverse consequence, and, as just noted, there is no testimony from any person with the authority to dock a removed operator's pay.

[23] Two of the four cases that the Employer cites in support of its effective recommendation argument involve progressive policies. See *Sheraton Universal*, 350 NLRB at 1117; *Progressive Transportation*, 340 NLRB at 1044. A third does not expressly indicate that it involved a progressive policy, but it relies on *Progressive Transportation*. See *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004). Further, the putative supervisors in *Mountaineer Park* actually wrote specific disciplinary recommendations, unlike the road supervisors here. See id. The fourth case the Employer cites does not support its argument, as it states that in order to establish the authority to effectively recommend discipline, the party asserting supervisory status must show, among other things, that putative supervisors submit actual recommendations. See *ITT Lighting Fixtures*, 265 NLRB 1480, 1485 (1982).

are not independently investigated. With respect to incident reports, there is no evidence that incident reports constitute disciplinary recommendations, and the only incident report in evidence involved no discipline at all.[24] With respect to accident investigations, the Employer asserts that the road supervisors' preventability determinations are regularly upheld, but there are only two examples of preventability determinations in the record, one of which was later overruled, and both Jackson and Holtz freely admitted that their determinations can be overruled. The Employer claims that preventability determinations are overruled only when there is Dash-Cam evidence indicating otherwise, but neither Jackson nor Holtz offered such testimony, and Jackson expressly stated that after an accident packet is submitted, there are discussions with the driver, suggesting that higher level management in fact routinely conducts additional investigation beyond the road supervisor's initial findings, Dash-Cam or no. As it is, there is no indication that Jackson's preventability determination led to discipline; Holtz' accident investigation did lead to discipline, but only because his initial determination that the accident was nonpreventable was later overruled.[25] And accident investigations do not prompt road supervisors to make any disciplinary recommendation. The remaining testimony on which the Employer relies is insufficient to carry its burden. Although Holtz testified that management has sought his input in disciplinary matters, he offered no further context for that statement, and elsewhere he stated that he has never recommended discipline while working for the Employer. Similarly, although Jackson testified that he made 25 recommendations in the last year and has never been overruled, he did not even generally describe what those recommendations entailed, how he made these recommendations, how he determined what to recommend in these instances, or what disciplinary consequences resulted from his recommendations.[26]

For all of the foregoing reasons, we reverse the Regional Director and find that the Employer has not established that road supervisors possess the authority to discipline, and we further find that the Employer has not established that road supervisors possess the authority to effectively recommend discipline.[27]

Reward

As noted above, the Regional Director found it unnecessary to decide whether road supervisors possess the authority to reward operators. He did, however, state that road supervisors have exercised the authority to reward, although he expressed doubt whether they did so more than sporadically. The Employer did not request review of the Regional Director's findings in this regard.[28] Assuming this contention is properly before the Board, having reviewed the record, we conclude that there is insufficient evidence to establish that road supervisors possess the authority to reward. There was some testimony that road supervisors can record favorable observations on an ROR, but there was no indication that this leads to any positive consequences for the operators. The only other testimony bearing on the road supervisors' authority to reward is limited to their role in the recent "safety blitz." According to Jackson, this program ended a week before the hearing. Although Jackson and Holtz vaguely referred to other incentive programs and safety blitzes, there is no testimony establishing what the road supervisors' role was in these other programs, or whether these other programs took place when they worked for the Employer or some other WMATA contractor. The only specific evidence of the road supervisors' authority to reward, then, is limited to events that took place shortly before the hearing. Thus, even if the distribution of $25 gift cards is sufficient to constitute a "reward" within the meaning of Section 2(11)—an issue we need not decide here—the evidence does not establish

[24] This incident report simply describes how the operator and a passenger felt what might have been a sideswipe; when the road supervisor summoned to the scene could not see any damage, he placed the operator back in service. The only other detailed testimony about incident reports is that they might be used to report passengers getting sick.

[25] Although Holtz testified at an unemployment hearing that resulted from another of his preventability determinations, there is no testimony about the underlying incident, and thus no evidence as to whether his determination was upheld without further investigation.

[26] To the extent that the Employer contends that removal from service also constitutes an effective recommendation of discipline, as discussed above there is no evidence that a removed operator has ever actually suffered adverse consequences as a result of that removal. The Employer also refers to recommending retraining as an effective recommendation of discipline, but there are no specific examples of a road supervisor actually doing this, nor are there any examples of an operator suffering an adverse consequence due to retraining.

