

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

CALIBER MOTORS INC., d/b/a	)	
MERCEDES-BENZ OF ANAHEIM	)	
	)	
Employer,	)	
	)	Case No. 21-RC-21275
and	)	
	)	
INTERNATIONAL ASSOCIATION OF	)	
MACHINISTS AND AEROSPACE WORKERS,	)	
LOCAL LODGE 1484, DISTRICT LODGE 190,	)	
IAMAW, AFL-CIO	)	
	)	
Petitioner,	)	

**EMPLOYER’S REQUEST FOR REVIEW**

Caliber Motors Inc. (“Mercedes-Benz of Anaheim” or “Company” or “Employer”), by and through its undersigned counsel, timely files this Request for Review pursuant to Section 102.67 of the Board’s Rules and Regulations, as amended.

**PRELIMINARY STATEMENT**

The Employer operates a Mercedes-Benz automobile dealership in Anaheim Hills, California and is engaged in the sale and repair of new and used Mercedes-Benz vehicles. On February 9, 2011 the International Association of Machinists and Aerospace Workers, Local Lodge 1484, District Lodge 190, IAMAW, AFL-CIO filed a petition seeking an election in a unit consisting of all full-time and regular part-time automotive technicians.

A hearing was held on February 25, March 1 and 2, 2011 in which the sole issue to be determined was whether individuals employed in the classification of Team Leader are supervisors within the meaning of Section 2(11) of the Act and should therefore be excluded

from any unit found appropriate by the Regional Director. The Regional Director in his Decision and Direction of Election (“D&DE”) dated April 20, 2011 concluded that the Team Leaders were not supervisors within the meaning of Section 2(11) and should be included in the unit.

The factual bases upon which the Regional Director’s conclusions are based are flawed and these errors impacted the legal analysis. The Regional Director ignored compelling and in many cases unchallenged evidence of the specific exercise of supervisory functions by the Team Leaders, evidence that Team Leaders regularly exercise several of the enumerated supervisory functions under Section 2(11). As recognized in the General Counsel’s *Outline of Law and Procedure in Representation Cases*, Section 17-500, the real task confronting the Board when dealing with the question of supervisory status is the difficult one of finding whether the supervisory power in fact exists which can only be ascertained as a result of painstaking analysis of the facts in each case. The Regional Director’s failure to recognize evidence and to draw appropriate distinctions did not properly consider the mandate that Section 2(11) is to be read in the disjunctive and that “the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class.” *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949).

#### **GROUND FOR REQUEST FOR REVIEW**

Pursuant to Sections 102.67(c)(1) and (2) of the Board’s Rules and Regulations, as amended, Caliber Motors Inc. respectfully requests review of the Regional Director’s Decision and Direction of Election on the following grounds: First, the factual findings on which it is based are erroneous, and these errors prejudicially affect the Employer’s statutory rights. Second, by incorrectly applying these factual findings to the interpretation of Section 2(11) of

the Act, the Decision is premised on incorrect conclusions of law and departs from officially reported Board precedent.

## ARGUMENT

### **I. The Record Contains Multiple Unchallenged Instances Showing Team Leaders' Exercise of Supervisory Indicia**

It is well established that the party alleging supervisory status has the burden of proving that claim. Furthermore, "purely conclusory" evidence is not sufficient to establish supervisory status. *Avante at Wilson*, 348 NLRB 1056 (2006). In order to meet the burden of proof, evidence must include specific details making clear that the claimed supervisory authority exists. The Regional Director would add the requirement that such authority must be exercised. While the instances cited below show that the requisite authority is actually exercised, the requirement for the exercise of the authority by each Team Leader is not mandatory so long as the authority to act is present as indicated by *Pepsi-Cola Co.*, 327 NLRB 1062 (1999):

. . . the evidence establishes that all account representatives who have merchandisers assigned to them, or to their team, possess the same authority with respect to the discharge of the merchandisers. Contrary to the Regional Director, we do not draw a distinction between those account representatives who in fact have exercised their authority to discharge and those who have not; the determinative factor is that all such account representatives possess the authority to do so.

#### A. Team Leaders Effectively Recommend Promotions

##### 1. Promotion of Adrian Ibarra to Team Leader in January, 2011

Ibarra was promoted from technician to Team Leader on the Blue Team in January, 2011. Before effecting any promotion, Service Manager, Mike Dehdashti, spoke to Blue Team Leader Kevin Lisonbee when Lisonbee asked Dehdashti for help with an additional Team Leader to fill the vacant Team Leader position on the Blue Team. Dehdashti specifically solicited Lisonbee's

views on the issue of a possible promotion of Ibarra asking: “What do you think? What do you think about him [Ibarra]? Would you want him as a team leader? Do you recommend him to be a team leader? And what would you like to see done?” TR 133. Lisonbee told Dehdashti that Ibarra was the right person for that position. TR 371-72. Ibarra was promoted to Blue Team Leader on Lisonbee’s recommendation. TR 134; 371-3; 403.

The evidence regarding the timing and the details of the discussions between Dehdashti and Lisonbee concerning Ibarra’s promotion are unchallenged.

2. Promotion of Luis Mendez

Approximately one and one half to two years before the hearing Team Leader Paul Vasquez asked Dehdashti to move Luis Mendez who was an Express Service technician from that group to his team. Dehdashti moved Mendez from the Express Service team to the Blue Team as soon as the next vacancy occurred on Vasquez’s team. TR 196-98.

3. Promotion of Aaron Avanzando

Approximately four years before the hearing Team Leaders Ettekal and Soto had a technician opening on their team and asked Dehdashti that an individual on the Express Service Team named Aaron Avanzando be moved to their team. Dehdashti promoted Avanzando to technician and moved him to their team in response to their recommendation. TR 195-96.

The Express Service Team is composed of entry level technicians who have recently graduated from some sort of automotive training. The dealership gives them additional training until they are prepared to join one of the five color-designated teams. TR 198-99. The assignment of work to Express Service Team members is made by Team Leader David Gomar. Express Service Team members may also work in other teams’ areas depending on arrangements between a Team Leader and Gomar. TR 201; Smith TR 430-33.

The evidence concerning all these promotions was received into the record without objection from the Petitioner.

Individuals with the power to recommend as contemplated by the statute are able “on their own volition . . .” to bring a recommendation to their superiors and action is taken as recommended. In *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004) a divided panel found two individuals to be supervisors where they could “on their own volition . . . bring a potential disciplinary issue” to their superiors and discipline is imposed at the level recommended. The same level of recommendation is evident in this record with respect to Team Leader recommendations for promotions over a multi year period. Team Leaders identified individuals they wanted on their teams and requested those individuals be promoted and they were promoted in accordance with the Team Leaders’ recommendations.

B. Team Leaders Effectively Recommend Personnel Transfers

1. Retention of Technician Jack Clere On The Orange Team

In late January, 2011 there was a reorganization/realignment of the five colored teams because two technicians on the Red Team had recently quit. Dehdashti prepared a chart showing his proposed realignment of the remaining technicians and submitted it to the Team Leaders for their review. When submitting it for their review he told them, “If there’s any issues, anybody would like to move technicians, or do anything different, then we’ll do it that way.” Dehdashti TR 392; Lynch TR 824.

Orange Team Leaders Lynch and Varner objected vehemently to Dehdashti’s planned transfer of technician Jack Clere from their team to the Blue Team. They told him the movement of Clere to another team would hurt the team’s productivity and union witness Varner testified: “We said that that’s – that can’t happen. He’s one of our, you know, most productive guys and

we just, you know can't do it." TR 703. "[T]hat can't happen," -- strong words those. Indeed, the Team Leaders' objections to the movement of Clere can be seen not only as a mere recommendation but rather as a *demand for a change* in the manager's realignment plan.

When he learned of their objections to the planned reorganization, Dehdashti made a decision which puts the Team Leaders' ability to make effective recommendations into even sharper focus -- he told the Orange and Blue Team Leaders to decide on a personnel transfer among themselves. The team leaders discussed the matter, reached a decision (TR 741-42) and that decision was implemented by Dehdashti within one day. TR 393.