[27] In reversing the Regional Director, however, we reiterate—as we did in denying the Petitioner's motion to consolidate in the April 21, 2015, order—that the facts of this case are not, as the Petitioner asserts, "virtually identical" to *Diamond Transportation*, supra, nor do we agree with the Petitioner's contention that all road supervisors working for WMATA contractors must be treated the same for the purposes of Sec. 2(11). We also find it unnecessary to pass on the Petitioner's assertion that none of the purportedly disciplinary actions taken by road supervisors involves any independent judgment.

[28] In the order granting review, we stated that the Petitioner had raised substantial and material issues with respect to discipline and effective recommendation thereof. Although the order does not refer to the road supervisors' purported authority to reward, the Regional Director made no ultimate finding on this issue, and the Employer has, since the hearing, consistently argued—including in its opposition and brief on review—that the road supervisors have the authority to reward.

that the road supervisors' authority to reward is anything more than isolated, infrequent, or sporadic. See, e.g., *The Republican Co.*, supra, slip op. at 8; *Shaw, Inc.*, 350 NLRB 354, 357 and fn. 1 (2007); *Franklin Home Health*, 337 NLRB at 829; *Chevron U.S.A.*, 309 NLRB 59, 61 (1992). In addition, the evidence is too limited and vague to establish that road supervisors exercised independent judgment even during the "safety blitz." There is no indication that road supervisors used discretion in approaching an operator to ask him or her to recite the safety message, and Holtz stated that an operator who recited the message would receive the card, but that he could not award a gift card to an operator if he observed the operator committing an infraction. Jackson testified that he would award the card if the safety message was recited to his "satisfaction," but he made no attempt to explain how he would decide whether he was satisfied.

CONCLUSION

In view of the foregoing, we reverse the Regional Director and find that the Employer has not established that its road supervisors possess the authority to discipline. We also find that the Employer has not shown that the road supervisors possess the authority to effectively recommend discipline or reward, and we affirm the Regional Director's finding that the road supervisors do not possess the authority to responsibly direct. In the absence of such evidence, the secondary indicia of supervisory authority on which the Regional Director relied are immaterial. See *Ken-Crest Services*, 335 NLRB at 779 (secondary indicia are insufficient by themselves to establish supervisory status). For all these reasons, we find that the Employer's road supervisors are not supervisors within the meaning of Section 2(11) of the Act.

ORDER

The Regional Director's finding that road supervisors are supervisors within the meaning of Section 2(11) of the Act is reversed. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. May 12, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Unlike my colleagues, I would affirm the Regional Director's Decision and Order dismissing the election petition. I believe the record supports the Regional Director's finding that the Employer's road supervisors and lead road supervisors (collectively "road supervisors") are statutory supervisors under Section 2(11) of the National labor Relations Act (NLRA or Act). Specifically, I believe the record establishes that the road supervisors, who work out of the Employer's facilities in Washington, D.C., and Hyattsville, Maryland, possess the authority to discipline operators (i.e., drivers of MetroAccess vans) who are their subordinates. Thus, because supervisors are excluded from the Act's definition of "employee,"[1] the Regional Director properly dismissed the petition seeking to represent the road supervisors.

This case is similar to a recent decision—*Veolia Transportation Services*, 363 NLRB No. 98 (2016) ("*Veolia I*")—that involved the Employer's "road supervisors" in the metropolitan Las Vegas area. In *Veolia I*, the Board majority found that the Las Vegas road supervisors were not statutory supervisors. However, I dissented in *Veolia I* on the basis that the road supervisors had the authority to discipline bus drivers or to effectively recommend discipline. Id., slip op. at 12–14. Here, similar to *Veolia I*, the Employer operates a large passenger transportation operation, with approximately 600 van operators who spend most of their workday driving vans on routes dispersed throughout the Washington DC metropolitan area (which includes portions of Maryland). The Employer has 15 road supervisors—consisting of two lead road supervisors and thirteen road supervisors—who are tasked with observing the 600 operators to ensure they adequately perform their job duties, drive their assigned routes, operate safely, and otherwise comply with a host of policies. Above the level of the 15 road supervisors, in relation to the operations at issue here, the Employer's management structure is extremely sparse, consisting of only four people: a project manager (Michael Staley), an operational director (Melvin Barkley), and two operational managers (Larry Worthy and Shandell Hassan). The Employer also has approximately ten "safety and training supervisors," whose supervisory status under Section

[1] Sec. 2(3) states that the term "employee" shall not include "any individual employed as a supervisor." The term "supervisor" is defined in Sec. 2(11) as encompassing "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 connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

2(11) has not been established, and who the Regional Director found were the only other "individuals to whom operators can be said to report."