This is an unquestioned and very recent example of Team Leaders' ability to make recommendations "on their own volition. . ." where those recommendations are accepted and implemented. It would be difficult to imagine a situation which better illustrated Team Leaders' ability to make effective recommendations. In this case they essentially *overrode* the realignment planned by the service manager and substituted changes of their own design *without his input*.

This situation involving the possible transfer of Jack Clere and the ultimate Team Leader decision to transfer an employee other than Jack Clere to another team (TR 741-2) is the more significant in light of the dealership's pay practices. The pay for each technician on a team is determined on a daily basis by the flag hours produced by all the team's technicians working that day. TR 20-21; 533. Thus referring to Company Exhibit 9, (red team pay for Wednesday, February 16), the Team Leaders and team members present that day each earned 7.12 hours of pay based on the fact that the team produced 31.4 hours during the 35.20 clock hours they worked that day. On February 17, the individuals who worked that day were paid 8.88 hours because the team produced 48 flagged hours while working 43.20 clock hours. A review of CX 9

reveals a similar pattern of calculation of daily payment based on the results of the team's productivity on each specific work day.

A technician at this dealership is not paid on his own productivity or individual skills but rather on the skills and efficiency of the entire team. In the more traditional model a technician has a pre determined rate of pay and is paid on the hours he flags individually. Given the unique pay arrangement of this dealership, the transfer of a technician from one team to another can have a significant impact on a transferred technician's earning ability if the technician is transferred from a high performance team to a lower performing team or visa versa. A transfer recommended by a Team Leader has a much greater impact on a technician's income and represents much more than merely working at a different lift in the same building.

## 2. Movement of Arman Sakadjian from the Gray to the Green Team

Approximately six months prior to the hearing management proposed moving technician Sakadjian from the Gray to the Green Team. Team Leaders Dan Smith and Mike Williams of the Gray Team expressed some concern about the movement but ultimately resolved the matter between themselves and the Green Team Leaders Sunny Perez and Mike Farhar by working out a trade between themselves moving Sakadjian and receiving technician Larry Griffin in return. TR 394-5. This did not involve the same level of opposition to the initial management transfer decision as was present in the transfer of Jack Clere, but it is further evidence of the significant input Team Leaders have into the transfer of technicians from one team to another.

The Regional Director in his D&DE referenced a particular instance where a Team Leader's recommendations were not adopted. This occurred when Team Leader Lisonbee and Service Manager Dehdashti disagreed on the qualifications of an individual Lisonbee felt was unqualified and who Dehdashti promoted to be Team Leader of the Express Service Team. The

fact of disagreement on the qualifications of David Gomar does not establish that Team Leaders could not and did not make effective recommendations concerning promotions. The cases considering the concept of effective recommendation under Section 2(11) do not require that *every recommendation* of a 2(11) supervisor be adopted, only that individuals meeting the criteria of Section 2(11) must be able to make effective recommendations on their own volition. The Act requires that a supervisor must have the authority in the interest of the employer to effectively recommend actions dealing with the transfer, promotion, assignment, reward or responsibly to direct employees. One example of disagreement does not negate the fact that, considering the record evidence as a whole, Team Leaders do make effective recommendations in a number of different areas which directly impact employees within the selected unit. The record is full of instances both near in time to the hearing and covering the period of time several years before the hearing in which the Team Leaders have made a numerous effective recommendations regarding specific promotions, transfers of employees, job assignments and exercised other indicia of supervisory authority.

C. Team Leaders Responsibly Assign Work

The record is full of examples where Team Leaders effectively assign work or move technicians from one job to another, depending on changing needs. Nowhere was this authority made more clear than in management's response to a technician who refused a Team Leader's work assignment.

Approximately three months before the hearing (TR 814) a technician, Martin Monje, felt he was not qualified to work on a vehicle assigned to him by Team Leader Jarrett Lynch and he refused Lynch's assignment that he work on a particular vehicle. There was a heated argument between Lynch and Monje which was overheard by Shop Foreman, Richard Graboyes. TR 837.



Upon Graboyes' learning of the situation, the parties went straightaway to Dehdashti's office where Service Manager Mike Dehdashti and Shop Foreman Richard Graboyes told Monje in no uncertain terms that Lynch had the authority to give him work assignments and he was to perform the work assigned to him by Lynch. TR 815; 838.

Quite aside from a recognition of the Team Leaders' authority to assign work, this was also an example of management conferring ostensible or apparent authority on the Team Leaders'. Ostensible or apparent authority can also be a basis for making the supervisory determination. *Poly-America, Inc.*, 328 NLRB 667 (1999), and *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998). The Board held in *Wolverine World Wide*, 196 NLRB 410 (1972) that apparent authority was a valid basis on which to find supervisory status: "Thus, it appears that all six of the above-mentioned individuals are held out as supervisors to employees by the respective department foremen and the employees are instructed to do as they are told by these individuals." (Emphasis added.)

It was immediately made clear to Monje that he must comply with Lynch's job assignments. This very swift affirmation of the Team Leaders' authority to make job assignments is the most effective statement management could have made on the subject of Team Leaders' authority. Management demonstrated in a very tangible way that technicians are required to comply with Team Leader job assignments and that Team Leaders have the authority to make assignments of work.

The record contains additional evidence that Team Leaders assign work and change work assignments as the need arises. Team Leader Dan Smith testified that he uses individuals on the Express Service Team to perform work for his team approximately ten times per week and estimated that he assigned work at this frequency or greater for the prior six months. TR 431.

Team Leader Smith also has transferred work from his team to another team who had a greater capacity to perform the particular work. TR 433. Other Team Leaders have also come to Smith and he has agreed to have his team perform other team's work. TR 433. These exchanges were completed by one Team Leader speaking with another and without intervention of the Shop Foreman or Service Manager. TR 434. Smith estimated that there were approximately 20 such exchanges of work between teams in the course of an average month. TR 434-5.<sup>1</sup>

Team Leader Kevin Lisonbee testified that he changed technician work assignments approximately 20 times in the course of the year prior to the hearing. TR 787.

Team Leader Richard Varner also confirmed that Team Leaders move work among the technicians on their team. TR682-3.

Team Leader Jarrett Lynch estimated that he changed technician work assignments on his team approximately 30 to 40 times in the year before the hearing. TR 836.

The Regional Director essentially dismissed the Team Leader assignment of work by characterizing the transfers as "routine." This is an inaccurate characterization of the record evidence. Deciding which technician to move to satisfy a particular requirement taking into consideration the other tasks to be accomplished, relative technician competencies, whether or not a task might be better transferred to another team or to the Express Service Team and doing this without any input or overall guidance from management is not routine. The *Oakwood* Board majority defined "independent judgment" to be "at a minimum" the authority to "act or effectively recommend action, free of the control of others" and to "form an opinion or evaluation by discerning and comparing data." *Outline of Law and Procedure in Representation*

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<sup>1</sup> The Regional Director at pp. 4-5 of his D&DE found that such transfers of work had to be reviewed by the respective Service Advisors and the Shop Foreman. This conclusion is completely unsupported in the record. Team Leader Dan Smith testified to the opposite conclusion, indicating that he did not need permission to transfer work between teams. TR 434.

*Cases*, 17-502, p. 215. When making a reassignment of a technician, the Team Leader has to evaluate the relative priority of a number of competing tasks – at least the task the technician is currently working on as well as the new task. The Team Leader also has to evaluate the technician’s skill set and ability to complete the new task as well as the skill sets and abilities of all the other technicians on his team who might also be able to complete the new task. The Team Leader also has to decide whether the task might be transferred to another team. Inescapably the team’s efficiency and resulting overall earnings for that day are impacted by the wisdom or folly of a particular reassignment and by the assignments of work during the day.

Additionally the Team Leaders’ bonus is directly impacted by his ability to make appropriate and effective assignments and reassignments of work. Team Leaders, in recognition of the fact that their work assignments have a direct impact on the shop efficiency, are paid a bonus, one element of which is a guaranteed .05 cents per shop hour flagged for a particular month. TR 28-9. Assignments which are effective and well-thought-out will increase the flagged shop hours for the month. Work assignments which do not utilize technicians’ skills to the maximum and which are not well planned will result in decreased flagged shop hours and will directly impact Team Leaders’ earnings.