The road supervisors—in addition to making their own observations—have responsibility for investigating incidents and accidents. Similar to *Veolia I*, the evidence here reveals that the road supervisors play an essential role in the Employer's disciplinary process. They make independent judgments about whether particular misconduct should be addressed by administering informal counseling or whether it warrants a written warning that is retained on file and used when the Employer determines the appropriate future discipline to be imposed for subsequent policy violations.

Specifically, in this case, Road Supervisor Brian Jackson testified without contradiction that he takes factors such as an operator's experience level and the severity of his misconduct into account when deciding what level of discipline to apply in a given situation. More generally, the record establishes that road supervisors are responsible for following operators on their assigned van routes and monitoring their compliance with various employment policies. As found by the Regional Director, road supervisors possess authority to orally counsel and write up operators who violate company policy. Road supervisors exercise independent judgment in deciding whether a particular violation may be handled informally or whether it warrants being documented in a road observations report (ROR) that is retained in an operator's personnel file for future disciplinary reference.

In two respects, the record provides stronger support here for a finding that road supervisors have "discipline" authority than existed in *Veolia I*.

First, in *Veolia I*—like the instant case—the employer had "senior road supervisors" and regular "road supervisors."[2] However, in *Veolia I*, it was undisputed that the "senior road supervisors" *were* statutory supervisors, and the petitioned-for bargaining unit sought to encompass only the regular "road supervisors."[3] By comparison, the petitioned-for unit in the instant case encompasses the two "lead road supervisors" *and* the thirteen regular "road supervisors." Thus, unlike *Veolia I*, the Board majority here essentially finds that the Employer has 615 statutory employees whose work involves driving disabled customers throughout the Washington DC metropolitan area,[4] and *nobody* in the field exercises *any* supervisory authority, except perhaps for the ten "safety and training supervisors," whose supervisory status under Section 2(11) remains unclear.[5] In either case, my colleagues' findings mean that the 615 field personnel are supervised exclusively by *four people* (a Project Manager, an Operational Director, and two Operational Managers) or by *14 people* (if the foregoing individuals are considered along with the ten "safety and training supervisors"). As explained below, I believe such a finding fails the "test of common sense."[6]

Second, in the instant case, the two applicable collective-bargaining agreements establish progressive disciplinary policies that *explicitly* identify "policy review/documented verbal counseling" or "oral reprimand" as the first level of discipline as part of a four-step disciplinary process. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007) (finding that "counseling forms are a form of discipline because they lay a foundation, under a progressive disciplinary system, for future discipline against an employee."). In reversing the Regional Director's decision, my colleagues here disregard unrebutted documentary and testimonial evidence regarding the Employer's progressive disciplinary policies, characterizing that evidence as "too vague, limited, and conflicting" to establish that road supervisors actually mete out discipline specified in the collective-bargaining agreements' progressive disciplinary policies. I disagree with my colleagues' characterization of this evidence.[7]

To establish that the road supervisors are statutory supervisors, the Employer must show by a preponderance of evidence that (1) the road supervisors hold the authority to engage in any *one* of the 12 different supervisory functions enumerated in Section 2(11) (including the authority to discipline or to effectively recommend discipline), (2) their exercise of the authority requires independent judgment and is not routine or clerical, and (3) their authority is exercised in the interest of the employer. Sec. 2(11) (quoted in fn. **Error! Bookmark not defined.**1 supra); *Oakwood Healthcare, Inc.*, 348 NLRB

[2] *Veolia I*, 363 NLRB No. 98, slip op. at 1 and fn. 5; id., slip op. at 12 (Member Miscimarra, dissenting).

[3] Id. The Board majority in *Veolia I* stated: "The senior road supervisors oversee the road supervisors. It appears undisputed that all of these positions—except, of course, the disputed road supervisors—are supervisors within the meaning of Section 2(11)." Id., 363 NLRB No. 98, slip op. at 1.

[4] The Board majority here finds that the Employer has approximately 615 statutory employees, consisting of approximately 600 van operators plus the two senior road supervisors and the thirteen regular road supervisors.

[5] The petitioned-for bargaining unit initially encompassed the lead and regular road supervisors and the "safety and training supervisors," but the latter were amended out of the petition at the hearing, and the Regional Director made no finding regarding the 2(11) status of the "safety and training supervisors."

[6] *Buchanan Marine*, 363 NLRB No. 58, slip op. at 10 (Member Miscimarra, dissenting). See also text accompanying fns. 14–18 infra.

[7] Because I find that the road supervisors are Sec. 2(11) supervisors based on their authority to discipline operators, I need not and do not pass on whether they also have the authority to reward employees.

686, 687 (2006). Section 2(11) requires only that a supervisor possess "authority" to carry out or effectively recommend a supervisory function, even if there is no proof that the authority has been exercised. See, e.g., *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007).

Regarding the authority to discipline or effectively to recommend discipline, the Board has issued a number of cases holding that, even though an alleged supervisor has the authority to coach, counsel, and/or warn an employee for misconduct or dereliction of duty, this does not involve "discipline" unless the coaching, counseling, or warning is a documented step in a rigid and inflexible progressive disciplinary policy. See, e.g., *Lucky Cab Co*., 360 NLRB No. 43, slip op. at 3 (2014); *The Republican Co.,* 361 NLRB No. 15, slip op. at 7 (2014). As explained in *Veolia I*, I disagree with these cases, because I believe the term "discipline" in Section 2(11) was intended to encompass coaching, counseling, and warnings whenever the evidence reveals that these actions influence subsequent disciplinary decisions. See *Veolia I*, 363 NLRB No. 98, slip op. at 13 (2016) (Member Miscimarra, dissenting). In any event, as explained below, the Employer in this case maintains collectively-bargained progressive discipline policies, and road supervisors are unquestionably authorized to administer first-step discipline under these policies.

The Employer maintains two progressive discipline policies. The policy governing operators in Washington, DC, is set forth in a collective-bargaining agreement between the Employer and The Drivers, Chauffeurs, and Helpers Local Union No. 639:

> **Progressive Discipline**
> Any violation of posted and/or written Company rules, policies and/or procedures may result in disciplinary action. With the exception as listed under 'Serious Infractions' below, and the attendance policy, any posted and/or written Company rules, policies and/or Procedures may result in the following disciplinary action.
> First Violation:Policy review/documented verbal counseling.
> Second Violation: First Written Warning Notice
> Third Violation: Second Written Warning Notice
> Fourth Violation: Suspension or May Result in Discharge From Company
> . . .
> **Serious Infractions.**
> The following violations of Company policies and rules are considered serious infractions and may be just cause for immediate discharge of the employee, although the Company may impose a lesser penalty.
> Theft or deliberate destruction, defacing or damaging of Company or Client property or property of another employee or passenger.
> Physical violence or fighting on Company premises or vehicles or any time while on duty. Self Defense, as supported by local authorities, would not be considered a violation of this section.
> Possession of firearms, weapons or explosives and similar devices on Company premises or vehicles or any time while on duty.
> . . . .[8]

The progressive discipline policy governing operators in Hyattsville, Maryland, is set forth in a collective-bargaining agreement between the Employer and Local 1764, Amalgamated Transit Union:

> Disciplinary measures shall be taken in the following order:
>
> • Oral reprimand
> • Written reprimand
> • Suspension, not to exceed five (5) days (notice to be given in writing).
> • Discharge.
>
> The Company will generally follow this four-step process for most rule or policy infractions. The Employer's focus will be to improve the employee's performance and retain a qualified, trained and valuable employee. The Company reserves the right, however, to repeat steps as necessary or skip steps entirely for more serious infractions. For example, some of the serious infractions sure to earn much more than a simple verbal warning, up to and including termination include, but are not limited to:
>
> • Violations of the drug/alcohol policy.
> • Gross misconduct or gross insubordination.
> • Theft of fares or company property.
> • Use of Electronic Device while in revenue service
> • Failure to properly report an accident
> . . .[9]

Because the road supervisors possess authority to issue first-step discipline under both progressive policies, extant law compels the conclusion that they are statutory supervisors under Section 2(11), which means they are excluded from the Act's definition of "employee," and the Regional Director properly dismissed the representation petition encompassing them. *Lucky Cab Co*., 360

[8] Er. Ex. 1 at 8.
[9] Er. Ex. 2 at 9.

NLRB No. 43, slip op. at 3, and *Oak Park Nursing Care Center*, 351 NLRB at 28.