This possibility of increased or decreased earnings directly addresses the Board’s requirement articulated in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) that an individual’s exercise of true assignment and responsible direction under the Act requires “for direction to be responsible, the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other such that some adverse consequence may befall the one providing the oversight if the tasks . . . are not performed properly. *Id.* at 692. To the extent that Team Leaders assign work and reassign work as necessary in an efficient and

productive fashion, they will maximize their monthly earnings of the .05 cents per hour for all shop flagged hours. To the extent that they do not assign work in the most efficient manner, their earnings will decrease. The incentive system provides very quick monthly feedback on how well the Team Leaders are assigning work to their teams. The operation of the incentive bonus system satisfies the Board's requirements that there be consequences flowing from the supervisor's exercise of responsible direction.

In paying the five cents for each flagged shop hour to Team Leaders, the employer is putting its money where its mouth is in recognizing the direct impact Team Leaders have on shop profitability by the way they assign work to technicians on their teams. It would make no sense to pay an incentive for a task a Team Leader is unable to control. For example, it would make no sense to offer the reader of the record an incentive bonus payment based on the number of pink elephants sold by Babys R Us. The reader of the record has no way of influencing the sale of pink elephants and such an incentive could not possibly encourage behavior designed to improve sales of pink elephants. That is not the case with the Team Leaders' assignment and direction of work. They directly impact shop flagged hours by the way they assign work to their teams. They are responsible for the effective assignment of work every day and the incentive payments recognize the reality of their role in maintaining and improving shop efficiency.

The essential nature of the Team Leaders' role in the assignment of work is the reason for management's almost instantaneous response to Martin Monje's refusal of the work assignment by Team Leader Jarrett Lynch. If technicians were permitted to refuse to comply with Team Leaders' work assignments, the whole system would quickly grind to a stop without the Team Leader's effective directing and managing the assignment of work.

D. Team Leaders Independently Reward Employees

The record evidence clearly establishes that there was a \$1,500 bonus from Mercedes-Benz (TR 202-05). Dehdashti gave \$300.00 to the Team Leaders of the five color coded teams to be distributed as they saw fit. At the hearing Dehdashti did not know precisely exactly how Team Leaders had divided the money among the members of their teams. TR 218-9. The only suggestion he made was that they might wish to consider sharing the bonus with a member of the Express Service Team as well as with their own team.

The Regional Director recognized that the Service Manager did not give the Team Leaders any instructions as to the actual distribution aside from the recommendation that they consider the Express Service team. However, he dismissed the discretion granted but not used (“The fact that the Team Leaders theoretically could have used discretion, but apparently did not, is not sufficient . . .”).

The unchallenged record evidence establishes that Team Leaders used their own independent judgment to distribute the \$300 per team bonus money. Team Leaders from the Orange Team distributed their team’s share “down to the nickels and dimes” among their own team members only. TR 753-55. Team Leader Lisonbee distributed the \$300 among his own team and gave a portion of that money to an Express Service team member. TR 789; 797. Thus discretion was clearly exercised in different ways by Team Leaders who testified at the hearing.

The Regional Director is unwilling to concede that the \$1,500 amount of money was a reward. It was in fact a reward: 1) it was money which was not owed to employees as the result of their normal employment; 2) it was Compensation over and above the amount of pay specified as a base salary or hourly rate of pay; 3) it was money provided by an entity other than the

employer. If the payment of these monies was not a reward, it is hard to imagine what a reward would be.

The Regional Director further dismissed the discretion and the ability to reward employees on the basis that the record did not reflect precisely how the other Team Leaders exercised their discretion with the bonuses. Once it is clear that discretion was given, it is not essential that the record reflect precisely how each and every Team Leader distributed the monies to his team so long as it is established that the distribution was at their own discretion. Just as the Board did not need to draw distinctions between various account representatives who supervised others based on whether they had or had not actually exercised that supervisory authority in *Pepsi Cola, supra*, 1062, the Board does not need to know precisely how each Team Leader exercised the discretion given to him. It is enough to know that they were given discretion with regard to the distribution of the money: “Contrary to the Regional Director, we do not draw a distinction between those account representatives who in fact have exercised their authority to discharge [reward technicians on their team] and those who have not; the determinative factor is that all such account representatives possess the authority to do so.”