My colleagues contend that the policy in Local 639's agreement is not truly "progressive," and hence that any documented verbal counseling conducted by road supervisors does not constitute 2(11) "discipline," because the policy permits the Employer to repeat disciplinary steps as necessary and to skip steps for "serious" infractions, citing *Lucky Cab*, supra, slip op. at 3. Again, I disagree with the notion that flexibility in a progressive policy means that remedial actions taken pursuant to its express provisions are not "discipline" within the meaning of Section 2(11). The fact that a policy may permit some discretion to accommodate exceptional circumstances does not preclude first-step corrective action from laying a foundation for future discipline, the touchstone of the analysis. See *Oak Park Nursing Care Center*, 351 NLRB at 28–29 (finding that employer's policy was progressive and that counseling forms completed by LPNs constitute 2(11) discipline despite the fact that the employer had repeated a step in the progression); *Progressive Transportation Services*, *Inc.*, 340 NLRB 1044, 1046 (2003) (rejecting contention that discipline is supervisory only if there is "a rigid and inflexible system under which discipline always leads to a precise impact on employment").[10] Board findings must be supported only by the "preponderance" of the record evidence,[11] which means the Board cannot reasonably insist on a more exacting standard when evaluating supervisory status. I believe it is unrealistic and oversimplistic for the Board to find, in effect, that "discipline" does not constitute "discipline" unless it is part of an uncompromising "one-size-fits-all" progressive discipline process that permits no flexibility and no exceptions. By adopting such an approach in the instant case, the Board majority is effectively imposing its own views regarding the *appropriateness* of the parties' collectively bargained contract provisions concerning discipline. However, passing judgment on the substance of the disciplinary provisions in the parties' collective-bargaining agreements exceeds the Board's authority under the Act.[12]

I likewise disagree with my colleagues' complaint that the record fails to include testimony regarding how the Employer typically handles ROR forms after road supervisors submit them to an administrative assistant, that the record only includes a single ROR that was admitted into evidence, and that the record fails to include evidence regarding the higher levels of discipline that were based on prior infractions. Relying on these alleged defects, the majority concludes that the Employer's evidence is "too vague, limited, and conflicting" to establish that the Employer actually maintains progressive disciplinary policies and the road supervisors' role in implementing those policies. Here as well, I believe my colleagues' findings are irreconcilable with the Act's "preponderance" standard. Questions involving supervisory status turn on whether an alleged supervisor is vested with sufficient "authority" to perform or effectively recommend one of the actions specified in Section 2(11) of the Act. In the instant case, the record contains detailed and specific evidence demonstrating the Employer's and Union's mutual understandings regarding what constitutes "discipline." Along these lines, the Employer introduced into evidence the two collectively-bargained progressive discipline policies, which were part of the collective-bargaining agreements; the record includes an ROR documenting an instance of counseling imposed as progressive discipline; and two road supervisors testified about the progressive discipline policies and their authority to impose progressive discipline. For example, in response to a question about whether disciplinary counseling is part of a progressive discipline policy, Road Supervisor Jackson testified:

> Yeah, it's something we can exercise judgment on and it can be because, for instance, me being a supervisor and that's how I'm viewed from a driver, when I go out, say I see that driver again . . . then the next situation wouldn't be a verbal. It would be something I would write down, you know, and that would go into their file.[13]

[10] *Lucky Cab*, 360 NLRB No. 43, cited by the majority, is distinguishable. The discipline policy at issue there, which the Board found was not progressive, emphasized the employer's discretion to choose any discipline it thought appropriate in a given circumstance and stated that "no formal order or system is necessary." Here, in contrast, the policy in Local 639's agreement provides that "[d]isciplinary measures *shall be taken in the following order*" (emphasis added), states that the company "will generally follow this four-step process for most rule or policy infractions," and only thereafter reserves some discretion to deviate for exceptional circumstances.

[11] Sec. 10(c) of the Act requires that the Board base its decisions on "the preponderance of the testimony" presented in a given case.

[12] Sec. 8(d) of the Act states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." See also *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 107–108 (1970) ("While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.").

[13] Tr. at 78.

As I have previously explained, the Board should not disregard unrebutted evidence "merely because it could have been stronger, more detailed, or supported by more specific examples." *Buchanan Marine*, 363 NLRB No. 58, slip op. at 9 (Member Miscimarra, dissenting); see also *WSI Savannah River Site*, 363 NLRB No. 113 slip op. at 5 (2016) (Member Miscimarra, dissenting). Among other things, this practice creates the appearance that the Board may be "rejecting evidence that does not support the Board's preferred result." Id. (quoting *Spentonbush/Red Star Cos. V. NLRB*, 106 F.3d 484, 490 (2d Cir. 1997)). The Employer's unrebutted evidence, described above, establishes that the road supervisors impose discipline on employees in accordance with progressive disciplinary policies maintained by the Employer. Accordingly, because the road supervisors are statutory supervisors, I believe the Regional Director properly dismissed the representation petition.

As a final matter, I have previously criticized the Board's application of the framework for analyzing supervisory issues as increasingly abstract and out of touch with the practical realities of the workplace. *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 4 (2015) (Member Miscimarra, dissenting from majority's finding that tug boat captains were not statutory supervisors). See also *Veolia I*, 363 NLRB No. 98, slip op. at 13–14 (Member Miscimarra, dissenting); *G4S Government Solutions, Inc.*, 363 NLRB No. 113, slip op. at 6–7 (2016) (Member Miscimarra, dissenting). As indicated in *Buchanan Marine* and other cases (including *Veolia I*), I believe the Board in every situation involving disputed supervisor status should take into account three common sense factors: (i) the nature of the employer's operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.[14] I have explained: "In plain English, this final factor essentially asks 'if one accepts the Board's finding that the disputed employees are *not* supervisors, does that produce a ridiculous, ludicrous or illogical result—for example, where *nobody* has the authority to hire, discharge, discipline, assign, or direct employees (or to exercise the other indicia of supervisory authority set forth in Section 2(11)?'"[15] In other words, the Board is responsible for applying "the general provisions of the Act to the complexities of industrial life."[16] These "complexities" include the reality that most businesses cannot operate, and many business functions cannot be performed, unless a reasonable number of people exercise supervisory authority regarding a particular facility, shift or function.

I believe the above factors reinforce the other record evidence that establishes the existence of 2(11) authority for the road supervisors in the instant case. Regarding the first and second factors—the "nature of the employer's operations" and the "work performed by undisputed statutory employees"—there is no dispute: the employer is responsible for van operations that include approximately 600 van operators who drive throughout the metropolitan Washington DC area, which also encompasses portions of Maryland. Regarding the third factor—"whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute"—I believe the majority's finding fails the "test of common sense."[17] As noted previously, a finding that none of the road supervisors possess 2(11) authority means the Employer has approximately 615 employees whose jobs involve driving throughout a large metropolitan area, and *nobody* in the field has any authority regarding "discipline" (nor do they exercise any of the other types of Section 2(11) supervisory authority), except perhaps for ten "safety and training supervisors" whose 2(11) supervisory status remains in question.[18] Based on my colleagues' findings, the roughly 615 statutory employees would be supervised exclusively by four people (the Project Manager, the Operational Director, and two Operational Managers, producing a ratio of more than 150 employees per supervisor) or by 14 people (the foregoing individuals plus the 10 "safety and training supervisors," producing a ratio of more than 40 employees per supervisor). In either case, as the Regional Director properly found, a finding that the road supervisors are statutory employees "would appear to leave operators with little if any oversight throughout the day," which I believe is

[14] I first articulated these factors in *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 5 fn. 9 (2015) (Member Miscimarra, dissenting), in which the Board majority held, over my dissent, that tugboat captains failed to qualify as statutory supervisors. As I explained in my dissent in *Buchanan Marine*, these factors do not comprise a new test for supervisory status, but rather constitute a guide to how the Board should *apply* the indicia of supervisory status that Congress listed in Section 2(11). *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 10 (Member Miscimarra, dissenting) (emphasis in original). See also *Veolia I*, 363 NLRB No. 98, slip op. at 13–14 (Member Miscimarra, dissenting); *G4S Government Solutions, Inc.*, 363 NLRB No. 113, slip op. at 6–7 (2016) (Member Miscimarra, dissenting).

[15] *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 10 (Member Miscimarra, dissenting) (emphasis in original).

[16] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963) (citation omitted). See also *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[17] *Buchanan Marine*, 363 NLRB No. 58, slip op. at 10 (Member Miscimarra, dissenting).

[18] See fn. **Error! Bookmark not defined.**5 supra.

unreasonable considering the record evidence in this case. See also *Formco, Inc.*, 245 NLRB 127, 128 (1979) (finding that ratios of 30-to-1 and 70-to-1 were disproportionately high and supported a finding that disputed leadmen were statutory supervisors ineligible to vote in election).

For these reasons, I believe the record supports the Regional Director's finding that the lead road supervisors

and road supervisors are statutory employees under Section 2(11), and I believe the Board should affirm the Regional Director's dismissal of the election petition. Accordingly, I respectfully dissent.

Dated, Washington, D.C. May 12, 2016

Philip A. Miscimarra, Member

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