There was also an additional bonus from a distributor of products used at the dealership. These monies were distributed in late December, 2010 or January, 2011. The distributor provided envelopes of cash which Dehdashti gave directly to the Team Leaders to distribute as they chose. He was not even aware of the amount of money in each envelope or how they monies were distributed. TR 217. This is another example of the Team Leaders’ ability to reward team members and of their complete discretion in deciding how to distribute those monies.

The ability to reward employees granted to Team Leaders was improperly analyzed and ignored by the Regional Director. The Team Leaders' ability to reward their team members should not be ignored by the Board because this is yet one more way the Team Leaders properly are found to possess the indicia of supervisory status as that is defined by Section 2(11) of the Act.

E. Team Leaders Independently Schedule Saturday Work

The Service Department is open every Saturday and each team is expected to contribute two technicians to work each Saturday. The decision as to which two technicians will work is left to the Team Leaders. (TR 125; 128) Some Team Leaders rotate the Saturday assignment between the team's technicians and other Team Leaders make the Saturday work assignments in other ways. (Smith TR 436; Varner TR 706-7; Lisonbee TR 777).

The differences in the methods different Team Leaders use to cover their portion of the Saturday work is further evidence of Team Leaders' exercise of judgment and discretion in the assignment of Saturday work. Management does not make the decision as to which technicians are going to be scheduled to work on any given Saturday, rather the Team Leaders make that decision and notify management earlier in the week about which technicians on their team will be working on any given Saturday. TR 126-28.

This is yet another example of the Team Leaders' ability to responsibly direct team members. Responsible direction does not necessarily mean using a horse whip to make others do what you want them to do. Nor is a showing of absolute authority and imperious commands required to satisfy the requirements of the statute. Obtaining volunteers can be as effective (or perhaps more effective) a management style as the Prussian model of absolute authoritarianism.

Whether a Team Leader chooses to obtain volunteers or whether he assigns individuals or uses some other method of selection, it is the Team Leader's responsibility to have two technicians report for Saturday work. The evidence demonstrates that Team Leaders have and regularly exercise the authority to assign two employees per team to perform Saturday work.

## **II. Team Leaders' Duties And Responsibilities Are Similar**

Not all Team Leaders testified during the hearing, but there was no dispute that the duties and responsibilities of all Team Leaders are identical. Dehdashti TR 124-25; Smith TR 424; Varner TR 727. There is no suggestion in the record of any distinctions in authority or responsibility regarding any individual designated as a Team Leader. Therefore the Board should not draw distinctions between individual Team Leaders nor should it speculate what other Team Leaders did or might have done as the Regional Director did as reflected in footnote 14. The guidance of *Pepsi-Cola Co., supra* should apply here: the Board should determine that the actual exercise is not the distinguishing factor but rather the authority to exercise the various supervisory indicia which determines the question of supervisory status.

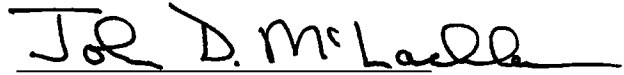
## **CONCLUSION**

The Regional Director's Decision and Direction of Election improperly evaluated the evidence adduced during the three days of hearings and as a result did not properly decide the question whether Team Leaders are supervisors within the meaning of Section 2(11) of the Act. Team Leaders have authority in the interest of the employer to transfer, promote, assign and reward employees as well as responsibly to direct them and responsibly to recommend such actions and their exercise of these functions requires the use of independent judgment.



Team Leaders are supervisors within the meaning of Section 2(11) of the Act.

Respectfully submitted this 4<sup>th</sup> day of May, 2011.

A handwritten signature in black ink that reads "John D. McLachlan". The signature is written in a cursive style with a horizontal line underneath.

John D. McLachlan  
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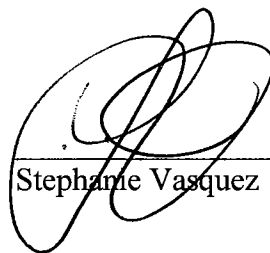
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**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 4<sup>th</sup> day of May, 2011, caused to be served a true and correct copy of the Employer's Request for Review on the following individuals via prepaid overnight delivery, addressed as follows:

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